EMERGING RIGHT TO PRIVACY: AN INDIAN PERSPECTIVE

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CERTIFICATE

This is to certify that ***Mrs. Jyoti Jajodia (Mozika)*** *has pursued research work under my supervision for more than two years and fulfils the requirements of the ordinances relating to Doctor of Philosophy of the University. She has completed her work and the thesis is ready for submission. To the best of my knowledge and belief, the thesis contains the original work done by the candidate and it has not been submitted by her or any other candidate to this or any other University for any degree previously. In habit and character the candidate is a fit and proper person for the Ph.D. Degree.*

I recommend submission of her thesis.

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CHAPTER-1

INTRODUCTION

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INTRODUCTION

"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 is an attempt, that is to say, to do more than maintain a posture of self-respecting independence toward other men ; it seeks to erect an unbreakable wall of dignity and reserve against the entire world."

Clinton Rositter,
"The Free Man in the Free Society,"
The Essentials of Freedom.

The desire for privacy is distinctively human. It is a function of man's unique ethical, intellectual and artistic needs. Over the years legal scholars have attempted to define privacy but it is only in the last century this word has been used as a legal concept to describe the state's duty to let its people alone in certain spheres of their lives. Later in the course of its academic and juristic evolution, the concept was described more succinctly as the claim of individuals, groups or institutions to determine for themselves when, how and to what extent information about themselves is communicated to others. Recent legislative and judicial recognition of the significance of privacy and the right to privacy are understandable from several perspectives: historical changes and advanced technology, recent acknowledgement of psychological and

sociological needs for individuals to maintain minimal conditions of privacy for self-development; and the heritage of limited governance and ideological commitment to individualism in recent political history. Indeed, the growing controversy over the privacy safeguard appear at the broadest political perspective as nothing less than a concern for freedom from government intrusion into citizens' lives. Current legal preoccupation with privacy protection, is both unique and paradoxical: unique among the nations of the world in terms of judicial decisions and legislations relating to privacy, and paradoxical because even though world constitutions do not guarantee a right of privacy, judicial decisions denominated a right of privacy as a fundamental right emanating from the totality of the constitutional schemes of modern liberal democracies. Actually the legal right of privacy was born out of the dicta and dissent of more than a century of judicial opinion. It emerged as a product of incremental judicial decision making and the concept of privacy became a salient political issue.

Privacy necessarily involves a composite of interests, which require protection by the legal system. There are various issues or questions which come in the mind of any jurist when he tries to analyse the concept of privacy in order to determine its conceptual paradigm and give it recognition and protection as a legal right under the legal system : what is the concept of privacy, what are its legal dimensions and under which law this right may be appropriately located? Whether this right has any constitutional base in the Bill of Rights of different modern constitutions? A modest attempt has been made to answer the aforesaid issues in the present study. The major factor contributing to the privacy problem is the absence of legislation and ubiquity of organizational rules ensuring privacy, confidentiality and process compliance. The law does not provide a general right to privacy but a number of provisions apply in

particular circumstances to protect privacy. The uncertainty as to location of right to privacy has been another pervading issue. Whether it should find its place in the statute books through a separate legislation or through independent and comprehensive provisions in the Bill of Rights itself. The interests included in the right of privacy have been protected irrespective of the fact of prevailing uncertainty over its apposite location in the statute books. What was the extent to which the right enjoyed protection as an easementary or customary right? To what extent the developments were taking place in the United States and England and how far such developments may be useful for learning a lesson and developing the right in India are among the subject-matters of the present study.

The concept of right to privacy does not lend itself to easy definition. The difficulty arises out of the fact that this concept is not a unitary concept but a multi-dimensional concept amenable more for enumeration rather than definition. But a right without definition is a right without protection. Therefore it becomes necessary to define the right to privacy in such a way that it may cover all the aspects of the right. In order to arrive at an appropriate definition, it becomes necessary to analyse various definitions given by modern scholars. It is desirable to mention here that the development of right has been much more in place in the United States than in any other country, therefore, frequent references has been made to the views of American scholars in the present study. This has been done intentionally in order to derive benefits from it for developing an insight into the right. The concept of privacy was thrown up in great haste from a miscellany of legal rocks and stones and because of inherent difficulties in defining such an elusive concept, there has been a lack of continuity in the various definitions put forward by different scholars. Whether there is coherence and continuity amongst such definitions? Is it possible to evolve a conspectus out of these

definitions? Is there any definition which aptly covers all aspects of privacy? The present work makes an attempt to study the definition of privacy given by eminent scholars and tries to evolve a comprehensive definition. In considering the emergence of right to privacy in India, it becomes necessary to look into other Constitutions of the world. Although the right to privacy is not found as an independent fundamental right in any modern Constitution, it is not true that the interests, which form part of privacy have not been protected under other Constitutions. The Universal Declaration of Human Rights, 1948 proclaims the international standard of human rights and it is the first international document which expressly declares the right to privacy as an independent right. It is therefore necessary to look into the Universal Declaration so that the right in our country may be raised to the international standard. The present study also studies the impact of the Declaration. Coming to India we find that there is no express guarantee of the right to privacy under our Constitution. Whether the right to privacy may be developed as a fundamental right in our Constitution? The study enters a detailed discussion on this aspect and examines the relevant judicial decisions on this important right. It also examines the existing relevant positions under other laws, e.g., torts, Telegraph Act, Easement Act, family law, criminal law, etc.

A right is generally available to free man. Whether the right to privacy is available only to innocent persons or it is available to accused and criminals as well – is the question which has been answered in the present study. What would be the scope of this right when it becomes a part of the right to life and personal liberty. Would the wide scope of Article 21 of the Constitution of India be available to this right? These issues have also been discussed in the present study. There can be no absolute right to privacy in this complex civilization; the right has to

operate within its limitations. What may be the limitations upon the right? What are the remedies available for the effective enforcement of the right? These matters have also been discussed in this work. The most important aspect of privacy is the privacy of home. This may include, *inter alia,* the right to sleep and comfort and the right against police surveillance. On the one hand privacy requires freedom of home and prevention of any interference or intrusion into it especially by the police, on the other hand, the maintenance of law and order requires constant vigil on and information about the law-breakers and criminals. Therefore the problem arises in this respect as to how to maintain a discreet and an acceptable balance between the two opposing and countervailing societal requirements. With the help of legal literature and available judicial decisions, a benign endeavour has been made in the present study to determine the area in which the protection of the home may be permitted and beyond which the police or other law enforcement agencies may be allowed to intervene.

Another important aspect of privacy is the privacy of communication. The right to communicate ideas creates a peculiar set of problems for constitutional democracies. The right is substantially valuable in itself. The right of free expression is considered essential for the development of personality. Privacy of communication is natural extension of this right. The protection of privacy in this respect has become stupendous in view of the fact that with the development of science and technology and rapid growth of computers, various modes of violation of privacy of communication has emerged. It is relevant to mention here that the law extends its protection to different categories of privileged communications. In the present study, an analysis of the relevant provisions under different laws in our country has been made along with a reference to the principles prevalent in other countries. The

issue of telephone-tapping has often come up before the judiciary. When there is no express provision in the law against telephone-tapping, whether the right to privacy and the principle developed thereof as a result of judicial decisions would be sufficient to prevent the high-handed interference of tapping the conversation between two individuals? Even if telephone-tapping is considered as invasion on privacy whether it would be covered within Article 21 of our Constitution or would the statutory law be sufficient to deal with the problem? The present study focuses on these issues too. Considering the matter of privacy in respect of fundamental freedoms guaranteed under Article 19 of our Constitution, we come across other modes of communication like videography and photography. Whether the freedom of the press should be allowed to go unrestrained unmindful of the right of privacy of individuals or the right to know must observe restraint in view of a person's right to privacy? This important issue has also been discussed in the present study. Computer technology makes a special and formidable contribution to the problem of privacy. Whether the Cyber law is sufficiently developed to cope with the emerging problem? The present study analyses this developing issue and also discusses the relevant provisions of the Information Technology Act, 2000.

The list of areas in which right of privacy was found to have some application included the family, marriage and procreation, etc. The family is the essential unit of the society without which its existence may be endangered. The institution of marriage and procreation of children are its natural corollary. A number of matrimonial rights emanate from it. In this context, a significant question arises as to whether the right to marry and procreate children may be guaranteed as part of the right to privacy. A survey of the international human right instruments and the modern democratic constitutions becomes essential in order to consider the impact

of the global problem of population explosion upon it. From the perspective of individual liberty, it seems desirable to guarantee the right to marry with full consent and to establish a home and the other consequences to follow and thus, at international level this right to marry found a prominent place in many Conventions and Declarations. The present work discusses the aforesaid areas with respect to the development of the relevant rights and the limitations thereon in order to bring out the complete picture. Some of the rights comprised in the right to marry and procreate children are inter-linked with the concept of bodily integrity and cannot be studied independently, therefore, those aspects have also been dealt with in the present work.

The right of privacy is broad enough to encompass the area of contraception and abortion, i.e., a woman's decision whether or not to terminate her pregnancy. The issue of abortion dominated the right to privacy for a long time in the United States and it led to the establishment of the constitutional right to privacy included in the Bill of Rights through a series of landmark judicial decisions of the US Supreme Court. Many commentators attempt to justify the prohibition of artificial birth-control and of the voluntary termination of pregnancy through abortion by attributing absolute rights, above all, the right to life, to the unborn. There are numerous positions that might be taken on the question of abortion, but to restrict the freedom of a woman to terminate the pregnancy on the basis of the right to life of a newly conceived child is from the point of view of materialist philosophy unjustifiable. This development opened an important aspect of privacy as to the permissibility of abortion as a matter of right of the pregnant woman even if unmarried and its conflict with the right of the foetus. In order to deal with the above problem an enactment has been passed by the Parliament in our country. How far has the enactment been successful in resolving the conflict in our country and to

what extent the American judicial decisions have been relevant under our Constitution in this respect, are points which have been considered in this work. Privacy is the guarantor of individual moral autonomy, a basic value in our democratic system of government. The dignity, modesty and self-respect of individual have been the prime concern of the libertarians in modern times. These areas may have wide dimensions and extensive parameters. The present work concentrates upon analyzing such parameters within our constitutional framework. There has been upheaval in demand for sexual autonomy before and after marriage at the global level. In the legal arena such a demand found its base in the right to privacy. The matter has squarely been considered at the judicial front. This issue involves manifold aspects such as: whether autonomy be given to young boys and girls, whether it may be enjoyed by the married partners in between them and beyond, whether the homosexual relation should be recognized? These issues and related matters have been examined in the present work.

Coming to the framework of the study , the present work is divided into eight chapters. Chapter 1 introduces the subject and the issues involved therein. The concept of the right and its place in the Indian Constitution, as well as, in some other Constitutions and international instruments in the historical context have been discussed in Chapter 2. Chapter 3 concentrates upon the scope of the right in respect of the persons to whom it is available and the limitations upon the right. This chapter also discusses about the remedies available for the effective enforcement of this right. Different aspects of the right to privacy such as right to sleep and comfort and the right against police surveillance included into the privacy of home have been included in Chapter 4. Chapter 5 contains the privacy of communication. It includes different

aspects like privileged publications and telephone-tapping, other modes of expression and communication including the complexities of computer communication. The right to marry and procreation of children have been grouped under the privacy and matrimonial rights in Chapter 6. The inviolability of person is an important aspect of the right to privacy that includes the sexual autonomy and dignity, as well as, the right to abortion, found place in Chapter 7. At the end, the work closes with an epilogue in Chapter 8. The present study takes stock of the reported judicial decisions in India and some of the important American and English cases, available academic writings and relevant statutory provisions. As the development of the right and legal materials thereon has been much more in the United States, some of the judicial decisions and academic opinion from America have been analysed in detail wherever relevant in view of the Indian trend to look at and follow the principles evolved therein. The work has been done within the aforesaid limitations.

CHAPTER-2

CONCEPTUAL AND CONSTITUTIONAL FOUNDATION

A. Historical Background

B. Definitional Concept

C. Other Constitutions

D. International Instruments

E. Indian Framework

(i) Constitutional Provisions

(ii) Other Laws

CHAPTER-2

CONCEPTUAL AND CONSTITUTIONAL FOUNDATION

The idea of privacy is as old as the history of mankind itself. The need for the protection of privacy was felt by human beings from the ancient times, however, the concept was not well defined. When we start discussion on the concept and basis of this right it becomes necessary to trace its historical development in order to find out a universally acceptable definition. The other relevant issue in this respect which attracts our attention is to locate the particular law under which the protection may be properly accorded to this right. At this stage it becomes necessary to look into provisions of other Constitutions in order to derive its fine points which may be beneficial for developing the parameters of the right in our country. An attempt for the protection of privacy through International Instruments is equally desirable to discuss to evolve the international common standard of this important right. The aforesaid developments have been analysed in the following pages before discussing the Indian position in the Constitution and other relevant laws.

A. Historical Background

In early times, privacy was part of the law of private property. Two important essays published in 1890 in the US are said to be responsible for development of this right in the said country. An article in Scriber's magazine written by the editor of the New York Evening Post described a growing tension between the urge for privacy and the increased tendency of the press to cater to the public curiosity about other people's affairs.[1] In December 1890 Warren and Brandeis wrote that the principle which protected personal writings and other personal production, not against theft and physical appropriation, but against publication in any form, was not the principle of private property but that of an inviolate personality[2]. To quote Warren and Brandeis:

> "(T)he rights, so protected, whatever their exact nature, are not rights arising from contract or from special trust, but are rights, as against the world; and, as above stated, the principle which has been applied to protect these rights is in reality not the principle of private property, unless that word be used in an extended and unusual sense. The principle which protects personal writings and any other productions of the intellect or of the emotions, is the right to privacy and the law has no new principle to formulate when it extends this protection to the personal appearance, sayings, acts,

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1. M.L. Upadhyay & P. Jayaswal, Constitutional Control of Right to Privacy, 2 *CILQ* (1989) 39.

2. Charles Warren & Louis D. Brandeis, the Right to Privacy, 4 *HLR* 193, at 205.

to personal relation, domestic or otherwise." [3]

Almost forty years after the publication of the Warren and Brandeis article, Brandeis, by this time a distinguished judge of the Supreme Court of the United States wrote in *Olmstead* vs. *United States* [4] which raised the issue of the admissibility of evidence obtained by eavesdropping (specifically by wire-tapping) against a man charged with crime, declared in his dissenting opinion, that such evidence was not admissible. In a famous passage he observed:

> "Discovery and invention have made it possible for the government by means far more effective than stretching upon the rack to obtain disclosure in court of what is whispered in the closet ..... The progress of science in furnishing the Government with means of espionage is not likely to stop wire-tapping. Ways may someday be developed by which the Government without removing papers from secret drawers, can reproduce them in court, and by which time it will be enabled to expose to a jury the most ultimate occurrences of the home. Advances in the psychic and related sciences may bring means of exploring unexposed beliefs, thoughts and emotions." [5]

The learned Judge further observed:

> "The makers of the Constitution.....sought to protect Americans in their beliefs, their thoughts, their emotions and their sensations. They conferred, as against the Government, the right to be let alone.....the most comprehensive of rights

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3. *Ibid*, at 213.

4. (1928) 277 U.S. 438.

5. *Ibid*, at 474.

and the rights most valued by civilized man". [6]

In the course of time, Brandeis' view expressed in the *Olmstead* in dissent, became the law. Brandeis spoke of surveillance by Government, which has special dangers. Such devices are not only available to and have not been used exclusively by governmental instrumentalities. They are part of the armoury of an army of snoopers. Computer technology makes a special and formidable contribution to the problem.

The paradox of the age was that its ruling ideology was that of individualism – the right to shape one's own life without social control and to rebuff all inquisition with a sturdy, 'Mind your own business and I'll mind mine'. This, it might be supposed, was the quintessence of privacy. The trouble was that the conditions of the industrial society, especially the intensive competition and the constant insecurity, threatened individualism at every point. Hence the belief in individualism and the fragility of the individualism worked towards the same end – a desperate clinging to privacy and a truly, neurotic fear of intrusion or disclosure. With the growing complexity of society, and the increasing centralization of economic activity, governments saw themselves obliged to assume greater responsibilities and greater powers. Individualism fought a bitter but inevitably a losing battle. By present-day standards, the intervention of the state in the affairs of the citizen was timid at any time before 1914. By the 1930s, the state was seen as plainly the major threat to privacy and, indeed, as a devouring monster. The word 'totalitarian' was devised to refer to the Soviet Union, to Nazi Germany and to Fascist Italy. The common feature of these regimes, and the justification for the

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6.*Ibid*, at 479.

label, was that the state enforced its will in spheres which had hitherto been regarded as private – in family life and the roles of men and women, in the upbringing (as well as simply the education) of children, in the use of leisure, in literature and the arts. There seemed to be no corner at all where the individual could hide and be let alone. Moreover, the state's demand for political conformity was so insistent that the citizen was not merely forbidden to express the 'wrong' opinions but obliged to announce his adherence to the 'right' ones at every turn [7].

The United States was swept in the early 1950s by the wave of intolerance associated with Senator Jacob Mc Carthy – inquisitions into private lives which drove the victims to collapse or even suicide, blacklists and dismissals, the demand for 'loyalty oaths' in state employment and the universities. Even in Britain, economic difficulties and the retention of wartime controls meant that the state wielded powers never yet known in times of peace. In some quarters, the post-war Labour Government's policies - widespread nationalisation and new state-run welfare services - together with such restrictions as building licences and planning permission, were seen as the harbingers of a new state of affairs in which there would be no place for the private man. [8]

The new technology, too, placed huge and novel powers at the disposal of unscrupulous rulers. Radio had served Hitler as a potent medium of centralized propaganda, and was now reinforced by television. The work of the political police was eased by fingerprinting, by lie-detectors, by concealed listening devices and tape- recorders, to say

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7. *Ibid,* at 16-18

8. *Ibid,* at 18

nothing of new 'scientific' methods of torture. The computer was making its appearance, and it was getting easier and easier for the authorities to amass information about individuals. [9]

In UK, on 26 November 1969 Mr. Brian Walden, MP, introduced in the House of Commons a bill 'to establish a right to privacy, to make consequential amendments to the law of evidence and for connected purposes'. Two similar bills had been presented by private members during the decade, one in the House of Lords in 1961 and one in the Commons in 1967. The Government reacted by setting up a Committee on Privacy, with these terms of reference: "To consider whether legislation is needed to give further protection to the individual citizen and to commercial and industrial interests against intrusions into privacy by private persons and organisations, or by companies, and to make recommendations."[10] In other words, the committee was debarred from examining threats to privacy coming from the state, from local Government, from the police or from any other source that could not be described as "private person or organisation".[11] The committee was appointed on 13 May, 1970 and reported on 25 May, 1972. It was chaired by Sir Kenneth Younger, a former minister retired from politics. The Younger Committee pointed out that in certain respects people in a pre-industrial society enjoyed less privacy than we do. The whole question of privacy, indeed, is connected with that of the increasingly impersonal nature of authority. Anxiety over privacy, therefore, begins with the

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9. *Ibid*, at 18

10. Mervyn Jones (ed.), *Privacy* (1971), at 11.

11. *Ibid*, at 20.

transformation of society into large-scale, generally urban units, a process that went hand in hand with the Industrial Revolution. Privacy is associated in most people's minds with security – with being 'let alone' to live the kind of life and do the kind of work on which one had counted.[12]

The setting up of the Younger Committee was an admission on the part of authority that concern over privacy was real and to some extent justified. The Younger Committee which reported on privacy in the United Kingdom in 1972 observed that while privacy is widely recognized 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 media. It is generally agreed that, to this point, the common law of England and many other Common-wealth common law jurisdictions know no generalised right to privacy. In the parliamentary debate on the first of the private members' bills on privacy introduced in the United Kingdom during the 1960's, *Lord Mancroft's Right to Privacy Bill, 1961,* Lord Denning said that the law on privacy in the United States had evolved from the English common law and that in England "the Judges may well do it". The Younger Committee 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. Lord Denning's statement in the debate on the *Mancroft's Bill* was very much in character, but it is very doubtful if the common law of England would at this time, recognize or announce a general right of privacy .[13] To quote Lord Denning:

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12. *Ibid*, at 15.

13. S. K. Sharma, *Privacy Law – A Comparative Study*, Atlantic Publishers and Distributors, New Delhi, 1994 at 11.

"There is no obstacle in the way of judges, it is open to them to find – as the courts of the United States have found – a new tort. English law should recognize a right of privacy. Any infringement of it should give a cause of action for damages or an injunction as the case may require. It should also recognize a right of confidence for all correspondence and communications which expressly or impliedly are given in confidence. With likewise a cause of action." [14].

As in England, so elsewhere in the Common-wealth, there has been no common law development of a generalised right to privacy. Latham,C.J., of the Australian High Court in *Victoria Park Racing Co.* vs. *Taylor* ,[15] said that however desirable some "limitation upon invasion of privacy might be, no authority shows that any general right of privacy exists". These has been growing and active concern with problems of privacy in Australia . Legislations in two states in the latter 1960's dealt with surveillance devices. In 1971 legislation was enacted in Queensland which tackled a variety of privacy issues including credit reporting and data banks ; in South Australia in 1972, legislation dealt with surveillance devices and more recently there has been sensitive and acrimonious debate on proposed legislation in South Australia and Tasmania designed to provide more comprehensive protection for privacy . One of the most significant and comprehensive surveys of the privacy issues in Australia has been the Report on the Reform of the Law Concerning Privacy by Professor W.L.Morrison which was commissioned by the Conference of

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14. Lord Denning, *What Next in the Law?* Butterworth's, Aditya Books Private Ltd. New Delhi. 1993 at 267.

15. (1937) 58 *CLR* 479.

Attorney-General of the Common-wealth and the Australian States and was published in 1973 . Recommendations in the Morrison Report have been translated into law in New South Wales [16].

The United States has given leadership in the common law world in exploring the complex issues involved in the protection of privacy. Even though the American Constitution does not guarantee a right of privacy, the Supreme Court in 1960 constitutionally denominated a right of privacy as "a fundamentally personal right emanating from the totality of the constitutional scheme under which we live." [17] The legal right of privacy was, of course, born out of the dicta and dissent of more than a century of judicial opinion. Claims of personal privacy had been recognised under the Fourth Amendment's protection against unreasonable searches and seizures and the Fifth Amendment's privilege against self incrimination. The Supreme Court also legitimatised privacy interests under the First Amendment in the context of freedom of belief, speech and association, as well as, those of freedom from governmental surveillance and public intrusions by the media and possession of obscenity and pornography in one's home. Individual justices on several occasions also have acknowledged protection of privacy interests under the guarantees of the Third, Ninth and Fourteenth Amendments. The legal right of privacy therefore emerged as the product of incremental judicial decision making and the concept of privacy became a salient political issue in the United States. [18]

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16. *See*, the Privacy Act, 1975.

17. *Poe* vs. *Ullman*, (1960) 367 U.S. 497 at 521, per Douglas, J., the court did not uphold a constitutional right of privacy until *Griswold* vs. *Connecticut*, (1965) 381 U.S. 479.

18. David M. O' Brien, *Privacy, Law and Public policy* (1979), at 4.

In 1965, in *Griswold* vs. *Connecticut*, [19] the American Supreme Court had an occasion to consider the right to privacy on the constitutional basis. The Court invalidated a Connecticut Statute which made the use of contraceptives a criminal offence on the basis of violation of privacy , Douglas, J., who delivered the main opinion, examined the earlier decisions and observed:

> "(S)pecific 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 ....." [20]

The various guarantees, in the opinion of the learned Judge, were the First Amendment, the Third Amendment, the Fourth Amendment, the Fifth Amendment and the Ninth Amendment.

In *Jane Roe* vs. *Henry Wade*,[21] the Court finally established the constitutional right to privacy. It was observed in this case that "although the Constitution does not explicitly mention any right of privacy, the United States Supreme Court recognises that a right of personal privacy, or a guarantee of certain areas or zones of privacy, does exist 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 in the concept of liberty guaranteed by the first section of the Fourteenth Amendment."

In India, the concept of privacy may be found in ancient times. Certain matters were suggested to be kept secret from disclosure, as,

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19. (1965) 14 L. Ed. 2d 510.

20. *Ibid*, at 514

21. (1973) 35 L. Ed. 2d 147.

आयुवित्तं गृहच्छिद्र मन्त्तमौषध मैथुने ।
दानं मानापमानौ च नंव गोप्यानि कारयेत ॥[22]

The ancient Indian literatures are full of the instances to bring home the conclusion that the privacy of woman, family, procreation, communication and matters relating to personal privacy were protected by the society, as well as, by the state under the *Dharmashastras*. All the religious texts contain the principle of non-interference by others or by the King until, of course, it is not required in the public interest, or in some cases, for the prevention of crime. In course of time, however, the ancient Indian literatures did not attract the attention of the world of scholarship. Therefore it became difficult to connect that principle with the modern contemporary jurisprudence. At the same time those principles continued to dominate as the dictate of morality even during the British period which considerably influenced the morality of the law and found place in the civil, as well as, criminal laws. The principles contained therein sufficiently indicate that the state hardly interfered in the privacy of family, home or religious matters.

There are no express words in the Constitution of India about the right to privacy and it could not be found in any other statute, though, interests similar to that have been protected both under civil law and under the Penal Code,[23] the Evidence Act [24] and under the Constitution. The Supreme Court has, in recent decisions, developed various rights, interests

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22. Hitopadesh I: 123, Worship, sex and family matters, etc. were to be protected from disclosure

23. For detailed discussion *see*, *infra*, Chapter 2 section (e).

24. *Ibid.*

similar to privacy, i.e., right of free enjoyment, right to sleep, right to human dignity, right to have access to justice etc, under the concept of personal liberty in Article 21 of the Constitution.[25]

The Indian Supreme Court, for the first time, considered the right to privacy in *Kharak Singh* vs. *State of U. P.* ,[26] which was a case on police surveillance and domestic visit at night by the police personnel. In *Govind's* case [27] the Court established that the right to privacy is a fundamental right. As a source of this right, like early cases in U.S.A., the Court found the fundamental right to privacy as emanation from Articles 19 and 21.[28] However, *Govind's* case firmly laid it down that Article 21 protects the right to privacy and promotes the dignity of the individual. Separate right to privacy should be developed through the process of case by case development [29].

After *Kharak Singh* and *Govind* there have been a whole range of cases dealing with one or the other aspect of privacy. Thus, privacy is a fundamental right guaranteed by our Constitution, but the content and extent of this right are not clear. The protection of privacy under right to human dignity enshrined in Article 21 is not sufficient to include all aspects of privacy. Article 21 is already overburdened with recent developments , it may not bear the later development of privacy. The protection of the right to privacy should find some place somewhere in the Constitution because it is a fundamental right. Although there is no

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25. *Francis Coralie* vs. *Union Territory of Delhi*, AIR 1981 SC 746.

26. AIR 1963 SC 1295.

27. AIR 1975 SC 1378.

28. AIR 1981 SC 746, at Para 28.

29. *Ibid.*

mention of the privacy as a fundamental right in our Constitution expressly, the judiciary through case to case development has evolved it as a Fundamental Right included in Article 21 and other provisions of Fundamental Rights and Directive Principles and subjected it to the limitations of 'due process' as well as of 'reasonable restrictions'.[30]

30. *See*, *R. Rajagopal* vs. *State of T. N*, AIR 1995 SC 264 and *Mr. 'X'* vs. *Hospital 'Z'*, AIR 1999 SC 495.

B. Definitional Concept

The quest for privacy is inherent in human behaviour. It is the natural need of a man to establish individual boundaries and to restrict the entry of others into that area. There are few moments in the life of everyone when he does not want interference from others and desires to be alone. Autonomy is an essential element for the development of one's personality. These areas may be in relation to person, family, marriage, sex or other matters which require closed chamber treatment. In such areas an individual requires to be at liberty to do as he likes. An intrusion on privacy threatens that liberty. For the happiness of a man it becomes necessary to protect intrusion in one's secret which is basic to a free society, and more particularly, in a democratic world. [1] At the same time there are multi-dimensional modes to invade privacy. With the development of science and technology and due to the rapid rate of industrialization new weapons to invade privacy have emerged. As a consequence the problem to protect privacy has also become complex. [2] The problem before libertarians is how to secure one's dignity and to create a sense of responsibility and respect for freedom.[3]

The idea of privacy is vexed and difficult to get into a right perspective. Numerous meanings crowd in on the mind that tries to analyse privacy : the privacy of private property; privacy as proprietary

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1. *See*, Justice Frankfurter in *Wolf* vs. *Colorado*, (1948) 338 US 25.

2. *See*, Zeev Segal, A General Approach to Privacy: The Israeli vs. The English Approach, *Public Law*, 1982, Stevens, London, 240 at 242.

3. *See*, B. P. Dwivedi, The Right to Privacy: A New Horizon, *AIR* 1991 (Journal) 113.

interest in name and image; privacy as the keeping of one's affairs to one's self; the privacy of the internal affairs of a voluntary association or of a business corporation; privacy as the physical absence of others who are unqualified by kinship, affection, or other attributes to be present; respect for privacy as respect for the desire of another person not to disclose or to have disclosed information about what he is doing or has done; the privacy of sexual and familial affairs; the desire for privacy as a desire not to be observed by another person or persons ; the privacy of the private citizen in contrast with the public official; and these are only a few. But not only are there many usages of the concept of privacy; there are also the numerous related and contrasting terms: freedom, autonomy, publicity, secrecy, confidentiality, intimacy and so forth [4].

According to Edward Shils, Privacy is a "zero-relationship" between two persons or two groups or between a group and a person. It is a "zero-relationship" in the sense that it is constituted by the absence of interaction or communication or perception within contexts in which such interaction, communication or perception is practicable – i.e., within a common ecological situation, such as that arising from spatial contiguity or membership in a single embracing collectivity such as a family, a working group or ultimately a whole society. Privacy, according to him, may be the privacy of a single individual, it may be the privacy of two individuals, or it may be the privacy of three or numerous individuals. But it is always the privacy of those persons, single or plural, vis-à-vis other persons [5].

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4. Edward Shils, Privacy: Its Constitution and Vicissitudes, 31 *Law and Contemporary Problems* 1966) 281.

5. *Ibid*, at 281.

Privacy is a confusing and complicated idea. It is a primary value of an open society, and it is still possible, several centuries later, to quicken the pulse by quoting William Pitt's stirring peroration denying to the King of England the right to cross the threshold of the "ruined tenement" of the poorest subject in his kingdom. The English common law protected against eavesdropping as well as trespassing and other violations of property rights.[6] Abuse of general search warrants or writs of assistance, by English authorities in the American colonies led to adoption of the Fourth Amendment subjecting searches and seizures to warrant requirements, while the Fifth Amendment's ban on self-incrimination stemmed from an even deeper conception of individual integrity.

The Supreme Court in *Boyd* vs. *United States* [7] initiated a broad interpretation of the Fourth and Fifth Amendments in the context of criminal prosecution. But in 1890 an influential *Harvard Law Review* article by Samuel Warren and Louis D. Brandeis freed the privacy concept from its propertied and criminal procedure history and defined it as a broader "right to be let alone".[8] Warren and Brandeis said in their famous article that the object of privacy is to protect 'inviolate personality'. The learned authors elaborated the proposition as follows:

> "Thus, in very early times, the law gave a remedy only for physical interference with life and property, for trespass *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

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6. *See*, Foreword by C.Herman Pritchett in David M.O'Brien, *Privacy, Law and Public Policy* (1979) USA.

7. (1866) 116 U.S. 616

8. Warren and Brandeis, The Right to Privacy, 4 *HLR* 193 – 220 (1890).

the right to property secured to the individual his lands and his cattle. Later there came 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.....".[9]

Not only 75 years later did the Supreme Court translate this right into constitutional terms. Then, in *Griswold* vs. *Connecticut*,[10] Justice Douglas, in a classic exercise of judicial activism, found a right to privacy in the "penumbras" of the First, Third, Fourth, Fifth and Ninth Amendments, while two of his colleagues located it more simply in the due process clause of the Fourteenth Amendment.[11]

The threat to privacy in the *Griswold* was criminal prosecution for use of contraceptives, but there were contemporaneous invocations of the right to privacy, particularly against collection of personal information on computers and data banks that make complete life histories available to anyone with access to a computer terminal. The resulting pressures led most of the states as well as Congress to pass legislations protecting it in very broad terms. For example, the people of California adopted the constitutional amendment in 1974. The same year Congress passed a federal Privacy Act which stated:

"All people are by nature free and independent, and have certain inalienable rights, among which are those of enjoying and defending life and liberty; acquiring, possessing and protecting

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9. *Ibid*, at 193.

10. (1965) 381 U.S. 479.

11. *See*, Foreword by Herman C. Pritchett in David M. O'Brien, *Privacy, Law and Public Policy*, (1979), U.S.A.

property; and pursuing and obtaining safety, and happiness and privacy".[12]

It soon became obvious that the privacy issue had not been thought through, and that privacy is one of those good things that it is possible to have too much of. Oregon, for example, passed a privacy law forbidding disclosure of arrests, indictments, convictions, sentences, and prison releases. Immediately, arrested individuals began piling up in jails because officials could not tell relatives and friends that they had been arrested and needed bail. Within four days the Oregon legislature repealed the statute.[13] One of the principal responsibilities of the Supreme Court, particularly since 1965, has been to establish the constitutional basis for privacy claims and the necessary limits of those claims. The Court's decisions have attracted an extra ordinary amount of interest, not only in law reviews and scholarly journals but in public prints and media also.[14]

In democratic societies there is a fundamental belief in the uniqueness of the individual, his basic dignity, his worth as a human

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12. *Ibid.*

13. *See, ibid* at (viii); The U.S. Embassy in Moscow thought that the federal privacy law forbade release of the name of a U.S. citizen who died in a fall from a Moscow hotel. The California Supreme Court reversed the conviction of a drug peddler; because a telephone lineman who had legally overheard the crime being planned was forbidden by the State Privacy Act from telling anyone about it.

14. *Ibid.* at (viii).

being. Psychologists and sociologist have linked the development and maintenance of the sense of individuality to the human need for autonomy. One of the accepted ways of representing the individual's need for an ultimate core of autonomy has been to describe the individual's relation with others in terms of a series of zones or regions of privacy leading to a 'core-self '. The most serious threat to individual autonomy is that someone will penetrate this inner zone and the ultimate secrets either by physical or other means.[15]

Although there has been much scholarly writing since the publication of the seminal article by Warren and Brandeis on the right to privacy, there still remains considerable confusion as respects the nature of the interest which privacy is designed to protect. There is a school of thought of which Dean Prosser is the most outstanding spokesmen that privacy is not an independent value at all but a composite of interest in reputation, emotional tranquility and intangible property. The view of Dean Prosser has been adopted by Salmond [16] although English common law does not recognize invasion of privacy as a tort in all cases in which the American courts do. According to Dean Prosser, the four distinct torts, which are discovered in these cases, are:

1. Intrusion upon a person's solitude or seclusion or into his affairs.
2. Public disclosure of embarrassing fact's of a person's private life.
3. Publicity which places an individual in false light in public eyes.
4. Appropriation to a person's advantage of another's name or likeness .[17]

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15. K. K. Mathew, The right to be Let Alone, (1979) 4 *SCC* (Journal) 1.

16. Salmond, *The Law of Torts*, 15th Edition. at 44 – 45.

17. *See*, (1979) 4 *SCC* (Journal) 1.

According to Alan F. Westin, 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. 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. The individual's desire for privacy is never absolute, since participation in society is an equally powerful desire. Thus each individual is continually engaged in a personal adjustment process in which he balances the desire for privacy with the desire for disclosure and communication of himself to others, in light of the environmental conditions and social norms set by the society in which he lives. The individual does so in the face of pressures from the curiosity of others and from the processes of surveillance that every society sets in order to enforce social norms. [18]

Some forms of interference with privacy have existed for centuries, such as spying and prying, or attacks on someone's honour and reputation ; others are new, or more easily or more effectively practiced on account of modern techniques, for example, interference with correspondence or communication [19].

A very special problem resulting from the development of modern

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18. Alan F. Westin, *Privacy and Freedom*, (1970) New York, at 7.

19. A. H. Robertson (ed), *Privacy and Human Rights*, Manchester Univ. Press, 1973, at (vii): some of the modern devices may be cited, for example, the hidden camera for the visual image, the hidden microphone for the spoken word, infra-red photography, the use of laser rays, and so on.

technology arises from the storage of information about our private lives in computers. While data banks may be perfectly proper if subject to adequate control and used in the public interest, they become dangerous when there is not sufficient control of accuracy of the information stored, of its relative completeness – or at least of its balanced character because *suppresio veri* may be *suggestio falsi.* [20]

The law relating to privacy is in a state of full evolution. There are two reasons for this. First, that privacy, when considered as a positive right, is of recent origin. It is not found in any of the classic texts of the eighteenth century; it is but a newcomer when compared with due process of law and *habeas corpus*. Indeed, in the twentieth century it is a matter of current concern in developed and sophisticated societies but hardly known in the simpler *milieux* of other countries, where everyone knows the business of everyone else and the man who keeps to himself tends to be regarded as anti-social .[21]

The second reason for this modern development in the law is that if the right of privacy has come to be recognized in our legal systems in the first half of the last century, it has been jeopardized to an unparalleled extent as a result of the ingenuity of man in the second half. It was comparatively easy to protect privacy at a time when encroachments thereon could be identified and prosecuted – or form the subject of a civil action; but it is much more difficult in an age of scientific and technological developments, when many encroachments cannot even be perceived at the time when they are committed – though their subsequent exploitation may have far-reaching consequences. The right is based

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20. *Ibid.*

21. *Ibid*, at (viii).

essentially upon the recognition of the individual's interest that he should be protected against any intrusion into his intimate life and into any part of his existence which he might legitimately desire to keep to himself. This should include protection against the public disclosure of private facts and against publicity which places one in a false light in the public eye. [22]

The assumption that privacy denotes an individual's seclusion or withdrawal from public affairs have been shared by both early proponents of privacy protection and some contemporary psychologists and sociologists. In 1888, noting for the first time "a right to be let alone", Judge Thomas M. Cooley planted the seed for the legal profession's interest in privacy. [23] Two years later Samuel Warren and Louis Brandeis cultivated the notion with the initial analysis of the concept of privacy.[24] Anticipating judicial recognition of new rights, they argued inductively that common law protected against invasions of privacy, albeit parasitically, in the areas of contract and industrial property. They believed that the expansion of property rights constituted a "recognition of man's spiritual nature". The principle which protects personal writing and all the 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.[25]

From an analytical perspective, the Warren and Brandeis interpretation of privacy as a "right to be let alone" that protects man's

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22. *Ibid.*

23. Thomas Cooley, *Torts*, 2d.ed. 1888 , at 91.

24. Samuel D. Warren and Louis D. Brandeis. The Right to Privacy, 4 *HLR* 193 (1890).

25. *Ibid*, at 205.

"inviolate personality" is unsatisfying. Their definition is too imprecise for judicial construction and principled application, let alone incorporation into public policy. Yet, other scholars in the United States, following jurists in the Continental tradition shared their impulses for a broad unitary definition by including privacy interests in a "right of personality".[26] Today, many psychologists and sociologists are also inclined to similarly broad definitions. A. Bates defines it as a person's feeling that others should be excluded from something which is of concern to him, and also recognition that others have a right to do this.[27]

Another scholar F.S. Chapin stated it to be a value to be oneself : relief from the pressures of the presence of others.[28] According to Sidney M. Jourard it means an outcome of a person's wish to withhold from others certain knowledge as to his past and present experience and action and his intention for the future; a desire to be an enigma to others or to control others' perceptions and beliefs about the self. [29] The aforesaid definitions have two common features: the equation of privacy with withdrawal, or the desire to be withdrawn, from public affairs and the assumption that privacy is voluntary, and essentially involves individual self-control.[30]

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26. *See*, Roscoe Pound, Interests in Personality, 23 *HLR* 343(1915).

27. *See*, A. Bates, Privacy- A Useful concept ? 42 *Social Forces*, 432 (1964); David M. O'Brien, *Privacy, Law and Public Policy*, (1979), at 6.

28. *See*, F.S.Chapin, some Housing Factors Related to Mental Hygiene. 7 *Journal of Social Issues* 164(1951); David M O'Brien, *Privacy, Law and Public Policy*, (1979), at 6.

29. Sidney M. Jourard, Some Psychological Aspects of Privacy, 31 *Law and Contemporary Problems*, 307(1966).

30. David M. O'Brien, *Privacy, Law and Public Policy*, (1979), at 6.

Frederick Davis [31] suggested that the right of privacy has little more utility for judicial, and, by implication, administrative decision making than the "pursuit of happiness". He argued that "the concept of a right to privacy was never required in the first place, and ..... its whole history is an illustration of how well-meaning academicians can upset the normal development of laws by pushing too hard". For Davis, and other scholars, the concept of privacy has utility only in a psychological sense but should not be afforded independent legal recognition. Arguably, psychological and social interests in privacy could be protected by more "elementary interests": principally, infliction of mental suffering and expropriation of personality or proprietary interest. Hence, for Davis, "privacy is an interest or condition which derives from and is automatically secured by the protection of more recognizable rights". This approach, it is submitted, is extreme in as much as it constitutes an absolute denial of a legal right and assumes that interests in privacy are not intrinsic but merely derivative from and instrumental to other individual rights. Yet, like other proponents of privacy protection, Davis assumes that recognition of privacy interests is tantamount to legitimatising a right to privacy.[32]

In 1960 William Prosser re-examined the concept and law of privacy only to conclude that there was no independent privacy interest – hence, no right of privacy *per se*. Prosser found only a complex of four interests and torts : "The law of privacy comprises four distinct kinds of invasions of four distinct interests of the plaintiff, which are tied together

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31. Frederick Davis, What Do We Mean by 'Right to Privacy'? 4 *South Dakota Law Review* 1. at 4, 5 and 20 (1959).

32. *Ibid*, note 30, at 6-7.

by the common name, but otherwise have almost nothing in common except that each represents an interference with the right of the plaintiff....'to be let alone'".[33]

The four interests and torts, Prosser found, are as follows:

1. *Intrusions upon the plaintiff's seclusion or solitude, or into his private affairs.* Protected here is the interest in freedom from mental distress. It has been used chiefly to fill in the gaps left by trespass, nuisance, the intentional infliction of mental distress, and whatever remedies there may be for the invasions of constitutional rights.

2. *Public disclosures of embarrassing private facts about the plaintiff.*

3. *Publicity that places the plaintiff in a false light.* The public disclosure and false light torts protect interests in reputation and mental distress; both overlap with the law of defamation.

4. *Appropriation for the defendant's advantage of the plaintiff's name or likeness.* Unlike the other three interests protected, here the interest is not mental but a proprietary one – an interest in the exclusive use of the plaintiff's name and likeness.[34]

Prosser's classification of privacy torts was widely accepted but rekindled controversy over the theoretical and legal foundations of privacy. If Prosser's analysis was correct, then Warren and Brandeis were wrong. In stead of a single interest, there were four interests represented

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33. William Prosser, Privacy, 48 *California Law Review*, 383, at 392 (1960).

34. *Ibid*, note 30.

By four torts none of which bore a distinctive interest in privacy. Prosser's examination, therefore, presented proponents of privacy protection with 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.[35]

Edward Bloustein [36] endeavoured to resolve the paradox by developing a general theory of individual privacy, which he also hoped would reconcile divergent trends in case law. By reanalyzing Prosser's classification, Bloustein attempted to show that the principle of "inviolate personality" was still the fundamental interest in privacy cases. According to him, 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. Like Warren and Brandeis, Bloustein assumed that privacy interests have an intrinsic value, and for this reason they involve more than mere protection of instrumental values, such as protection of property, reputation and mental suffering.[37]

The significance of Bloustein's analysis is threefold. First, he correctly points out that if privacy should be respected for its intrinsic worth rather than for its instrumental value, then it becomes irrelevant whether, for example, public disclosures of personal information are true or have economic value. Second, if the social interest in privacy has an intrinsic worth, then privacy must be given greater weight in policies than

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35. *Ibid*, at 8.

36. Edward Bloustein, Privacy as an Aspect of Human Dignity: An Answer to Dean Prosser, 39 *New York University Law Review* 962, 1003 (1964).

37. *Ibid*, note 30, at 8.

the simple legitimation accorded interests having only derivative or instrumental values. Third, it is only with an encompassing principle of privacy that one can reconcile the constitutional law of privacy – that is; reconcile privacy cases such as those of contraception and abortion with those dealing with the privacy of association, possession of pornography, and unreasonable intrusions upon and disclosures of private engagements. Likewise, a unifying principle of privacy compensates for another major weakness in Prosser's analysis, namely, the impossibility of reconciling privacy in tort and nontort contexts, since the fundamental interests in each context diverge. Whereas the constitutional right of privacy protects the sanctity of a man's home and the privacies of life, tort protection extends to the interests in economic security, reputation and mental stability. Bloustein's analysis, then, correctly criticizes Prosser for acknowledging a concept of privacy while failing to articulate the underlying interest in privacy applicable to tort and nontort contexts. The problem with Bloustein's analysis, however, 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 classification of the reason privacy is of value at all – namely, that privacy is associated with human freedom and dignity.[38]

Initial approaches to the concept of privacy did not find wide acceptance, owing to their lack of precision and their failure to analyse the concept of privacy systematically. The conceptual murdle surrounding early definitional approaches stems from a failure to distinguish the concept of privacy from that of a right to privacy, that is, to recognize the difference between privacy and its legal protection.

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38. *Ibid*, at 8-9.

According to Hyman Gross,[39] 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. He further pointed out:

> "A legal right of privacy exists to the extent that such legal interest may be (not could be) accorded protection by legal procedures. But privacy in these contexts does not exist because of such legal recognition. It exists – like secrecy, security, or tranquility – by virtue of habits of life appropriate to its existence". [40]

Charles Fried proposed that privacy provides the rational context for a number of our significant ends, such as love, trust and friendship, respect and self-respect. Like Gross, Fried views privacy as a context for other intrinsic ends. But unlike Gross, Bloustein and Warren and Brandeis, Fried argues that the normative import attached to privacy derives from its utility, its instrumental value. Privacy is a necessary element of those ends (love, respect and trust), it draws its significance from them. And yet, since privacy is only an element of those ends, not the whole value, we have not felt inclined to attribute privacy ultimate significance. Privacy provides a rational context for human ends because privacy is chosen. Consequently, privacy should be respected and legally recognized since intrusions upon or disclosures of personal engagements constitute deprivation of individual liberty. Accordingly Fried offers the following definition:

"Privacy is not simply an absence of information about us in the

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39. Hyman Gross, The Concept of Privacy, 42 *New York University Law Review* 34, 53 (1967).

40. *Ibid*, at 35-36.

mind of others; rather it is the control we have over information about ourselves ..... The person who enjoys privacy is able to grant or deny access to others..... Privacy thus is control over knowledge about oneself. But it is not simply control over the quantity of information abroad; there are modulations in the quality of knowledge as well" [41].

Psychologists have defined privacy as follows:

> The essence of privacy is no more, and certainly no less, than the freedom of the individual to pick and choose for himself the time and circumstances under which and most importantly, the extent to which, his attitudes, beliefs, behaviour and opinions are to be shared with or withheld from others .[42]

Further;

> Obtaining freedom of choice or options to achieve goals, control over what, how and to whom a person communicates informations about the self .....[43] Selective control of access to the self or to one's group.[44]

From a psychologists' point of view, Irwin Altman suggests that the key elements for understanding privacy are the following: (i) Privacy is a dialectic process involving both a closing off of the self and an opening of the self to others. (ii) Privacy is an interpersonal boundary

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41. *Ibid*, note 30, at 13.

42. Oscar M.Ruebhausen and Orville G. Brim, Privacy and Behavioral Research, 65 *Columbia Law Review* 1184, 1189 (1965).

43. H. Proshansky, W.H.Ittelson, L.G. Rivlin, eds., *Environmental Psychology*, New York: Holt Rinchart and Winston, 1970.

44. Irwin Altman, Privacy: A Conceptual Analysis, 8 *Environment and Behavior* 7, 8 (1976).

control process, or a series of events involving regulation and control of social interaction or "permeability" of the self to others .This boundary control process aids in the placing and management of social interaction. (iii) Privacy is a non-monotonic process, with a region above and below which interaction amount and quality are unsatisfactory. (iv) Privacy involves various social units, or different combinations of persons and groups. (v) A distinction is made between subjectively desired or momentary ideal level of privacy (desired privacy) and actual outcomes (achieved privacy). (vi) Privacy is an input and output process, or a combination of incoming social stimulations from others and outgoing interaction from the self to others.[45]

Such a psychological perspective also informs the approaches advanced by Arthur Miller, Alan F. Westin and Richard B. Parker. According to Arthur Miller, privacy is the individual's ability to control the circulation of information relating to him.[46] As aforesaid, Alan F. Westin defines privacy as the claim of individual, groups or institutions to determine for themselves when, how and to what extent the information about them is communicated to others. 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 state of solitude or small group intimacy or when among larger groups, in a condition of anonymity or reserve.[47] According to Richard B. Parker, Privacy is control over whom

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45. *Ibid*, at 8.

46. *Ibid*, note 30, at 12.

47. Alan F.Westin, *Privacy and Freedom*, New York, Atheneum, 1970, at 7-8.

and by whom the various parts of us can be sensed by others..... (more specifically) control over who can see us, hear us, touch us, smell us, and taste us, in sum, control over who can sense us, is the core of the concept of privacy. It is control over the sort of information found in dossiers and data banks.[48]

Gaiety defined privacy as, "an autonomy or control over the intimacies of personal identity" [49]. This definition, however, did not clarify the nature and limits of such control.

In the opinion of Clinton Rossiter, "Privacy seeks to erect an unbreakable wall of dignity and rescue against the entire world." [50]

Gary L. Bostwick suggested three classes of privacy, namely, the privacy of repose, sanctuary and intimate decisions. "Repose" is freedom from anything that disturbs or excites. It partakes of calm, peace and tranquility. The purpose of sanctuary is to keep certain things within the zone which means prohibiting others from seeing, hearing and knowing.[51]

Gavin Phillipson and Helen Fenwick have observed:

> "Any discussion of enhancing legal protection for 'privacy' must indicate the sense in which that vexed term is being used and in particular, seek to identify what should count as a legally actionable invasion of it. A necessary first step is to draw a distinction between what may be termed 'substantive' and 'informational' autonomy. The former denotes the individual's

48. Richard B. Parker, A Definition of Privacy, 27 *Rutgers Law Review*, 275, 280-81 (1974).

49. Gaiety, Redefining Privacy, 12 *HCR-CLR* 233.

50. *See*, K. K. Mathew, The Right to be Let Alone (1979) 4 *SCC* 1(Journal), at 2.

51. Gary L. Bostwick, A Taxonomy of Privacy: Repose, Sanctuary and Intimate decision (1976).

interest in being able to make certain substantive choices about personal life without state coercion .... 'Informational autonomy', on the other hand, refers to the individual's interest in controlling the flow of personal information about herself, the interest referred to by the German Supreme Court as "informational self-determination ", the right to 'selective disclosure'. In accordance with the views of a number of scholars, we propose this interest as the primary concern of the law of this area."[52]

To be sure the privacy doctrine involves the "right to make choices and decisions", which, it is said, forms the "kernel" of autonomy. The question, however, is *which* choices and decisions are protected. On this point the court has offered little guidance. We are told that privacy encompasses only those "personal rights that can be deemed 'fundamental' or 'implicit in the concept of ordered liberty'," that it insulates decisions "important" to a person's destiny, and that it applies to "matters.....fundamentally affecting a person." Perhaps the best interpretation of these formulations is that privacy is like obscenity: the Justices might not be able to say what privacy is, but they know it when they see it .[53]

A whole range of cases have come before the US Supreme Court where the Court had the opportunity of dealing with various aspects of the

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52. Gavin Phillipson and Fenwick, Breach of Confidence as a Privacy Remedy in the Human Rights Era, 63 *MLR* 660, 662 (2000).

53. Jed Rubenfeld, The Right of Privacy, 102 *HLR* 737, 751-52 (1989).

right to privacy. In *Griswold* vs. *Connecticut* [54], the Court observed that specific guarantees in the Bill of Rights "have penumbras formed by emanations from those guarantees that help to give them life and substance " and some of these guarantees "create zones of privacy".

In *Charles Katz* vs. *United States* [55] it was held that the right to privacy is the right to be let alone by other people. Subsequently, in *Jane Roe* vs. *Henry Wade* [56], the Court observed that only personal rights that can be deemed "fundamental" or "implicit in the concept of ordered liberty" are included in the guarantee of a right of personal privacy..... The right to privacy to some extent extends to activities relating to marriage, procreation, contraception, family relationships, and child-rearing and education ..... The right to privacy ..... is broad enough to encompass a woman's decision whether or not to terminate her pregnancy.

In *Carey* vs. *Population Services International*, [57] the Court was of the opinion that if the due process right of privacy under the Fourteenth Amendment meant anything, it was the right of the individual, married or single, to be free of unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child.

The Indian Constitution does not specifically provide the "right to privacy" as one of the fundamental rights guaranteed to the citizens. But it

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54. (1965) 381 U.S. 497.

55. (1967) 19 L. Ed. 2d 576.

56. (1973) 35 L. Ed. 2d 147.

57. (1977) 52 L. Ed. 2d. 675.

must be noted that interests similar to that are protected under the Penal Code ,[58] the Evidence Act [59] and the Constitution ,[60] although different nomenclatures like privileged communication, matrimonial rights etc. have been given to it in different statutes. As aforesaid, the quest for privacy is a natural need of a man so as to establish individual boundaries and to restrict the entry of others in that area. An intrusion into or interference with the privacy of a person threatens his liberty in the matters of sex, family, marriage or such other matters which require closed chamber treatment. Such intrusion or interference must therefore, be done away with at all costs, otherwise the very purpose of the fundamental rights and personal liberties enshrined in and guaranteed by our Constitution will be set at naught. The Supreme Court, in various cases, has risen to the occasion and considered the 'right to privacy'. It has been clearly enunciated in judicial pronouncements that 'right to privacy' is a part of the fundamental right guaranteed under our Constitution in Article 21. Mathew J., after tracing the origin of the right to privacy and its treatment by the American Supreme Court, has stated the law in the following words:

> "(P)rivacy concerns 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 the right ....."

He further opined:

> "Any right to privacy must encompass and protect the personal

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58. For detailed discussion *see. infra*, Chapter 2 , Section (e).

59. *Ibid.*

60. *Ibid.*

intimacies of the home, the family, marriage, motherhood, procreation and child-rearing....." [61]

According to Krishna Iyer, the right to privacy is a part of the right to human dignity and the public law on information must frown on the violation of that intimacy of life which is the core of individuality of being.[62] One finds, then, agreement on a fundamental perspective and a definitional approach to privacy as "control over personal information". The prevailing approach to privacy nevertheless is inadequate because, first, its definitions are at once too broad and too narrow and, second, it assumes fallaciously that privacy is solely voluntary and fundamentally involves control over personal information.[63]

The critique of definitional approaches to privacy revealed logical fallacies and the failure to account for various kinds of privacy interest and litigation. As a logical and practical matter, privacy seems to differ significantly from the right to privacy. A person may have a large degree of privacy without having chosen it, let alone having had a right to choose it; rights of privacy are products of social structure, conventions and legal policy. Moreover, a right of privacy does not necessarily include claims to choose where, when and how one will have privacy. Therefore, in order to elucidate the legal boundaries of privacy, an alternative analysis of privacy must construct a framework that does not confuse privacy and the right of privacy. [64]

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61. *Govind* vs. *State of M.P.*, AIR 1975 SC 1378.

62. V. R. Krishna Iyer, *The Right to Know is Fundamental in Salvaging Democracy*, Delhi (1990), at 119.

63. *Ibid*, note 30.

64. *Ibid.*

In conclusion, it may be said that privacy, as a philosophical or moral concept, has escaped precise definition for over a hundred years. Given this difficulty, privacy may be best understood by the functions that it serves. Privacy is central to dignity, and individuality or personhood. Privacy is also indispensable to a sense of autonomy – to a feeling that there is an area of individual's life that is totally under his or her control, an area that is free from outside intrusion. The deprivation of privacy can even endanger a person's health. Although privacy is difficult to define as a philosophical or moral concept, the legal concept of privacy has evolved over the past century to include several permutations. [65]

65. *See*, Privacy. Photography and the Press, 111 *HLR* 1086, 1087 (1998).

C. Other Constitutions

The right to privacy has been guaranteed in some form or the other, either explicitly or implicitly, in many of the Constitutions of the world. In the Canada Act, 1982 it finds mention rather indirectly, in relation to the right to be secure against unreasonable search or seizure.[1] In the Constitution of Eire (1937) the right to privacy is provided in respect of inviolability of the dwellings of citizens. No person can forcibly enter the dwelling of a citizen except in accordance with law [2]. Moreover, the Eire Constitution also recognizes the sanctity of the family as a natural primary and fundamental unit group of society and as a moral institution possessing inalienable and imprescriptible rights, antecedent and superior to all positive law, and accords it protection in its constitution and authority.[3] The Constitution of Japan (1946) recognizes the right to privacy by expressly stating that the homes, papers, and effects of all persons shall be secure against entries, searches and seizures except upon warrant issued for adequate cause .[4]

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1. Art.8 of the Canada Act, 1982 reads : " Everyone has the right to be secure against unreasonable search or seizure."

2. Art.40(5) of the Constitution of Eire states : "The dwelling of every citizen is inviolable and shall not be forcibly entered save in accordance with law."

3. *See,* Art.41, Constitution of Eire.

4. Art.35 of the Constitution of Japan provides as follows :

The right of all persons to be secure in their homes, papers and effects against entries, searches and seizures shall not be impaired except upon the warrant issued for adequate cause and particularly describing the place to be searched and things to be seized,or except as provided by Art.33.

Each search or seizure shall be made upon separate warrant issued by a competent judicial officer.

The Constitution of West Germany (1949) contained provisions in relation to marriage and family. Marriage and family were accorded special protection of the state.[5] Privacy of posts and telecommunications was also recognized. Posts and telecommunications were inviolable except in pursuance of a law.[6] The Constitution of West Germany also declared that the home shall be inviolable. Searches could be ordered only as provided by law and could be carried out only in the form prescribed by law.[7]

The erstwhile USSR also guaranteed its citizens inviolability of the person and home. The Constitution of the Union of Soviet Socialist Republics (1979) guaranteed that the citizens may not be arrested except by a court decision or on the warrant of a procurator.[8] Similarly, it was also provided that no one could, without lawful grounds, enter a home against the will of those residing in it.[9] There was also an express provision stating that the privacy of citizens, and of their correspondence,

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5. Art.6, Constitution of West Germany – (1) Marriage and family shall enjoy the special protection of the state.

6. Art. 10 – Privacy of posts and telecommunication-(1) Privacy of posts and telecommunication shall be inviolable. (2) This right may be restricted only pursuant to a law. Such law may lay down that the person affected shall not be informed of any such restriction if it serves to protect the free democratic basic order or the existence or security of the federation or a land, and that recourse to the courts shall be replaced by a review of the case by bodies and auxilliary bodies appointed by Parliament.

7. Art. 13 Inviolability of the home-(1) The home shall be inviolable. (2) Searches may be ordered only by a judge or, in the event of danger in delay, by other organs as provided by law and may be carried out only in the form prescribed by law. (3) In all other respects, this inviolability may not be encroached upon or restricted except to avert a common danger or a mortal danger to individuals, or, pursuant to a law, to prevent imminent danger to public safety and order, especially to alleviate the housing shortage, to combat the danger of epidemics or to protect endangered juveniles.

8. *See*, Constitution of USSR, Art.54.

9. *See, Ibid*, Art. 55.

telephone conversation and telegraphic communications is protected by law.[10]

The Constitution of the People's Republic of China (1982) declares that the freedom of person of the citizens of the People's Republic of China is inviolable. No person can be arrested except as provided by law.[11] It is also stated that the personal dignity of citizens[12] and the home of citizens[13] is inviolable. Unlawful search or intrusion into a citizen's home is prohibited. Protection of law is also accorded to the freedom and privacy of correspondence of citizens.[14]

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10. *See, Ibid,* Art.56.

11. *See* , Constitution of the People's Republic of China, 1982.

Art.37 – The freedom of person of citizens of the People's Republic of China is inviolable. No citizen may be arrested except with the approval or by decision of a people's prucuratorate or by decision of a people's court , and arrests must be made by a public security organ. Unlawful deprivation or restriction of citizens' freedom of person by detention or other means is prohibited ; and unlawful search of the person of citizens is prohibited.

12. *See* , *ibid* , Art.38.-The personal dignity of citizens of the People's Republic of China is inviolable. Insult, libel, false charge or frame-up directed against citizens by any means is prohibited.

13. *Ibid,* Art.39.- The home of citizens of the People's Republic of China is inviolable. Unlawful search or Intrusion into a citizen's home is prohibited.

14. *Ibid* , Art.40.- The freedom and privacy of correspondence of citizens of the People's Republic of China are protected by law. No organization or individual may , on any ground , infringe upon the freedom and privacy of citizens' correspondence except in cases where to meet the needs of state security or of investigation into criminal offences, public security or procuratorial organs are permitted to censor correspondence in accordance with procedures prescribed by law.

The Constitution of Bangladesh (1972) also provides for the protection of home and correspondence. It states that every citizen shall have the right, subject to reasonable restrictions imposed by law in the interest of the security of the state, public order, public morality or public health – (a) to be secure in his home against entry, search and seizure; and (b) to the privacy of his correspondence and other means of communication.[15]

15. *See* , Constitution of Bangladesh, 1972, Art.43.

D. International Instruments

The recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world.[1] The Charter of the United Nations is the first international document for encouraging respect for human rights and for fundamental freedoms for all without any distinction as to race, sex, religion or language.[2] The broad parameters laid down by the Charter in respect of the human rights was carried forward by the Universal Declaration of Human Rights which was adopted by the General Assembly of the United Nations on 10 December,1948. This Declaration specifically included the protection of privacy of all persons. Article 12 of the Declaration provides:

> "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 protection of the law against such interference or attacks".

The above provision generally included the privacy of family, home, correspondence and personal privacy. It also intended to protect the privacy interest of the person in honour and reputation. The nature of the right recognised in the Declaration is to prohibit any kind of arbitrary interference in the privacy of persons and to extend the protection of law against such interference to everyone. Since the Universal Declaration is mainly aimed at promotion and propagation of human rights amongst the

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1. Preamble to the Universal Declaration of Human Rights, 1948.

2. Article 1, U. N. Charter, 1945.

world community, it was thought not sufficient to cover up all aspects of human rights in minute details. Therefore it was further supplemented by two other International Covenants in 1966. These three documents thus taken together comprise the international human rights instruments. The rights to privacy expressly recognised by the Universal Declaration was further carried forward by the International Covenant on Civil and Political Rights.[3] In addition to the aforesaid express provisions on right to privacy there are other human rights contained in the Universal Declaration which protect various aspects of privacy. The importance of right to dignity,[4] life and liberty [5] and protection against torture, cruel, inhuman and degrading treatment or punishment [6] and against arbitrary arrest, detention or exile [7] cannot be undermined. The provisions in the European Convention on Human Rights, 1950 in respect of protection of privacy are more elaborate as it commands respect for private and family life, as well as home and correspondence of every person. It further prohibits any interference by public authority in the exercise of the above rights. Together with the recognition of the right to privacy, it also

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3. Article 17 of the International Covenant on Civil and Political Rights (1966) provides as follows:

1) No one shall be subjected to arbitrary or unlawful interference with his privacy, family, house 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".

4. Articles 1 and 6, Universal Declaration of Human Rights,1948.

5. *Ibid,* Article 3.

6. *Ibid,* Article 5.

7. *Ibid,* Article 9.

provides for its limitations which may be imposed in the interest of the 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 right and freedom of others in accordance with the law and to the extent, it is necessary in a democratic society. [8]

The aforesaid international standard of human right to privacy has been generally recognised in the modern Constitutions enacted thereafter either expressly or the principles have been incorporated therein through judicial interpretation. In the context of Indian Constitution the above provisions are very significant as the Government of India has ratified the international instruments and Parliament is obliged to enact laws for giving effect to international conventions.[9] Moreover the State should strive to foster respect for international law obligation.[10] Fortunately, India has the Protection of Human Rights Act,1993, which defines "human rights" to mean "the rights relating to life , liberty, equality and dignity of the individual guaranteed by the Constitution or *embodied in the international covenants* [11] and enforceable by the courts in India". In view of this unique provisions in the statutory law the enforcement agencies for human rights in the aforesaid law are obliged to take cognizance of the rights recognized under the International Covenants. It is significant to note here that the rights contained in the international human rights

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8. Article 8, *European Convention for the Protection of Human Rights and Fundamental Freedoms, 1950.*

9. Article 253, *The Constitution of India.*

10. Article 51, *The Constitution of India.*

11. Section 2(d), *The Protection of Human Rights Act, 1993. (Emphasis added).*

instruments are not enforceable as such by courts in India, however, the recent judicial trend is in the direction of enforcing the International human rights as far as possible through the Directive Principles and Fundamental Rights under our Constitution. A positive obligation has been imposed upon courts to give due regard to international conventions and norms for constructing domestic laws.[12] In view of these developments it is submitted that the right to privacy as contained in the Universal Declaration and Covenant on Civil and Political Rights may well be read and enforced as fundamental right in our Constitution.

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12. *Vishaka* vs. *State of Rajasthan*, AIR 1997 SC 3014, *Peoples Union for Civil Liberties* vs. *Union of India*, AIR 1997 SC 568, *Apparel Export Promotion Council* vs. *A.K.Chopra*, AIR 1999 SC 625.

E. Indian Framework.

(I) Constitutional Provisions.

There are no express words in the Constitution of India about the right to privacy and it could not be found in any other statute though, interests similar to that were protected under the Penal Code or the Evidence Act and under the Constitution although different names were given to it at different times, viz., privileged communications, withholding of documents, domestic affairs, matrimonial rights etc. The Supreme Court, in recent decisions, has developed various rights, interests in all cases similar to privacy i.e. , right of free enjoyment, right to sleep, right to human dignity, right to have access to justice, etc., under the concept of personal liberty in Article 21 of the Constitution. The Supreme Court has held that:

> "The right to life enshrined in Article 21 cannot be restricted to mere animal existence. It means something much more than just physical survival. The right to life includes the right to live with human dignity and all that goes along with it, namely, the bare necessaries of life such as adequate nutrition, clothing and shelter over the head and facilities for reading, writing and expressing oneself in diverse forms, freely moving about and mixing and commingling with fellow human beings." [1]

But the Constitution does not cover at one place all the interests in privacy which need protection .

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1. *Francis Coralie* vs. *Union Territory of Delhi,* AIR 1981 SC 746, at 752.

Cases of privacy in India are either related to police surveillance or matrimonial rights and sexual autonomy. The Supreme Court, for the first time, considered the right to privacy in a case on police surveillance and domestic visit at night by the police personnel in *Kharak Singh* vs. *State of U. P.* [2] In this case the Supreme Court had occasion to consider the validity of Regulation 236 of the U. P. Police Regulation. It was held by a majority that Regulation 236(b) providing for domiciliary visits was unconstitutional for the reason that it abridged the fundamental right of a person under Article 21 and since Regulation 236(b) did not have the force of law , the Regulation was declared bad. The other provisions of the Regulation were held to be constitutional. The majority, in this case, said that 'personal liberty' in Article 21 is comprehensive to include all varieties of rights which go to make up the personal liberty of a man other than those dealt with in Art. 19(1)(d). According to the Court while Art. 19(1)(d) deals with particular types of personal freedom, Art. 21 takes in and deals with the residue. The Court quoted and followed a passage from the judgment of Field J., in *Munn* vs. *Illinois*,[3] where the learned judge pointed out that life in the Fifth and Fourteenth Amendment of the U.S. Constitution corresponding to Article 21 meant not merely the right to the continuance of a person's animal existence, but a right to the possession of each of his agent – his arms and legs, etc. There was no doubt that the word 'life' in Article 21 bears the same signification. Then the Court raised the following question:

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2. AIR 1963 SC 1295.

3. (1876) 94 U.S. 113, at 142.

"Is then the word 'personal liberty' to be construed as excluding from its purview an invasion on the part of the police of the sanctity of a man's home and an intrusion into his personal security and his right to sleep which is the normal comfort and dire necessity for human existence even as an animal ?" [4]

The Court also referred to the Preamble to the Constitution that it was designed to "assure the dignity of the individual" and therefore of those cherished human values as the means of ensuring his full development and evolution. The Court wanted to draw attention to the concepts underlying the Constitution which would point to such vital words as "personal liberty" having to be construed in a reasonable manner and to be attributed that sense which would promote and achieve those objectives and pointed out that it wanted by no means to stretch the meaning of the phrase to square with any pre-conceived notions or doctrinaire constitutional theories.[5]

The Court then quoted a passage from the judgment of Frankfurter J. in *Wolf* vs. *Colorado* [6] to the effect that the security of one's privacy against arbitrary intrusion by the police is basic to a free society and that the knock at the door, whether by day or by night, as a prelude to a search, without authority of a law but solely on the 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 people. The

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4. AIR 1963 SC 1295, at 1302.

5. *Ibid.*

6. (1948) 338 U.S. 25.

Court then said that at common law every man's house in his castle and that embodies an abiding principle transcending mere protection of personal rights and expounds a concept of "personal liberty". which does not rest upon any element of feudalism or any theory of freedom which has ceased to be of value.[7] The Court ultimately came to the conclusion that Regulation 236(b) which authorized domiciliary visits was violative of Article 21 and there is no "law" on which the same could be justified, it must be struck down as unconstitutional. The Court was of the view that the other provisions in Regulation 236 were not bad as no right of privacy has been guaranteed by the Constitution. [8]

Subba Rao, J., dissenting, was of the opinion that the word' liberty' in Article 21 was comprehensive enough to include privacy also. He said that although it is true our Constitution does not expressly declare a right to privacy as a fundamental right, but the right is an essential ingredient of personal liberty, that in the last resort, a person's house where he lives with his family is his "castle", that nothing is more deleterious to a man's physical happiness and health than a calculated interference with his privacy and that all the acts of surveillance under Regulation 236 infringe the right of the petitioner under Article 21 of the Constitution. [9]

In a subsequent decision of the Supreme Court in *Govind* vs. *State of Madhya Pradesh,* [10] Mathew, J., taking the lead given by the minority judgment of Subba Rao, J., in *Kharak Singh's* case and adverting to the American legal and philosophical literature on right to privacy and to the

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7. *Ibid* at 1302-03.

8. *Ibid.*

9. *Ibid*, at 1306.

10. AIR 1975 SC 1378.

American cases reported in *Griswold* vs. *Connecticut* [11] and *Jane Roe* vs. *Henry Wade* [12] ruled that Article 21 of the Indian Constitution embraces the right to privacy and human dignity. The centre-piece of the judgment in *Govind's* case is to hold that right to privacy is part of Article 21 of the Indian Constitution and to stress its constitutional importance and to call for its protection. The learned judge then examined the content of the right to privacy and observed that "any right to privacy must encompass and protect the personal intimacies of the home, the family, marriage, motherhood, procreation and child-rearing."[13] The learned judge stressed the primordial importance of the right to privacy for human happiness and directed the Courts not to reject the privacy–dignity claims brought before them except where the countervailing State interests are shown to have overweighing importance. He observed that "there can be no doubt that the makers of our Constitution wanted to ensure conditions favourable to the pursuit of happiness. They certainly realized as Brandeis, J., said in his dissent in *Olmstead* vs. *United States of America,*[14] "the significance of man's spiritual nature, of his feelings and of his intellect and that only a part of the pain, pleasure, satisfaction of life can be found in material things and therefore, they must be deemed to have conferred upon the individual as against the Government a sphere where he should be let alone." [15] The learned judge also stated that "there can be no doubt that privacy–dignity claims deserves to be examined with care and to be denied only when an important countervailing interest is shown to be

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11. (1965) 14 L. Ed. 2d. 510.

12. (1973) 35 L. Ed. 2d. 147.

13. AIR 1975 SC 1378, at 1385.

14. (1927) 277 U.S. 438.

15. *Ibid*, at 479.

superior."[16]

In *Maneka Gandhi* vs. *Union of India,*[17] the Supreme Court widened the scope of the expression 'personal liberty', and aptly observed:

> "The expression 'personal liberty' in Article 21 is of widest amplitude and it covers a variety of rights which go to constitute the personal liberty of man and some of them have been raised to the status of distinct fundamental rights and given additional protection under Article 19."

A direct case on privacy came before the Andhra Pradesh High Court in *T. Sareetha* vs. *T. Venkata Subbaiah* [18] wherein the Court held the right to privacy as a fundamental right. Justice Chaudhury extended the protection of privacy to inhuman and degrading treatment of forcible sexual cohabitation.[19] Relying on western sexologists the Court held that sexual autonomy was necessary for the enjoyment of life. The freedom to choose partner for sexual act was included in enjoyment of life. The Court extended this concept of sexual autonomy to a Hindu wife and struck down Section 9 of the Hindu Marriage Act, 1955, which provided for restitution of conjugal rights. The Court observed that by this matrimonial remedy "during a moment's duration the entire life-style would be altered and would even be destroyed" without her consent. [20]

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16. *Ibid.*

17. AIR 1978 SC 597.

18. AIR 1983 A.P. 356.

19. *Ibid,* at 372-73

20. *Ibid,* at 370.

This situation was treated as a violation of individual dignity and right to privacy. The privacy right was again treated as part of Article 21.[21]

In *State of Maharashtra* vs. *Madhukar Narayan Mardikar,* [22] the apex Court held that even a woman of easy virtue is entitled to privacy and no one can invade her privacy as and when he 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.

In *R. Rajagopal* vs. *State of Tamilnadu,* [23] the Supreme Court held that the "right to privacy" is implicit in the right to life and liberty guaranteed to the citizens of this country by Article 21. It is a "right to be let alone". A citizen has a right to safeguard the privacy of his own, his family, marriage, procreation, motherhood, child-bearing and education and other matters. None can publish anything concerning the above matters without his consent whether truthful or otherwise. If one does so, one would be liable in an action for damages. It may, however, be different, if a person voluntarily thrusts oneself or raises a self-created controversy.

In *People's Union for Civil Liberties* vs. *Union of India,* [24] it was held that the right to hold telephone conservation 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 intimate and confidential character. Telephone conversation is a part of man's private

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21. *Ibid,* at 365-66.

22. AIR 1991 SC 207.

23. AIR 1995 SC 264.

24. AIR 1997 SC 568.

life. "Right to privacy" would certainly include telephone conversation in the privacy of one's home or office. Telephone-tapping is a serious invasion of privacy and would, thus infract Article 21 of the Constitution unless it is permitted under the procedure established by law.

In *Mr. "X" vs. Hospital "Z"*, [25] the Court was of the opinion that doctor-patient relationship, though basically commercial, is, professionally, a matter of confidence and, therefore, doctors are morally and ethically bound to maintain confidentiality. In such a situation, public disclosure of even true private facts may amount to an invasion of the right to privacy which may sometimes lead to the clash of one person's right "to be let alone" with another person's right to be informed. Disclosure of even true private facts has the tendency to disturb a person's tranquility. It may generate many complexes in him and may even lead to psychological problems. He may, thereafter, have a disturbed life all through. In the face of these potentialities the right of privacy is an essential component of right to life envisaged by Article 21. The right however, is not absolute and may be lawfully restricted for the prevention of crime, disorder or protection of health or morals or protection of rights and freedoms of others. As such when the patient was found to be HIV (+), its disclosure by the doctor would not be violative of either the rule of confidentiality or the patient's right of privacy as the lady with whom the patient was likely to be married was saved in time by such disclosure, or else, she too would have been infected with the dreadful disease if marriage had taken place and consummated. [26] Right to life of the lady with whom the patient was to marry would positively include the right to

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25. AIR 1999 SC 495.

26. *Ibid*, at 501-02.

be told that a person, with whom she was proposed to be married, was the victim of a deadly disease, which was sexually communicable. Since 'Right to Life' includes right to lead a healthy life so as to enjoy all faculties of the human body in their prime condition, the doctors by their disclosure that the patient was HIV (+) , cannot be said to have, in any way, violated the rule of confidentiality or the right of privacy. Moreover, where there is a clash of two fundamental rights as in the instant case, namely, the patient's right to privacy as part of right to life and his proposed wife's right to lead a healthy life which is her fundamental right under Article 21 the right which would advance the public morality or public interest, would alone be enforced through the process of Court, for the reason that moral considerations cannot be kept at bay. [27]

Thus, privacy is a fundamental right guaranteed by our Constitution, but the content and extent of this right is not clear. Though, it is a difficult task to define privacy, yet, the main concept should be determined. The protection of privacy under right to human dignity enshrined in Article 21 is not sufficient enough to include all aspects of privacy. The harm caused by violation of privacy cannot be repaired by awarding damages. The state of mental distress on the violation of privacy cannot be expressed in words. [28] It is submitted that these efforts are not sufficient to protect privacy which is so important. We should develop a fresh outlook to protect privacy.

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27. *Ibid*, at 503.

28. *See*, K.K. Mathew, The Right to be let alone , (1979) 4 *SCC* (Journal)

(II) Other Laws

Law of Torts

There is school of thought of which Dean Prosser is the most outstanding spokesman that privacy is not an independent value at all but a composite of interest in reputation, emotional tranquility and intangible property.[1] English common law does not recognize invasion of privacy as a tort in all cases in which the American Courts do. According to Dean Prosser, the four district torts, which are discovered in their cases are:

1. Intrusion upon a person's solitude or seclusion or into his affairs.
2. Public disclosure of embarrassing facts of a person's private life.
3. Publicity which places an individual in false light in public eyes.
4. Appropriation to a person's advantage of another's name or likeness.[2]

The interest protected in these cases are interests in freedom from mental distress in public disclosure and in false light cases, the interest in reputation and in appropriation cases proprietary interest in name and likeness: from this angle the prized right of privacy shrinks in its stature so that it becomes a mere application to novel circumstances of the traditional legal rights to protect well identified and established social values. In this view privacy is not an independent legal right protecting a fundamental human value. Assaults on privacy are transmitted into a species of defamation, infliction of mental distress and misappropriation. Accordingly there is no new tort of invasion of privacy but only new ways

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1. The view of Dean Prosser has been followed by Salmond in his *The Law of Torts*, 15th edition. at 44 and 46.

2. Quoted in K. K. Mathew, The Right to be let Alone, (1979) 4 *SCC* (Journal) 1.

of committing old torts. In other words, the social value or the interest in privacy is not an independent one but only a composite of the value society places on protecting mental tranquility, reputation or intangible forms of property.[3]

Owing to the nature of instruments by which privacy is invaded, the injury inflicted bear superficial resemblance to wrongs dealt with by the law of libel and slander. The principle on which the law of defamation rests is radically different from that on which the law of privacy is based. Defamation deals with damage to reputation, with injury done to the individual in his external relations to the community by lowering him in the estimation of his fellow men. The wrong and the correlative right recognized by the law of libel and slander are in their nature material rather than spiritual. That branch of the law is simply extended the protection surrounding physical property to certain of the conditions necessary or helpful to worldly prosperity. On the other hand, the law recognizes no principle upon which compensation can be granted for mere injury to feelings.[4]

Warren and Brandeis thought that privacy is exclusively a remedy for a single tort. In their famous article, 'The Right to Privacy,'[5] Warren and Brandeis said that the object of privacy is to protect 'inviolate personality." They elaborated the proposition as follows: "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

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3. *Ibid*, at 2.

4. *Ibid.*

5. 4 *HLR* 193.

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 [6].

Some of the justices of the Supreme Court of America who have spoken about privacy have attempted to define it as an aspect of the pursuit of happiness.[7] Pursuit of happiness requires certain amount of liberty to do as one likes. Privacy requires a private enclave as it were, where an individual is at liberty to do what he wants. An intrusion on privacy threatens that liberty just as assault, battery or imprisonment. It is really an offence "to the reasonable sense of personal dignity." 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 in damages. The injury is to the spiritual element in our otherwise mundane composition [8].

In India there is no reported case on privacy as part of law of torts the reason being perhaps that there is very little tort litigation in India. Though there are no decided cases about the invasion of the right to privacy, the invasion of this right has been dealt with as a part of law of trespass or nuisance where it is well developed. Intrusion cases which is

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6. *Ibid.* at 193.

7. *See, Poe* vs. *Ullman*, 367 U.S. 497 at 522; *Public Utility Commission* vs. *Pollock*, 343 U.S. 451; *Goldman* vs. *United States*, 316 U.S. 129.

8. K. K. Mathew, The Right to be alone, (1979) 4 *SCC* (Journal) 1 at 3.

the first classification of right to privacy overlap the law of trespass. *Kharak Singh* and *Govind* both deal with this aspect of the matter and provide the limit within which a person can enjoy this right. However, both these cases deal with public authority and private individuals. Invasion of incorporeal right to immovable property is treated as a private nuisance and gives rise to an action for damages. A private nuisance can however become legal by prescription though a public nuisance cannot so become. Rights violated either by trespass or by private nuisance do not always disturb enjoyment of privacy though its disturbance cannot always be ruled out.

Similarly appropriation cases are usually dealt with as a part of law of libel and defamation. In fact, defamation is a generic name for the wrong and libel and slander are its particular forms. Libel is treated as a criminal offence but slander is not except when it is blasphemous, seditious or obscene or amounts to contempt of court. Though the appropriation cases have similarity with the law of libel they are really different. Though American Courts had many occasions to deal with appropriation cases of privacy, Indian Courts have not faced them so far and therefore the law has not yet developed.[9]

It is pertinent to refer in this content to the observation of the Supreme Court in *R. Rajagopal* vs. *State of Tamil Nadu*:[10]

> "The right to privacy as an independent and distinctive concept originated in the field of Tort law, under which a new cause of action for damages resulting from unlawful invasion of privacy was

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9. M. L. Upadhyay and Prashant Jayaswal. Constitutional Control of Right to Privacy. 2 *CILQ* (1989) 39, 53-54.

10. AIR 1995 SC 264.

recognized." [11]

The Indian Telegraph Act , 1885

Section 5(2) of the Act permits interception of messages in accordance with the provisions of the said section. Occurrence of any public emergency or in the interest of public safety are the *sine qua non* for the application of the provision of Section 5(2). Unless a public emergency has occurred or the interest of public safety demands, the authorities have no jurisdiction to exercise the powers under that provision.[12]

A leading case on Section 5(2) of the Indian Telegraph Act which came up before the Court is *People's Union for Civil Liberties* vs. *Union*

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11. *Ibid*, at 269.

12. Sec 5(2) reads as follows: "On the occurrence of any public emergency, or in the interests of public safety, the Central Government or a State Government or any officer specially authorized in this behalf by the Central Government or a State Government may, if satisfied that it is necessary or expedient so to do in the interests of the sovereignty and integrity of India, the security of the state, friendly relations with foreign States or public order or for preventing incitement to the commission of an offence, for reasons to be recorded in writing, by order, direct that any message or class of messages to or from any persons or class of persons, or relating to any particular subject brought for transmission by or transmitted or received by any telegraph, shall not be transmitted, or shall be intercepted or detained or shall be disclosed to the Government making the order or an officer thereof mentioned in the order : Provided that press messages intended to be published in India of correspondents accredited to the Central Government or a State Government shall not be intercepted or detained, unless their transmission has been prohibited under this sub-section.

of India .[13] In this case it was held that occurrence of public emergency or existence of public safety interest are *sine qua non* for application of provisions of Section 5(2) of the Act. It was also held that telephone tapping infracts right to life under Article 21 of the Constitution. The Supreme Court directed the observance of procedural safeguards before resorting to telephone-tapping.

Another relevant case in this context is *R. M. Malkani* vs. *State of Maharashtra* .[14] This was a case under Section 25 of the Act which states that if any person intending to intercept or to acquaint himself with the contents of any message damages, removes, tampers with or touches any battery, machinery, telegraph line, post or other thing whatever, being part of or used in or about any telegraph or in the working thereof, he shall be punished with imprisonment for a term which may extend to three years or with fine or with both. In the above case it was observed that where a person talking on the telephone allows another person to record it or hear it, it cannot be said that the other person who is allowed to do so is damaging, removing, tampering, touching machinery, battery, line, or post for intercepting or acquainting himself with the contents of any message. There was no element of coercion or compulsion in attaching the tape recorder to the telephone. There was no violation of the Indian Telegraph Act. [15]

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13. AIR 1997 SC 568.

14. AIR 1973 SC 157.

15. *Ibid*, at 161.

The Indian Easement Act , 1882

A right of privacy falls under illustration (b) of Section 18 of the Indian Easements Act, 1882.[16] Right of privacy is a valuable right which needs protection. There is an invasion of this right if it has been recognised by custom. The right of privacy being a customary right it is always open to the Court to see whether the custom is, in the circumstances, reasonable and whether it has ceased to be enforceable by desuetude. Be that as it may, the customary right of privacy may be said to exist only in respect of the inner courtyard.[17] There is no natural right of privacy recognised by law any where in India. It is only customary easement arising by virtue of a local custom. Thus in order to entitle the plaintiff to a decree for a mandatory injunction directing the defendant to close window put in his own property, the plaintiff must establish that there is such a customary right in the town where the properties are located, that no owner or occupier of the house can open a new window therein so as to substantially invade his neighbour's privacy.[18] The right of privacy in regard to house cannot be claimed on the basis of natural modesty and morality. Thus, the plaintiff is required to establish a custom

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16. Illustration (b) of sec 18 of the Indian Easements Act, 1882 reads as follows: " (b) 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 portion of A's house which are ordinarily excluded from observation, and B acquires a like easement with respect to A's house.

17. *Diwan Singh* vs. *Inderjeet*, AIR 1981 All 342.

18. *Deep Chand* vs. *Hansraj*, AIR 1971 Mys 322.

of privacy which disentitles the defendant from opening windows on his side. The mere fact that the lady members of the family of the plaintiff observe *purdah* will not disentitle him to claim a mandatory injunction against the defendant on the ground that his right of privacy has been invaded.[19] The right of privacy can be acquired only as a customary easement.[20]

In *Basai* vs. *Hasan Raza Khan*,[21] Dhawan, J., said "there is no doubt that a code of decency is enforced in all civilized societies, under which no one has a right to annoy others by acting himself indecently or behaving as a Peep Tom or making a nuisance of himself to his neighbors. The courts, civil and criminal will come to the aid of any person whose feelings are outraged by deliberate acts of intrusion into his privacy. However, the remedy in all such cases is against the specific conduct, or rather, misconduct, of a person. But the right to privacy which was recognised in *Gokul Prasad* vs. *Radho* [22] had nothing to do with the misconduct of the defendant but with a customary right based on *Purdah* which entitled the owner of the property to compel the owner of another to modify the design or architecture of his property so that the women residing in the dominant tenement could be kept in *Purdah*.

The Indian Courts are courts of law as well as of equity, and they ought not to give effect to a custom which the growing consciousness of the community in which it is said to have prevailed is prepared to treat it as unsuited to modern conditions and from which it has allowed a

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19. *Ghulam Mohd.* vs. *Aziz Sheikh*, AIR 1976 J&K 49.

20. *C. Ksrishnamurthy* vs. *U. Rajlingam*, AIR 1980 AP 69.

21. AIR 1963 All 340.

22. ILR 10 All. 358.

departure in several cases.[23]

Indian law does not know of cases where the plaintiff claiming a right flowing from a custom, is or can himself be the progenitor of the custom. From the nature of things, a custom is something the originator of which is known by certainty. Ex-hypothesis, therefore, plaintiff cannot have started a custom. He may start practice, but the practice cannot lead to the legal consequence to which a custom leads [24].

In *Syed Hussain* vs. *Kamal Chand* [25] the Court was of the view that while it is no doubt true that custom gives rise to a customary right as well as to a customary easement, there is a vital difference between the two as Section 2(b) of the Easements Act makes it quite clear that the Act does not deal with a customary right. The reason is that customary rights are rights arising by custom, but unappurtenant to a dominant tenement, while a customary easement can exist only for the beneficial enjoyment of other heritage and cannot exist in gross. All the same, where a customary easement is claimed by virtue of Section 18, the essential characteristics of a custom bearing on it have to be established. The courts, however, recognize the customary right of privacy even before the commencement of the Easements Act in states or localities where it was found to exist, and it was later only that it was recognized as an easement under Section 18 of the Easements Act.

It is necessary for a customary easement that it should not only be ancient and certain, but that it should also be reasonable. A custom will

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23. See, *Mookka Kone* vs. *Ammakutti Ammal*, AIR 1928 Mad 299 (FB); *Abdul Majid* vs. *Suba Khan*, AIR 1940 Lah 109; *Bui* vs. *Bela Singh*, AIR 1947 Lah 233.

24. *K. K. Khandolkar* vs. *T. P. Homkhandi*, AIR 1991 Bom 119.

25. AIR 1969 Raj 31.

not, therefore, have the sanction of Section 18 if it is not reasonable, but wherever the claim has been found to be reasonable, it has been upheld by the courts of law. [26]

The right of privacy, if at all, may be claimed as a customary right.[27] But for this, every man may open any number of windows looking over his neighbour's land. Moreover such right is not that can be exercised only once at the beginning, but it is a continuing right.[28] Illustration (b) to Section 18 makes it clear that in order to entitle the plaintiff to a decree for a mandatory injunction for directing the defendants to close the window put up in his own property, the plaintiff mush establish that there is such a customary right in the town where the properties are located, that no owner or occupier of house can open a new window therein so as to substantially invade his neighbour's privacy. He has also to establish that he has enjoyed such customary right of privacy and that there is an infringement of such a right.

In *Anguri* vs. *Jeevandas* [29] the Supreme Court observed:

> "As far as the question of opening of new windows is concerned, it is open to the defendants to use their property in any manner permitted by law, and hence they cannot be restrained from opening new windows as no customary right of privacy appears to have been pleaded or proved. This position is not disputed by the plaintiffs. It is, however equally clear that, if the defendants open any new windows, the plaintiffs are fully entitled to block the same

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26. *Jamiluddin* vs. *Abdul Majid*, AIR 1915 All 218.

27. *Pir Agha Mohammed Hussain* vs. *Elias Haji Wahiddino*, AIR 1948 Sind 36 (DB).

28. *Parmatma Prasad* vs. *Mt. Sampatti*, AIR 1968 All 184 (185)

29. AIR 1988 SC 2024.

by raising the height of their walls and the defendants are not entitled to break or damage the said walls or any portion thereof so as to remove the obstruction to their new windows".

Thus it is not every infringement of privacy which is actionable. It must be shown that there has been substantial and material infringement of privacy. The right to privacy cannot be carried to an oppressive length. Each case must be decided upon its own peculiar facts in determining whether there has or has not been a substantial infringement of the right to privacy. [30]

Family Laws

The privacy of family finds mention in some statutes. Hearing *in camera* in certain marriage and divorce statutes may be said to have the aim of privacy in view. It is said that confidentiality of proceedings is sometimes desirable. This is much more so in regard to matrimonial proceedings. All the matrimonial statutes provide that at the desire of the parties, the proceedings may be heard *in camera*. Section 22 of the Hindu Marriage Act, 1955 provides for this [31] Similar provision is contained in Section 33

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30. *Ibid, see* also, *Kunj Behari* vs. *Brij Behari Lal*, AIR 1947 Oudh 139.

31. Sec. 22 of the Hindu marriage Act, 1955 reads as follows:

(1) Every proceeding under this 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 judgment of the High Court or of the Supreme Court printed or published with previous permission of the Court. (2) If any person prints or publishes any matter in contravention of the provisions contained in sub-sec (1) he shall be punishable with fine which may extend to one thousand rupees.

of the Special Marriage Act, 1954 [32] and in the Parsi Marriage and Divorce Act, 1936. [33]

Similar provision has been enacted in the Indian Divorce Act, 1869, though the provision is not as comprehensive as under the Hindu Marriage Act, 1955. Section 53 of the Indian Divorce Act, 1869 provides:

"The whole or any part of any proceeding under this Act be heard, if the court thinks fit, within 'closed doors'".

Under the Act discretion rests with the court, while under the other three statutes it is mandatory.[34]

The Indian Evidence Act , 1872

There are provisions under the Evidence law which protect the privacy interests of an accused person in view of the presumption of innocence under the Law. Therefore, the confession made by the accused if it appears to have been caused by any inducement, threat or promise is

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32. Sec. 33 of the Special Marriage Act, 1954 reads as follows:

(1) 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 judgment of the High Court or the Supreme Court printed or published with the previous permission of the Court.

(2) If any person prints or publishes any matter in contravention of the provisions contained in sub-section (1), he shall be punishable with fine which may extend to one thousand rupees .

33. The Parsi Marriage and Divorce Act, 1936 (Amending Act of 1988).

34. Paras Diwan, *Law of Marriage and Divorce*, 3rd Ed., Universal Law Publishing Co. Pvt. Ltd. (1997) at 851 & 852.

inadmissible in evidence.[35] However, in case of absence of such inducement, threat or promise that is not expected in the presence of a Magistrate may well be proved against such person.[36] It may be pointed out here that the extent of this protection is not absolute and it cannot operate in cases where such confession is otherwise relevant and in such cases merely the promise of secrecy cannot shield it as a matter of privacy.[37] The privacy of communication and official secrecy have been

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35. Indian Evidence Act, 1872.

Sec. 24. *Confession caused by inducement, threat or promise, when irrelevant in Criminal proceedings* – A confession made by an accused person is irrelevant in a criminal proceeding, if the making of the confession appears to the court to have been caused by any inducement, threat or promise, having reference to the charge against the accused person, proceeding from a person in authority and sufficient, in the opinion of the court, to give the accused person grounds, which would appear to him reasonable for supposing that by making it he would gain any advantage or avoid any evil of a temporal nature in reference to the proceedings against him.

Sec. 25. *Confession to police officer not to be proved* – No confession made to a police officer shall be proved as against a person accused of any offence.

36. Sec. 26. *Confession by accused while in custody of police not to be proved against him* – No confession made by any person whilst he is in the custody of a police-officer, unless it be made in the immediate presence of a magistrate, shall be proved as against such person

37. Indian Evidence Act, 1872. Sec 29. *Confession otherwise relevant not to become irrelevant because of promise of secrecy, etc.* – If such a confession is otherwise relevant, it does not become irrelevant merely because it was made under a promise of secrecy, or in the consequence of a deception practiced on the accused person for the purpose of obtaining it, or when he was drunk, or because it was made in answer to questions which he need not have answered, whatever may have been the form of those questions, or because he was not warned that he was not bound to make such confession and that evidence of it might be given against him.

protected from disclosure as special privilege. The Judicial officers shall not be compelled to answer any questions as to his conduct in court as such.[38] The communication between husband and wife during marriage is regarded as private and the law accords protection to such communication. Even the person who is or has been married shall not be permitted to disclose any such communication without the consent of the other person who made it. [39] Further, the affairs of state is regarded as privileged and it is only the head of the department concerned who can decide either to give or withhold such permission, as he thinks fit. The communication made to the public officer in his official capacity and confidence is also enjoined with the special privilege.[40] As a matter of public policy the

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38. Sec 121. *Judges and Magistrates* – No Judge or Magistrate shall, except upon the special order of some court to which he is subordinate, be compelled to answer any question as to his own conduct in court as such Judge or magistrate, or as to anything which came to his knowledge in court as such Judge or Magistrate; but he may be examined as to other matters which occurred in his presence whilst he was so acting.

39. Sec 122. *Communication during marriage* – No person who is or has been married shall be compelled to disclose any communication made to him during marriage by any person to whom he is or has been married; nor shall he be permitted to disclose any such communication, unless the person who made it, or his representative in interest,consents,except in suits between married persons, or proceedings in which one married person is prosecuted for any crime committed against the other.

40. Sec 123. *Evidence as to affairs of state* – No one shall be permitted to give any evidence derived from unpublished official records relating to any affairs of state, except with the permission of the officer at the head of the department conceerned, who shall give or withhold such permission as he thinks fit.

police officer, as well as, revenue officer enjoy the privacy of source of any information relating to the commission of offences. No such officer shall be compelled to disclose the source of such information .[41] The privilege of communication is also available to certain categories of professionals like barrister, attorney, pleader or vakil. The communication made by such professional with his clients shall not be permitted to be disclosed except with the express consent of his client. However, this protection does not extend over the communication for any illegal purpose and any fact relating to the commission of any crime or fraud. The privilege is also available to the interpreters.[42] The above privilege is

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.Sec 124. *Official communications* – 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.

41. Sec 125 *Information as to commission of offences* – No Magistrate or police-officer shall be compelled to say whence he got any information as to the commission of any offence, and no revenue-officer shall be compelled to say whence he got any information as to the commission of any offence against the public revenue.

42. Sec 126. *Professional communications* – No barrister, attorney, pleader or vakil shall at any time be permitted, unless with his client's express consent, to disclose any communication made to him in the course and for the purpose of his employment as such barrister, pleader, attorney or vakil by or on behalf of his client, or to state the contents or condition of any document with which he has become acquainted in the course and for the purpose of his professional employment, or to disclose any advice given by him to his client in the course and for the purpose of such employment

Provided that nothing in this section shall protect from disclosure –

(1) Any such communication made in furtherance of any illegal purpose;

available as a matter of law and does not merely depend upon the volition of the party. Therefore the principle of waiver is not applicable in such cases.[43] The privilege of confidential communication is not only available to the aforesaid categories of professionals but it is equally available to the client and, therefore, the person cannot be compelled to disclose to the court any confidential communication between him and his legal professional.[44] In cases where the privilege is available in respect of any title-deed or documents from production the same privilege has been made available to the other person who is in possession of such deed

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(2) Any fact observed by any barrister, pleader, attorney or vakil, in the course of his employment as such, showing that any crime or fraud has been committed since the commencement of his employment.

Sec 127. *Section 126 to apply to interpreters etc.* – The provisions of Sec 126 shall apply to interpreters, and the clerks or servants of barristers, pleaders, attorneys and vakils.

43. Sec. 128. *Privilege not waived by volunteering evidence* – If any party to a suite gives evidence therein at his own instance or otherwise, he shall not be deemed to have consented thereby to such disclosures as is mentioned in Sec. 126; and, if any party to a suite or proceeding calls any such barrister, pleader, attorney or vakils as a witness, he shall be deemed to have consented to such disclosure only if he questions such barrister, attorney or vakil on matters which, but for such question, he would not be at liberty to disclose.

44. Sec 129. *Confidential communications with legal advisers* – No one shall be compelled to disclose to the court any confidential communication which has taken place between him and his legal professional advisor, unless he offers himself as a witness, in which case he may be compelled to disclose any such communications as may appear to the court necessary to be known in order to explain any evidence which he has given, but no others.

or document.[45] Any witness before the court enjoys the privilege of not being subjected to arrest or prosecution in furtherance of the answer given by him in response to any question relevant to the matter in issue.[46]

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45. Sec 130. *Production of title-deeds of witness, not a party* – No witness who is not a party to a suit shall be compelled to produce his title-deeds to any property, or any document in virtue of which he holds any property as pledge or mortgage, or any document the production of which might tend to criminate him, unless he has agreed in writing to produce them with the person seeking the production of such deeds or some person through whom he claims.

Sec 131. *Production of documents or electronic records which another person, having possession could refuse to produce.* – No one shall be compelled to produce documents or electronic records in his possession, which any other person would be entitled to refuse to produce if they were in his possession, unless such last-mentioned person contents to their production.

46. Sec. 132. *Witness not excused from answering on ground that answer will criminate.* – A witness shall not be excused from answering any question as to any matter relevant to the matter in issue in any suit or in any civil or criminal proceeding, upon the ground that the answer to such question will criminate, or may tend directly or indirectly to criminate such witness, or that it will expose, or tend directly or indirectly to expose, such witness to a penalty or forfeiture of any kind:

Provided that no such answer, which a witness shall be compelled to give, shall subject him to any arrest or prosecution, or be proved against him in any criminal proceeding, except a prosecution for giving false evidence by such answer.

Criminal Law

The reputation of a person is integral to one's personality and, therefore, it is generally protected through legal rules in a legal system. Any attack on it and attempt to lower down the reputation has been made a punishable offence under the criminal law in addition to the civil action for damages under the law of torts. Sections 499-502 of the Indian Penal Code, 1860 deal with the offence of defamation. Whoever defames another is liable to be punished under the provisions of the IPC. Section 499 [47] which defines the offence of defamation requires three essentials:-

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47. Sec 499, Indian Penal code – *Defamation* – whoever by words either spoken or intended to be read, or by signs or by visible representations, makes or publishes any imputation concerning any person intending to harm or knowing or having reason to believe that such imputation will harm the reputation of such person, is said, except in the cases hereinafter excepted, to defame that person.

Explanation 1:- It may amount to defamation to impute anything to a deceased person, if the imputation would harm the reputation of that person if living, and is intended to be hurtful to the feeling of his family or other near relatives.

Explanation 2:- It may amount to defamation to make an imputation concerning a company or an association or collection of persons as such.

Explanation 3:- An imputation in the form of an alternative or expressed ironically, may amount to defamation.

Explanation 4:- No imputation is said to harm a person's reputation, unless that imputation directly or indirectly, in the estimation of others, lowers the moral or intellectual character of that person, or lowers the character of that person in respect of his caste or his calling or lowers the credit of that person, or causes it to be believed that the body of that person is in a loathsome state or in a state generally considered as disgraceful.

(1) Making or publishing any imputation concerning any person.

(2) Such imputation must have been made by

(a) words, either spoken or intended to be read ; or

(b) signs; or

(c) visible representations.

(3) Such imputation must have been made with the intention of harming or with knowledge or reason to believe that it will harm the reputation of the person concerning whom it is made.

The modesty of a woman has obtained special treatment in the penal code and cases of any attempt to insult the modesty of woman just just by word, sound, gesture or exhibition is severely punishable.[48]

In addition to the above, section 499 provides ten exceptions to the definition of defamation, which enumerate circumstances which do not constitute the offence of defamation.

Sec. 500 *Punishment for defamation* – whoever defames another shall be punished with simple imprisonment for a term which may extend to two years, or with fine, or with both.

Sec 501. *Printing or engraving matter known to be defamatory* – whoever prints or engraves any matter knowing or having good reason to believe that such matter is defamatory of any person, shall be punished with simple imprisonment for a term which may extend to two years, or with fine, or with both.

Sec 502. *Sale of printed or engraved substance containing defamatory matter* – whoever sells or offers for sale any printed or engraved substance containing defamatory matter, knowing that it contains such matter, shall be punished with simple imprisonment for a term which may extend to two years, or with fine, or with both.

48. Sec 509 provides: whoever, intending to insult the modesty of any woman utters any word, makes any sound of 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

There are certain provisions in the Criminal Procedure Code, 1973, which try to safeguard the privacy of the female. Section 51(2) states that whenever it is necessary to cause a female to be searched, the search shall be made by another female with strict regard to decency. Again Section 53(2) states that whenever the person of a female is to be examined under this Section the examination shall be made only by, or under the supervision of a female registered medical practitioner. Thus special protection is afforded to females under the above provisions.

The provision relating to the recording of confessions and statements in Section 164 of the Criminal Procedure Code also makes a stipulation with a view to protect the privacy of a person. A statement of a witness or a confession made by an accused is not admissible in evidence unless the provisions of Section 164 are strictly followed.[49]

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of such woman, shall be punished with simple imprisonment for a term which may extend to one year, or with fine, or with both.

49. Section 164, Cr.P.C., provides as follows:

(1) Any Metropolitan Magistrate or Judicial Magistrate may, whether or not he has jurisdiction in the case, record any confession or statement made to him in the course of an investigation under this chapter or under any other law for the time being in force, or at any time afterwards before the commencement of the inquiry or trial:

provided that no confession shall be recorded by a police-officer on whom any power has been conferred under any law for the time being in force.

(2) The Magistrate shall, before recording any such confession, explain to the person making it that he is not bound to make a confession and that, if he does so, it may be used as evidence against him; and the Magistrate shall not record any such confession unless, upon questioning the person making it, he has reason to believe that it is being made voluntarily.

Similarly, if the provisions of Section 165 are not followed when conducting a search by a police officer, such a search would not be valid. The provisions of Section 165 are mandatory for the conduct of a search by a police officer.[50]

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(3) 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 authorise the detention of such person in police custody.

(4) Any such confession shall be recorded in the manner provided in section 281 for recording the examination of an accused person and shall be signed by the person making the confession; and the Magistrate shall make a memorandum at the foot of such record ..

(5) Any statement (other than a confession) made under sub-section (1) shall be recorded in such manner hereinafter provided for the recording of evidence as is, in the opinion of the Magistrate, best fitted to the circumstances of the case; and the Magistrate shall have power to administer oath to the person whose statement is so recorded.

(6) The Magistrate recording a confession or statement under this section shall forward it to the Magistrate by whom the case is to be inquired into or tried.

50. Section 165. *Search by police officer* – (1) whenever an officer-in-charge of a police station or a police-officer making an investigation has reasonable grounds for believing that anything necessary for the purposes of an investigation into any offence which he is authorized to investigate may be found in any place within the limits of the police station of which he in-charge, or to which he is attached, and that such thing cannot in his opinion be otherwise obtained without undue delay, such officer may, after recording in writing the grounds of his belief and specifying in such writing, so far as possible, the thing for which search is to be made, search, or cause search to be made for such thing in any place within the limits of such station.

(2) A police officer proceeding under sub-section (1), shall, if practicable, conduct the search in person.

(3) If he is unable to conduct the search in person, and there is no other person competent to make the search present at the time, he may, after recording in writing his reasons for so doing,

Other Enactments.

In modern times due to the development of science and technology and widespread use of computers, the problem of protecting the privacy of persons has become very complex. The cyber law is aid to find out the solution to the problem of protection of privacy. At the same time the recently emerging right to information has come into sharp conflict with the right to privacy. In India, the existing criminal law was found not sufficient to deal with this problem and to strike a balance between making the information available and keeping some information away in this computer age. In this context the Information Technology Act, 2000 makes a provision to protect the information secured from any electronic record, book, register, correspondence etc. from disclosure to any other

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require any officer subordinate to him to make the search, and he shall deliver to such subordinate officer an order in writing, specifying the place to be searched, and so far as possible, the thing for which search is to be made; and such subordinate officer may thereupon search for such thing in such place.

(4) The provisions of this code as to search-warrants and the general provisions as to searches contained in section 100 shall, so far as may be, apply to a search made under this section.

(5) Copies of any record made under sub-section (1) or sub-section (3) shall forthwith be sent to the nearest Magistrate empowered to take cognizance of the offence and the owner or occupier of the place searched shall, on application, be furnished, free of cost, with a copy of the same by the Magistrate.

person and makes it a punishable offence [51].

51. Section 72, Information Technology Act, 2000 provides: *Breach of confidentiality and privacy* – Save as otherwise provided in this Act or any other law for the time being in force, if any person who, in pursuance of any of the powers conferred under this Act, rules or regulations made thereunder, has secured access to any electronic record, book, register, correspondence, information, documents or other material without the consent of the person concerned discloses such electronic record, book, register, correspondence, information, document or other material to any other person shall be punished with imprisonment for a term which may extend to two years, or with fine which may extend to one lakh Rupees, or with both.

CHAPTER-3

SCOPE OF THE RIGHT

A. Innocent Persons

B. Accused and Criminals

C. Prostitutes

D. Limitations of the Right

E. Remedies

(i) Constitutional Remedies

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CHAPTER-3

SCOPE OF THE RIGHT

Rights are generally available to innocent persons. Jurisprudentially speaking, a right is a protected interest under the law, therefore, it is necessary that the particular interest must be recognized and protected by the legal system through legal rules in order to raise it to the status of a right. Modern legal systems not only protect the rights of the innocent but the rights of other persons are also protected. The scope of the right to privacy in this respect extends over the innocent, as well as, the accused and criminals and also to the persons of good character and bad characters which have been discussed here. Every right has to operate within limitations, therefore, the limit on the right to privacy has been discussed. A right without effective remedy is a right without protection. For the effective enforcement of a right it becomes necessary to provide for an effective remedy. The right to privacy in this respect attracts the constitutional remedies as well as the civil law remedies, a brief reference thereof has been made in this chapter.

A. Innocent Persons

Privacy primarily concerns 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 the right. Any right to privacy must encompass and protect the personal intimacies of the home, the family, marriage, motherhood, procreation and childrearing of any individual. Rights and freedoms of citizens are set forth in the Constitution in order to guarantee that the individual, his personality and those things stamped with his personality shall be free from official interference except where a reasonable basis for intrusion exists. "Liberty against Government" a phrase coined by Professor Corwin express this idea forcefully. In this sense, many of the fundamental rights of citizens can be described as contributing to the right to privacy [1]. As Ely says: " There is nothing to prevent one from using the word 'privacy' to mean the freedom to live one's life without governmental interference. But the court obviously does not so use the term. Nor could it, for such a right is at stake in every case.[2] Thus it follows that the right to privacy is available to all innocent persons and can be restricted or denied to persons having a criminal record, who are habitual offenders and are a danger to community security. In *Govind's* case the court observed that surveillance is to be confined to the limited class of citizens who are determined to lead a criminal life or whose antecedents would reasonably lead to the conclusion that they will lead

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1. *Govind* vs. *State of Madhya Pradesh*, AIR 1975 SC 1378, at 1385.

2. *See*, The Wages of Crying Wolf: A Comment on *Roe* vs. *Wade*, 82 *Yale L.J.* 920, at 932.

such a life. Persons who appear to be earning an honest livelihood, i.e., innocent persons should not be subject to surveillance.[3] The court in the above case observed that the impugned regulation 855 of the M.P. Police Regulations, empowers surveillance only of persons against whom reasonable materials exist to induce the opinion that they show 'a determination, to lead a life of crime' – crime in this context being confined to such as involve public peace or security only and if they are dangerous security risks. Mere convictions in criminal cases where nothing gravely imperils safety of society can not be regarded as warranting surveillance under this regulation. Similarly, domiciliary visits and picketing by the police should be reduced to the clearest cases of danger to community security and not routine follow-up at the end of a conviction or release from prison or at the whim of a police officer.[4]

In *Malak Singh* vs. *State of Punjab*, [5] the Supreme Court examined the extent of the right of a person whose name was included in surveillance register of the police to be given opportunity to show cause against such inclusion. It was observed that discreet surveillance of suspects, habitual and potential offenders may be necessary and so the maintenance of history sheet and surveillance register may be necessary too, for the purpose of prevention of crime. The entry in the surveillance register is to be made on the basis of the material provided by the history sheet whose contents, by their very nature have to be confidential. But all this does not mean that the police have a license to enter the names of whoever they like (dislike?) in the surveillance register; nor can the

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3. *Ibid*, note 1, at 1386.

4. *Ibid*, note 1, at 1386.

5. AIR 1981 SC 760.

surveillance be such as to squeeze the fundamental freedoms guaranteed to all citizens or to obstruct the free exercise and enjoyment of those freedoms; nor can the surveillance so intrude as to offend the dignity of the individual. Surveillance of persons who do not fall within the categories mentioned in Rule 23.4 [6] or for reasons unconnected with the prevention of crime, or excessive surveillance falling beyond the limits prescribed by the rules, will entitle a citizen to the court's protection which the court will not hesitate to give.[7] Ordinarily the names of persons with previous criminal record alone are entered in the surveillance register. They must be proclaimed offenders, previous convicts, or persons who have already been placed on security for good behaviour. In addition, names of persons who are reasonably believed to be habitual offenders or receivers of stolen property whether they have been convicted or not may be entered. Thus nowhere is it provided that the right to privacy of an innocent person can be infringed. It is clear 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 a claimed right is entitled to protection as a fundamental privacy right, a law infringing it must satisfy the compelling state interest test.

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6. Chapter 23 of the Punjab Police Rules deals with prevention of offences, Rule 23.4 which provides for the maintenance of a surveillance register in every police station is in the following terms:

(1) In every police station, other than those of the railway police, a Surveillance Register shall be maintained in Form 23.4 (1).

(2) In Part I of such register shall be entered the names of persons commonly resident within or commonly frequenting the local jurisdiction of the police station concerned , who belonged to one or more of the following classes: -

(a) All persons who have been proclaimed under Section 87, Code of Criminal Procedure, 1973.

(b) All released convicts in regard to whom an order under Section 565, Criminal Procedure Code, has been made.

(c) All convicts the execution of whose sentence is suspended in the whole, or any part of whose punishment has been reemitted conditionally under Section 401, Criminal Procedure Code.

(d) All persons restricted under Rules of Government made under Section 16 of the Restriction of Habitual Offenders (Punjab) Act, 1918.

(3) In Part 2 of such register may be entered at the discretion of the Superintendent –

(a) persons who have been convicted twice, or more than twice, of offences mentioned in Rule 27.29;

(b) Persons who are reasonably believed to be habitual offenders or receivers of stolen property whether they have been convicted or not;

(c) persons under security under Section 109 or 110, Code of Criminal Procedure;

(d) Convicts released before the expiration of their sentences under the Prisons Act and Remission Rules without the imposition of any conditions.

7. *Ibid*, note 5, at 763-64.

B. Accused and Criminals

The question regarding the scope of the right to privacy of accused and criminals came up before the Supreme Court in *Kharak Singh* vs. *State of Uttar Pradesh* .[1] In this case the petitioner – Kharak Singh was challaned in a case of dacoity in 1941 but was released under Section 161, Criminal Procedure Code as there was no evidence against him. On the basis of the accusation against him the police opened a "history-sheet" in regard to him. Regulation 236 in chapter XX of the Police Regulation defines "history-sheets" as "the personal records of criminals under surveillance". That regulation further directs that "history-sheets" should be opened only for persons who are or are likely to become habitual criminals or the aiders or abettors of such criminals. These history-sheets are of two classes: Class A for dacoits, burglars, cattle-thieves, and railway-goods - wagon thieves, and Class B for those who are confirmed and professional criminals who commit crimes other than dacoity, burglary, etc., like professional cheats. A history sheet in Class A was opened up for the petitioner and he was therefore "under surveillance" [2]

The sole question for determination in the above case was whether "surveillance" [3] under the impugned Chapter XX of the U. P. Police

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1. AIR 1963 SC 1295.

2. Ibid, at 1298

3. Regulation 236 defines "surveillance" which reads :

Without prejudice to the rights of Superintendents of Police to put into practice any legal measures, such as shadowing in cities, by which they find they can keep in touch with suspects in particular localities or special circumstances , surveillance may for most practical purposes be defined as consisting of one or more of the following measures :

Regulations constituted an infringement of any of a citizen's fundamental rights guaranteed by part III of the Constitution. In this case it was held by majority that Regulation 236(b) providing for domiciliary visits was unconstitutional for the reason that it abridged the fundamental right of a person under Article 21 and since Regulation 236(b) did not have the force of law, the regulation was declared bad. The other provisions of the Regulation were held to be constitutional.

In *D.B.M. Patnaik* vs. State of *Andhra Pradesh* [4], the Supreme Court observed that convicts are not by mere reason of the conviction, denuded of all the fundamental rights which they otherwise possess. Even a convict is entitled to the precious right guaranteed by Article 21 of the Constitution that he shall not be deprived of his life or personal liberty except according to procedure established by law. No person, not even a prisoner, can be deprived of his 'life' or 'personal liberty' except according to procedure established by law .[5]

(a) secret picketing of the house or approaches to the house of suspects ;

(b) domiciliary visits at night ;

(c) through periodical enquiries by officers not below the rank of sub-inspector into repute. habits, associations, income, expenses and occupation;

(d) the reporting by constables and chowkidars of movements and absences from home:

(e) the verification of movements and absences by means of inquiry slips ;

(f) the collection and record on a history-sheet of all information bearing on conduct.

4. AIR 1974 SC 2092.

5. *Ibid*, at 2094 - 2095

Again in *Sunil Batra* vs. *Delhi Administration* [6], the Supreme Court reiterating the above view observed that it is no more open to debate that convicts are not wholly denuded of their fundamental rights. However, a prisoner's liberty is in the very nature of things circumscribed by the very fact of his confinement. His interest in the limited liberty left to him is then all the more substantial. [7]

To what extent may the citizen's right to be let alone be invaded by the duty of the police to prevent crime was the problem posed in *Malak Singh* vs. *State of Punjab.* [8] Section 23 of the Police Act prescribes it as the duty of police officers "to collect and communicate intelligence affecting the public peace, to prevent the commission of offences and public nuisances". In connection with these duties it will be necessary to keep discreet surveillance over reputed bad characters, habitual offenders and other potential offenders. Organized crime cannot be successfully fought without close watch of suspects. But surveillance may be intrusive and it may so seriously encroach on the privacy of a citizen as to infringe his fundamental right to personal liberty guaranteed by Article 21 of the Constitution and the freedom of movement guaranteed by Article 19(1) (d). That cannot be permitted. So long as surveillance is for the purpose of preventing crime and is confined to the limits prescribed by Rule 23.7 of the Punjab Police Rules a person whose name is included in the surveillance register cannot have a genuine cause for complaint.[9] History sheets and surveillance registers have to be and are confidential

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6. AIR 1978 SC 1675.

7. *Ibid*, at 1727.

8. AIR 1981 SC 760.

9. *Ibid*, at 763.

documents. Neither the person whose name is entered in the register nor any other member of the public can have access to the surveillance register. The nature and character of the function involved in the making of an entry in the surveillance register is so utterly administrative and non-judicial, that it is difficult to conceive of the application of the rule of *audi alteram partem*. Such enquiry as may be made has necessarily to be confidential and it necessarily excludes the application of that principle.[10] It would be contrary to the public interest to reveal the information in the history-sheet, particularly the source of information.[11] However, in surveillance of persons who do not fall within the categories mentioned in Rule 23.4 of the Punjab Police Rules or for reasons unconnected with the prevention of crime, or excessive surveillance falling beyond the limits prescribed by the rules will entitle a citizen to the court's protection which the court will not hesitate to give. Surveillance, therefore, has to be unobstructive and within bounds.[12] While it may not be necessary to supply the grounds of belief to the persons whose names are entered in the surveillance register it may become necessary in some cases to satisfy the court when an entry is challenged that there are grounds to entertain such reasonable belief.[13]

In *R. Rajagopal* vs. *State of Tamilnadu* [14], the Supreme Court had the occasion to decide the question regarding the publication of autobiography of condemned prisoner vis-à-vis right to privacy and

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10. *Ibid*, at 763.

11. *Ibid*, at 763.

12. *Ibid*, at 763-64.

13. *Ibid*, at 764.

14. AIR 1995 SC 264.

powers of state officials. The apex Court observed that the editor or publisher of the Magazine have a right to publish, what they allege to be the life-story or autobiography of condemned prisoner in so far as it appears from the public records, even without his consent or authorization. But if they go beyond that and publish his life-story, they may be invading his right to privacy and will be liable for the consequences in accordance with law. Similarly, the State or its officials cannot prevent or restrain the said publication .[15]

Thus it has been well-settled that the fundamental rights are not only available to freemen but to the accused, prisoners, convicts and detenus also. The right to privacy shall also be available to the accused and the criminals; however, this right may be curtailed so far as it is necessary for the prevention of crime. The curtailment of the right cannot be done by mere regulation without the authority of law. It is possible to deprive a person of the right only by the just, fair and reasonable procedure established by the law.

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15. *Ibid*, at 277.

C. Prostitutes

The right to privacy is available to women. The question which arises in this respect is whether it is available only to women of good characters or even to women of bad characters. In *State of Maharashtra* vs. *Madhukar Narayan Mardikar*,[1] the question arose as to whether a prostitute also has a right to privacy and protection from sexual assault. In the above case, a police inspector was dismissed from service on his proved involvement in an act of rape. The High Court quashed his dismissal on the ground that the woman, whom he was alleged to have raped, was a woman of easy virtue. The Supreme Court on appeal held that a woman even of so-called easy virtue was entitled to protect herself against unwilling sexual assault. This was part of her personal liberty which was included in the right to privacy. Ahmadi, J., as he then was, aptly observed:

> "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. Therefore, merely because she is a woman of easy virtue her evidence cannot be thrown overboard. At the most the officer called upon to evaluate her evidence would be required to administer caution up to himself before accepting her evidence." [2]

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1. AIR 1991 SC 207.

2. *Ibid*, at 211.

D. Limitations of the Right

To determine in advance of experience the exact line at which the dignity and convenience of the individual must yield to the demands of the public welfare or of private justice would be a difficult task; but the more general rules are furnished by the legal analogies already developed in the law of slander and libel and in the law of literary and artistic property. [1]

1. The right to privacy does not prohibit any publication of matter which is of public or general interest. In determining the scope of this rule, aid would be afforded by the analogy, in the law of libel and slander, of cases which deal with the qualified privilege of comment and criticism on matters of public and general interest. There are of course difficulties in applying such a rule; but they are inherent in the subject-matter, and are certainly no greater than those which exist in many other branches of the law – for instance, in that large class of cases in which the reasonableness or unreasonableness of an act is made the test of liability. The design of the law must be to protect those persons with whose affairs the community has no legitimate concern, from being dragged into an undesirable and undesired publicity and to protect all persons, whatsoever; their position or station, from having matters which they may properly prefer to keep private, made public against their will. It is the unwarranted invasion of individual privacy which is reprehended, and to be, so far as possible, prevented. The distinction, however, is obvious and fundamental. There are persons who may reasonably claim as a right, protection from the notoriety entailed by being made the victims of the journalistic enterprise. There are others who, in varying degrees, have renounced the right to live their lives screened from public observation.

Matters which men of the first class may justly contend, concern themselves alone, may in those of the second be the subject of legitimate interest to their fellow-citizens. Peculiarities of manner and person, which in the ordinary individual should be free from comment, may acquire a public importance, if found in a candidate for political office. Some further discrimination is necessary, therefore, than to class facts or deeds as public or private according to standard to be applied to the fact or deed *per se*. To publish of a modest and retiring individual that he suffers from an impediment in his speech or that he cannot spell correctly, is an unwarranted, if not an unexplained, infringement of his rights, while to state and comment on the same characteristics found in a would-be congressman could not be regarded as beyond the pale of propriety. [2]

The general object in view is to protect the privacy of private life, and to whatever degree and in whatever connection a man's life has ceased to be private, before the publication under consideration has been made, to that extent the protection is to be withdrawn. Since, then, the propriety of publishing the very same facts may depend wholly upon the person concerning whom they are published, no fixed formula can be used to prohibit obnoxious publications. Any rule of liability adopted must have in it an elasticity which shall take account of the varying circumstances of each case, a necessity which unfortunately renders such a doctrine not only more difficult of application, but also to a certain extent uncertain in its operation and easily rendered abortive. Besides, it is only the more flagrant breaches of decency and propriety that could in

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1. Warren and Brandeis, The Right to Privacy, 4*HLR*193, at 214.

2. *Ibid*, at 214 - 215.

practice be reached; and it is not perhaps desirable even to attempt to repress everything which the nicest taste and keenest sense of the respect due to private life would condemn.[3]

In general, then, the matters of which the publication should be repressed may be described as those which concern the private life, habits, acts, and relations of an individual, and have no legitimate connection with his fitness for a public office which he seeks or for which he is suggested or for any public or quasi-public position which he seeks or for which he is suggested, and have no legitimate relation to or bearing upon any act done by him in a public or quasi-public capacity. The foregoing is not designed as a wholly accurate or exhaustive definition, since that which must ultimately in a vast number of cases become a question of individual judgment and opinion is incapable of such definition; but it is an attempt to indicate broadly the class of matters referred to. Some things all men alike are entitled to keep from popular curiosity, whether in public life or not, while others are only private because the persons concerned have not assumed a position which makes their doings legitimate matters of public investigation.[4]

2. 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. Under this rule, the right to privacy is not invaded by any publication made in a court of justice, in legislative bodies, or the committees of those bodies, in municipal assemblies, or the committees of such assemblies, or practically by any

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3. *Ibid*, at 215 - 216.

4. *Ibid*, at 216.

communication made in any other public body, municipal or parochial, or in any body quasi-public, like the large voluntary associations formed for almost every purpose of benevolence – business , or other general interest ; and (at least in many jurisdictions) reports of any such proceedings would in some measure be accorded a like privilege. Nor would the rule prohibit any publication made by one in the discharge of some public or private duty, whether legal or moral, or in conduct of one's own affairs in matters where his own interest is concerned.[5]

3. The law would probably not grant any redress for the invasion of privacy by oral publication in the absence of special damage. The same reasons exist for distinguishing between oral and written publications of private matters, as is afforded in the law of defamation by the restricted liability for slander as compared with the liability for libel. The injury resulting for such oral communications would ordinarily be so trifling that the law might well, in the interest of free speech, disregard it altogether.[6]

4. The right to privacy ceases upon the publication of the facts by the individual, or with his consent. This is but another application of the rule which has become familiar in the law of literary and artistic property. The cases there decided establish also what should be deemed a publication; - the important principle in this connection being that a private communication of circulation for a restricted purpose is not a publication within the meaning of the law.[7]

5. The truth of the matter published does not afford a defence. Obviously

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5. *Ibid*, at 216 – 217.

6. *Ibid*, at 217.

7. *Ibid*, at 218.

this branch of law should have no concern with the truth or falsehood of the matters published. It is not for injury to the individual's character that redress or prevention is sought, but for injury to the right of privacy. For the former, the law of slander and libel provides perhaps a sufficient safeguard. The latter implies the right not merely to prevent inaccurate portrayal of private life, but to prevent its being depicted at all.[8]

6. The absence of "malice" in the publisher does not afford a defence. Personal ill-will is not an ingredient of the offence, anymore than in an ordinary case of trespass to person or to property. Such malice is never necessary to be shown in an action for libel or slander at common law, except in rebuttal of some defence, e.g., that the occasion rendered the communication privileged or under the statutes, that the statement complained of was true. The invasion of the privacy that is to be protected is equally complete and equally injurious, whether the motives by which the speaker or writer was actuated are, taken by themselves, culpable or not; just as the damage to character, and to some extent the tendency to provoke a breach of the peace, is equally the result of defamation without regard to the motives leading to its publication. Viewed as a wrong to the individual, this rule is the same pervading the whole law of torts, by which one is held responsible for his intentional acts, even though they are committed with no sinister intent ; and viewed as a wrong to the society , it is the same principle adopted in a large category of statutory offences.[9]

The Supreme Court in various cases tried to evolve the limitations upon the right to privacy. In *Malak Singh* vs. *State of Punjab,*[10] where the

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8. *Ibid*, at 218.

9. *Ibid.*, at 218-219.

10. AIR 1981 SC 760

appellants sought the removal of their names from the surveillance registers maintained by the police under Rule 23 of the Punjab Police Rules and the insistence for opportunity to show cause against such inclusion, the Court observed that so long as surveillance is for the purpose of preventing crime and is confined to the limits prescribed by Rule 23.7 of the Punjab Police Rules a person whose name is included in the surveillance register cannot have a genuine cause for complaint.[11]

In *R.Rajagopal* vs. *State of Tamilnadu,*[12] dealing with the question regarding publication of autobiography of a condemned prisoner vis-à-vis right to privacy and powers of state officials, the Supreme Court laid down:

> "(1) 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. If he does so, he would be violating the right to privacy of the person concerned and would be liable in an action for damages. Position may, however, be different, if a person voluntarily thrusts himself into controversy or voluntarily invites or raises a controversy.
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> (2) The rule aforesaid is subject to the exception, that any publication concerning the aforesaid aspects becomes unobjectionable if such publication is based upon public records including court records. This is for the reason that once a

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11. *Ibid*, at 763.

12. AIR 1995 SC 264.

matter becomes a matter of public record, the right to privacy no longer subsists and it becomes a legitimate subject for comment by press and media and others. However, in the interests of decency [Art. 19 (2)] an exception must be carved out to this rule, viz., a female who is the victim of a sexual assault , kidnap, abduction or a like offence should not further be subjected to the indignity of her name and the incident being published in press or media.

(3) There is yet another exception to the Rule in (1) above, indeed, this is not an exception but an independent rule. In the case of public officials, it is obvious, right to privacy, or for that matter, the remedy of action for damages is simply not available with respect to their acts and conduct relevant to the discharge of their official duties. This is so even where the publication is based upon facts and statements which are not true, unless the official establishes that the publication was made "by the defendant" with reckless disregard for truth. In such a case, it would be enough for the defendant (member of the press or media) to prove that he acted after reasonable verification of the facts; it is not necessary for him to prove that what he has written is true. Of course, where the publication is proved to be false and actuated by malice or personal animosity, the defendant would have no defence and would be liable for damages. It is equally obvious that in matters not relevant to the discharge of the duties, the public officials enjoy the same protection as any other citizen, as explained in (1) and (2) above . It needs no reiteration that judiciary, which is protected by the power to punish for

contempt of Court and the Parliament and Legislatures protected as their privileges are by Articles105 and 104 respectively of the Constitution of India, represent exception to this rule....." [13]

Again in *Mr. 'X'* vs. *Hospital 'Z'*, [14] the Supreme Court has held that although the "right to privacy" is a fundamental right under Article 21 of the Constitution but it is not an absolute right and restrictions can be imposed on it for the prevention of crime, disorder or protection of health or morals or protection of rights and freedom of others. In this case, the appellant after obtaining the degree of MBBS in 1987 joined the Nagaland State Medical and Health Service as Assistant Surgeon Grade I. A government servant was suffering from some disease. He was advised to go to the 'Z' Hospital at Madras. The appellant was directed by the government of Nagaland to accompany the said patient to Madras for treatment. For the treatment of the disease the patient needed blood. The appellant was asked by the doctors to donate blood for the patient. When his blood samples were taken the doctors found that the appellant was HIV (+). In the meantime the appellant settled his marriage with one Miss 'Y' which was to be held on Dec 12, 1995. But the marriage was called off on the ground that the blood test of the appellant conducted by the respondent hospital was found to be HIV (+). As a result of this he contended that his prestige among his family members was damaged. The appellant filed a writ petition in the High Court of Bombay for damages against the respondents on the ground that the information which was required to be secret under Medical Ethics was disclosed illegally and

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13. *Ibid*, at 276-77.

14. AIR 1999 SC 495.

therefore the respondents were liable to pay damages. He contended that the respondents were under a duty to maintain confidentiality on account of Medical Ethics formulated by the Indian Medical Council. He contended that the appellant's "right to privacy" had been infringed by the respondents by disclosing that the appellant was HIV (+), and therefore, they are liable in damages.

A two-judge division Bench of the Supreme Court comprising Saghir Ahmed and Kirpal, JJ., held that by disclosing that the appellant was suffering from AIDS the doctors had not violated the right of privacy of the appellant guaranteed by Article 21. The Court held that although the right to privacy is a fundamental right under Article 21, but it is not an absolute right and restrictions can be imposed on it. The right to marry is an essential element of right to privacy but is not absolute. Marriage is the sacred union, legally permissible, of two healthy bodies of opposite sexes. Every system of matrimonial law provides that if a person is suffering from venereal disease in a communicable form it will be open to the other partner in the marriage to seek divorce. If a person is suffering from disease even prior to the marriage he has no right to marry so long as he is not fully cured of the disease. As such when the patient was found to be HIV (+), the disclosure by the doctor was not violative of either the rule of confidentiality or the patient's right to privacy as the lady with whom the patient was likely to be married was saved by such disclosure or else she too would have been infected with the dreadful disease if marriage had taken place.

Miss 'Y' was entitled to enjoy all human rights available to any other human being. This is apart from, and in addition to the fundamental right available to her under Article 21 which guarantees right to life to every citizen of the country. Right to life of the lady with whom the

patient was to marry positively includes the right to be told that a person with whom she was proposed to be married was victim of a deadly disease which was sexually communicable. Right to life includes right to lead a healthy life so as to enjoy all faculties of the human body in their prime condition. Moreover, where there is a clash of two fundamental rights as in the instant case, namely, the patient's right to privacy as part of right to life and his proposed wife's right to lead a healthy life which is her fundamental right under Article 21, the right which would advance the public morality or public interest would alone be enforced through the process of court. The Court said that moral considerations cannot be kept at bay and the judges are not expected to sit as mute structures of clay in the Hall, known as Court Room, but have to be sensitive, "in the sense that they must keep their fingers firmly upon the pulse of the accepted morality of the day". [15]

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15. J.N.Pandey, *Constitutional Law of India*, 209-10, 36th Edition, 2000.

E. Remedies

It is true that our Constitution does not specifically provide the right to privacy as a fundamental right but this right is enshrined in Article 21 of our Constitution. It is also true that fundamental rights are meaningless unless there is an effective machinery for the enforcement of the rights. It is the remedy, which makes the right real. If there is no remedy there is no right at all. Remedies may be two types, viz., constitutional remedies and civil law remedies. Constitutional remedies may be availed of by way of moving the Supreme Court under Article 32 and the High Courts under Article 226, by the way of public interest litigation or by way of claim for compensation. The civil law remedies may be acquired by the way of damages and injuction. As the right to privacy is a part of the right to personal liberty under Article 21, so whenever this right is infringed, one may get remedies for the violation of fundamental rights.

Constitutional Remedies

1. Right to move the Supreme Court or High Courts

Article 32(1) guarantees the right to move the Supreme court by "appropriate proceedings" for the enforcement of the fundamental rights conferred by Part III of the Constitution. Clause(2) of Article 32 confers power on the Supreme Court to issue appropriate directions for orders or writs, including writs in the nature of *habeas corpus, Mandamus,* prohibition, *quo-warranto* and *certiorari* for the enforcement of any of the rights conferred by Part III .

The traditional rule is that the right to move the Supreme Court is only available to those persons whose fundamental rights are infringed. The power vested in the Supreme Court can only be exercised for the enforcement of fundamental rights. Article 32 permits large discretion to the Court to give appropriate relief. The Court can frame such writs as the exigencies of a particular case demand.[1]

On the other hand, Article 226 of the Constitution confers power on all the High Courts to issue the writs, orders or directions for the enforcement of fundamental rights. So by Articles 32 and 226 the Supreme Court and the High Courts protect the citizen's fundamental rights. In discharging the duties assigned to protect fundamental rights the Supreme Court in the words of Patanjali Shastri, J., plays the role of a sentinel on the *qui vive* .[2] Again in *Daryao* vs. *State of Uttar Pradesh,* [3] the Supreme Court considered it a solemn duty to protect the fundamental right zealously and vigilantly. Thus whenever a man's right to privacy is violated he can move the Supreme Court or the High Courts for getting appropriate remedy.

2. Public Interest Litigation

The judiciary in India has accepted public interest litigation as an effective tool in its hands to uphold the life, liberty, equality and basic human rights enshrined in the Constitution. The courts permit public interest litigations or social interest litigations at the instance of 'public-spirited

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1. *Chiranjit Lal Chaudhury* vs.*Union of India,* AIR 1951SC 41.

2. *State of Madras* vs. *V.G.Raw*, AIR 1952 SC 196.

3. AIR 1961 SC 1457 at 1461.

citizens' for the enforcement of constitutional or other legal rights of any person or group of persons who because of their poverty or socially or economically disadvantaged position, are unable to approach the court for relief. In privacy related issues also, it is seen that social-spirited persons go to the Supreme Court for appropriate remedy.

In *People's Union for Civil Liberties* vs. *Union of India,*[4] popularly known as ' Telephone-tapping case', the petition was filed by way of a public interest litigation under Article 32 of the Constitution by the People' Union for Civil Liberties – a voluntary organization – highlighting the incident of telephone-tapping in the recent years. In this case the constitutional validity of Section 5 of The Indian Telegraph Act, 1885 which authorizes the central or the state governments to resort to telephone-tapping in the circumstances mentioned therein was challenged. The Court laid down exhaustive guidelines to regulate the discretion vested in the state for the purposes of telephone-tapping and interception of other messages so as to safeguard public interest against the arbitrary and unlawful exercise of power by the government.

There are various cases where various non-governmental organizations filed a public interest litigation for the prevention of sexual harassment of working women. In *Vishaka* vs. *State of Rajasthan,*[5] a writ petition was filed by Vishaka, a non-governmental organization, by way of PIL seeking enforcement of fundamental rights of working women under Articles 14, 19 and 21 of the Constitution. The Court held that it is the duty of the employer or other responsible person in work places or other institutions, whether public or private, to prevent sexual harassment

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4. AIR 1997 SC 568.

5. AIR 1997 SC 3011.

of working women. It is necessary for the safety of the society as well as to maintain the dignity, decency and privacy right of a woman.

3. Compensation under the Indian Constitution

The Constitution of India guarantees the fundamental right to life and personal liberty under Article 21 to any person. As the right to privacy is a part of Article 21, the Supreme Court has in various cases involving the invasion of privacy rights awarded compensation to the victims. Most of these cases are related with custodial violence, rape, illegal search and seizure, etc.

In *Delhi Domestic Working Women's Forum* vs. *Union of India,*[6] the Supreme Court directed the setting up of a criminal inquiries compensation board to award compensation to a rape victim whether or not a conviction has taken place. In awarding compensation the board has to take into account the pain, suffering and shock as well as the loss of earnings and expenses of the child. Thus the court trying an accused in a rape case has the jurisdiction to award compensation to the victim of the rape.

In *P.Rathinam* vs. *State of Gujarat,*[7] the Supreme Court appointed a commission to investigate a place where a rape had taken place and directed the government to pay interim compensation of rupees fifty thousand to the victim of rape.

Thus, it is seen that compensation may be awarded by the court

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6. (1995) 1 SCC 14.

7. 1994 SCC (Cri.) 1163.

where a woman's right to privacy or health is involved. In *Jwala Devi* vs. *Bhoop Singh,*[8] it was alleged by an old woman that she was assaulted, tortured and paraded in the street after rubbing black shoe-polish on her face by a police official. It was a gross violation of her privacy right and finally the Supreme Court in an appeal directed that rupees five thousand be paid as compensation to the petitioner.

Civil Law Remedies

Generally civil law remedies are available in the case of torts. The remedies available for a tort by means of an action are by way of damages and injunction.

1. Damages

In a suit for damages in tort, the court awards pecuniary compensation to the plaintiff for the injury or damage caused to him by the wrongful act of the defendant. There are provisions of punishment to offenders who violate or infringe the right to privacy by way of trespass or invasion of incorporeal right to property.

In *Govind* vs. *State of M.P.,*[9] it was alleged that the domiciliary visits and other actions of the police infringed the petitioner's privacy right. However, in *R.Rajagopal* vs. *State of Tamilnadu,*[10] we find that the right to privacy or the remedy of action for damages is not available to

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8. AIR 1989 SC1441.

9. AIR 1975 SC 1378.

10.AIR 1995 SC 264.

public officials as long as the criticism concerns the discharge of their public duty; not even when the publication is based on untrue facts and statements, unless the official can establish that the statements had been made with reckless disregard of truth.

2. Injunction

The person suffering the invasion of his right may bring a suit for damages or injunction as he may deem fit and proper. Injunction is available to prevent an attempted trespass or for continuing the same. The grant for injunction is however discretionary and is regulated by the Specific Relief Act, 1963. [11]

Sometimes the court ordered for injunction to restrain the publication which was based upon a defamatory statement. In *Smt. Sonakka Gopalagowda Shanthaneri* vs. *U.R. Ananthemurthy,* [12] the petitioner filed a suit for injunction for restraining a film-maker from exhibiting a film or an author from reprinting a disputed book which was based on defamatory statement relating to her husband's character. The Court held that loss of reputation and consequent loss of dignity and character cannot be compensated in terms of money and held that to restrain the opposite party from committing defamation the proper remedy is an order of injunction.

Similarly in *M/s. Anglo-Dutch Paint, Colour and Varnish Works*

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11. Secs 37-39, Specific Relief Act, 1963.

12. AIR 1988 Kant 255. *see*,also, *National Sugar Mills Ltd.* vs *Ashutosh Mukherjee*, AIR 1962 Cal 27.

Pvt. Ltd. vs. *M/s.India Trading House,*[13] the Court granted an injunction against the infringement of copy-right or trademark.

An injunction can be granted to keep the secrecy of a family. In *Ashim Ranjan Das* vs. *Bimla Ghosh,*[14] privacy of members of undivided family was in question. The members of an undivided family are protected under the law to maintain their privacy. If a stranger, who claiming lease of a portion of the disputed house, seeks to interfere with the privacy, then the members will naturally require an urgent remedy. The Court in this case directed interim injunction to the plaintiffs, against the stranger lessee, from entering into possession as no stranger can be permitted to pierce the veil of that privacy.

In *Argyll* vs. *Argyll,*[15] the Duchess of Argyll, filed a suit for injunction to restrain the publication of a famous newspaper named 'The People' which was related with her personal married life with the Duke of Argyll. The newspaper got this personal information from the Duke and they offered to publish the information in their newspaper. As this matter was a personal matter and not related with public interest, the Court granted injunction to restrain the publication.

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13. AIR 1977 Del 41.

14. AIR 1992 Cal 44.

15. (1967) 1 Ch. 302.

CHAPTER- 4

PRIVACY OF HOME

A. Right to Sleep and Comfort

B. Right against Police Surveillance

CHAPTER- 4

PRIVACY OF HOME

The first and foremost natural requirement of a person is to have a private home without any interference and unwanted intervention by others. This natural requirement attracts various dimensions including the right to sleep and comfort which are discussed here. Some of these aspects forming part of the right to privacy have been recognized as the basic right included in the right to life and personal liberty through case to case development. Such relevant cases have been analysed here in order to determine the area of this aspect as a part of the right to privacy. One important aspect regarding invasion of privacy is police surveillance. This issue has come up before the court to determine in which case the right to privacy protects against the police surveillance and where the police surveillance would be permissible and the protection of the right would not be available. These developments have been discussed here with the help of relevant judicial decisions.

A. Right to Sleep and Comfort

In *Francis Coralie* vs. *Union Territory of Delhi.*[1] the Supreme Court was of the opinion that the right to life enshrined in Article 21 cannot be restricted to mere animal existence. It means something much more than just physical survival.

Earlier in *Kharak Singh* vs. *State of U.P.*[2] dealing with the question whether the intrusion into the residence of a citizen and the knocking at his door with the disturbance to his sleep and ordinary comfort, which such action must necessarily involve, constitutes violation of the freedom guaranteed by Article 19(1)(d) or a deprivation of the personal liberty guaranteed by Article 21 of the Constitution, the Apex Court held that "personal liberty" in Article 21 is comprehensive to include all varieties of rights which go to make up the personal liberty of a man other than those dealt with in article 19(1)(d). According to the Court, while Article 19(1)(d) deals with the particular types of personal freedom, Article 21 takes in and deals with the residue. The Court in this case raised the following issue:

> "Is then the personal liberty to be construed as excluding from its purview an invasion on the part of the police, of the sanctity of a man's home and an intrusion into his personal security and *his right to sleep which is the normal comfort and dire necessity for human existence even as an animal* ."[3]

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1. AIR 1981 SC 746.

2. AIR 1963 SC 1295.

3. *Ibid, at* 1302.

The Court then quoted a passage from the judgment of Frankfurter J. in *Wolf* vs. *Colorado* [4] to the effect that the security of one's privacy against arbitrary intrusion by the police is basic to a free society and that the knock at the door, whether by day or by night, as a prelude to a search, without authority of law but solely on the 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 the English speaking people. The Court then said that at common law every man's house is his castle and that embodies an abiding principle transcending mere protection of property rights and expounds a concept of "personal liberty" which does not rest upon any element of feudalism or any theory of freedom which has ceased to exist[5] The majority came to the conclusion that only cl.(b) of Regulation 236 of U. P. Police Regulations which authorises "domiciliary visits" is violative of Article 21 of the Constitution.

Subba Rao, J., dissenting in *Kharak Singh's* case opined that in the above case, policemen were posted near the house of petitioner to watch his movements and those of his friends or associates who went to his house. They entered his house in the night and woke him up to ascertain whether he was in the house and thereby disturbed his sleep and rest. It may be relevant here to refer to the observation of the Court with regard to the scope of Article 21. It was observed "the expression 'life' used in that article cannot be confined only to the taking away of life, i.e., causing death". The court quoted and followed the opinion of Field. J., in *Munn*

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4. (1948) 338 U.S. 25.

5. *Ibid, at 1302.*

"Something more than mere animal existence. The inhibition against its deprivation extends to all those limbs and faculties by which life is enjoyed. The provision equally prohibits the mutilation of the body by the amputation of an arm or leg, of the pulling out of an eye, or the destruction of any other organ of the body through which the soul communicates with the outer world".

The expression liberty is given a very wide meaning in America. It takes in all the freedoms. In *Bolling* vs. *Sharpe*[7], the Supreme Court of America observed that the said expression was not confined to mere freedom from any bodily restraint and that liberty under law extended to the full range of conduct which the individual was free to pursue.

In *A. K. Gopalan* [8] 'personal liberty' was described to mean liberty relating to or concerning the person or body of the individual ; and personal liberty in this sense was the antithesis of physical restraint or coercion. The expression is wide enough to take in a right to be free from restrictions placed on his movements. The expression "coercion" in the modern age cannot be construed in a narrow sense. In an uncivilized society where there are no inhibitions, only physical restraints may detract from personal liberty, but as civilization advances, the psychological restraints are more effective than physical ones. The scientific methods used to condition a man's mind are in a real sense physical restraints, for they engender physical fear channeling one's actions through anticipated and expected grooves. So also creation of condition which necessarily

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6. (1876) 94 U.S. 113.

7. (1954) 347 U.S. 497 at 499.

8. *A.K.Gopalan* vs. *State of Madras*, AIR 1950 SC 27.

engender inhibitions and fear complexes can be described as physical restraints. 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* vs. *Colorado* [9], 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 movement 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.

The minority in *Kharak Singh's* case, therefore, defined the right to personal liberty in Article 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. In effect, all the acts of surveillance under Regulation 236 infringe the fundamental right of the petitioner under Article 21 of the Constitution.

Similarly, in *Govind* vs. *State of M. P.* [10], it was observed that any

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9. (1948) 338 U.S. 25.

10. AIR 1975 SC 1378 at 1385.

right to privacy must encompass and protect the personal intimacies of the home, the family, marriage, motherhood, procreation and child-rearing. It was further said that 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 be engaging in such activities and that such harm is not constitutionally protectable by the state. The second is that individuals 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 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 of their natures.

B. Right against Police Surveillance

Surveillance is obviously a fundamental means of social control. Parents watch their children, teachers watch students, supervisors watch employees, religious leaders watch the acts of their congregants, policemen watch the streets and other public places and government agencies watch the citizen's performance of various legal obligations and prohibitions. Records are kept by authorities to organize the task of indirect surveillance and to identify trends that may call for direct surveillance. Without such surveillance, society could not enforce its norms or protect its citizens, and an era of ever increasing speed of communication, mobility of persons, and coordination of conspiracies requires that the means of protecting society keep pace with the technology of crime. Yet one of the central elements of the history of liberty has been the struggle to install limits on the power of economic, political and religious authorities to place individuals and private groups under surveillance against their will. The whole network of constitutional rights – especially those of free speech, press, assembly, and religion; forbidding the quartering of troops in private homes; securing "persons, houses, papers and effects" from unreasonable search and seizure; and assuring the privilege against self-incrimination – was established to curtail the ancient surveillance claims of governmental authorities.[1] In its most visible sense, the power of the state over the citizen is embodied in the police force. Many aspects of police work – inquiry, detection, pursuit and arrest – obviously cannot be carried out without intrusion on privacy,

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1. Alan F. Westin, *Privacy and Freedom*, Atheneum, New York (1970), 57.

and the concern of society is to strike a balance between the disadvantages of this intrusion and the advantage of security against crime. [2]

Alan F. Westin observed that analysis of what is being done to penetrate individual's privacy through current surveillance technology and the prospects for technological advance as well as the counter-measures available, may be divided into three categories: these are *physical surveillance*, the observation without his knowledge or consent of a person's location, acts, speech, or private records through listening or watching devices; *data surveillance*, the collection, storage, exchange, and integration of comprehensive documentary information about individuals and groups through computers and other data-processing systems; and *psychological surveillance*, the use of mental testing, drugs, emotion-measuring devices and other process to extract information which the individual does not know he is revealing, reveals unwillingly, or discloses without full awareness of the exposure of his private personality [3].

I. Physical Surveillance

Locating and shadowing an individual has been a major aspect of surveillance since antiquity. In order to "tag" an individual and follow him efficiently and secretly, radio transmitters have been developed which are smaller than a quarter coin and can transmit for a range of several city blocks when equipped with a thin wire antenna 12 to 15 inches long, or for 50 to 100 feet without antennas. These signal devices can be secreted in a subject's auto, briefcase, or luggage; if no antennas are needed they can now be built into his eyeglasses, hearing aid, or pocket watch; they can also be installed in his clothing in such guises as false coat buttons

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2. Mervyn Jones (Compiled and Edited), *Privacy*, 1971, 84.

3. Alan F.Westin, Science, Privacy, Freedom: Issues and Proposals for the 1970's, 66 *CLR*. 1003.

with the antenna sewed into the collar, belt buckles with the antenna threaded through the belt, or in the heels of his shoes with antennas placed in the laces. The "radio pill" developed for medical research, permits investigators with access to a subject's large-sized anti-allergy or anti-histamine pills to lodge the "tag" in the stomach of the subject himself. Though it will be passed out of the body in due course, the pill emits a signal that can be followed at ranges of 10 to 20 yards. Another major form of tagging is the application of fluorescent dyes or radioactive substances to the person, his clothing, or effects. These substances are invisible to the eye but glow when seen through ultra-violet light sources or cause pulsing signals on portable scintillation detectors. Tiny quantities of gamma-ray emitting substances can even be put into a person's food or medication and trailed by radiation detectors [4].

Watching the individual and inspecting physical objects in private rooms is a second major aspect of physical surveillance. One method of watching is through one-way screens, such as the familiar glass that appears to be a mirror in the room under observation but permits viewing from the adjoining rooms. More sophisticated screens are now used which seem to be solid wall panels but are made of special substances that permit infra-red light to pass through; this allows investigators to observe or photograph by means of infra-red light projectors. Miniature still and movie cameras with automatic light meters can be secreted within rooms under surveillance and triggered at periodic intervals by signals from outside or by movement within the room. Even more useful for optical surveillance is the closed- circuit television unit. These TV cameras can be, and are, secreted in offices and residences in a host of available

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4. *Ibid*, 1005.

locations – air conditioning and heating grills, the speaker portion of radios and television sets, even behind wall sockets. Pictures are carried by cables leading from the camera units to the investigator's viewing screen and can operate in darkness if an infra-red energy source is planted or beamed into the room under surveillance. One closed-circuit television system operating without infra-red energy can transmit clear pictures of an entire room from the illumination given off by a cigarette lighter [5].

Persons who seek privacy for their meetings or acts by moving about in public - on the streets, in parks, or at public events and places of public accommodation – can be photographed through long range cameras at distances of 500 to 1000 yards. As popular accounts of "spy satellite" camera work have made clear to the public, photography for distances of miles is possible with special camera equipment [6].

Listening to private speech is probably the most important type of physical surveillance, and it is here that the greatest advances in technology have been made. The most complete audial surveillance is obtained by making the subject a walking transmitter. This is accomplished by building sub-miniature radio transmitters into his clothing or personal effects in much the same way that signal tags are planted. One such unit places a microphone in one button of a person's suit, a sub-miniature transmitter in a second button, and the battery source in a third and uses conductive wire that matches the thread of seams and decoration as the unit's antennae. Such installations can be made in a matter of minutes if access can be obtained to a person's clothing through,

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5. *I bid.*

6. *Ibid*, 1006.

for example, his dry cleaner or a public check room. [7]

New technology has supplemented the direct connection and induction coil tap of earlier decades and has produced far more sophisticated induction devices than were previously available. For example, miniature devices are now available that fit within the telephone handset itself, and portable induction coils attached to miniaturized recorders make it possible for a person to sit in waiting rooms and lobbies outside business, law and government offices and record all the calls going on inside. This can often be done even from the street outside a ground floor office or residence, from hotel rooms adjoining those of the subject, and at distances of 10 to 20 feet from a telephone booth.[8]

Vital information passing over new data-communication systems has also become a target of new surveillance technology. A growing volume of business and governmental data is being transmitted from point to point by teletype machines, data- phone systems and computers. Surveillance devices are available to intercept teletype signals and feed them into the investigator's teletype printer; the same can be done with data-phone transmissions that are not transmitted in scrambled form. Computer tapping is also possible through direct connections to a parallel computer or, if fairly close contact can be achieved, by radio tapping of the electrical signals produced by the print-out mechanism.[9]

Many other possible devices could be discussed and the vulnerability of new communication systems to surveillance could be

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7. *Ibid.*

8. *Ibid*, 1008.

9. Ibid.

described. But to cut it short, there will be even more serious problems for privacy from physical surveillance in the future as the sciences of light and sound continue their rapid advances.

II. Data Surveillance.

The computer-born revolution in human capacity to process data is obviously an enormous boon to mankind. Businessmen, government officials, behavioural scientists, and many others are now better able to make more fact based, logical, and predictable decisions than they ever could before the age of electronic information storage and retrieval systems. To understand the current pressures on privacy created by the information processing revolution, we should note six basic trends at work.[10]

First is the general expansion of information- gathering and record-keeping even apart from computers. The growing complexity of our economic system, the increase of government regulatory functions, the domination of large bureaucratic organisations in our private sector, and social science's heavy commitment to data manipulation have combined to make this possible. To help himself, to help science, and to help society run efficiently, the individual now pours a constantly flowing stream of information about himself into the record files. New forms of financial operations have produced the credit card, which records the where, when and how-much of many once-unrecorded purchasing, travel and entertainment transactions of the individual's life. Through miniaturization, previous physical limits on such data storage have been overcome; the microfilm of earlier decades has now given way to

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10. Alan F. Westin, *Privacy and Freedom*, Atheneum New York (1970), 158.

photochromic micro images that make it possible to reproduce the complete Bible on a thin sheet of plastic less then two inches square, or to store page-by-page copies of all the books in the library of Congress in six four-drawer filing cabinets.[11]

Second, the mobility of persons and the standardization of life in mass society have led to the development of large private and governmental investigative systems whose function is the amassing of personal dossiers. This has become the method by which a large organization makes judgments about people when it wants to hire or fire them, lend them money, or give them passports to travel abroad. The dangerous aspect of such dossiers is that the raw facts about individuals take on added weight because they are part of an official file compiled by an investigative agency. Because individuals often do not know of the existence of many of the dossiers about them, or what is in those they do know to exist, there is usually no process to challenge the accuracy of fact, opinion, or rumour the files contain.[12]

Third, general information gathering and the dossier have been radically accelerated by the advent of the electronic digital computer, with its capacity to store more records and manipulate them more efficiently and rapidly than was ever possible before. The present-generation computer, with thin-film memory cores and ultra-high-speed tunnel diodes can store millions of bits of information and perform calculations on these bits at speeds of billionth of a second.

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11. *Ibid*, 159

12. *Ibid.*

The most significant fact for the subject of privacy is that once an organisation purchases a giant computer, it inevitably begins to collect more information about its employees, clients, members, taxpayers, or other persons in the interest of the organisation. The result may be to provide better service, make more efficient use of personnel, know more facts on which to base decisions, pinpoint wrongdoers and the like. But the inevitable result is that the investigation acquires two or three times as much personal information from respondents as was ever collected before because of the physical or cost limits of acquisition. The impact of computers on organisational life is to destroy practical boundaries of privacy in record giving which were once as meaningful in this area as walls and doors were to conversational privacy before the advent of new physical surveillance technology.[13]

Fourth, the development of many new public programs has produced a requirement for more personal data about individuals than in the previous research or record keeping. The data are then stored in computer memory centres, usually with the individual's name attached.[14]

Fifth, advances in the computer field are rapidly accelerating the sharing of data among those who use the machines. Standardization of computer languages and the perfection of machines that translate one machine language system into another have made it possible for computers to communicate directly with one another, so that data can flow in and out of separate systems. This innovation has led to information exchanges among units within the same large organization, such as police and health agencies in a state, or among independent organizations with

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13. *Ibid.* 161.

14. *Ibid.*

common interest, such as life-insurance companies. A more significant aspect of this trend is the growth of central data pools which are based not only on the desire to collect and collate all significant information about individuals or events in a particular field but are also a response to the technology development that allows remote-stations access to central data banks.[15]

Sixth, we have entered in an era in which automatic data processing will gradually replace many of the cash transactions of the past, providing an increasing trial of records about significant transaction of the individual's life. The credit-card system that spread in the 1950s was the first stage of this process. But the increase in records about personal life from such direct computerized transactions is apparent.[16]

III. Psychological Surveillance.

Psychological surveillance encompasses scientific techniques which seek to extract information from an individual that he does not want to reveal, or does not know he is revealing, or is led to reveal without a mature awareness of its significance for his privacy. Public attention in recent years has focused on two main types of psychological surveillance, the polygraph and personality testing.

The polygraph is a combination of sensing instruments which measures an individual's bodily responses in an attempt to determine whether he is answering questions truthfully. The theory of the polygraph is that persons who know they are lying when asked about matters of consequence cannot control all the physical indicators of stress that are prompted by conscious lying and that a trained polygraph operator

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15. *Ibid*, 162.

16. *Ibid.*

matching known true answers with answers to questions about guilt or innocence can identify the lies. As a result of researches into space medicine, new sensors such as eye-pupil dilation have been added to those used on polygraphs since the 1920s and by using special chairs, hidden cameras, and special heat measuring instruments, it is possible to administer the tests without the subject's knowledge.[17]

Such uses of polygraphs raise serious privacy issues: the scope of questioning into past conduct, beliefs, and tendencies; the creation of a confessional psychology in millions of persons working for government and industry; and the intrusion into the inner realm of emotions rather than reliance on objective evidence, outward appearance, and formal interviewing to make judgments as to the suitability of individuals.

A similar issue is raised by personality tests – psychological measurements that attempt to discover traits of personality and thus judge an individual's psychological strengths and weaknesses. The tests are most often used to predict the subject's future performance in some particular role. They may be pencil and paper quizzes in which the subject answers questions about himself, his emotions, his preferences, or his attitudes, or they may be "projective" tests, in which he is asked to draw a picture, interpret ink blots, comment on ambiguous pictures, or perform similar tasks that provide psychological clues about personality. In general, the personality test differs from tests of intelligence or aptitudes in that it does not measure more or less objective factors such as language skills, logic or physical dexterity but seeks to measure emotions, attitudes,

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17. Alan F. Westin, Science, Privacy and Freedom: Issues and Proposals for the 1970's, 66 *CLR* 1003, 1014.

propensities and levels of personal adjustments.[18] When used for career counseling or for therapeutic diagnosis, there is no serious issue of privacy but the question of privacy does arise, however, when personality tests are adopted on a large scale in order to facilitate personnel selection and promotion by industry and government.

Surveillance of industry and group conduct – a primary means of social control – can be carried to lengths that seriously impair freedom in democratic societies. Observation, extraction and reproducibility, the three basic types of surveillance inevitably exercise a restrictive influence on individual and organisational behavior, thus impairing many of the crucial functions that privacy performs. The rapid development and widespread use of surveillance techniques have upset the classic balance between surveillance and privacy. Now the task of law and social intervention is to see to it that the balance is restored.

A rapidly developing technology which makes it easily possible to exercise surveillance over the activities and conduct of individual by the use and exploration of a variety of devices has become a matter of increasing and anxious concern. The American Supreme Court in *Katz* vs. *United States* [19] held that the attaching by FBI agents, of an electronic listening and recording device to the outside of a public telephone booth from which a suspect placed his call, constitutes a violation of the Fourth Amendment's prohibition of unreasonable searches and seizures, in the absence of an antecedent order judicially sanctioning such surveillance.

The Supreme Court of India had an occasion to deal with the

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18. *Ibid.*

19. 389 U.S. 347 (1967).

question of police surveillance in *Kharak Singh* vs. *State of U.P.* [20] In this case, the Court had to consider the validity of Regulation 236 of the U.P. Police Regulations. It was held that Regulation 236(b) providing for domiciliary visits was unconstitutional for the reason that it abridged the fundamental right of a person under Article 21 and since Regulation 236(b) did not have the force of law, the regulation was declared bad. Thus in *Kharak Singh's* case, police surveillance was struck down as unconstitutional because an unauthorised intrusion into a person's home caused the violation of a common law right of man. But as there is no invasion till there is such intrusion or trespass, secret picketing was held permissible. Only that much concession was conceded to the police, but obviously "no knock at the door" to ascertain the whereabouts of suspects will be tolerated. Thus *Kharak Singh's* case includes the sanctity of a man's home within the ambit of personal liberty under Article 21.

The Court in *Kharak Singh's* case relied, *inter alia*, on the judgments of Field J. in *Munn* vs. *Illinois* [21] and Frankfurter J. in *Wolf* vs. *Colorado* [22] as it observed:

> "We have already extracted a passage from the judgment of Field J. in *Munn* vs. *Illinois* where the learned judge pointed out that life in the Fifth and the Fourteenth Amendment of the US Constitution corresponding to Article 21 means not merely the right to the continuance of a person's animal existence, but a right to the possession of each of his organs – his arms and legs etc".

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20. AIR 1963 SC 1295.

21. (1877) 94 U.S. 113.

22. (1949) 338 U.S. 25.

The Court further referred to the Preamble and broad objectives of the framers of the Constitution when it said:

> "It might not be inappropriate to refer here to the words of the Preamble to the Constitution that it is designed to "assure the dignity of the individual" and therefore of the cherished human value as the means of ensuring his full development and evolution. We are referring to these objectives of the framers merely to draw attention to the concepts underlying the Constitution which would point to such vital words as "personal liberty" having to be construed in a reasonable manner and to be attributed that sense which would promote and achieve those objectives and by means to stretch the meaning of the phrase to square with any pre-conceived notions or doctrinaire constitutional theories "[23].

The court then quoted a passage from the judgment of Frankfurter J. in *Wolf* vs. *Colorado* [24] to the effect that the security of one's privacy against arbitrary intrusion by the police is basic to a free society and that the knock at the door, whether by day or night, as a prelude to a search, without authority of law but solely on the 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 people. The court then said that at common law every man's house is his castle and that embodies an abiding principle transcending mere protection of property rights and

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23. AIR 1963 SC 1295, 1302.

24. *Ibid*, note 22.

expounds a concept of "personal liberty" which does not rest upon any element of feudalism or any theory of freedom which has ceased to exist. [25]

Subba Rao, J., writing for the minority was of the opinion that the word liberty in Article 21 was comprehensive enough to include privacy also. He said that although it is true our Constitution does not expressly declare a right of privacy as a fundamental right, but the right is an essential ingredient of personal liberty, that in the last resort a person's house, where he lives with his family, is his "castle", that nothing is more deleterious to a man's physical happiness and health than a calculated interference with his privacy and that all the acts of surveillance under Regulation 236 infringe the fundamental right of the petitioner under Article 21 of the Constitution. And as regards Article 19(1)(d) he was of the view that that right also was violated. He said that the right under Article19(I)(d) is not mere freedom to move without physical obstruction and observed that movement under the scrutinizing gaze of the policemen cannot be free movement, that the freedom of movement in clause(d), therefore, must be a movement in a free country, i.e., in a country where he can do whatever he likes, speak to whomsoever he wants, meet people of his own choice without any apprehension, subject, of course, to the law of social control and that a person under the shadow of surveillance is essentially deprived of this freedom. He concluded by saying that surveillance by domiciliary visits and other acts is an abridgement of the fundamental right guaranteed under Article 19(1)(d) and under Article 19(1)(a).[26]

25. *Ibid*, note 23.

26. AIR 1963 SC 1295, 1306.

In *Govind* vs. *State of M.P* ,[27] the petitioner in a petition under Article 32, challenged the validity of Regulations 855 and 856 of the M.P. Regulation made by the Government under the Police Act, 1861. Regulation 855 provides that where on information the District Superintendent believes that a particular individual is leading a life of crime, and his conduct shows a determination to lead a life of crime, that individual's name may be ordered to be entered in the surveillance register, and he would be placed under regular surveillance. Regulation 856 provides that such surveillance *inter alia* may consist of domiciliary visits, both by day and night, at frequent but irregular intervals.

The Court, in this case, observed that the police regulations were framed by the Government of Madhya Pradesh under Section 46(2)(c) of the Police Act. The Government is empowered to make rules consistent with the Act. One of the objects of the Act is to prevent commission of offences. The provision in Regulation 856 for domiciliary visits and other actions by the police is intended to prevent the commission of offences. The object of domiciliary visits is to see that the person subjected to surveillance is in his home and has not gone out of it for commission of any offence. Therefore, Regulations 855 and 856 have the force of law. [28]

The Court further observed that depending on the character of the person subjected to surveillance as also the objects and the limitation under which surveillance is made, it cannot be said surveillance by domiciliary visits would always be unreasonable restriction upon the right of privacy. Assuming that the fundamental rights explicitly guaranteed to a citizen have penumbral zones and that the right to privacy is itself a

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27. AIR 1975 SC 1378.

28. *Ibid*, at 1381.

fundamental right, that fundamental right must be subject to restriction on the basis of compelling public interest. As regulation 856 has the force of law, it cannot be said that the fundamental right of the petitioner under Article 21 has been violated by the provisions contained in it: for what is guaranteed under that Article is that no person shall be deprived of his life or personal liberty except by the procedure established by 'law'. The procedure is reasonable having regard to the provisions of Regulations 853(c) and 857. Even if it be held that Article 19(1)(d) guarantees to a citizen a right to privacy in his movement as an emanation from that Article and is itself a fundamental right, the question will arise whether Regulation 856 is a law imposing reasonable restriction in public interest on the freedom of movement falling within Article 19(5) does not apply in terms, as the right to privacy of movement cannot be absolute, a law imposing reasonable restriction upon it for compelling interest of state must be upheld as valid.[29]

The court said that on interpreting the Regulations in a narrower sense it would be clear that Regulation 855 empowers surveillance only of persons against whom reasonable materials exist to induce the opinion that they show 'a determination to lead a life of crime' – crime in this context being confined to such as involve public peace or security only and if they are dangerous security risks. Mere convictions in criminal cases where nothing gravely imperils safety of society can be regarded as warranting surveillance under this Regulation. Similarly, domiciliary visits and picketing by the police should be reduced to the clearest cases of danger to community security and not routine follow-up at the end of a

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29. *Ibid*, at 1386.

conviction or release from prison or at the whim of a police officer. In truth, legality apart, these regulations ill-accord with the essence of personal freedoms and the state will do well to revise these old police regulations verging perilously near unconstitutionality [30].

In *Prem Chand* vs. *Union of India,*[31] Krishna Iyer, J., who delivered the judgment, observed that any police apprehension is not enough for passing order of externment. Some ground or other is not adequate. There must be a clear and present danger based upon credible material which makes the movements and acts of the person in question alarming or dangerous or fraught with violence. Likewise, there must be sufficient reason to believe that the person proceeded against is so desperate and dangerous that his presence in the locality or any part thereof is hazardous to the community and its safety. A stringent test must be applied in order to avoid easy possibility of abuse of this power to the detriment of the fundamental freedoms. Natural justice must be fairly complied with and vague allegations and secret hearings are gross violations of Articles 14, 19 and 21 of the Constitution. All power, including police power, must be informed by fairness if it is to survive judicial scrutiny.

Another leading case on police surveillance was *Malak Singh* vs. *State of Punjab,*[32] where the action of the police in entering the name of the petitioner in the surveillance register was challenged. The Court held that intensive police surveillance encroaching on the privacy of a citizen so as to infringe his fundamental right under Article 21 was

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30. *Ibid,* at 1386.

31. AIR 1981 SC 613.

32. AIR 1981 SC 760.

impermissible. The purpose of police surveillance was the prevention of crime but this did not mean that the police had a license to enter names of whoever they like or dislike. It was observed in this case that Section 23 of the Police Act prescribes it as the duty of police officers "to collect and communicate intelligence affecting the public peace, to prevent the commission of offences and public nuisances", in connection with these duties it will be necessary to keep discreet surveillance over reputed bad characters, habitual offenders and other potential offenders. Organized crime cannot be successfully fought without close watch of suspects. But surveillance may be intrusive and it may so seriously encroach on the privacy of a citizen as to infringe his fundamental right to personal liberty guaranteed by Article 21 of the Constitution and the freedom of movement guaranteed by Article 19(1)(d). That cannot be permitted. The Court held that so long as surveillance is for the purpose of preventing crime and is confined to the limits prescribed by Rule 23.7 of the Punjab Police Rules a person whose name is included in the surveillance register cannot have a genuine cause for complaint. However, surveillance of persons who do not fall within the categories mentioned in Rule 23.4 of the Punjab Police Rules or for reasons unconnected with the prevention of crime, or excessive surveillance falling beyond the limits prescribed by the rules will entitle a citizen to the court's protection which the court will not hesitate to give. Surveillance, therefore has to be unobtrusive and within bounds. While it may not be necessary to supply the grounds of belief to the persons whose names are entered in the surveillance register it may become necessary in some cases to satisfy the court when an entry is challenged that there are grounds to entertain such reasonable belief.

CHAPTER-5

PRIVACY OF COMMUNICATIONS

A. Privileged Communication

B. Telephone-tapping

C. Photography and Publishing

D. Computers

CHAPTER-5

PRIVACY OF COMMUNICATION

The private communication and protection thereof is another important area in relation to the right to privacy. The legal rules under different laws which accord protection to communications made between some parties have been analysed here. The legal provisions protect the privileged communication, however, it does not provide an absolute shield. With the development of science and technology various modes have evolved to peep into private life like, bugging mechanisms, telephone tapping and different photography mechanisms. The computer has been the latest hazards in unveiling the privacy of the individual. Although there is need to develop adequate safeguards in these areas, the available legal provisions have been discussed here.

A. Privileged Communication.

The greatest threat to civilised social life would be a situation in which each individual was utterly candid in his communications with others, saying exactly what he knew or felt at all times. Among mature persons all communication is partial and limited, based on the complementary relation between reserve and discretion.[1] Privacy for limited and protected communication has two great aspects. First, it provides the individual with the opportunities he needs for sharing confidences and intimacies with those he trusts – spouse, "the family", personal friends, and close associates at work. The individual discloses because he knows that his confidences will be held, and because he knows that breach of confidence violates social norms in a civilised society.[2] "A friend" said Emerson [3], "is someone before.....whom I can think aloud". In addition, the individual often wants to secure counsel from persons with whom he does not have to live daily after disclosing his confidences. He seeks professionally objective advice from persons whose status in society promises that they will not later use his distress to take advantage of him. To protect freedom of limited communication, such relationship – with doctors, lawyers, ministers, psychiatrists, psychologists, and others – are given varying but important degrees of legal privilege against forced disclosure. The privacy given to the religious confessions in democratic societies is well known, but the need for confession is so general that

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1. Alan F. Westin, *Privacy and Freedom*, Atheneum, New York (1970), 37.

2. *Ibid*, at 38.

3. Ralph Waldo Emerson, "*Friendship*", *The complete Works of Ralph Waldo Emerson*, New York (1903), 202.

those without religious commitment have institutionalized their substitute in psychiatric and counseling services [4].

In its second general aspect, privacy through limited communication serves to set necessary boundaries of mental distance in interpersonal situations ranging from the most intimate to the most formal and public. In marriage, for example, husbands and wives need to retain islands of privacy in the midst of their intimacy if they are to preserve a saving respect and mystery in the relation. These elements of reserved communication will range from small matters, involving management of money, personal habits, and outside activities, to the more serious levels of past experiences and inner secrets of personality. Successful marriages usually depend on the discovery of the ideal line between privacy and revelation and on the respect of both partners for that line. In work situations, mental distance is necessary so that the relations of superior and subordinate do not slip into an intimacy which would create a lack of respect and an impediment to directions and connections. Thus, physical arrangements shield superiors from constant observation by subordinates and social etiquette forbids conversations or off-duty contacts that are "too close" for the work relationship. Similar distance is observed in relations between professor and student, parent and child, minister and communicant, and many others. Psychological distance is also used in crowded settings to provide privacy for the participants of group and public encounters; a complex but well understood etiquette of privacy is part of our social scenario [5]. Bates remarked that "we request or recognise withdrawal into privacy in facial expressions, bodily gestures, conventions

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4. Westin, *Priavcy and Freedom*, 1970, 38.

5. Ibid, 38

like changing the subject, and by exchanging meaning in ways which exclude others present, such as private words, jokes, winks and grimaces".[6] We learn to ignore people and to be ignored by them as a way of achieving privacy in subways, on streets, and in the "non-presence" of servants or children. There are also social conventions within various sub-groups in the population establishing fairly clearly the proper and improper matters for discussion among intimates, workmates, persons on a bus, and other groups.[7]

The organisations need to communicate in confidence with its outside advisers and sources of information and to negotiate privately with other organisations corresponds to the individual's need for protected communication. One aspect of privacy for confidential communication involves the information that organisations acquire from individuals and from other organisations. Private agencies such as life-insurance companies, credit bureaus, employees, and many others collect reams of personal information, sometimes under the compulsion that the benefits offered by the organisation cannot be had unless the information is provided. Government departments, in their capacities as law-enforcement, regulatory, money-granting and employment agencies, collect even more personal data and much of this too is compelled – by a legal duty to respond to the government enquiry. But organisations also need to protect such information against many of the claims to access made by the press and other private and public agencies if they are to continue to get frank and full information from reporting sources. This

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6. Alan Bates, " Privacy - A Useful Concept?" 42 *Social Forces,* 429, 432 (1964).

7. Alan F. Westin, *Ibid*, note 1 at 39. 12. *Ibid*, at 1814.

fact makes confidential treatment of the data an independent organisational need, not an assertion of privacy solely on behalf of those furnishing the information. [8]

Many private organisations have developed confidentiality policies to govern this issue. Government usually tries to safeguard confidential information through statutes or regulations prohibiting unauthorised disclosures by government employees of information acquired in their official capacities or contained in government files. Pressures on the privacy of governmentally obtained data arise when business, the press, or other governmental agencies claim the right of the people to have access to such information, creating an important area of struggle over executive privacy. [9]

Another aspect of confidential communications involves the privacy of negotiations among organisations in society. Leading examples are labour-management negotiations over working terms, negotiations among political parties and factions over political affairs and the bargains struck by civic groups of all kinds on matters of community relations. Unless the representatives of the negotiating organisations can debate and work toward such bargains in privacy, without premature exposure either to their respective memberships or to the general public, there cannot be a successful process of accommodation and compromise. Privacy is a necessary element for the protection of organisational autonomy, gathering of information and advice, preparation of positions, internal decision-making, inter-organisational negotiations, and timing of disclosure. Privacy is thus not a luxury for organizational life; it is a vital

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8. *Ibid*, at 49-50.

9. *Ibid*, at 50.

lubricant of the organisational system in free societies. [10]

Privacy of communication received legal protection in India under Sections 121 - 132 of the Indian Evidence Act, 1872. It will not be out of place here to give a brief survey of these sections. Section 121 refers to the privilege of persons connected with the administration of justice. It is against public policy or expediency to allow disclosure of matters in which judges or magistrates have been judicially engaged. Section 121 enacts that a judge or magistrate cannot be compelled to answer questions: (1) as to his own conduct in court as judicial officer; and (2) as to anything which came to his knowledge in court as such judicial officer, unless ordered by a superior court. The privilege does not extend to other collateral matters or incidents occurring in his presence while acting as a judicial officer.[11]

Husbands and wives are competent witnesses in all civil proceedings; and in criminal proceedings against an accused, his or her wife or husband is a competent witness, whether for or against. Section 122 contains a rule of privilege protecting the disclosure of all communications, between persons married to one another, made during marriage, except in certain cases, i.e., in litigation between themselves. The provisions of the section may be summarized thus:

1) The privilege extends to all communications made to a person during marriage, by any person to whom he or she has been married, but not to communications before marriage.

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10. *Ibid*, at 51.

11. Sudipto Sarkar and V. R. Manohar, *Sarkar on Evidence*, 14th Ed., 1993, Vol 2, 1809.

2) The communication need not be confidential. The rule applies to communications of every nature.

3) The rule of privilege applies equally whether or not the witness or his or her spouse is a party to the proceeding. It extends to all cases, i.e., to cases between strangers as well as to suits or proceedings in which the husband or wife is a party.

4) The privilege extends to communications made to a spouse and not to those made by a spouse. But the privilege is conferred not on the witness (unless the witness happens to be the spouse who made the communication), but on the spouse who made the communication; the witness cannot therefore waive it at his or her own will, nor can the court permit disclosure even if he or she is willing to do it. It is only the spouse who made the communication or his or her representative in interest who can consent to give up the privilege. [12]

Disclosure of secret information contained in unpublished state papers, are privileged from production on the ground of public policy or as being detrimental to the public interest or service. On grounds of public policy, relating to affairs of state contained in unpublished official records are protected from disclosure except with the permission of the head of the department concerned. Section 123 prohibits the disclosure of any evidence derived from unpublished official records relating to any affairs of state without the permission of the head of the department concerned, who has discretion to give or refuse such permission. [13]

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12. *Ibid*, at 1814.

13. *Ibid*, at 1823.

As in Section 123, public policy also requires that communications made to a public officer in "official confidence" should not be disclosed for being detrimental to the public interest or service. The communication may be oral or in writing. The confidence reposed may be express or implied. Section 124 is not confined to unpublished records as is Section 123. Unlike Section 123, the discretion as to whether disclosure should be made rests with the public officer to whom the communication is made in official confidence and not with the head of the department. The only ground on which privilege may be claimed is prejudice to public interest. [14]

Section 125 entitles a police officer to refuse to disclose the source of his information as to the commission of any offence. On grounds of public policy, the source of information of offence against the laws should not be divulged. If the names of the informers and the channel of communication are not protected from disclosure, no one would be forthcoming to give such information. This privilege is necessary for creating confidence and offering encouragement to informants. It is the duty of every citizen to communicate to his government any information which he has of the commission of an offence against the laws. To encourage him in performing this duty without fear of consequences, the law holds such information to be among secrets of state. Courts of justice, therefore, do not compel or allow the discovery of such information, either by the subordinate officer to whom it is given or by any other person, without the permission of the government.[15]

Sections 126-129 deal with the law relating to professional

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14. *Ibid*, at 1845.

15. *Ibid*, at 1851.

communications between clients and legal advisers or their clerks. A lawyer is under a moral obligation to respect the confidence reposed in him and not to disclose communications which have been made to him in professional confidence, i.e., in the course and for the purpose of his employment, by or on behalf of his clients, or to state the contents of conditions of documents with which he has become acquainted in the course of his professional employment, without the consent of his client. Section 126 gives legal sanction to this obligation.[16] The privilege given by Section 126 to legal advisers is, by the provisions of Section 127, extended to interpreters and the clerks or servants of barristers, pleaders, attorneys, and vakils. As it is not possible for lawyers to transact all their business in person and they have to employ clerks or agents, the privilege necessarily extends to facts coming to their knowledge in the course of their employment. The protection extends to all the necessary organs by which such communications are effected and therefore an interpreter, or an intermediate agent is under the same obligations as the legal adviser himself. [17]

The privilege is the privilege of the client and not of the legal adviser, and therefore he alone can waive it. Section 126 permits disclosure when it is waived expressly. Section 128 refers to implied waiver; and says that the privilege is not waived if a party to suit gives evidence therein at his own instance or otherwise. Section 128 further says that the privilege is not also lost by merely calling the legal adviser as a witness unless a party questions him on the particular point. [18]

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16. *Ibid*, at 1857.

17. *Ibid*, at 1877.

18. *Ibid*, at 1877-78.

Sections 126, 127 and 128 prevent a legal adviser or his clerk, servant, etc., from disclosing confidential communications made in the course of professional employment. By Section 129 a similar protection is afforded to the client which says that no one shall be compelled to disclose confidential communication which has taken place between himself and his legal adviser, unless he himself offers as a witness ; in which case he can be compelled to disclose any such communication which the court thinks necessary to explain the evidence which he has given, but no others. [19]

Section 130 lays down that a witness who is not a party to a suit, i.e., a stranger, shall not be compelled to produce (1) his title-deeds or documents in the nature of title- deeds, e.g., documents of pledge or mortgage, or (2) any document the production of which might tend to criminate him, unless he has agreed in writing to produce them. The reason for the rule is protection from the mischief and inconvenience that might result from compulsory disclosure of title. Section 131 prohibits the production of document in the possession of a person, which any other person would be entitled to refuse to produce if they were in his possession. [20]

Under Section 132 a witness cannot refuse to answer a question which is relevant to the matter in issue in any suit or in any civil or criminal proceeding simply on the ground that the answer will tend to criminate him or expose him to a criminal charge, penalty or forfeiture. The legislature, while depriving the witness of the privilege has in order to

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19. *Ibid*, at 1879.

20. *Ibid*, at 1883.

remove any inducement to falsehood, added a proviso to the section declaring that if a witness is compelled by the court to answer, such incriminating answers will not subject the witness to any arrest or prosecution or be proved against him in any criminal proceedings except in case of a prosecution for giving false evidence. [21]

During the last few years, courts have started giving protection against the disclosure or misuse of confidential information. In the beginning, injunction was the remedy ordinarily sought in such cases. However, one can now see a definite trend recognising the right of the aggrieved individual to claim damages also, where there is unauthorised disclosure or use of information which was imparted in confidence. Even though many of these cases were concerned with trade secrets mainly, they do not rest merely on the element of monetary gain or loss. In fact, some of them reflect protection of confidence in the sphere of personal privacy. [22]

As early as 1846, in the case *Prince Albert* vs. *Strange*,[23] an injunction was obtained against the unauthorised circulation of certain etchings privately made by Queen Victoria and her Prince Consort.

In 1967, in *Argyll* vs. *Argyll*,[24] an injunction was obtained by a wife against her husband, who was about to disclose certain confidential matters communicated to him by the wife, the disclosure having been thought of by her husband after the marriage had broken down. In this

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21. *Ibid*, at 1891.

22. P.M. Bakshi, Breach of Confidence as an Actionable Wrong, *Chartered Secretary*, (1998), 11.

23. (1848) 2 De. & Sm. 652.

24. (1967) Ch. 302.

case it was held that with the object of preserving the marital relationship, it was the policy of the law that communications, not limited to business matters, between husbands and wife should be protected against breaches of confidence, so that, where the court recognised that such communications were confidential and that there was a danger of their publication within the mischief, which it was the policy of the law to avoid, it would interfere; and that, on the facts, publication of some of the passages complained of would be in breach of marital confidence. It was further observed that, it being the policy of the law to preserve the close confidence and mutual trust between husband and wife, subsequent adultery by one spouse resulting in divorce did not relieve the other spouse from the obligation to preserve their earlier confidences. Accordingly, the plaintiff's adultery did not entitle the first dependant to publish the confidences of their married life, and an injunction would be granted restraining him from doing so.

From the aforesaid discussion, it can be surmised that if certain information or other material has been obtained in confidence, and is published wrongfully, action for damages for breach of confidence would lie. In appropriate cases, injunction is also available. Except where there are overriding considerations of public interest, where a person obtains information in the course of a confidential employment, the law does not allow him to make any improper use of the information so obtained. [25]

The essence of this branch of law is the principle that a person who has obtained information in confidence is not allowed to use that information as a "springboard" for the purpose of activities detrimental to the person who made the confidential communication. In *Saltman*

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25. *Pollard* vs. *Photography* Co. (1889) 40 Ch. D. 345.

Engineering Co. vs. *Campbell Engineering Co.*,[26] certain drawings were entrusted by the plaintiff to the defendant, for the purpose of manufacturing tools for making leather pouches. The defendants made use of the drawings in order to make leather pouches on their own account. The court held such use to be illegal. As the plaintiff had not given his consent to such use he was entitled to an injunction. The Court of Appeal made it clear that contract or no contract, the obligation arose from the circumstances.

It may be noted here that the question of confidence, apart from the breach of copyright or patent, has occasionally arisen in India also. In a Delhi case, *John Richard Brady* vs. *Chemical Process Equipment,*[27] the plaintiff imparted to the defendant know-how (also giving certain drawings and other technical documents). This was held to have given rise to a confidential relationship. The Court issued an injunction to prevent abuse of the drawings. It was found that defendant's machine was strikingly similar to the drawings given by the plaintiff. The Delhi High Court quoted the following passage from Patrick Heirn, *Business of Industrial Licensing,* pages 112-115 :

> "The maintenance of secrecy which plays such an important part in securing, to the owner of an invention, the uninterrupted proprietorship of marketing *know- how,* which thus remains at least a form of property, is enforceable at law."

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26. (1948) 65 R.P.C. 203 (CA)

27. (1987) 13 *Ind .Jud. Reports* (Del) 739.

B. Telephone Tapping

The conditions of modern living, with close proximity of dwellings and people, rapid transportation, easy communication, and not least, the developments of modern technology, have gravely accentuated the problem of retaining a reasonable area of privacy for the individual. The modern eavesdropper is able not only to report on us, but with the assistance of science, can actually reproduce our very words as spoken with all their nuances, tones, and individual characteristics. The problem of the eavesdropper who is ready to invade the privacy of others, either for his personal gain or out of a sense of public duty, has probably always been with us. The eavesdropper of old did not present a major problem to society, for it was possible to guard against his presence. With the invention of the telegraph and telephone and their quick acceptance as indispensable means of communication, however, the problem of the eavesdropper assumed new magnitude. No longer the person spied upon needed to be within listening distance. The devices of science could now be utilized to facilitate the task of the eavesdropper, who might be far removed from his victim physically and yet be able to maintain surveillance as efficiently as if he were hidden in the kitchen closet. Eavesdropper did not wait long to capitalize on the invention of the telegraph, and interception of transmitted messages became a prevalent practice. [1]

One of the earliest cases where the American Supreme Court dealt with the constitutional question raised by wire tapping was *Olmstead* vs.

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1. Jacob W. Landynski, *Search and Seizure and the Supreme Court – A Study in Constitutional Interpretation*, 1966, 198-99.

United States, [2] decided in 1928. The *Olmstead* case is considered a landmark in constitutional law, not so much for the decision itself as for the quality of its oft quoted dissenting opinions.

Chief Justice Taft in his opinion for the Court rejected the contention that wire tapping was a search under the Fourth Amendment. "There was no searching.....the evidence was secured by the use of .....hearing and that only," said Taft. "There was no entry of the houses or offices of the defendants." [3] Nor could the interception of a conversation qualify as a seizure under the Fourth Amendment, for the Amendment referred only to the seizure of tangible items. Moreover, one who uses a telephone is in communication with someone who is outside the house: "The language of the Amendment cannot be extended and expanded to include telephone wires reaching to the whole world from the defendant's house or office. The intervening wires are not part of his house or office." [4]

Even if the Fourth Amendment did not render wire tapping a search in the constitutional sense. Olmstead contended that the evidence was nevertheless inadmissible as having been obtained in violation of law which made wire tapping a criminal offence. The Chief Justice rejected this argument by limiting the application of the federal exclusionary rule to violations of the Constitution. In a passage which revealingly summed up the majority's philosophy and its low esteem of the exclusionary rule, he said: " A standard which would forbid the reception of evidence if obtained by other than nice ethical conduct by government officials would

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2. 277 U.S. 438 (1928).

3. *Ibid*, at 464.

4. *Ibid*, at 465.

make society suffer and give criminals greater immunity than has been known heretofore." [5]

Justice Holmes' dissent is one of his best-known opinions because of his characterization of wire-tapping as "dirty business".[6] Actually, Justice Holmes was referring not to wire-tapping itself but to illegal wire-tapping. Indeed, he was "not prepared to say that the penumbra of the Fourth and Fifth Amendments covers the defendant"[7] and he addressed himself exclusively to the moral issue involved, that is, whether evidence secured in violation of law should be admissible. Justice Holmes thought not.

Justice Brandeis also had some strong words to say on the moral issue, but, unlike Holmes, he was unequivocal in his assertion that wire-tapping was a search within the meaning of the Fourth Amendment. In words that today seem to be almost prophetic; he painted a grim picture of the probable consequences to privacy of the new technology if the protection of the Constitution could not be invoked to cope with this development:

> "Subtler and more far-reaching means of invading privacy have become available to the Government. Discovery and invention have made it possible for the Government, by means far more effective than stretching upon the rack, to obtain disclosure in court of what is whispered in the closet ..... The progress of science in furnishing the Government with means of espionage is not likely to stop with wire-tapping. Ways may some day be

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5. *Ibid*, at 468.

6. *Ibid*, at 470.

7. *Ibid*, at 469.

developed by which the Government, without removing papers from secret drawers, can reproduce them in court, and by which it will be enabled to expose to a jury the most intimate occurrences of the home. Advances in the psychic and related sciences may bring means of exploring unexpressed beliefs, thoughts and emotions "[8].

Turning to the moral issue which had agitated Justice Holmes, Justice Brandeis agreed that, regardless of the constitutionality of wire-tapping, evidence obtained by this method should be held inadmissible when obtained, as in this case, in violation of law.

In *Katz* vs. *United States*, [9] it was held by the American Supreme Court that the attaching by FBI agents, of an electronic listening and recording device to the outside of a public telephone booth from which a suspect placed his call, constitutes a violation of the Fourth Amendment's prohibition of unreasonable searches and seizures, in the absence of an antecedent order judicially sanctioning such surveillance.

Thus the initial view of the American Supreme Court in *Olmstead* vs. *United States* [10] that the Fourth Amendment had no application to telephone-tapping was modified in *Katz* vs. *United States* [11] to the effect that the Court extended it to protect the privacy against bugging.

In *United States* vs. *Nixon,*[11a] following the indictment of seven high-ranking White House officials, including former special presidential assistants H.R.Halderman and John Ehrlichman and former Attorney

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8. *Ibid*, at 473-74.

9. 389 U.S. 347 (1967).

10. (1928) 72 L. Ed. 944.

11. (1967) 19 L. Ed. 2d. 576.

11a. 418 U.S. 683.

General John Mitchell, for conspiracy to defraud the US Government and obstruction of justice, the special prosecutor obtained a subpoena directing President Richard M. Nixon to deliver to the trial judge certain tape-recordings and memoranda of conversation held in the White House. The trial judge would then examine those tapes and documents and give to the prosecution and defence those portions relevant to the issues at trial. The remainder would be returned to the President. Nixon produced some of the subpoenaed material but withheld other portions, invoking executive privilege, which he claimed, placed confidential presidential documents beyond judicial control. The trial judge denied the President's claim and he appealed to the Court of Appeals. The special prosecutor asked the Supreme Court to review the case before the Court of Appeals had passed judgment and the Justices agreed.

Neither the doctrine of separation of powers, nor the need for confidentiality of high level communications, can sustain an absolute, unqualified presidential form of immunity from judicial process under all circumstances. The President's need for complete candour and objectivity from advisers calls for great deference from the courts. However, when the privilege depends solely on the broad, undifferentiated claim of public interest in the confidentiality of such conversations, a confrontation with other values arises. In the absence of a claim of need to protect military, diplomatic, or sensitive national security secrets, we find it difficult to accept the argument that even the very important interest in confidentiality of presidential communications is significantly diminished by production of such material *in camera* with all the protection that a district court will be obliged to provide.

The expectation of a President to the confidentiality of his conversations and correspondence, like the claim of confidentiality of

judicial deliberations, for example, has all the values to which we accord deference for the privacy of all citizens and added to those values, the necessity for protection of the public interest in candid, objective, and even blunt or harsh opinions in presidential decision-making.... These are the considerations justifying a presumptive privilege for presidential communications. The privilege is fundamental to the operation of Government and inextricably rooted in the separation of powers under the Constitution. Nowhere in the Constitution is there any explicit reference to a privilege of confidentiality, yet to the extent this interest relates to the effective discharge of a President's power, it is constitutionally based.

There is no express guarantee against tapping of telephone under the Constitution of India, therefore, the argument that, it violates the privacy of conversation under Article 21 was raised before the Court in *R. M. Malkani* vs. *State of Maharashtra* .[12] In this case, one of the contentions of the appellants was that the evidence was illegally obtained in contravention of Section 25 of the Indian Telegraph Act and therefore the evidence was inadmissible. Section 25 of the Indian Telegraph Act, 1885 states that if any person intending to intercept or to acquaint himself with the contents of any message damages, removes, tampers with or touches any battery, machinery, telegraph line, post or other thing whatever, being part of or used in or about any telegraph or in the working thereof he shall be punished with imprisonment for a term which may extend to three years, or with fine or with both [13].

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12. AIR 1973 SC 157.

13. Telegraph is defined in the Indian Telegraph Act in Sec 3 to mean any appliance, instrument, material or apparatus used or capable of use for transmission or reception of signs, signals,

The Court held that where a person talking on the telephone allows another person to record it or to hear it, it cannot be said that the other person who is allowed to do so is damaging, removing, tampering, touching machinery, battery line or post for intercepting or acquainting himself with the contents of any message. There was no element of coercion in attaching the tape recorder to the telephone. There was no violation of the Indian Telegraph Act. Recognizing the right to privacy of conversation of innocent person, the Court observed:

> "The telephonic conversation of an innocent citizen will be protected by courts against wrongful or high-handed interference by tapping the conversation. The protection is not for the guilty citizen against the efforts of the police to vindicate the law and prevent corruption of public servant. It must not be understood that the courts will tolerate safeguards for the protection of the citizen to be imperiled by permitting the police to proceed by unlawful or irregular methods" [14].

The provision empowering the Government to tap telephone under Section 5(2) of the Indian Telegraph Act was challenged by the People's Union for Civil Liberties for being violative of the right to freedom guaranteed under Articles 19(1)(a) and 21 of the Constitution of India in the case of *People's Union for Civil Liberties* (*PUCL*) vs. *The Union of India and Another*,[15] popularly known as the 'Telephone-tapping case'. The writ petition was filed in the wake of a report 'Tapping of

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writing, images and sounds or intelligence of any nature by wire, visual or other electromagnetic emissions, radio waves or Hertizan waves, galvanic, electric or magnetic means.

14. AIR 1973 SC 157, 164.

15. AIR 1997 SC 568.

Politicians' Phones by the Central Bureau of Investigation (CBI)' which appeared in the `Mainstream` dated March 26, 1991. Section 5(2) of the Indian Telegraph Act of 1885, which was at the core of the controversy, provides that on the occurrence of any public emergency, or in the interest of public safety, the Central Government or a State Government or any officer specially authorized in this behalf by the Central Government or a State Government, may, if satisfied that it is necessary or expedient to do so in the interest of the sovereignty and integrity of India, the security of the State, friendly relations with foreign States or public order or for preventing incitement to the commission of an offence, for reasons to be recorded in writing, by order, direct that any message or class of messages to or from any person or class of persons, or relating to any particular subject, brought for transmission by or transmitted or received by any telegraph, shall not be transmitted, or shall be intercepted or detained, or shall be disclosed to the Government making the order or an officer thereof mentioned in the order: provided that press messages intended to be published in India of correspondents accredited to the Central Government or a State Government shall not be intercepted or detained, unless their transmission has been prohibited under this sub-section.

Therefore, Section 5(2) permits the interception of messages in accordance with the provisions of the said section. "Occurrence of any public emergency" or "in the interest of public safety" are the *sine qua non* for the application of the provisions of Section 5(2). Unless a public emergency has occurred or the interest of public safety demands, the authorities have no jurisdiction to exercise the powers under the said

section.[16]

Kuldip Singh, J., delivering the judgment observed:

"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".[17]

The Court further observed that the right to privacy is a part of the right to "life" and "personal liberty" enshrined under Article 21 of the Constitution. Once the facts of 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" [18] It was observed that 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 man's life. It is considered so

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16. *Ibid*, at 576.

17. *Ibid*, at 570.

18. *Ibid*, at 574

important that more and more people are carrying mobile telephone instruments in their pockets. It was said:

> "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 unless it is permitted under the procedure established by law".

The Court also observed that the right to freedom of speech and expression guaranteed under Article 19(1)(a) of the Constitution means the right to express one's convictions and opinions freely by word of mouth, writing, printing, picture, or by any other manner. When a person is talking on the telephone he is exercising his right to freedom of speech and expression. Telephone-tapping unless it comes within the grounds of restrictions under Article 19(2) would infract Article 19(1)(a) of the Constitution.[19]

In the absence of any provision for procedural safeguard in the Telegraph Act in the matter of telephone-tapping, the Supreme Court, in the above case, directed observance of following procedure by way of safeguard before resorting to telephone- tapping:

1. An order for telephone-tapping in terms of Section 5(2) shall not be issued except by the Home Secretary, Government of India and Home Secretaries of the State Governments. In an urgent case the power may be delegated to an officer of the Home Department of the Government of India and the State Governments not below the rank of Joint Secretary. Copy of the order shall be sent to the Review Committee

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19. *Ibid*, at 574-75.

concerned within one week of the passing of the order.

2. The order shall require the person to whom it is addressed to intercept in the course of their transmission by means of a public telecommunication system, such communications as are described in the order. The order may also require the person to whom it is addressed to disclose the intercepted material to such person and in such manner as are described in the order.

3. The matters to be taken into account in considering whether an order is necessary under Section 5(2) shall include whether the information which is considered necessary to acquire could reasonably be acquired by other means.

4. The interception required under Section 5(2) shall be the interception of such communications as are sent to or from one or more addresses, specified in the order, being an address or addresses likely to be used for the transmission of communications to or from, from any particular person specified or described in the order or one particular set of premises specified or described in the order.

5. The order under Section 5(2) shall unless renewed, cease to have affect at the end of period of two months from the date of issue. The authority which issued the order may, at any time before the end of two month's period renew the order if it considers that it is necessary to continue the order in terms of Section 5(2) of the Act. The total period for the operation of the order shall not exceed six months.

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.

7. The use of intercepted material shall be limited to the minimum that is necessary in terms of Section 5(2).

8. Each copy made of any of the intercepted material shall be destroyed as soon as its retention is no longer necessary in terms of Section 5(2).

9. There shall be a Review Committee consisting of Cabinet Secretary, the Law Secretary at the level of the Central Government. The Review Committee at the State level shall consist of Chief Secretary, Law Secretary and another member, other than the Home Secretary, appointed by the State Government.

a) The Committee shall on its own, within two months of the passing of the order by the authority concerned, investigate whether there is or has been a relevant order under Section 5(2). Where there is or has been an order whether there has been any contravention of the provisions of Section 5(2).

b) If on an investigation the Committee concludes that there has been a contravention of the provisions of Section 5(2), it shall set aside the order under scrutiny of the Committee. It shall further direct the destruction of the copies of the intercepted material.

c) If on investigation, the Committee comes to the conclusion that there has been no contravention of the provisions of Section 5(2) it shall record the finding to that effect [20].

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20. *Ibid*, at 578-79.

C. Photography and Publishing

A free and unrestrained press has long been recognized as one of the hallmarks of liberty. In fact, Justice Stewart went so far as to equate the press with a fourth branch of government [1] and although the exact scope of the freedom of the press is debatable, most scholars and judges agree that the press serves as an important check on government and a source of information for the people. Despite its acknowledged importance, however, the press, like any other institution, has the potential to abuse its freedom. As James Madison commented "some degree of abuse is inseparable from the proper use of everything, and in no instance is this more true than in that of the press." [2] During a time of tabloid newspapers and exposé television programs perhaps Madison's words ring truer today than ever before. Lately, however it has not been the government that has objected to a cantankerous press, an obstinate press, and a ubiquitous press but rather private individuals who complain of the intrusive, harassing and mercenary tactics of tabloid photographers and who long for a balance between the people's right to know versus a person's right to privacy [3].

This tension was recently exacerbated by the controversy surrounding the role of "paparazzi" photographers in the automobile accident that killed Princess Diana in August 1997. Prompted by public

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1. *See,* Protter Stewart, Or of the Press, 26 *Hastings L J* 631, 634 (1975)

2. James Madison, *Report on the Virginia Resolutions,* in 4 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 546,571 (Jonathan Elliot ed., 2d ed. 1937)

3. 112 *HLR* 1367 (1999).

outcry over the controversy, members of Congress quickly proposed a new federal legislation to control the press, and the California state legislature was soon to follow with its own legislation. Responding to claims that paparazzi journalists would go to any lengths and use the latest technology to obtain pictures or soundbites, the legislators sought to enhance the penalties for invasion of privacy by creating both civil and criminal actions against people who intrude on others privacy through either conventional or high-tech means. Despite bipartisan support, the 105th congress did not pass the federal bill. The California state legislature however did pass the Senate Bill which became law on September 29, 1998. [4]

As stated earlier, the right to privacy originated in an 1890 article by Samuel Warren and Louis Brandeis, *The Right to Privacy,*[5] which created a minor revolution in the development of the common law. The article criticized the press for "overstepping in every direction the obvious bounds of propriety and of decency" [6] and proposed a new tort for the violation of privacy rights.[7] By 1960, acceptance of this new tort had spread and majority of the states recognized the right of privacy in some form.[8] Since then, the concept of privacy has developed into four distinct torts: unreasonable intrusion upon a persons seclusion; public disclosure of private facts; publicity that places a person in a false light ; and

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4. *Ibid,* at 1368.

5. Samuel D. Warren & Louis D. Brandeis. The Right to Privacy, 4 *HLR* 193 (1890).

6. *Ibid,* at 196.

7. *See, Ibid,* at 195-97, 214-19. (Discussing the limitations on the right to privacy and what remedies may be granted for enforcement of the right).

8. *See* , William L. Prosser, Privacy, 48 *Cal. Law Rev.* 383,383 (1960)

appropriation of a person's name or likeness.

At the same time, laws prohibiting harassment exist in several states. Whereas the tort of intrusion generally exempts photographers from liability for taking unwanted photographs in or from public places, harassment statutes enable individuals to obtain injunctive relief from persistent press hounding, regardless of where it occurs.

A quarter century ago, for example Jacqueline Kennedy Onassis obtained an injunction from a federal district court against Donald Galella,[9] a freelance celebrity photographer and self-described "paparazzo".[10] According to Onassis, Galella had engaged in a campaign of harassment against Onassis and her family. More recently, in *Wolfson* vs. *Lewis* [11] a couple obtained an injunction against reporters who were working on a story for the television program *Inside Edition.* The Court acknowledged that intrusion claim generally do not arise from matters occurring in public view but held that conduct amounting to persistent harassment and unreasonable surveillance could rise to the level of intrusion upon seclusion. Theories of harassment thus enable individuals to obtain indirect protection of even public expectations of privacy. [12]

In addition to the aforementioned prohibitions on intrusion and harassment, a number of other laws protect individuals from overly aggressive photographers. For example, photographers cannot trespass on private property. Also, assault and battery statutes prohibit photographers

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9. *See, Galella* vs. *Onassis,* 487 F. 2d. 986, 993 (2d Cir.1973).

10. The term "paparazzo" refers to an obnoxious type of photographer. *See , Ibid,* at 991.

Translated literally, the term means "a kind of annoying insect." *Ibid,* at 991-92.

11. 924 F. Supp. 1413 (E. D. Pa. 1996).

12. Privacy, Photography and the Press 111 *HLR* 1086, 1089.

from engaging in or threatening unwanted physical contact with their subjects. Moreover, photographers who use motor vehicles to chase their subjects risk prosecution for reckless endangerment. These laws protect everyone - not just celebrities and public figures - from overly aggressive photography, and they do so without unduly restricting freedom of speech and expression. [13]

Recently these traditional torts of trespass, harassment, reckless endangerment and others have been invoked with greater frequency, as competitive pressures among the media have created a frenzy in reporters, editors, correspondents and producers to catch a sensational story. Nevertheless, the ability of these torts to protest privacy is questionable, as ever-advancing technology renders "public" those places and activities that were once "private". Thus as Warren and Brandeis realized over 100 years ago, it may be necessary to respond to these "recent inventions and business methods" and to consider "the next step which must be taken for the protection of the person, and for securing to the individual" the right to privacy. [14]

The tort of unreasonable intrusion, which provides a model for the California anti-paparazzi statute "concerns an individual's claim to have a right to a 'personal space', where other citizens and the government are normally not allowed to trespass".[15] The tort protects against both nonconsensual physical intrusions into legally recognized places of privacy and "unwarranted sensory intrusions such as eavesdropping,

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13. *Ibid*, at 1090

14. Warren & Brandies, *Ibid* note 5, at 195

15. Rodney A. Smolla, *Free Speech in an Open Soceity* 120 (1992).

wiretapping, and visual or photographic spying".[16] A person is liable for unreasonable intrusion when he intentionally intrudes, physically or otherwise, upon the solitude or seclusion of another or his private affairs or concerns, if the intrusion would be highly offensive to a reasonable person. [17]

To prove the first element of the tort, that an intrusion actually occurred, the plaintiff must have had an objectively reasonable expectation of privacy in the place, conversation or activity upon which the defendant allegedly intruded. In a few jurisdictions, this element is satisfied only if the defendant physically trespassed on property "occupied privately by a plaintiff for purposes of seclusion". Most jurisdictions, however, do not focus the inquiry on the plaintiff's property rights, but instead consider the nature of the relevant place, conversation or activity and its accessibility to the public. If these jurisdictions of the place where the alleged intrusion occurred was accessible to the public or was on private property that was in public view, then the tort generally would not protect the plaintiff's privacy. Therefore, in some situations, the plaintiff, through her own lack of care, can relinquish the privacy provided by private property. [18]

The second element of the intrusion tort, that the defendant intruded upon privacy in a manner highly offensive to a reasonable

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16. *Ibid,* at 489.

17. Privacy, Technology and the California "Anti-Paparazzi" Statue, 112 *HLR* 1349, 1370.

18. *See, Deteresa* vs. *American Broad. Cos.,* 121 F. 3d 460, 466 (9th Cir. 1997) (finding no intrusion when a reporter secretly recorded a conversation that he had with the plaintiff while standing at the front door of the plaintiff's home, because the plaintiff "spoke voluntarily and free with an individual whom she knew was reporter ") .

person, is generally determined on the basis of all the circumstances of the intrusion, including its degree and setting and the intruder's motives and objectives. When an alleged intruder is a member of the press in pursuit of a news story, his motivations are particularly important to the offensiveness analysis. In such situations, courts have recognized that even though the First Amendment does not immunize members of the press from liability for torts that they commit while gathering news, it does reflect a strong societal interest in effective and complete reporting of events, that may – as a matter of tort law – justify an intrusion that would otherwise be considered offensive. [19]

The fact that courts require a more significant showing of offensiveness when the alleged intruder is gathering news does not, however, give the press *carte blanche* to use whatever technique it deems necessary. Some methods of reporting, such as asking questions, would rarely if ever be deemed an actionable intrusion In contrast, other news gathering activities, such as trespassing into private property or wiretapping someone's telephone could rarely, if ever, be justified by a reporter's need to get the story because these activities would be deemed highly offensive even if the information sought was of weighty public concern. Between these two extremes lie difficult cases, many involving the use of photographic and electronic recording equipment for which tort law provides no bright line. It is precisely this uncertainty that has undermined the effectiveness of the intrusion tort. [20]

Thus, despite over 100 years of development, traditional privacy law is generally considered weak; indeed Mc Clurg remarked that a

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19. *See,* Ibid, note 17 at 1317.

20. *Ibid,* at 1371-72

"lesson of modern privacy law in the tort arena is that if you expect legal protection for your privacy, you should stay inside your house with the blinds closed".[21] It is said that the modern tort of intrusion is nothing but trespass law updated to the age of potentially intrusive devices.[22] Warren and Brandeis complained of "recent inventions" such as instantaneous photographs and numerous mechanical devices that threaten to make good the prediction that what is whispered in the closet shall be proclaimed from the house tops [23] but those devices pale in comparison to modern technology. Today's news gatherers often employ high- powered cameras, hidden cameras that can fit into tie-tacs or clocks, microphones that can pick up sound on the other side of walls or at a distance of up to 100 yards, night- vision scopes, and even satellite photographs. [24] The tort of intrusion has failed to keep pace with these intrusions. [25]

On its face, the tort of intrusion has the potential to reach abuses of

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21. *See,* Andrew Jay Mc Clurg, Bringing Privacy Law Out of the Closet: A Tort Theory of Liability for Intrusions in Public Places, 73 *N.C.L Rev.* 989, 990 (1995).

22. Mark Sableman, *More Speech, Not Less: Communications Law in the Information Age,* 128 (1997).

23. Warren & Brandeis,*Ibid,* note 5, at 195.

24. *See,* Mc Clurg, *Ibid,* note 21, at 1018-21 and 150-176. Although statutes concerning wiretapping and eavesdropping prohibit the use of some of these devices in certain situations, *See,* e.g., 18 U.S.C § 2510-2520 (1994) the statutes nevertheless leave the press with substantial freedom to use many of these devices to gather news surreptitiously, *See,* e.g., *Desnick* vs *American Board Cos.,* 44 F. 3d 1345, 1351-53 (7th Cir. 1995) (finding no violation of wiretapping statutes and no invasion of privacy when reporters used hidden cameras to record their encounters with the plaintiff inside the plaintiffs opthalmic clinic).

25. *See, Ibid.* Note17 at 1372.

technology. The language of the tort includes those intrusions that occur physically or otherwise, which suggests that the tort applies to activities that use technology to achieve the same result as a physical intrusion. Some courts have, on occasion, given the tort this broad definition. For the most part, however, courts have so narrowly limited the tort that it is largely toothless in the face of an increasingly intrusive press. It is difficult to explain courts indifference towards technology. Some courts may tie privacy interests to property interests and refuse to find an intrusion unreasonable if no physical invasion has occurred. This possibility cannot fully account for the weakness of the tort with regard to technology, however as most courts recognize that an intrusion need not be physical in order to be unreasonably offensive. Therefore, court's reluctance to find "technological intrusions" may have more to do with the tort itself. [26]

Intrusion requires a reasonable expectation of privacy in the place, conversation, or activity intruded upon and it requires that the intrusion be highly offensive. The problem with this formulation is that it allows privacy to be diminished as new technology reduces what individuals can reasonably expect to be private, and as social attitudes become more accepting of intrusive uses of technology. Although the case law does not explicitly address this point. It does demonstrate the susceptibility of the common law intrusion tort to technological and social change. In *Shulman* vs. *Group W. Productions, Inc.,* the California Supreme Court distinguished between an accident scene near a freeway, which a reporter could videotape without intruding, and the inside of a rescue helicopter,

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26. *Ibid,* at 1372-73.

where the plaintiff could have a reasonable expectation of privacy.[27] The difference between the places was that the attendance of reporters and photographers at the scene of an accident is to be expected, but there is no law or custom permitting the press to ride in ambulances without the patient's consent.[28] As this reasoning indicates, the reasonable scope of person's privacy expectation depends partially on the methods of information collection available to the press and public – once the press establishes a law or custom that permits a form of newsgathering that was previously uncommon, then a plaintiff will no longer have a reasonable expectation of privacy with respect to that form of newsgathering. Therefore, by varying the frequency of use of any intrusive newsgathering technique, the media can, "in some sense define the scope of legal protection provided by the intrusion tort." [29]

In *Dow Chemical Co.* vs. *United States,* [30] the US Supreme Court held that the Environmental Protection Agency had not conducted a search for the Fourth Amendment purposes when it flew over the defendant's plant and took pictures with an image- enhancing camera.[31] The Court reasoned that even though "surveillance of private property by using highly sophisticated surveillance equipment not generally available to the public....might be constitutionally proscribed absent a warrant", the use of the camera did not raise such problems because it was only "a conventional, albeit precise, commercial camera commonly used in map-

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27. *See, Shulman*, 995 P. 2d at 490 (Cal 1998).

28. *Ibid.*

29. *See, Ibid*, note 17, at 1374.

30. 476 U.S 227 (1986).

31. *See, Ibid,* at 238 - 39.

making." [32] The court explicitly tied the permissible degree of invasion to the availability of the surveillance technique used, a formulation identical to the approach taken by the California Supreme Court in *Shulman.* Thus both the *Shulman* court and the *Dow Chemical* court defined privacy in terms of what can and does reasonably intrude upon it.

If an individual's reasonable expectation of privacy depends on what can intrude upon it then the new technological innovations can render unreasonable those privacy expectations that were once reasonable. Although no case directly asserts that new technology affects a person's reasonable privacy expectations, contrasting two Ninth Circuit cases suggests that technology does play such a role. In *Dietemann* vs. *Time, Inc.,*[33] the court found an unreasonable intrusion when a reporter used a hidden microphone to record a conversation that he had with the plaintiff inside the plaintiff's home.[34] By contrast, in *Deteresa vs. American Broadcasting Cos.* ,[35] decided twenty-six years after *Dietemann,* the Ninth Circuit found no unreasonable intrusion when a reporter used a hidden microphone to record a conversation that he had with the plaintiff on the front step of her home.[36] The *Deteresa* court distinguished *Dietemann* on the grounds that the reporter never entered Ms. Deteresa's home and the that Ms. Deteresa knew that the person to whom she spoke was a reporter. However, as for the first distinction, Ms. Deteresa's expectation of privacy was not in her home, but rather in her conversation

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32. *Ibid.* at 238.

33. 449 F. 2d 245 (9th Cir. 1971).

34. *See, Ibid* at 249.

35. 121 F. 3d 460 (9th Cir. 1997).

36. *See, Ibid* at 466.

with the reporter. Therefore a distinction based on the character of the *place*, as opposed to the confidentiality of the *conversation*, seems immaterial considering that both Ms. Deteresa's conversation and Mr. Dietemann's conversation occurred in places where the general public could not hear them. As for the second distinction, the *Deteresa* Court ignored the *Dietemann* court's reasoning a risk that what is heard will be repeated, he "does not and should not be required to take the risk that what is heard... will be transmitted by... (a) recording".[37] The *Deteresa* court, by contrast, stated merely that "Ms. Deteresa spoke voluntarily and freely with an individual whom she knew was a reporter", [38] implying that Ms. Deteresa should have been aware that what she was saying could have been recorded, a risk that Mr. Dietemann did not have to assume. The accessibility of the hidden microphone technology seems to be the only principled distinction that rendered unreasonable for Ms. Deteresa an expectation of privacy that had been reasonable for Ms. Deteresa an expectation of privacy that had been reasonable for Mr. Dietemann . Accordingly the prevalence of the technology apparently diminished the protection provided by the intrusion tort.

Although, the use of new technology plays a role in undermining the intrusion tort, it is probably not solely responsible for the torts decreasing effectiveness. Changing social norms have also contributed to the erosion of the tort. As an initial matter, the public's desire for shocking, titillating and voyeuristic entertainment provides a lucrative market for intrusively gathered information. However, the public's appetite for this type of news and entertainment does more than just

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37. *Dietemann*, 449 F. 2d at 249

38. *Deteresa*, 121 F. 3d at 466.

provide a market for the media to serve; it also immunizes the media from liability for its intrusive conduct. Because the intrusion tort relies on whether conduct is considered highly offensive, it also directly correlates with society's view about privacy: as concerns about privacy relax, so does the protection the tort provides. Trying privacy to social norms in this manner may be a generally valid way to define such an amorphous concept but it is not without problems. Specifically, much like the effect of changing technology on the reasonableness of a person's privacy expectations correlating privacy with social norms allows intrusions that were once considered highly offensive to become socially acceptable with time. As a result, the intrusion tort is weakened considerably in the face of advancing technology and an increasingly voyeuristic social attitude, leaving personal privacy rarely protected .[39]

Amidst protests that traditional tort law did not sufficiently protect privacy interests the California state legislature passed Senate Bill 262, a bill designed to address a widely experienced problem. The loss of privacy as a result of advancing technological changes. The statute is remarkable not only for its attempt to address the shortcomings of the common law privacy torts, but also for the manner in which it does so. The statute departs from the common law method of protecting privacy, which is to regulate privacy directly by defining it in terms of "solitude", "seclusion" or "private affairs or concerns". Instead, the statute seeks to protect privacy indirectly by improving the protections provided by non-legal forms of regulation. With this approach, the statute attempts to avoid the problems that undermined the common law intrusion tort. [40]

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39. *See*, *Ibid*, note 17, at 1376.

40. Ibid, at 1376-77.

The California anti-paparazzi statute seizes upon the notion that the law can be used to regulate physical barriers, markets, and norms directly in an effort to protect privacy indirectly. Most importantly, the statute seeks to resurrect the privacy protection traditionally furnished by physical barrier by "redefining" what is meant by physical space : the statute defines a person's private "space" not in terms of feet or yards, but instead in terms of what can be observed without the assistance of sensory-enhancing technology. The statute also imposes significant damage awards for its violation thereby changing the market for intrusively gathered information in an effort to reduce the occurrence of privacy invasion. Finally although the statute does not explicitly address social norms it may reflect an effort to use the law to reinforce social aspirations for greater privacy protections. [41]

One of the best protectors of privacy traditionally has been physical space: the torts of intrusion and trespass would protect a person's reasonable expectation of privacy if he secluded himself from the public. However, physical space as a protector of privacy and constraint on behavior is particularly subject to erosion by changed circumstances. For example, even though physical access to property may be limited, a photographer may attain the same proximity to her subject through the use of a telephoto lens. Therefore, for the physical space constraint to protect the subject's privacy against this non-physical intrusion, some additional restraint must prevent the photographer from using the telephoto lens: the absence of such technology; the cost of such technology; the moral sense that this technology should not be used for spying; or a law prohibiting such technology. Alternatively, the protection provided by the

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41. *Ibid,* at 1378.

original constraint – physical space - could be translated, such that its protection is defined both in terms of property rights (to prevent physical intrusions) and in terms of "access rights" (to prevent non-physical intrusions). The California statute adopts this last option. In an effort to restore the privacy protection that physical barriers traditionally provided, the California statute makes tortuous the capturing of visual or audio images through the use of sensory-enhancing technology if these images could not have been captured without a trespass and without the enhanced technology. With this formulation, the tort expands the protection provided by physical space. Not only does the tort prevent people from walking into the physical space around a person's property; it also prevents them from using technology to "shrink" that space and thereby to "trespass" by non-physical means. The tort thus gives the physical space a new meaning that cannot be eroded by technological advances and reinforces the protection that space provides with a more permanent form of constraint. [42]

In addition to regulating physical space as a way of regulating privacy, the new California statute attempts to enhance privacy by regulating market for intrusively obtained information. The statute provides for damages that are more certain, and possibly greater than, those imposed by the common law intrusion tort. The damages provision consequently acts to increase the expected cost, and therefore to reduce the occurrence, of intrusive newsgathering. [43] In sum, perhaps the intended effect of the statute was to reflect and reinforce social norms that favour privacy.

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42. *Ibid*, at 1378-79.

43. *Ibid*, at 1380.

In India, a leading case dealing with the question of publication and the right to privacy was *R. Rajagopal vs. State of Tamil Nadu,* [44] popularly known as "*Auto Shankar Case*". In this case the Supreme Court of India has expressly held that the "right to privacy", or the right to be let alone is guaranteed by Article 21 of the Constitution. A citizen has a right to safeguard the privacy of his own, his family, marriage, procreation, motherhood, childbearing 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. If he does so, he would be violating the right of the person concerned and would be liable in an action for damages. However, position may be different if he voluntarily puts into controversy or voluntarily invites or raises a controversy. [45]

This rule is subject to an exception that if any publication of such matters are based on public records including court it will be unobjectionable. If a matter becomes a matter of public record the right to privacy no longer exists and it becomes a legitimate subject for comment by press and media among others. Again, an exception must be carved out of this rule in the interests of decency under Article 19(2) in the following cases, viz., a female who is the victim of a sexual assault, kidnapping, abduction or a like offence should not further be subjected to the indignity of her name and the incident being published in press or media. [46]

The second exception is that the right to privacy or the remedy of action for damage is simply not available to public officials as long as the

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44. AIR 1995 SC 264.

45. *Ibid,* at 276.

46. *Ibid,* at 276. 48. *Ibid,* at 277.

criticism concerns the discharge of their public duties, not even when the publication is based on untrue facts and statements unless the official can establish that the statement had been made with reckless disregard of truth. All that the alleged contemner needs to do is to prove that he has written after reasonable verification of facts. The Court, however, held that the judiciary with its contempt powers and the legislature with its privileges stands on different footing. [47]

In this case the editor and the associate editor of the Tamil Magazine "Nakheeran" published from Madras moved the Supreme Court and asked for a writ restraining government officials from interfering with their right to publish the autobiography of Auto Shanker who had been convicted for several murders and awarded capital punishment. Auto Shanker had written his autobiography in jail which depicted close relationship between the prisoner and several IAS, IPS and other officials, some of whom were partners in several crimes. The announcement by the Magazine that very soon a sensational life history of Auto Shanker would be published created panic among several police officials that they might be exposed. They forced him by applying third degree method to write a letter addressed to the Inspector General of Prisons that he had not written any such book and it should not be published. The I.G. wrote to the publisher that it was false and should not be published.

It is to be noted that the petitioners did not show that they were authorized to publish the book. The question for consideration was whether a citizen could prevent another from writing his autobiography. Secondly, does an authorized piece of writing infringe the citizen's right

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47. *Ibid,* at 277.

to privacy. Does the press have the right to an unauthorized account of a citizen's life. Thirdly, whether the Government could maintain an action for defamation or put restraint on press not to publish such materials against their officials or whether the officials themselves had the right to do so. The Court held that the state or its officials have no authority in law to impose prior restraint on publication of defamatory matter. The public officials can take action only after the publication of it is found to be false. Thus the editor or the publisher of the magazine have a right to publish what they allege to be the life story or autobiography of condemned prisoner in so far as it appears from the public records even without his consent or authorization. But if they go beyond that and publish his life-story, they may be invading his right to privacy and will be liable for the consequences in accordance with law. [48]

48. *Ibid*, at 277.

D. Computers

The human memory has been reinforced for thousands of years by writing, and over the last 100 years by typing and mimeographing. The invention of the computer has facilitated the storage and handling of information to a degree that can fairly be called revolutionary. The amount of information that can be accumulated is no longer limited by the storage space needed for masses of sheets of paper and metal cabinets, nor by the labour and wages of clerks and typists. The Bible, for instance, can be reproduced on a thin sheet of plastic less than two inches square. It is therefore feasible to include far more items than in the past. Also, computerized records are more durable than pieces of paper, and there is no incentive to get rid of them after a limited period of time. With regard to records concerning individuals, the scope for the invasion of privacy is greatly enlarged.[1] It is now technically feasible for all the information about individuals (medical, financial and so forth) to be brought together in one large data-bank. Obviously, this would wipe out one of the basic safeguards of privacy: that information should be seen only by those to whom it was given for their specific purpose – health details to the doctor or hospital, details of earning to the tax inspector etc.[2] Thus a significant threat to privacy posed by the advent of the computer lies in the so called 'data-banks'. These should be thought of not so much as computers, but as immense storage systems in which an astronomic amount of information can be permanently held and extracted in any sequence, and in any selected permutations, at any time. The usefulness of such systems to the

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1. Mervyn Jones (compiled and edited), *Privacy*, 1971, at 52.

2. *Ibid*, at 60.

community is obvious, particularly in the fields of medical statistics, planning, simulation of economic models, prediction of demographic and other trends, and so forth. So long as the use of the data stored in the facility is confined to statistical purposes of this kind, the benefit is obvious. The danger arises only because, by the very nature of the facility, it provides an open invitation for the extraction of the full record of named individuals, legitimately by those who have official access to the facility, and possibly illegitimately by those who can obtain access by fraud, stealth or corruption. [3]

From the privacy point of view, the most alarming fact about the computer is the ease with which information can be elicited from it. Professor Westin writes: "Standardization of computer languages and the perfection of machines that translate one machine language system into another have made it possible for computers to communicate directly with one another so that data can flow in and out of separate 'systems'. To get information from computer, one needs to have either (a) another computer; or (b) a computer terminal, which is a much cheaper proposition; or (c) an ordinary telephone. [4]

In Britain, both computer-users (in general) and computer manufactures have shown themselves aware of the problem of privacy and willing to accept safeguards. The Conference called by the National Council of Civil Liberties and reported in the book *Privacy, Computers and You* [5], was willingly attended by representatives of the computer

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3. Privacy and the Law, A report by Justice (1970)

4. *See*, *Ibid*, note 1 at 62.

5. B. C. Rowe (ed), *Privacy, Computer and You* (National Computing Center, 1972)

industry. Certain safeguards for privacy were found perfectly feasible.As the information enters the file, its origin, degree of confidentiality and destination within the file can be logged. Within the computer it is possible to hold all or parts of the information in sealed compartments, and to scramble it within these compartments. As it leaves the computer the content, time and name of the user can be logged. A system operating like the passkeys to a vault permits the imposing of any rules and safeguards an organisation may wish. Facilities for implementing these safeguards are now included in the various program packages offered by computer manufacturers. The way they are implemented is the private concern of the user, but the facility is there. We have yet to devise a code that cannot be broken, and it is true that, even if it is harder to gain access to computer files, the concentration of information within them could make it more worthwhile to try. But the facts to remember are these:
First, computerized information is held in a form that restricts access to those who are acquainted intimately both with computer systems in general and the system in question. Next, the imposition of monitoring and passkey techniques means that any betrayal of security needs the connivance of as many executives as one cares to nominate. Thirdly, the 'passkeys' can be changed more frequently than any physical key. And, finally, the logging of entries and withdrawals of information is automatic. The combination of connivance and technical skills needed to break into data banks is therefore considerably greater than those needed for entering ordinary filing systems. [6]

The Younger Committee also tackled this problem and

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6. *Ibid.*

recommended built-in safeguards to prevent easy access to computerized information and undesirable disclosure: The fear of many of those outside the computer world who have given evidence relates mainly to access from terminals. In this connection it is important to bear in mind that links with terminals may be by private or public telephone lines or short wave radio. Access from terminals can be controlled by simply locking the terminal or the room containing it; by restricting access to sensitive information in the main computer store to specified terminals; by providing terminal-users with individual identity codes (such as keys, badges or tokens inserted at the terminal) or passwords which must accompany a request for information, by requiring an authorized terminal-user to answer random questions about his background to which only he will know the answers; or by voice identification techniques (still at an early stage of development). [7]

Devices of this kind, however, are very far from allaying all the anxieties which arise from the increasingly widespread use of the computer. It must be borne in mind that computer technology is already a massive industry employing thousands of people who are recruiting at high speed and without any great degree of discrimination. They are rapidly trained; there is no long standing tradition of discretion and responsibility, comparable, for instance, to the traditions of the medical profession. In the nature of things, it seems inevitable that some among the many thousands of computer employees will be indifferent to considerations of privacy; some will regard safeguards of confidentiality as a mere nuisance involving extra work, to be ignored whenever it is safe; and a few will be open to bribes and inducements, or willing to make

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7. *Report of the Committee on Privacy* (Cmnd.5012) (London : HMSO,1972).

unauthorized disclosures because they see this as a trivial matter. The atmosphere of computer work accentuates the dangers; the stress is placed on speed and convenience, and the highest value is placed on meeting the requirements of customers and providing a 'full-service' [8].

The Younger Committee came up with a series of remedies which amounted to a kind of privacy charter:

> There could be an incentive to cover the cost of the acquisition and recording of information by using it for purposes additional to that for which it was originally collected. For example a computerized record of subscribers to a trade publication might well prove useful to the manufacturers of certain products advertised therein. The situation could be a clear breach of privacy in so far as it could be held that private information (a name and address) given solely for the purpose of receiving a magazine is passed on without the authority of the originator.
>
> Therefore :
>
> (1) Information should be regarded as held for a specific purpose and not to be used, without appropriate authorization, for other purposes; and
>
> (2) Access to information should be confined to those authorized to have it for the purpose for which it was supplied.

Furthermore, because it is often cheaper to collect all available information in one operation and because computers have

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8. *See, Ibid,* note 1 at 78.

the capacity to store it, there could be a double incentive for the owners of computers to hoard large amounts of information some of which, though not essential now, might prove useful at some later date. We believe that:

(3) The amount of information collected and held should be the minimum necessary for the achievement of the specified purpose.

A great deal of personal information is acquired to provide statistics to assist planning and other research, or is acquired for some other purpose and subsequently adapted to a form suitable for such ends. Planners and researchers, however rarely need to know identities of individuals. Therefore:

(4) In computerized systems handling information for statistical purposes, adequate provision should be made in their design and programs for separating identities from the rest of the data.

Every system should be so designed that in situations where printout is appropriate an individual can on request be told of the contents of the record. Therefore:

(5) There should be arrangements whereby the subject could be told about the information held concerning him.

We are not convinced that considerations of privacy are at present sufficiently in the minds of computer users and we think that more regard should be paid to such considerations than is the case now. Therefore:

(6) The level of security to be achieved by a system should be specified in advance by the user and should include precautions against the deliberate abuse or misuse of information.

A security system would be incomplete however, if it did not include provision for the detection of an irregularity. Therefore:

(7) A monitoring system should be provided to facilitate the detection of any violation of the security system.

Computers have the capacity to retain information in effect indefinitely so that it is occasionally stored, in the form of discs or tapes, with little regard to a time limit. Therefore:

(8) In the design of information systems, period should be specified beyond which the information should not be retained.

(9) Data held should be accurate. There should be machinery for the correction of inaccuracy and the updating of information.

(10) Care should be taken in coding value judgments. [9]

Nevertheless, the Committee was forced to conclude that no safeguards can provide against all conceivable eventualities. Lapses are bound to occur, simply because this field of technology is new, experimental and constantly developing; and also because the safeguarding of privacy has never been a major consideration.

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9. *See, Ibid*, note 7.

Data Protection and privacy.

Since the Warren and Brandeis definition of privacy as the 'right to be let alone' a great amount of time has been devoted to defining an exhaustive list of the constituent components of the term 'privacy'. However, what does seem to be agreed upon is the extent to which the meaning of 'privacy' is dependant on a nation's culture. The 1978 Lindop Report on data protection differentiated between the principles upon which data protection legislation is based and justified and those that lie behind the 'right to privacy'. It stated:

> (T)he function of a data protection law should be different from that of a law on privacy: rather than establishing rights, it should provide a framework for finding a balance between the interests of the individual, the data user and the community at large [10].

Such a balancing act can be easily recognised in the two motives behind the Council of Europe Convention which are : the threat to individual privacy posed by computerization ; and the need to maintain a free flow of information in an international market. The Convention therefore attempts to reconcile Article 8 of the European Human Rights Convention, concerning an individual's right to privacy, with the principle of free flow of information enshrined in Article 10 of the Human Rights Convention [11].

Despite this difference between the concept of data protection and privacy, developing data protection case law can extend the scope of the legislation to wider questions regarding an individual's 'right to privacy' In Germany, a Constitutional Court decision declared unconstitutional an Act which had authorized the governmentt to undertake a comprehensive

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10. Chris Reed, (ed), *Computer Law,* 3rd Edition, 1st Indian Reprint (2000), 329.

11. *Ibid,* at 328.

population census. The Court declared that each data subject has a right to determine in general the release and use of his or her personal data; thus establishing a constitutional right of individual 'informational self-determination'. The decision also led to a fundamental review of the German Data Protection Act. It has also been noted that some judicial opinion within the European Court of Human Rights has begun to use the Council of Europe Convention on Data Protection to enliven and strengthen Article 8 of the European Convention on Human Rights. [12]

A related question concerns the relationship between data protection legislation and freedom of information laws. Access rights to public archives, for example, could lead to infringements of an individual's privacy. In Quebec, Canada, legislation has been adopted covering both access to documents held by public bodies and the protection of personal information in the same statute. Conversely, in the UK, it has been claimed that the Data Protection Act, 1984 has been used as an excuse by some government authorities to refuse the disclosure of legitimate public documents, and therefore maintain greater secrecy. [13]

In order to prevent organisations from avoiding data protection controls, and therefore guaranteeing a free flow of information, international governmental organisations have become involved in attempting to obtain international harmonisation for data protection legislation. These include the Council of Europe, the OECD, the United Nations and the European Community.

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12. Ibid, at 329-30.

13. Ibid, at 330.

The Council of Europe

The Council of Europe has been the major international force in the field of data protection since the 1981 Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data was agreed upon. A majority of the 39 Council of Europe members have signed the Convention, and have therefore accepted an obligation to incorporate certain data protection principles into national laws. The Convention came into force on 1 October 1985 when five countries had ratified it : Sweden, Norway, France, Federal Republic of Germany and Spain. The Council of Europe has been involved in this area since 1968, when the Parliamentary Assembly passed recommendation 509(68) asking the Council of Ministers to look at the European Human Rights Convention to see if domestic laws gave adequate protection for personal privacy in the light of modern scientific and technological developments. The Council of Ministers asked the Committee of Experts on Human Rights to study the issue and they reported that insufficient protection existed.

A specialist Committee of Experts on the Protection of Privacy was subsequently asked to draft appropriate resolutions for the Committee of Ministers to adopt. In 1976 the Committee of Experts on Data Protection was established. Its primary task was to prepare a convention on the protection of privacy in relation to data processing abroad and trans-frontier data processing. The text of this convention was finalised in April, 1980, and opened for signature on 28 January, 1981. The convention is based on a number of basic principles of data protection, upon which each country is expected to draft appropriate legislation. Such legislative provisions will provide for a minimum degree of harmonisation

between signatories, and should therefore prevent restrictions on trans-border data flows for reasons of 'privacy' protection.

Since 1981 the Committee of Experts on Data Protection has been primarily involved in the drafting of sectoral rules on data protection. These form part of an ongoing series of recommendations issued by the Committee of Ministers designed to supplement the provisions of the Convention. There are currently Council of Europe working parties looking into the media sectors; and the data protection issue created by the use of personal identification numbers and genetic data. No enforcement machinery was created under the Convention, and therefore any disputes have to be resolved at the diplomatic level. [14]

Organisation for Economic Cooperation and Development

The Organisation for Economic Cooperation and Development was established in 1961 and currently comprises 28 of the leading industrial nations. The nature of organisation has meant that interest in data protection has centred primarily on the promotion of trade and economic advancement of member states rather than 'privacy' concerns.

In 1963 a Computer Utilization Group was set up by the 3rd Ministerial meeting. Aspects of the group's work concerned with privacy went to a subgroup, the Data Bank Panel. This body issued a set of principles in 1977. In the same year the Working Party on Information Computers and Communications Policy (ICCP) was created out of the Computer Utilization and Scientific and Technical Policy Groups. Within this body the Data Bank Panel became the Group of Government Experts

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14. Ibid, at 330-31

on Trans-border Data Barriers and the Protection of Privacy. Its remit was:

> To develop guidelines on basic rules governing the trans-border flow and the protection of personal data and privacy, in order to facilitate the harmonization of national legislation.

The OECD guidelines were drafted by 1979, adopted in September 1980, and endorsed by the UK Government in 1981. The guidelines are based, as is the Council of Europe Convention, upon eight self-explanatory principles of good data protection practice. The Republic of Ireland became the last country to sign the guidelines in January, 1987. the guidelines are simply a recommendation to countries to adopt good data protection practices in order to prevent unnecessary restrictions on trans-border data flows and have no formal authority. However, some companies and trade associations, particularly in the US and Canada, have formally supported the guidelines. [15]

The United Nations

The United Nations has only focused on the human rights aspects of the use of computer technology comparatively recently. In 1989 the General Assembly of the Commission on Human Rights adopted a set of draft guidelines for the regulation of computerised personal data files. These draft guidelines were subsequently referred to the Commission on Human Rights' special rapporteur, Mr. Louis Joinet for redrafting, based on the comments and suggestions received from member governments and other interested international organisations. A revised version of the guidelines

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15. Ibid, at 332

was presented and adopted in 1990.

The guidelines are divided into two sections. The first section covers principles concerning the minimum guarantees that should be provided in national legislations. These 'principles' echo those put forward by both the Council of Europe Convention and the OECD guidelines except for three additional terms:

a) Principle of non-discrimination - sensitive data, such as racial or ethnic origin, should not be compiled at all.

b) Power to make exceptions – justified only for reasons of national security, public order, public health or morality.

c) Supervision and sanctions – the data protection authority shall offer guarantees of impartiality, independence vis-`a-vis persons or agencies responsible for processing and technical competence.

The second section considers the application of the guidelines to personal data files kept by governmental international organisations. This requires that international organisations designate a particular supervisory authority to oversee their compliance. In addition, it includes a 'humanitarian clause' which states that:

> A derogation from these principles may be specifically provided for when the purpose of the file is the protection of human rights and fundamental freedoms of the individual concerned or humanitarian assistance.

Such a clause is intended to cover such organisations as Amnesty International, which holds large amounts of personal data but would be wary of sending information out to a data subject on the basis of an access request made while the person was still imprisoned. [16]

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16. Ibid, at 332-33

The European Community

Despite interest and involvement in data protection and privacy issues for nearly two decades from both the European Parliament and the Commission, the emergence of a Directive concerning this area only appeared in 1990.

The European Parliament's involvement in data protection issues has primarily been through its Legal Affairs Committee; though the issue has been subject to parliamentary questions and debates for the past 10 years. In 1976, the European Parliament adopted a resolution calling for a Directive to ensure that community citizens enjoy maximum protection against abuses or families of data processing as well to avoid development of conflicting legislation.

In 1977 the Legal Affairs Committee established the Subcommittee on Data Processing and the Rights of the Individual. It produced the 'Bayerl Report' in May 1979. The resultant debate in the European Parliament led to recommendations being made to the Commission and the Council of Ministers concerning the principles that should form the basis of the Community's attitude to data protection. These recommendations called on the European Commission to draft a Directive to complement a common communications system, to harmonise the data protection laws and to secure the privacy of information of individuals in computer files.

A second Parliamentary report, the 'Sieglerschidt' Report, was published in 1982. The report noted that data transmission in general should be placed on a legal footing and not be determined merely by technical reasons. It recommended the establishment of a "European Zone" of members in the EEC and Council of Europe, within which authorization prior to the export of data would not be needed. It also

indicated that initiatives such as a Directive were still necessary. Following the report, a resolution was adopted by the European Parliament on 9th March, 1982 calling for a Directive if the Convention proved inadequate. In July 1990 the European Commission finally published a proposed Directive on data protection. After considerable controversy and political debate at all stages of the legislative process, the general framework Directive on data protection was finally adopted by the European Parliament and Council on 24th October, 1995. The Commission also expressed its desire to protect the rights of individual data subjects and in particular their right to privacy (Article 1(1)). [17]

The United Kingdom Data Protection Act, 1984.

In 1961 Lord Mancroft introduced a Right of Privacy Bill which finally led to the passage of the Data Protection Act, 1984. This first private member's Bill was followed by four others, from both the House of Commons and the Lords, until the Government decided to establish a formal committee of inquiry into this area, precipitated by a parliamentary debate on a private members Bill. In May 1970 a Committee on Privacy was appointed under the chairmanship of Kenneth Younger. Its terms of reference were:

> "To consider whether legislation is needed to give further protection to the individual citizen and to commercial and industrial interests against intrusions into privacy by private persons and organisations, or by companies, and to make recommendations."

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17. *Ibid,* at 333-35

The Committee's purview was limited to the private sector. The final report was presented to Parliament in July 1972.[18] During its establishment the Committee set up a special working party on computers. Its terms of reference were :

> "To examine the alternative means of controlling the handling of information by computers and to recommend those which seem most appropriate having regard to practicability and cost, and also to survey the present scale of computer use and likely evolution, with special reference to the implications for controls."

The working party concluded that: put quite simply, the computer problem as it affects privacy in Great Britain is one of the apprehensions and fears and not so far one of facts and figures.[19] The Committee noted that the main areas of public concern were with universities, bank records and credit agencies. It recommended that an independent body (standing commission) composed of computer experts and lay persons, should be established to monitor growth in the processing of personal information by computer, as well as the use of new technologies and practices.

In response to the Younger Report, a white paper, *Computers and Privacy* (Cmnd 6353), was presented to Parliament by the Home Secretary, Roy Jenkins, in December 1975. In it the Government accepted the need for legislation to protect computer based information. Despite the concerns expressed in the Younger Report with regard to manual records, the Government felt that computers posed a special threat to individual privacy:

The speed of computers, their capacity to store, combine, retrieve

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18. *Report on the Committee on Privacy* (Cmnd. 5012) (London: HMSO, 1972)

19. *Ibid,* at 179.

and transfer data, their flexibility and the low unit cost of the work which they can do have the following practical implications for privacy: (1) they facilitate the maintenance of extensive record systems and the retention of data on those systems; (2) they can make data easily and quickly accessible from many distant points; (3) they make it possible for data to be transferred quickly from one information system to another; (4) they make it possible for data to be combined in ways which might not otherwise be practicable; (5) because the data are stored , processed and often transmitted in a from which is not directly intelligible, few people may know what is in the records, or what is happening to them.

The Government. also issued a second White Paper entitled *Computers: Safeguards for Privacy* (Cmnd 6354) which agreed with the comments made by the Younger Report with regard to the concerns generated by public sector information. The paper considered the extent, nature and proper safeguarding of personal data held on computers in the public sector. The White Paper proposed legislation to cover both public and private sector information systems. The creation of a Data Protection Authority was also proposed, to supervise the legislation and ensure that appropriate safeguards for individual privacy were implemented. In order to provide a detailed structure for the proposed Data Protection Authority the government established a Data Protection Committee, a twelve-person committee, under the chairmanship of Sir Norman Lindop, which reported in 1978. [20]

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20. *See, Ibid,* note 10, 338-39.

The Lindop Report proposed that a number of data protection principles should form the core of the legislation with the Data Protection Authority being responsible for ensuring compliance with those principles. In particular, the Authority would be required to draft codes of practice for various sectors based on consultations with interested parties and associations, which would then become law as statutory instruments. Failure to comply with a code would lead to criminal sanctions. Overall the Lindop Report was concerned to produce a flexible solution which would not act so as to hold back the growing use of computers within both the public and private sector. After the fall of the government in 1979, legislation on data protection was delayed. Finally in 1982 the government issued a White Paper entitled *Data Protection: the Government's Proposal for Legislation* (Cmnd 8539). In the White Paper the idea of a Data Protection Authority was replaced by an individual Registrar of Data Protection. The Data Protection Act, 1984, received the royal assent on 12th July, 1984. The provisions of the Act were phased over a three-year period, with the Act becoming fully operational on 11th November, 1987. The Act was limited to computer data because the government felt that computers posed a unique threat to individual privacy through their ability to store, link and manipulate large amounts of data. [21]

Digital technology and new communication systems have made dramatic changes in our lives. Business transactions are being made with the help of computers. Business community as well as individuals are increasingly using computers to create, transmit and store information in the electronic form instead of traditional paper documents. Information stored in electronic form is cheaper. It is easier to store, retrieve and

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21. *Ibid*, at 340.

speedier to communicate. People are aware of these advantages but they are reluctant to conduct business or conclude transactions in the electronic form due to lack of legal framework. At present many legal provisions recognize paper based records and documents which should bear signatures. Since electronic commerce eliminates the need for paper based transactions, therefore, to facilitate e-commerce, there was a need for legal changes. The United Nations Commission on International Trade Law (UNCITRAL) adopted the Model Law on Electronic Commerce in 1996. India being signatory to it had to revise its laws as per the said Model Law. Keeping in view the above, the Information Technology Act, 2000 was passed by Indian Parliament. [22]

Just like the development of any new area such as a new geographical territory or a new financial instrument or a new invention, the internet is a new area where there are a majority of beneficial users, as well as, a few who like to exploit the others. The Information Technology Act, 2000 performs the dual role of encouraging digital interaction, as well as, booking the 'net criminals'. The Act provides for a legal framework so that information is not denied legal effects, validity or enforceability solely on the ground that it is in electronic form. This is done by legally recognizing electronic records [23] and electronic signatures [24] in government and its agencies, as well as, their use by

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22. Nandan Kamath, *Guide to Information Technology Act, 2000* (2000 edn). 3.

23. "Electronic Record" mean data, record or data generated, image or sound received or sent in an electronic form or microfilm or computer generated microfiche. *See,* Sec 2 (f) and Sec 4.

24. "Digital Signature" means authentication of any electronic record by a subscriber by means of an electronic method or procedure in accordance with the provisions of Sec 3 of the Act. *See,* Sec 2 (p) and Sec 5.

private individuals. Any subscriber may authenticate an electronic record by affixing his digital signature which shall be affected by the use of Asymmetric Crypto System and Hash function which envelop and transform the initial electronic record into another electronic record. Any person by the use of public key [25] of the subscriber can verify the electronic record. The private key [26] and the public key are unique to the subscriber and constitute a functioning key pair. [27] A public and private key pair has no intrinsic association with any person; it is simply a pair of numbers. For commerce on the internet, it is necessary to provide a way to send keys to wide variety of persons, many of whom are not known to the sender, where no relationship of trust has developed between the parties. This is where the Certifying Authorities have a role to play. A Certifying Authority is entrusted with the function of identifying persons applying for signature key certificates, verify their legal capacity, confirm the attribution of a public signature key to an identified physical person by means of a signature key certificate, maintain on-line access to the signature key certificates with the agreement of the signature key owner and take measures so that the confidentiality of a private signature key is guaranteed. The Act further provides that if any person publishes a Digital Signature Certificate or otherwise makes it available to any person with the knowledge that (i) the Certifying Authority listed in the certificate has not issued it; or (ii) the subscriber listed in the certificate has not accepted it; (iii) the certificate has been revoked or suspended unless

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25. "Public Key" means the key of a key pair used to verify a digital signature and listed in the Digital Signature Certificate [Sec 2 (zd)]

26. "Private Key" means the key of a key pair used to create a digital signature. [Sec 2 (zc)]

27. Sec 3.

such publication is for the purpose of verifying a digital signature created prior to such suspension or revocation, he shall be punished with imprisonment upto two years or with fine upto one lakh rupees, or with both.[28] Prior to the aforesaid Act in India and similar such enactments all over the world such actions were difficult to book the hackers [29] due to the definition of 'unlawful entry'. The definition was mostly restricted to physical actions. Since the hacker did not physically break into the office or house of the victim, such persons in the initial years were not convicted. [30]

Computer Network Break-ins

Using software tools installed on a computer in a remote location, hackers can break into computer systems to steal data, plant viruses or Trojan horses, or work mischief of a less serious sort by changing user names or passwords. Network intrusions have been made illegal under the Information Technology Act, 2000, but detection and enforcement are still difficult.

Section 43 is the basic section covering computer break-ins. It states that if any person without permission of the owner or any other person who is in charge of a computer, computer system or computer

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28. Sec 73.

29. Hacker is a term used to define a person who does not possess any authority to gain access to a particular computer but does so by trying different passwords on his own. This either on a trial or error basis or under a specially written software or by intercepting the password (stealing) when used by the authorized user.

30. Nitant P. Trilokekar, *A Practical Guide to Information Technology Act,* November 2000, Millennium Edn. at 51-52

network;

(a) Accesses or secures access to such computer, computer system or computer network;

(b) Downloads, copies or extracts any data, computer database, or information from such computer, computer system or computer network including information or data held or stored in any removable storage medium ;

(c) Introduces or causes to be introduced any computer contaminant or computer virus into any computer etc.;

(d) Damages or causes to be damaged any computer, etc., data, computer database or any other programmes residing in such computer etc.;

(e) Disrupts or causes disruption of any computer etc.;

(f) Denies or causes the denial of access to any person authorized to access any computer, etc. by any means;

(g) Provides any assistance to any person to facilitate access to a computer, etc., in contravention of the provisions of the Act, rules or regulations made thereunder;

(h) Charges the services availed of by any person to the account of another person by tampering with or manipulating any computer etc;

he shall be liable to pay damages by way of compensation not exceeding one crore rupees to the person so affected.

One more sanction under which prosecution could be made is under Section 66 where 'hacking' is defined and punishment is also specified. [31]

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31. Sec 66 (1): whoever with the intent to cause or knowing that he is likely to cause wrongful loss or damage to the public or any person, destroys or deletes or alters any information residing

Industrial Espionage

When any computer is attached to the internet, an unlawful entry can be made by any person in the reverse direction into the computer and thus to any data in it as well into the computers attached to this computer. A hacker can get virtual free hand including viewing of tenders, purchase prices and even inter-office memos. Corporations, like governments, love to spy on the enemy. Networked systems provide new opportunities for this, as hackers-for-hire retrieve information about product development and marketing strategies, rarely leaving behind any evidence of the theft. The difficulty of prosecution here is that the victim has himself visited the site voluntarily and downloaded the software voluntarily. In such a case, there is no effort on the part of the accused of trying to break in the computer resource like that of the hackers. Again the relevant section under the Indian Act is Section 43. Though the perpetrator has not hacked into the system, in such cases he has definitely secured access without permission of the victim at least for that part of the program that searches and retransmits information from his computer. [32]

Copyright Piracy

This is the easiest known abuse of the internet. We have available at the click of a mouse, thousands of written works from all over the world. If some of it is downloaded and the name of the author substituted, the

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in a computer resource or diminishes its value or utility or affects it injuriously by any means commits hacking.

Sec 66 (2):Whoever commits hacking shall be punished with imprisonment upto three years or with fine which may extend upto two lakh rupees or with both.

32. *Ibid*, at 54-55

piracy is committed. Apart from written words, even works of art (drawings / photos) can be easily downloaded. If a person later sells it claiming the work to be his, the copyright infringement is committed. This is a crime that is not easy to police. Copyright problems are the bane of the music industry. Since the piracy is done in a digital format, the end result is sharp and clear enough even for the discerning music lover. The only thing preventing a music lover from downloading a pirated song is his own righteous behaviour and not the quality of the song. The only option left for policing is to remain alert and try to track the sites as the offers are made. But due to the frequent change in site address, the customers will be troubled and eventually not make efforts to locate the relocated site. This way, if the demand dies down, the lack of demand will force out such sites. In this type of crime, typically a published article is used or a CD is taken and digital conversion is uploaded on the internet. The Information Technology Act, 2000 does not specifically cover such crimes. Only the Copyright and Patents Act can cover such cases. [33]

Software Piracy

According to estimates by the US Software Publisher's Association, as much as $7.5 billion of American software may be illegally copied and distributed annually worldwide. These copies work as well as the originals, and sell for significantly less money. Piracy is relatively easy, and only the largest rings of distributors are usually caught. The Information Technology Act, 2000 does not cover such crimes too and only the Copyright and Patents Act can cover such cases. [34]

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33. *Ibid*, at 55-56

34. *Ibid*, at 56

Child Pornography

This is a crime in which images of children in varying stages of dress and performing a variety of sexual acts are acquired. Legally speaking, people who use or provide access to child porn face the same charges whether the images are digital or on a piece of photographic paper. The Information Technology Act, 2000 does not give child pornography any special status. Section 67 may be mentioned in this regard: Section 67 of the Act reads: "Whoever publishes or transmits or causes to be published in the electronic form, any material which is lascivious or appeals to the prurient interest or if its effects is such as to tend to deprave and corrupt persons who are likely; having regard to all relevant circumstances, to read, see or hear the matter contained or embodied in it, shall be punished on first conviction with imprisonment of either description for a term which may extend to two tears and with fine which may extend to twenty five thousand rupees and in the event of a second or subsequent conviction with imprisonment of either description for a term which may extend to five years and also with fine which may extend to fifty thousand rupees."

Mail Bombings

By instructing a computer to repeatedly send electronic mail (E-mail) to a specified person's E-mail address, the cyber-criminal can overwhelm the recipient's personal account and potentially shut down entire systems. The Information Technology Act, 2000 does not specifically cover such crimes. It is dealt with in the Copyright and Patents Act. [35]

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35. *Ibid*, at 57-58

Password Sniffers

Password sniffers are programs that monitor and record the name and password of network users as they log in, jeopardizing security at a site. Whoever installs the sniffer can then impersonate an authorized user and log in to access restricted documents. Under the Information Technology Act, 2000, in the actual act of sniffing, the sniffers are not invading any computer systems. When the sniffer has used the collected password to take free access to a system, the crime gets covered by the Act under Sections 43(a) and 43(g). [36]

Spoofing

Spoofing is the act of humbugging by disguising one computer to electronically "look" like another computer in order to gain access to a system that would normally be restricted. There is no unauthorized entry but merely the identity is duplicated so that the traffic of the data is diverted to the wrong computer. The Information Technology Act, 2000 does not specifically cover such crimes. The Indian Penal Code can be used to initiate proceedings of fraud. [37]

Credit Card Fraud

The US Secret Service believes that half a billion dollars may be lost annually by consumers who have credit card and calling card numbers stolen from on-line databases. Security measures are improving and traditional methods of law enforcement system seem to be sufficient for prosecuting the thieves of such information. The Information Technology

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36. *Ibid*, at 58

37. *Ibid*, at 59.

Act, 2000 does not specifically cover such crimes. Sniffers are the ones who gain access to credit card numbers. These are used on the internet with the other 'identification' information which was gained in the same manner. Signatures are not forged since signatures are not used. [38]

Cyber Squatting

Cyber squatters usually grab a well known trademark which they register as domain name for ulterior purposes. They try and sell this domain name back to the rightful owners for a fancy price. This is done to mislead the internet users to believe that they are rightful owners of the brand. The Act does not specifically cover such crimes. [39]

Misleading Search Words

Some of the search results throw up absolutely unrelated sites. This is more by deliberate action than by accident. The idea is to grab a viewer who may be either an undecided viewer or searching for a competing site. The Act does not specifically cover such crimes. [40]

It may be noted that Section 72 of the Act specifically provides for remedy for breach of confidentiality and privacy. Section 72 states that if any person has secured access to any electronic record, book, register, correspondence, information, document or other material without the consent of the person concerned and discloses the same to any other person, he shall be punished with imprisonment up to two years, or with fine up to one lakh rupees, or with both.

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38. *Ibid*, at 59-60

39. Ibid, at 60.

40. *Ibid*, at 60-61.

CHAPTER-6

PRIVACY AND MATRIMONIAL RIGHTS

A. Right to Marry

B. Right to Procreation of Children

CHAPTER-6

PRIVACY AND MATRIMONIAL RIGHTS

The right to privacy has an important role to play in the area of matrimonial life. In this respect there is need to strike a balance between the individual's decision to marry and procreate children and the permissible limits in the society as an institution. Although the international standard of the right provides for the individual right to marry it has been hard to guarantee this right in any Constitution in view of the social factor, on the one hand, and in view of the other conflicting rights, on the other hand. The right to procreation of children as a part of the right to privacy is another controversial area which cannot be possibly allowed to operate in view of the higher national goal of population-control. The relevant provisions in the Constitution and other laws are discussed here.

A. Right to Marry

Family is the lowest unit of the society and for the existence of society the existence of family is a must. The free consent of the parties is essential for entering into marriage relationship. Article 16 of the Universal Declaration of Human Rights, 1948 recognizes the right to marry.[1] Similarly Article 23 of the International Covenant on Civil and Political Rights, 1966 provides for the protection of family by the society and the state. It also recognises the equality of the rights of the spouses.[2] Further, Article 12 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, 1950 states:

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1. Article 16 of the Universal Declaration of Human Rights provides:

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 along 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.

2. Article 23 of the International Covenant on Civil and Political Rights provides:

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 recognised.

3) No marriage shall be entered into without 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 it its dissolution. In the case of dissolution, provisions shall be made for the necessary protection of any children.

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

Article 17 of the American Convention on the Human Rights, 1969 more elaborately summarizes the right to marry and provides:

(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, in so far as such conditions do not affect the principle of non-indiscrimination established in this Convention.

(3) No marriage shall be entered into without free and full consent of the intending spouses.

(4) The State parties shall take appropriate steps to ensure the equality of rights and the adequate balancing of responsibilities of the spouses as to marriage, during marriage, and in the event of its dissolution. In case of dissolution, provisions shall be made for the necessary protection of any children solely on the basis of their own best interests.

(5) The law shall recognise equal rights for children born out of wedlock and those born in wedlock.

Thus states can neither decline to recognise, in principle, a right to marriage as a formal institution with legal effects, nor can they introduce regulations which make these rights illusory for large groups. Legal restrictions on marriage must be conditioned by special and relevant circumstances. The usual ones, which aim at upholding monogamy, protecting very young persons against their own immaturity and raising

certain obstacles in cases of bad health or blood relationship are, of course, acceptable.[3] Marriage has always been regarded as a central institution in American society. Alongside its strong symbolic meaning to the partners, marriage bestows concrete legal advantages on the couple: tax benefits, standing to recover damages for certain torts committed against the spouses, rights to succession, and insurance benefits, to name a few. Thus, states have recognised the special importance of marriage to society. The American Supreme Court also has affirmed the special status of marriage. In *Grisworld* vs. *Connecticut,* [4] the Court declared that marriage "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." [5] Moreover, in *Loving* vs. *Virginia* [6] and *Zablocki* vs. *Redhail,* [7] the Court firmly established marriage as a "'basic civil right of man' fundamental to our very existence and survival".[8]

The issue presented in *Loving* vs. *Virginia* [9] concerned the validity of the Virginia anti-miscegenation statutes, the central features of which are the absolute prohibition of a "white person" marrying any person other

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3. A. H. Robertson (ed.) *Privacy and the Human Rights*, 1970, 191.

4. 381 U.S. 479 (1965).

5. *Ibid*, at 486; *see* also *Maynard* vs. *Hill*, 125 U.S. 190, 211 (1888) (declaring that marriage is the foundation of the family and of society.).

6. 388 U.S. 1 (1967).

7. 434 U.S. 374 (1978).

8. *Loving*, 388 U.S. at 12 (Quoting *Skinner* vs. *Oklahoma*, 316 U.S. 535, 541 (1942); *see* also, *Zablocki*, 434 U.S. at 373 (stating "the right to marry is of fundamental importance.").

9. *See*, *Ibid* note 6.

than a "white person". A husband, a "white person" and his wife, a "coloured person" within the meanings given to those terms by a Virginia statute, both residents of Virginia, were married in the District of Columbia pursuant to its laws, and shortly thereafter returned to Virginia, where upon their plea of guilty, they were sentenced, in a Virginia state court, to one year in jail for violating Virginia's ban on inter-racial marriages. Their motion to vacate the sentences on the ground of unconstitutionally of these statutes was denied by the trial court. The Virginia Supreme Court of Appeals affirmed. On appeal, the Supreme Court of the United States reversed the conviction. In an opinion by Warren, Ch. J., expressing the view of eight members of the court, it was held that the Virginia statutes violated both, the equal protection and the due process clauses of the Fourteenth Amendment. Stewart, J., concurred in the judgment on the ground that a state law making the criminality of an act depend upon the race of the actor is invalid. The Court observed that the freedom to marry is one of the vital personal rights protected by the due process clause of the Fourteenth Amendment as essential to the orderly pursuit of happiness by free man. Marriage is one of the basic civil rights of man, fundamental to our very existence and survival. The Fourteenth Amendment requires that the freedom of choice to marry, not be restricted by invidious racial discriminations; the freedom to marry, or not marry, a person of another race resides with the individual and cannot be infringed by the state.

In *Zablocki* vs. *Redhail,*[10] under the terms of a Wisconsin statute providing that any resident of Wisconsin having minor issue not in his custody and which he is under an obligation to support by any court order

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10. *See, Ibid* note 7.

or judgment was not to marry, within Wisconsin or elsewhere, without first obtaining a court's permission to marry which permission could not be granted unless the applicant submitted proof of compliance with the support obligation, and in addition, demonstrated that the children covered by the support order are not then, and are not likely thereafter, to become public charges. A Wisconsin resident, who was under a court order to support his illegitimate child was denied a marriage licence by the county clerk of Milwaukee county on the sole ground that he had not obtained a court order granting him permission to marry. Thereafter, the applicant, who would have been unable to satisfy either of the statutory prerequisites for a court order granting permission to marry, brought a civil rights class action in the United States District Court for the Eastern District of Wisconsin, asserting that the Wisconsin statute violated the United States Constitution. The three judge District Court held that the statute was unconstitutional under the equal protection clause of the Fourteenth Amendment.

On direct appeal, the United States Supreme Court affirmed. In an opinion by Marshall, J., joined by Burger, Ch. J., and Brennan, White and Blackmunn, JJ., it was held that the statute violated the Fourteenth Amendment's equal protection clause, since (1) the Wisconsin statute classification significantly interfered with the exercise of the fundamental right to marry, and (2) the classification could not be justified on the basis of a state interest in (a) counselling marriage applicants as to the necessity of fulfilling prior support obligations, (b) protecting the welfare of out-of-custody children, or (c) protecting the ability of marriage applicants to meet support obligations to prior children. The Court observed:

"The freedom to marry is one of the vital personal rights protected by the due process clause of the Fourteenth Amendment as essential to the orderly pursuit of happiness by free men"

It was further observed:

"Marriage is one of the basic civil rights of man, fundamental to our very existence and survival. The right to marry is part of the fundamental right of privacy implicit in the Fourteenth Amendment's due process clause".

Judicial recognition of a fundamental right to marry represented two major constitutional moves. The first was towards protecting intimate adult unions from societal prejudice. Thus, in *Loving*, the Supreme Court held that a state miscegenation law was unconstitutional. The second move was towards removing unreasonable burdens on an individual's decision to marry. Thus, in *Zablocki*, the court invalidated a statute that implicitly tied the ability to marry to a person's wealth. Yet, despite these two moves, which together connote a respect for the importance to the individual of the right to marry, states – the traditional regulations of marriage – universally have denied this right to persons of same sex. Marriage statutes either expressly prohibit the same-sex marriage, or courts interpret them to contain such a prohibition [11].

Principles Informing the Right to Marry

At least three constitutional principles inform the right to marry, and each compels extending the right to same-sex couples. First, the right to marry derives in large part from the right to privacy . In *Cleveland Board of*

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11. Sexual Orientation and the Law, 102 *HLR* 1508, 1605-06.

Education vs. *La Fleur,*[12] the Court declared that it "has long recognised that freedom of personal choice in matters of marriage and family life is one of the liberties protected by the due process clause of the Fourteenth Amendment".[13] Autonomy in this area nurtures personhood and individuality. Choice in intimate relationships is no less critical for homosexuals than for heterosexuals. Thus, in so far as the right to marry derives from the right to privacy, it should extend to heterosexuals and homosexuals alike [14].

A complementary perspective on the right to privacy also supports the protection of same-sex marriages. Freedom of intimate association, a fundamental element of personal liberty, can be understood more as limiting state authority than protecting spheres of personal autonomy. As the court explained in *Roberts* vs. *United States Jaycees,*[15] freedom of association extends to "certain kinds of highly personal relationship" that "act as critical buffers between the individual and the power of the state ."[16] Under this theory, the state simply has no authority to pressure individuals into heterosexual relationships, by giving only those relationships the benefits and protections of the law.[17]

Marriage is also constitutionally protected because it promotes familial and societal stability. This functional view of marriage suggests that any stable and significant relationship between two consenting adults

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12. 414 U.S. 632 (1974)

13. *Ibid*, at 639-40

14. *See*, *Ibid*, note 11 at 1606.

15. 468 U.S. 609 (1984)

16. *Ibid*, at 618-19.

17. *See Ibid*, at 618-19.

should be accorded constitutional protection. Indeed the court's functionalism has moved it to expand rather than limit its definition of family. Thus, in *Moore* vs. *City of East Cleveland* ,[18] the Court invalidated a city ordinance barring extended families from living in a single unit and held that the scope of the privacy right in family matters extends to families comprised of closed relatives who coalesce out of choice, necessity and duty.[19] Protecting family in this sense promotes social stability by protecting the right of the extended family "to come together for mutual sustenance and to maintain or rebuild a secure home life". [20] Similarly, the courts functionalism should move it to expand its definition of marriage. To the extent that marriage is a vehicle for stability, because of the commitment it embodies, gaymen and lesbians in stable, committed relationships should be no less entitled to marry than their heterosexual counterparts. [21]

Just as courts and legislatures addressing this issue should acknowledge the principles that inform the right to marry, they should recognise which principles do not animate the right. The American Constitution does not protect marriage because of its link to procreation, while not directly addressing the issue, the court's holdings in *Griswold* vs. *Connecticut,* [22] *Eisenstadt* vs. *Baird* [23] and *Roe* vs. *Wade,* [24]

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18. 431 U.S. 494 (1977).

19. *Ibid*, at 505.

20. *Ibid.*

21. *See*, *Ibid* note 11 at 1607-08.

22. 381 U.S. 479 (1965).

23. 405 U.S. 438 (1972).

24. 410 U.S. 113 (1972).

clearly suggest that marriage can be understood independently of procreation. The state cannot force married persons to have children, nor can it forbid infertile persons to marry. Even if marriage is protected because it often involves procreation, the argument that gay and lesbian couples should, therefore, be denied the right to marry is without merit. Given the current advances is reproductive technology, in particular, artificial insemination and surrogacy, gaymen and lesbians can easily produce off-springs. Thus, allowing gaymen and lesbians to marry would not be inconsistent with policies favouring procreation.[25]

In sum, same-sex marriages are wholly consistent with the theoretical and policy justifications behind the right to marry. If the court is serious about the interest promoted by protecting the right to marry – self-determination, autonomy from the state, and societal and familial stability – then it should value them for heterosexuals and homosexuals alike and recognise that the fundamental right to marry should extend to gay and lesbian couples. [26]

State Justifications for Prohibiting Same-sex Marriages

Once courts and legislatures acknowledge a constitutionally protected right to marry for same-sex couples, the next inquiry is whether a state's interests in prohibiting same-sex marriage justify a substantial burden on that right. Under *Zablocki*, courts must apply strict scrutiny in testing the validity of the state restrictions that "significantly interfere with decisions to enter into the marital relationship". Two arguments further support applying strict scrutiny to same-sex marriage prohibitions. First, gay and

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25. *See, Ibid* note 11, at 1608.

26. *Ibid.*

lesbians should constitute a suspect class ; and second, same-sex marriage prohibitions arguably burden the associational rights of gaymen and lesbians under the First Amendment. States have argued that prohibiting same-sex marriage encourages procreation and promotes traditional values. For reasons explained above, the procreation argument is flawed. Furthermore, same sex marriage prohibitions, as instruments through which procreation interest is served, are over inclusive because gay and lesbian couples can have children. In addition, they are under-inclusive because many married heterosexual couples cannot, or elect not to, have children. [27]

The second preferred state interest - the invocation of traditional values – is nothing more than appeal to eliminate diversity, an interest explicitly rejected by the American Supreme Court.[28] As Justice Blackmun has noted, the legitimacy of secular legislation depends on whether the state can advance some justification for its law beyond its conformity to religious doctrine.[29] Neither the length of a time a majority has held its convictions, nor the passion with which it defends them, can withdraw legislation from the court's scrutiny.[30] Moreover anti-homosexual biases are nurtured by ill- founded assumption about gay and lesbian relationships. Gaymen and lesbians can and do have stable and long lasting relationships. Furthermore, they can and do create favourable environments in which to raise and educate children. Because the state interest in promoting majoritarian morality is based on "irrational

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27. *Ibid*, at 1609-10.

28. *See ,Moore*, 431 U.S. at 505-06.

29. *Bowers* vs. *Hardwick*, 478 U.S. 186, 211 (1986)

30. *Ibid*, at 210.

prejudice and fear of unconventional activities and lifestyles, it is illegitimate".[31]

Same-sex marriage prohibitions significantly interfere with the exercise of fundamental constitutional rights and do not withstand even a relatively low level of scrutiny. Courts should, therefore, strike them down. At least courts should recognize that the legal rights of gay and lesbian partners should not depend on marital status classifications.[32]

The Supreme Court of India had the occasion to deal with the right to marry as an aspect of the right to privacy in the leading case of *Mr. 'X'* vs. *Hospital 'Z,*[33] where the apex court observed that every youngman, or for that matter, a woman, has a right to marry. But such right cannot be claimed to be absolute. Marriage is the sacred union, legally permissible, of two healthy bodies of opposite sexes. It has to be mental, psychological and physical union. When two souls thus unite, a new soul comes into existence. That is how the life goes on and on, on this planet.[34] Mental and physical health is of prime importance in a marriage, as one of the objects of marriage is the procreation of equally healthy children. That is why in every system of matrimonial law; it has been provided that if a person was found to be suffering from venereal disease in a communicable form, it will be open to the other partner in the marriage to seek divorce.[35] Once the law provides the venereal disease as a ground for divorce to either husband or wife, such a person who was suffering

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31. *See, Ibid* note 11 at 1610-11.

32. *Ibid,* at 1611.

33. AIR 1999 SC 495.

34. *Ibid,* at 502.

35. *Ibid,* at 502.

from that disease, even prior to the marriage cannot be said to have any right to marry so long as he is not fully cured of the disease. If the disease, with which he was suffering, would constitute a valid ground for divorce, was concealed by him and he entered into marital ties with a woman who did not know that the person with whom she was being married was suffering from a virulent venereal disease, that person must be injuncted from entering into marital ties so as to prevent him from spoiling the health, and consequently, the life of an innocent woman.[36] Such a person is under a moral, as also a legal duty, to inform the woman, with whom the marriage is proposed, that he is not physically healthy and that he is suffering from a disease which is likely to be communicated to her. In this situation, the right to marry and duty to inform about his ailment are vested in the same person. It is a right in respect of which a corresponding duty cannot be claimed as against some other person. Such a right for these reasons also, would be an exception to the general rule that every "right has a correlative duty". Moreover, so long as the person is not cured of the communicable venereal disease or impotency, the right to marry cannot be enforced through a court of law and shall be treated to be a "suspended right." [37]

The Rajasthan High Court in *Mukesh Kumar Ajmera* vs. *State of Rajasthan*,[38] observed that right to privacy and liberty are not absolute rights. A law imposing reasonable restrictions upon it for compelling interest of state must be held to be valid. The disqualification provided in Section 19(L) of the Rajasthan state Panchayati Raj statute due to increase

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36. *Ibid*, at 502.

37. *Ibid*, at 502.

38. AIR 1997 Raj 250 ; *see* also *Smt. Saroj Chotiya* vs. *State* ,AIR 1998 Raj 28.

in the number of the children in the family of *Panch* or member to more than two cannot be said to be against the basic human dignity or against the right to life and personal liberty. The restriction imposed in Section 19(L) does not outrage the dignity of the individual. The object of this provision is to control population growth and family planning and such type of interference is necessary in a democratic society in the economic welfare of the country. The Court further observed that what is guaranteed under Article 21 is that no person shall be deprived of his life and personal liberty except according to procedure established by law. Right to marry and right to procreation of third and subsequent child is neither a common law right nor a right recognised or embodied in the Constitution. Thus in view of population growth control measures and family planning measures looking to the limited resources available with the country the right to marry and procreate children cannot be unrestricted. The above restrictions have been laid down with a social purpose, i.e., to fulfill the mandate given in the Directive Principles enshrined in the Constitution.

B. Right to Procreation of Children

Parenthood is an integral part of the life most individuals envision for themselves.[1] Reproduction may be seen as an interest worthy of special consideration: a perspective on human rights which would elevate the protection of procreative capacities to the status of a principle of morality, exceptions to which would require particular justification. Moreover, if reproduction is an interest worthy of special protection, then emphasis could legitimately be placed on assisting reproduction by, for example, the use of modern technology. [2]

It is seen that the history of the debate in this area has depended on the elevation of procreation from a mere capacity which cannot be interfered with, to a kind of right which depends on an element of choice, albeit that such choices may be closely linked with freedom from intervention. It was claimed by the early feminists that there was a right to control reproduction, vested in the individual, which was analogous to a right of privacy, guaranteed constitutionally in some countries. Whilst the major debate in the twentieth century revolved around the morality and legality of compulsory non-procreation, primarily through the device of compulsory sterilization, it was not merely the question of bodily integrity which was at issue. For example bodily integrity can be protected in medical situations by the existence of rules concerning the type of consent

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1. Medical Technology and the Law, 103 *H.L.R.* 1519, 1525.

2. Tom Campbell, David Goldberg, Shiela McLean, Tom Mullen and Basil Blackwell (ed), *Human Rights – From Rhetoric to Reality*, (1986). U.S.A., *See*, Shiela McLean, *The Right to Reproduce*, 99.

which renders medical intervention lawful. If this were all that the debate was about, then it would be possible to argue that the compulsory sterilization of, for example, the mentally ill, who lack legal capacity to consent, would not be unlawful or distasteful. However, although the groups on whom compulsory sterilization was practised were primarily those whose capacity was in doubt, the compulsory removal of their reproductive capacities was nonetheless ultimately condemned. Indeed, even though, it might be thought undesirable that these same groups should reproduce, either because of the potential to pass on genetic problems or because they might be deemed unfit for parenting, the practice of preventing reproduction was nonetheless seen as morally opprobrious.[3]

It is submitted that the compulsion not to reproduce was distasteful partly because of the discriminatory way in which it occurred, but primarily because the freedom to reproduce, if one so desired, was regarded as an aspect of being human which should not be denied. In other words, freedom of choice was vital to the protection of the individual's right. Moreover, the question of reproductive rights also has its roots firmly entrenched in the individual's freedom *not* to reproduce. Just as it is seen as offensive that people should be precluded from having the freedom to choose *to* reproduce, so it would be offensive should people be forced to reproduce.[4] Of course, the existence of a right to reproduce does not also imply a duty to reproduce. Indeed, as an English case put it:

The policy of the State ..... is to provide the widest freedom of

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3. *Ibid*, at 100-101.

4. *Ibid*, at 101.

> choice. It makes available to the public the means of planning their families or planning to have no families. If plans go awry, it provides for the possibility of abortion. *But there is no pressure on couples either to have children or not to have children or to have only a limited number of children.* [5]

Viewed in this way, it can reasonably be assumed that the state interference which contributed to the reference to the human rights in this area was condemned not only because it constituted unlawful use of force against the individual, nor merely because it denied the pleasures of parenthood to those involved, but also because it removed from them the freedom to make choices about whether or not, and when, to procreate. Indeed, interference by states with the freedom *not* to reproduce has itself generated considerable debate in relation, for example, to the legalization of voluntary sterilization, abortion and the free and legal availability of access to birth control. Although the element of choice remains crucial in these areas, the state may ultimately limit its availability by denying it where other important interests compete: as it may with all human rights. Thus, if it is accepted that the core of the right to reproduce is the individual's choice about when or whether to breed, state interference by limiting access to birth control or outlawing voluntary sterilization would amount to the kind of interference which is challengeable as a denial of fundamental rights. [6]

Modern technology generates further problems. Whilst the U.K. Report of the Committee on Human Fertilization and Embryology proposes methods whereby the availability of procedures such as

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5. *Thake* vs. *Maurice* [1984] 2 All.E.R.513, 526 (*emphasis added*).

6. *See, ibid*, note 2 at 101-102.

surrogacy can be limited, it might equally be argued that whereas regulation might be appropriate in order to ensure the safety and efficacy of these procedures, the limitations on commercial contracts and the limited availability of resources in this area of medical practice deny the freedom of choice which is central to the right to reproduce .[7]

Reproduction has no lengthy history of being accorded the status of human right. To use the example of the USA, it can be seen that the law did have an important role in this area in the twentieth century. By precluding access to birth control in the past, the law had always played a major part in controlling the struggle for choice in reproductive practices. However, the role adopted by the law in the twentieth century has been more intrusive in reproductive capacities. Rather than protecting the liberty of the individual, the law, in some states at least, aligned itself with those whose priority was the protection of society from the offspring of certain groups. In short, there was no recognition of a universal right to reproduce. The legal approach in America to compulsion in this area is amply demonstrated by the following comments made by the Court in *Buck* vs. *Bell* [7a]:

> "We have seen more than once that the public welfare may call upon the best citizens for their lives. It would be strange if it could not call upon those who already sap the strength of the state, for these lesser sacrifices, often not felt to be such by those concerned, in order to avoid our being swamped with incompetence. It is better for all the world, if instead of waiting to execute degenerate offspring for crime, or to let them starve for imbecility, society can

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7. *Ibid*, at 102-103.

7a. (1927) 274 U.S. 200.

prevent those who are manifestly unfit from continuing their kind."

Whilst apparently feeling the need to justify compulsion in this case and a number of others, the courts nonetheless did not recognize any universal human right to reproduce. Moreover, by dismissing the impact of the removal of capacities from certain people on the grounds that they may not in any event recognize their worth, the court also minimized the status of reproduction as a human right. For example, awareness that a human right exists is not necessarily central to the existence of the right, although it may predicate its exercise. Indeed, overt doubt was expressed in some cases as to whether or not such a right could be said to exist, or if it did, what was its status in the hierarchy of competing rights. As has been seen, many thousands of people were sterilized on a compulsory basis, the justification being the overriding interest of the state and by implication the low status accorded to freedom of choice in reproductive matters. Those whose breeding was seen likely to produce strong, healthy children, were encouraged to do so in the interests of the state, while other groups had their reproductive capacities removed without their choice. If there was a right to reproduce recognized and protected by the law, then it was selective and not universal. Moreover, it was unusually vulnerable to perceived state interests. [8]

From prohibiting the spread of birth-control information, the law had then moved into a second stage which simultaneously allowed voluntary control (at least for those with the education and social status to seek and obtain it) and permitted the compulsory removal of reproductive capacities in other groups. There is still at this stage no recognition of a

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8. *Ibid*, at 107-108.

fundamental non-discriminatory right to reproduce vested in individuals. As is the case today, people - and, in particular, women - in certain economic positions were permitted freedom of choice in these matters. For example, while at present the developed and the rich countries in the world are free to concentrate on certain aspects of the 'right' to reproduce, and to develop increasingly complex technology to facilitate reproduction, the economic and social situation of many, most notably in developing countries, continues to leave them vulnerable to biological roulette. Control of reproduction (including the right not to reproduce) which is now apparently well-established in most developed countries, remains out of the reach of many. Indeed the pressure to reproduce in certain situations continues to reflect not only a lack of information about how to control procreative capacity, but relate also to, for example, the economic dependence on producing children capable or working for the family income and providing support for old age. [9]

Using the interests of the State as the crucial yardstick, continued interference with the individual's choices about reproductive freedom was justified. In *North Carolina Association for Retarded Children et al.* vs. *State of North Carolina et al.,*[10] the Court reflected that mental retardation was an identifiable category, and that since such persons are in fact different from the general population they may rationally be accorded different treatment for their benefit and the benefit of the public. The compulsory prevention of the birth of a defective child or of a child whose parents could not properly care for it could be justified as reflecting a compelling state interest and therefore as not breaching the

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9. *Ibid*, at 108-109.

10. 420 F. Supp. 451 (1976).

Fourteenth Amendment to the American Constitution. [11]

Whilst debate on the issue of reproductive control has seldom reached the courts in the UK, the issue of non-voluntary sterilization was considered in the case of *Re D (a minor).*[12] In this case, the right of a child not to be sterilized without her own consent was upheld, but this was at least partly influenced by the impression that the child would – on reaching adulthood – not be sufficiently retarded as to be legally incapable of making other major decisions such as getting married. The Court referred in its judgment to a fundamental right to reproduce, but it is unclear what would have been the decision had the evidence shown that the girl in question would not have been able legally to consent to marriage at the appropriate age.[13]

Moreover, it has been suggested that the Court's reference to the existence of a right to reproduce should be taken in tandem with the rights guaranteed under international and European agreements. Article 12 of the European Convention on Human Rights guarantees the right to 'marry and found a family'. The Universal Declaration of Human Rights guarantees in Article 12 that there shall be no 'arbitrary interference with ..... privacy', and in Article 16 that 'Men and women of full age ..... have the right to marry and found a family'. It may be noted that both these declarations do not *per se* make reference to, or provide for, an individual human right to reproduce. Rather they seem to protect only the rights of those who are married (and those who, by implication, are capable of legally entering into this state). The individual as such is not protected by

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11. *See, ibid*, note 2 at 112.

12. [1976] 1 All E. R. 326.

13. *See, ibid*, note 2, at 112-13.

this: merely the nuclear family, which is 'the natural and fundamental group unit of society', is protected. However, whilst such apparently limited protection as is offered by those agreements might seem to deny the validity of any claim that choice and not status is central to right to reproduce, it is submitted that on closer inspection this argument does not work. The terms of the agreement cannot be, and are not, used to justify compulsorily terminating the pregnancies of those who are unmarried, for example. Whilst laws reinforcing incest taboos may make certain sexual relationships illegal, or proscribe marriage, they do not equally permit the forced termination of incestuous pregnancies. In other words, the agreements may encompass the prevention of certain relationships, and perhaps reinforce the value of traditional family groupings, but do not explicitly deny the right to reproduce itself. On a practical level 'even the one-parent family, whether or not that exists through choice, or through misfortune, is given substantial assistance'. The assertion that the right to reproduce is an individual one, dependent on freedom of choice seems therefore to maintain its force.[14] Recent American decisions seem to have made this clear by their interpretation of reproductive freedom as an aspect of the individual right of privacy. The Supreme Court of America first acknowledged reproductive autonomy as a fundamental right in 1942 in *Skinner* vs. *Oklahoma.*[15] Striking down as an equal protection violation a statute permitting sterilization of certain felons, the Court proclaimed the right to reproduce "one of the basic civil rights of man".[16] Twenty-three

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14. *Ibid*, at 113-14.

15. 316 U.S. 535 (1942).

16. *Ibid*, at 541.

years later, in *Griswold* vs. *Connecticut,*[17] which found unconstitutional a statute barring the use of contraceptives by married couples, recognized reproductive autonomy within marriage as a fundamental right protected by the due process clause. The Court reasoned that the statute concerned a relationship lying within the zone of privacy created by several fundamental constitutional guarantees.[18] The Court extended the zone of privacy beyond marriage in *Eisenstadt* vs. *Baird* [19] when it upheld the right of unmarried individuals to use contraceptives. The Court stated:

> "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."[20]

Carey vs. *Population Services International* [21] cemented the right to reproductive autonomy. Striking down a statute preventing the sale and distribution of contraceptives to minors under sixteen, the Court identified the right to reproductive autonomy rather than the existence of a marital relationship or an equal protection violation as the dispositive factor in creating the zone of privacy.[22] Finally, in *Roe* vs. *Wade* [23] the Court found this right of privacy broad enough to encompass a woman's decision

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17. 381 U.S. 479 (1965).

18. *Ibid*, at 485.

19. 405 U.S. 438 (1972).

20. *Ibid*, at 453.

21.431 U.S. 678 (1977).

22. *See, ibid*, at 687.

23. 410 U.S. 113 (1973).

whether or not to terminate her pregnancy.[24] These reproductive autonomy cases have established that the state cannot through statutes or regulations, prevent individuals from deciding whether or when they wish to procreate.

As aforesaid, parenthood is an integral part of the life most individuals envision for themselves. The biological link between parents and children is a fundamental part of this vision. Most people assume that someday they will have their "own" children. Women are raised to see themselves as future child bearers; men, to understand fertility as central to masculinity. As a result of this socialization, most people consider biological parenthood as essential component of a fulfilled life. Not everyone, however, can "naturally" fulfill this expectation. Reports indicate that roughly one-sixth of all people of childbearing age in the United States suffer from infertility. The psychological frustration of the socially constituted desire to produce children devastates many individuals. Determined to fulfill their desperate will to become parents infertile individuals avidly pursue "new reproductive technologies" that purport to hold out the final, tantalizing possibility of biological parenthood. Women are artificially inseminated; men seek surrogate mothers; embryos are fertilized in petri dishes.[25]

Although the desire to achieve biological parenthood is understandable, it must be evaluated against the many other factors involved in and interests affected by the development of reproductive technology. By focusing on women's reproductive capacity, the technology furthers stereotypical notions of women valued primarily as

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24. *Ibid,* at 153.

25. *See, ibid*, note 1, at 1526.

child bearers. The costs of infertility treatment heavily burden would-be parents and society. The technology may also harm children: no one can predict its "imponderable impact" on the children born of it. Moreover, the development of reproductive technology reinforces the value of genetic links and obstructs a reconceptualization of parenthood based on social relationships. As a result infertile individuals may feel pressure to pursue biological parenthood and may turn to noncoital reproduction without first giving serious thought to remaining childless or adopting. Such pressure limits the range of reproductive choices for all people by devaluing adoptive and foster child relationships, harms children whose welfare depends on finding adoptive parents, and promotes institutional biases favouring biological parenthood. [26]

Judicial attitudes towards the new reproductive technologies are symptomatic of the social premium placed on genetic parenthood by the traditional parent couple. Judges have repeatedly responded to parental disputes by choosing solutions that implicitly favour biological over social relationships. Legislation also reinforces this societal bias: intentionally or not, legislatures have created incentives skewed towards biological parenthood and against adoption. Though in accord with existing societal values, such judicial decisions and legislative choices further entrench the limited view of parenthood.[27] In America at least three state courts have heard due process challenges to state regulation of new reproductive technology. These courts have considered the issue of paid surrogate arrangements and agreed that state prohibition of such arrangements does not improperly infringe upon the right of privacy. The courts have also

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26. *Ibid,* at 1527.

27. *Ibid*, at 1527-28.

similarly assessed the extent to which regulation of such novel arrangements as surrogacy has implicated the right of privacy. *In re Baby M*,[28] the New Jersey Supreme Court held that the right of privacy did not extend to child and consequently did not protect procreation through surrogate motherhood contracts. The court specifically held that the right to procreate very simply is the right to have natural children, whether through sexual intercourse or artificial insemination. It is no more than that. In *Doe* vs. *Kelly*,[29] a Michigan Court briefly considered the right of privacy in surrogate arrangements. Though noting that the petitioners were entitled to have the child as planned, the Court objected to the alteration of a child's legal status through monetary payments. It thus found that state prohibition of paid surrogate arrangements did not impermissibly infringe upon any right of privacy. More recently, in *re Adoption of Paul,*[30] a New York Court, citing the reasoning in *Kelley* found no constitutionally protected right to participate in surrogate parenting arrangement which would contravene application of New York's ban on payment for adoption .

The state courts' limited reading of the right to privacy and refusal to extend protection to affirmative exercise of procreative rights is consistent with recent Supreme Court jurisprudence. Although the lower court cases have been limited to analysis of paid surrogacy arrangements, the Supreme Court is likely to view similarly the extent to which the other reproductive technologies implicate the right of privacy. The Court has

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28. 109 N.J. 396, 537 A.2d 1227 (1998).

29. 106 Mich. App. 169, 307 N.W. 2d 438 (1981).

30. No. A 12749/89 (N. Y. Fam. Ct. Jan 22, 1990) (1990 N.Y. Misc. LEXIS 30).

historically hesitated to extend the right of privacy to new relationships and activities. The current court is even more committed to a conservative reading of privacy and liberty interests protected by the Constitution, and it will likely greet with hostility any expensive characterization of the right of privacy. As a result, the Court is unlikely to stretch the due process clause to include the use of the new reproductive technologies.[31]

Of the courts that have considered the right to reproductive autonomy, the *Baby M* court's discussion is the most extensive. The court's delineation of the right, however, is problematic because the court focused on the constitutional status of the means used to achieve parenthood rather than on parenthood itself. Under this methodology, courts must gauge the "naturalness" or "unnaturalness" of various techniques as they develop. The *Baby M* court sanctioned artificial insemination as a means of having "natural children" but refused to sanction surrogate motherhood similarly. This designation, notwithstanding the judicial ease with which it was executed, might not have been so obvious to courts several years ago. Because this technology turns on a temporal understanding of societal norms, as determined by the judiciary alone, results are likely to be both arbitrary and unfair. Individual's choosing a relatively new technology may be denied constitutional protection, even though a later court may choose to extend such protection .[32] The methodology also intimates the court's acceptance

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31. *See, ibid*, note 1, at 1530-31.

32. The Court's emphasis on methodology over result lead to its controversial decisions in *Bowers* vs. *Hardwick*, 478 U.S. 186 (1986), and *Michael H.* vs. *Gerald D.*, 109 S.Ct. 2333(1989). In *Hardwick*, the Court upheld a sodomy statute despite its infringement of the right to intimate association, on the grounds that sodomy was not an intimate association traditionally

of a conception of parenthood that equates "natural" parenthood with "biological" parenthood. [33]

Rather than focus on modes of procreation, courts should protect the procreative right and the underlying values of privacy right jurisprudence. Courts should simply characterize the right to the use of reproductive technology as the right to "parent" a child rather than the right to achieve and maintain a biological tie with a child through any particular means. Courts can then recognise artificial insemination and surrogate motherhood as just two of many paths to parenthood. Under this alternative view of the right to reproductive autonomy, courts can focus on whether state regulations serve legitimate state interests instead of assessing the "naturalness" of new and evolving technologies. This analysis is far less capricious because it does not allow courts to reject protection for novel methods out of hand. Furthermore, the alternative view sets aside the constricting concept of parenthood as a function of biology, or "natural" procreation. Because the protected right is *parenthood,* the establishment of a genetic link in parenthood ceases to be a central concern. By de-emphasizing the importance of biological ties in parent-child relationships, courts could clear a conceptual path for a theory of family that turns on an existence of social relationships between

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accorded constitutional protection. *See* 478 U.S. at 191-94.Similarly, in *Michael H.*, the Court focused on a specific relationship rather than on the underlying right to maintain familial ties in denying protection to the filial relationship of a daughter and a father when the daughter was born while the mother was married to another man. The Court reasoned that their relationship fell outside of the traditional marital family. *See*, 109 S.Ct. at 2341-44 (plurality opinion).

33. *See, Ibid,* note 1, at 1531.

individuals. Judicial de-emphasis of biology may then play a valuable role in a broader societal move toward "re-expressing parenthood" and may enable individual's to make parenting choices free of strong societal pressure.[34]

The Rajasthan High Court in *Mukesh Kumar Ajmera vs. State of Rajasthan* [35] considered the disqualification under section 19(L) of the Rajasthan Panchayati Raj Act, 1994 on account of increase in number of children in family to more than two. The Court observed that the above disqualification is not against basic human dignity or against right to life and personal liberty.[36] The Court further observed that growing population is one of the major problems which India is facing today. Population progresses by geometrical progression while the resources increase only at an arithmetical rate. Bertrand Russell has stated "Population explosion is more dangerous than the hydrogen bomb". The legislative power to deal with the population matter effectively, purposely, meaningfully, objectively and efficiently stem basically from the social policy contained in the Directive Principles of the State Policy enshrined in Articles 39(e), (f), 41, 43, 45 and 47 of the Constitution of India. This social policy is designed to secure social order for the promotion of welfare of the people, adequate means of livelihood, raising the level of nutrition and standard of living, improving public health etc. These objectives can be achieved if the rapidly increasing population is controlled and the rate of population growth is essentially minimized otherwise all these policies will remain in vacuum. Imposing the conditions by providing the disqualification in the

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34. *Ibid*, at 1531-32.

35. AIR 1997 Raj 250.

36. *Ibid*, at 259.

election of the Panchayat Raj Institution is a first step to achieve this goal.[37]

The Court also pointed out that right to privacy and liberty are not absolute rights. A law imposing reasonable restrictions upon it for compelling interest of state must be held to be valid. The restriction imposed in Section 19(L) does not outrage the dignity of the individual. The object of this provision is to control population growth and family planning and such type of interference is necessary in a democratic society in the economic welfare of the country.[38] The Court referred to the judgment of the apex Court in *Air India* vs. *Nargesh Meerza* [39] where considering the danger of over- population and the necessity of family planning programme it was observed that in the first place the provision preventing the third pregnancy with two existing children would be in the larger interest of the health of the air hostesses concerned as also for the good upbringing of the children. Secondly, as indicated above, while dealing with the rule regarding prohibition of marriage within four years, same considerations would apply to a bar of third pregnancy where two children are already there because when the entire world is facing the problem of population explosion, it will not only be desirable but absolutely essential for every country to see that family planning programme is not only whipped up but maintained at sufficient levels so as to meet the danger of over-population which, if not controlled may lead to serious social and economic problems throughout the world. The Court further observed that law is enacted to serve the need of the society. It has

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37. *Ibid*, at 259.

38. *Ibid*, at 260.

39. AIR 1981 SC 1829.

to keep pace with the aspirations and need of the society as well as to take into consideration the changing concept of the value. It is only with an intention to serve the social purpose, namely, to control the problem of population explosion that these provisions have been enacted. There is no invasion of any constitutional right of any person. There is, also, no invasion on the part of Legislature into the marital right of a person concerned or a right of procreation of children .[40]

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40. *Ibid,* at 260 ; *see,*also, *Smt. Saroj Chotiya* vs. *State,*AIR 1998 Raj 28.

CHAPTER-7

PRIVACY AND INVIOLABILITY OF PERSON

A. Permissible and Imposed Abortion

B. Dignity, Modesty and Self-Respect

C. Sexual Autonomy

CHAPTER-7

PRIVACY AND INVIOLABILITY OF PERSON

The application of the right to privacy has been larger in the area of abortion and sexual autonomy than in any other sphere. A large number of petitions cropped up before the American Supreme Court since the development of the right to abortion. Although the right has been attacked on many grounds including public interest, the right to privacy as part of the right to privacy of women still prevails. The important judicial decisions in this respect and other developments in the United States are discussed below. The problem and the prospect of dignity, modesty and self respect are different in the Indian context. The sexual autonomy to the extent permissible under our laws has been regarded as part of the right to privacy. At the same time it has not been allowed to operate in the area wherein it interferes with other's rights or public policy. The relevant provisions and the judicial decisions have been discussed in the following pages.

A. Permissible and Imposed Abortion

The landmark case on the question of permissible and imposed abortion which came before the Supreme Court of the United States was *Jane Roe* vs. *Henry Wade*.[1] In this case an unmarried pregnant woman who wished to terminate her pregnancy by abortion instituted an action in the United States District Court for the Northern District of Texas, seeking a declaratory judgment that the Texas criminal abortion statutes, which prohibited abortions except with respect to those procured or attempted by medical advice for the purpose of saving the life of the mother, were unconstitutional. She also sought an injunction against their continued enforcement. A physician, who alleged that he had been previously arrested for violations of the Texas statutes and that two prosecutions were presently pending against him in the state courts, sought and was granted permission to intervene. A separate action, similar to that filed by the unmarried pregnant woman, was filed by a married childless couple, who alleged that should the wife become pregnant at some future date, they would wish to terminate the pregnancy by abortion. The two actions were consolidated and heard together by a three judge District Court, which held that (1) the unmarried pregnant woman and the physician had standing to sue, (2) the married, childless couple's complaint should be dismissed because they lack standing to sue, (3) abstention was not warranted with respect. to a declaratory judgment, (4) the right to choose whether to have children was protected by the Ninth Amendment, through the

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1. 35 L. Ed. 2d 147.

Fourteenth Amendment, (5) the Texas criminal abortion statutes were void on their face, because they were unconstitutionally vague and overbroad, and (6) the application for injunctive relief should be denied under the abstention doctrine. All parties took protective appeals to the United States Court of Appeals for the Fifth Circuit, which court ordered the appeals held in abeyance pending decision on the appeal taken by all parties to the United States Supreme Court, from the District Courts denial of injunctive relief.

On appeal, the United States Supreme Court reversed the District Courts judgment as to the physician-intervenor, dismissing his complaint in intervention, but affirmed the District Courts judgment in all other respects. In an opinion by Blackmun, J., expressing the views of seven members of the Court, it was held that (1) the pregnant, unmarried woman had standing to sue, (2) the complaint of the childless married couple presented no actual justifiable case or controversy and had been properly dismissed, (3) states have legitimate interest in seeing to it that abortions are performed under circumstances that insure maximum safety for the patient, (4) the right to privacy encompasses a woman's decision whether or not to terminate her pregnancy, (5) a woman's right to terminate her pregnancy is not absolute, and may to some extent be limited by the state's legitimate interests in safeguarding the woman's health, in maintaining proper medical standards, and in protecting potential human life, (6) the unborn are not included within the definition of a "person" as used in the Fourteenth Amendment, (7) prior to the end of the first trimester of pregnancy, the state may not interfere with or regulate an attending physician's decision, reached in consultation with his patient, that the patient's pregnancy should be terminated, (8) from and after the end of

the first trimester and until the point in time when the foetus becomes viable the state may regulate the abortion procedure only to the extent that such regulation relates to the preservation and protection of maternal health, (9) from and after the point in time when the foetus becomes viable the state may prohibit abortions altogether, except those necessary to preserve the life or health of the mother, and (10) the state may proscribe the performance of all abortions except those performed by physicians currently licensed by the state; and expressing the view of six members of the court, it was held that the physician's complaint should be dismissed and he should be remitted to his remedies in the pending state court proceedings.

The court noticed that the restrictive criminal abortion statutes in effect in a majority of states then were of relatively recent vintage. Those laws generally proscribing abortion or its attempt any time during pregnancy except when necessary to preserve the pregnant woman's life, are not of ancient or even of common law origin. Instead they derive from statutory changes effected, for the most part, in the latter half of the 19th century. Evidence and materials regarding the following aspects were before the Court and considered:

(1) *Ancient attitudes:* The court was told that at the time of the Persian Empire abortifacients were known and that criminal abortions were severely punished. On a survey of the law prevailing in Greece, Rome, etc., it was found that ancient religion did not bar abortion.

(2) *The Hippocratic Oath:* Though the oath varies somewhat according to the particular translation, the content is clear : "I will give no deadly medicine to anyone if asked, nor suggest any such counsel; and in like

manner I will not give to a woman a pessary to produce abortion". The Oath became the nucleus of all medical ethics and was applauded as the embodiment of truth, though it was not the expression of an absolute standard of medical conduct.

(3) *The Common Law:* It was undisputed that at common law abortion performed before "quickening" - the first recognizable movement of the foetus in uterus, appearing usually from the 16th to the 18th week of pregnancy - was not an indictable offence. Although Christian theology and the cannon law came to fix the point of animation at 40 days for a male and 80 days for a female, a view that persisted until the 19th century, there was otherwise little agreement about the precise time of formation or animation. Whether abortion of a quick foetus was a felony at common law, or even a lesser crime, was still disputed. Bracton writing early in the 13th century thought it homicide. But the later and predominant view, following the great common law scholars, has been that it was, at most, a lesser offence. In a frequently cited passage, Coke took the position that abortion of a woman "quick with childe" is "a great misprision, and no murder". Blackstone followed, saying that abortion after quickening had once been considered manslaughter (though not murder).

(4) *The English Statutory Law:* England's first criminal abortion statute, Lord Ellenborough's Act, came in 1803. It made abortion of a quick foetus a capital crime; but it provided lesser penalties for the felony of abortion before quickening and thus preserved the quickening distinction. A seemingly notable development in the English law was

the case of *Rex* vs. *Bourne* [2] which held that it was for the prosecution to prove beyond reasonable doubt that the operation was not performed in good faith for the purpose only of preserving the life of the mother. The surgeon had not got to wait until the patient was in peril of immediate death, but it was his duty to perform the operation if, on reasonable grounds and with adequate knowledge, he was of opinion that the probable consequence of the continuance of the pregnancy would be to make the patient a physical and mental wreck.

Thereafter, British Parliament enacted the new abortion law, the Abortion Act of 1967 which provides for abortion when a physician makes the determination: (a) that the continuance of the pregnancy would involve risk to the life of the pregnant woman or of injury to the physical or mental health of the pregnant woman, or any existing children of her family, greater than if the pregnancy was terminated, or (b) that there is a substantial risk that if the child were born it would suffer from such physical or mental abnormalities as to be seriously handicapped. The above Act also provides that, in making this determination, account may be taken of the pregnant woman's actual or reasonably foreseeable environment. It also permits a physician, without the concurrence of others, where he is of the good faith opinion that the abortion is immediately necessary to save the life or to prevent grave permanent injury to the physical or mental health of the pregnant woman.

(5) *The American Law:* In the United States the law in effect in all but a few states until mid-19th century was the pre-existing English common

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2. [1983] 3 All E. R. 615.

law. By 1840, when Texas had received the common law, only eight American states had statutes dealing with abortion. It was not until after the war between the states that legislation began generally to replace the common law. Most of those initial statutes dealt severely with abortion after quickening but were lenient with it before quickening. Most punished attempts equally with completed abortions. At least with respect to the early stage of pregnancy, and very possibly without such a limitation, the opportunity to make this choice was present in that country well into the 19th century. Even later, the law continued for sometime to treat less punitively an abortion procured in early pregnancy.

(6) *The position of the American Medical Association (AMA):* The anti-abortion mood prevalent in that country in the late 19th century was shared by the medical profession. Indeed, the attitude of the profession may have played a significant role in the enactment of stringent criminal abortion legislation during that period. The AMA Committee on Criminal Abortion offered and the Association adopted, resolutions protesting against unwarrantable destruction of human life, calling upon state legislatures to revise their abortion laws, and requesting the co-operation of state medical societies in pressing the subject.

Except for periodic condemnation of the criminal abortionist, no further formal AMA action took place until 1967, when the Committee on Human Reproduction urged the adoption of a stated policy of opposition to induced abortion, except when there is documented medical evidence of a threat to the health or life of the mother, or that the child may be born with incapacitating physical deformity or mental deficiency, or that a pregnancy resulting from legally established

statutory forcible rape or incest may constitute a threat to the mental or physical health of the patient and two other physicians chosen because of their recognized professional competence have examined the patient and have concurred in writing, and the procedure is performed in a hospital accredited by the Joint Commission on Accreditation of Hospitals. On June 25th 1970, the House of Delegates adopted preambles and most of the resolutions proposed by the reference committee.

(7) *The position of the American Public Health Association*: In October 1970, the Executive Board of the APHA adopted Standards for Abortion Services. These were five in number. It was recommended that abortions in the second trimester and early abortions in the presence of existing medical complications be performed in hospitals as inpatient procedures. For pregnancies in the first trimester, abortion in the hospital with or without overnight stay is probably the safest practice. An abortion in an extramural facility, however, is an acceptable alternative provided arrangements exist in advance to admit patients promptly if unforeseen complications develop. Standards for an abortion facility were listed. It was said that at present abortions should be performed by physicians or osteopaths who are licensed to practice and who have adequate training.

(8) *The position of the American Bar Association:* At its meeting in February 1972 the ABA House of Delegates approved, with 17 opposing votes, the Uniform Abortion Act that had been drafted and approved the preceding August by the Conference of Commissioners on Uniform State Laws. Three reasons have been advanced to explain

historically the enactment of criminal abortion laws in the 19th century and to justify their continued existence: (i) that these laws were the product of a Victorian social concern to discourage illicit sexual conduct, though Texas, did not advance this justification in the present case; (ii) that when most criminal abortion laws were first enacted, the procedure was a hazardous one for the woman, so that a state's real concern in enacting a criminal abortion law was to protect the pregnant woman, that is, to restrain her from submitting to a procedure that placed her life in serious jeopardy, though modern medical techniques have altered this situation; and (iii) that the state's interest – some phrase it in terms of duty - in protecting prenatal life, on the theory that a new human life is present from the moment of conception. [3]

The Court then considered the constitutional basis of the problem The US Constitution (as also the Constitution of India) does not explicitly mention any right of privacy. In a line of decisions the US Supreme Court had recognized that a right of personal privacy, or a guarantee of certain areas or zones of privacy, does exist under the Constitution. These decisions make it clear that 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 made it clear that the right has some extension to activities relating to marriage, procreation contraception, family relationships, and child rearing and education. This right of privacy, the Court observed, whether it be founded in the Fourteenth Amendment's concept of personal liberty and restrictions upon state action, as the Court felt it was, or in the Ninth Amendment's reservation of rights to

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3. *See, Ibid*, note 1, at 164-175.

the people, was 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 is apparent. Specific and direct harm medically diagnosable even in early pregnancy may be involved. Maternity or additional offspring may force upon the woman a distressful life and future. Psychological harm may be imminent. Mental and physical health may be taxed by child care. There is also the distress, for all concerned, associated with the unwanted child, and there is the problem of bringing a child into a family already unable, psychologically and otherwise, to care for it. In other cases, as in this one, the additional difficulties and continuing stigma of unwed motherhood may be involved. All these are factors the woman and her responsible physician will consider in consultation. [4]

On the basis of elements such as these, appellant and some amici argued that the woman's right is absolute and that she is entitled to terminate her pregnancy at whatever time, in whatever way, and for whatever reason she alone chooses. With this the court did not agree. The courts decision recognizing a right of privacy also acknowledged that some State regulation in areas protected by that right was appropriate. A state may properly assert important interests in safeguarding health, in maintaining medical standards, and in protecting potential life. At some point in pregnancy, these respective interests become sufficiently compelling to sustain regulation of the factors that govern the abortion decision. The Court held that the

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4. S. James Vincent, Unwanted Pregnancy and the Unremitted Row Over 'Roe vs. Wade' 32 *JILI* (1990) 246, at251.

privacy right involved, therefore could not be said to be absolute. The court had refused to recognize an unlimited right of this kind in the past, e.g., vaccination and sterilization and, therefore, concluded that the right of personal privacy included the abortion decision, but that this right was not unqualified and must be considered against important state interests in regulation.

The court summarized the conclusion as follows:

(i) A state criminal abortion statute of the current Texas type, that excepts from criminality only a life-saving procedure on behalf of the mother, without regard to pregnancy stage and without recognition of the other interests involved is violative of the Due Process Clause of the Fourteenth Amendment.

(ii) For the stage prior to approximately the end of the first trimester, the abortion decision and its effectuation must be left to the medical judgment of the pregnant woman's attending physician.

(iii) For the stage subsequent to approximately the end of the first trimester, the state, in promoting its interests in the health of the mother, may, if it chooses regulate the abortion procedure in ways that are reasonably related to maternal health.

(iv) For the stage subsequent to viability, the State in promoting its interest in the potentiality of human life may, if it chooses, regulate, and even proscribe abortion except where it is necessary, in appropriate medical judgment, for the preservation of the life or health of the mother.

(v) The State may define the term "physician" to mean only a physician currently licensed by the State and may proscribe any

abortion by a person who is not a physician as so defined. [5]

The above majority opinion was delivered by Justice Blackmun in which six others concurred. However, the minority opinion of Justices White and Rehnquist dissented, saying that nothing in the language or history of the Constitution supported the court's judgment, and that the court had simply fashioned and announced a new constitutional right for pregnant mothers and, with scarcely any reason or authority for its action, had invested that right with sufficient substance to override most existing state abortion statutes, whereas the issue of abortion should actually have been left with the people and the political processes they have devised to govern their affairs. [6]

To tell a woman that she must bear a child conceived as a consequence of voluntary intercourse may possibly be a little less intrusive, but it is still a major interference with freedom to shape one's own life. Here, perhaps, no precedent is needed to show that the values of Western civilization. But no liberty is absolute; and the question remains whether the invasion is justified by a "compelling public purpose". Sometimes, it is asserted that the unborn child is a "person"; that its life begins on conception; and protecting that person's life is a compelling public purpose. The argument depends upon the meaning of "person" and of "life". It is important not to tuck the conclusion into the definition. However, in *Roe* vs. *Wade* the Court found it unnecessary to decide when "life" begins. The precedents available in *Roe* did nothing to affirm or deny that the purpose in protecting "near-life" or "becoming life" is "compelling" when measured against the

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5. *See, ibid*, note 1, at 183 – 84.

6. *See, ibid*, note 4, at 253.

value of the woman's freedom of choice. [7]

A question arises as to where the judges should look for the law. The ideal of law would require them to search outside themselves in both history and contemporary life for expressions of the basic ideals and values of the American people. The first stage of such a search in the abortion case would lead one to the conclusion that the basic values of American society have not given the woman an absolute right to freedom of choice ranking above the interests served by anti-abortion laws. Sustaining the claim would override the laws of all fifty states some more than a century old, others quite recently liberalized and re-enacted. Sustaining the claim would also run counter to the moral code prevailing in the previous century. To quote Archibald Cox:

> Any law requiring a woman who has conceived to carry the unborn to birth denies her equal liberty and opportunity with men. Could conscientious and open-minded Judges conclude with equal assurance either that the anti-abortion laws were all too easily enacted, without compelling or even important justification, because of indifference to the resulting inequalities of liberty and opportunity? Or did the nearly unanimous acceptance of such laws for many decades rest to an important degree on the belief that they helped to preserve the special sanctity of human life (however broadly or narrowly the word be defined)? If the latter, can we as Judges say with assurance that modern science and medicine have undermined the old reasons for confidently believing that the prohibition does help to preserve the special sanctity of a human life? The right answer is

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7. *Ibid.*, at 254.

far from obvious. My own judgment is that the people's belief in anti-abortion laws rested for the most part on belief in their role in preserving our respect for the special sanctity of human life, and that the people ranked that interest as compelling. And even though science and technology have dispelled much of the mystery of creation and birth, just as they have clouded the line and protracted the time between life and death, I cannot say that prohibiting abortions can no longer be said to serve the compelling public purpose once underlying the anti-abortion laws. [8]

Again in *Planned Parenthood of Missouri* vs. *Danforth* [9] in litigation instituted in the United States District Court for the Eastern District of Missouri, a challenge was made to the validity, under the United States Constitution, of a Missouri statute setting forth conditions and limitations on abortions and establishing criminal offences for non-compliance with the various conditions and limitations. The specific provisions of the statute attacked were (1) a viability definition provision defining "viability", for purposes of a provision that no abortion not necessary to preserve the life or health of the mother should be performed unless the attending physician would certify with reasonable medical certainty that the foetus is not viable, as that stage of foetal development when the life of the unborn child may be continued indefinitely outside the womb by natural or artificial life-supportive systems, (2) a pregnant woman's consent provision requiring that a woman prior to submitting to an abortion during the

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8. *See,* Archibald Cox, *The Court and the Constitution,* Indian ed., Asian Books 333 (1989).

9. 49 L.Ed. 2d 788.

first 12 weeds of pregnancy must certify in writing her consent to the procedure and that her consent is informed, freely given, and not the result of coercion, (3) a spousal consent provision, requiring the prior written consent of the spouse of a woman seeking an abortion during the first 12 weeks of pregnancy, unless the abortion were certified by a physician to be necessary for preservation of the mother's life, (4) a parental consent provision, requiring, with respect to the first 12 weeks of pregnancy whereas the pregnant woman is unmarried and under 18 years of age, the written consent of a parent or person in *loco parentis* unless the abortion were certified by a physician as necessary for preservation of the mother's life, (5) a saline amniocentesis prohibition provision, describing the saline amniocentesis technique of abortion as one whereby the amniotic fluid is withdrawn and a saline or other fluid is inserted into the amniotic sac, and prohibiting such method of abortion after the first 12 weeks of pregnancy, (6) record keeping and reporting provisions, imposing requirements upon health facilities and physicians concerned with abortions irrespective of the pregnancy stage, and (7) a standard of care provision, declaring, in its first sentence, that no person who performs or induces an abortion shall fail to exercise that degree of professional skill, care and diligence to preserve the life and health of the foetus which such person would be required to exercise in order to preserve the life and health of any foetus intended to be born and not aborted, and providing, in its second sentence, that any physician or person assisting in an abortion who failed to take such measures to encourage or sustain the life of the child would be deemed guilty of manslaughter if the child's death resulted. The District Court upheld the constitutionality of the several challenged

provisions of the statute with the exception of the first sentence of the standard of care provision.

On direct appeals from the decision of the three-judge District Court, the United States Supreme Court affirmed in part, reversed in part, and remanded. In an opinion by Blackmun, J., it was held: expressing the unanimous view of the Court, that (1) the viability definition provision, which reflected the fact that the determination of viability, varying with each pregnancy, was a matter for the judgment of the responsible attending physician, was not unconstitutional, since it did not circumvent the permissible limitations on state regulation of abortions (2) the pregnant woman's consent provision was not unconstitutional since the state could validly require a pregnant woman's prior written consent for an abortion to assure awareness of the abortion decision and its significance, and (3) the recordkeeping and reporting provisions were not constitutionally offensive in themselves and imposed no legally significant impact or consequence on the abortion decision or on the physician-patient relationship; expressing the view of six members of the court, that (4) the spousal consent provision was unconstitutional, since the state, being unable to regulate or proscribe abortions during the first stage of pregnancy when a physician and patient make such decision, could not delegate authority to any particular person, even a pregnant woman's spouse to prevent abortion during the first stage of pregnancy, (5) the first sentence of the standard of care provision was unconstitutional, since it impermissively required a physician to preserve the life and health of a foetus, whatever the stage of the pregnancy, such unconstitutional first sentence not being severable from the second sentence establishing manslaughter for violation of the standard of care, notwithstanding that

the Missouri statute contained a severability provision; and expressing the view of five members of the court, that (6) the parental consent provision was unconstitutional, since the state did not have the constitutional authority to give a third party an absolute and possibly arbitrary , veto over the decision of a physician and his patient to terminate the patient's pregnancy, regardless of the reason for withholding the consent and (7) the saline amniocentesis prohibition provision was unconstitutional since it failed as a reasonable regulation for the protection of maternal health, being instead an unreasonable or arbitrary regulation designed to inhibit the vast majority of abortions after the first 12 weeds of pregnancy.

In 1992, in *Planned Parenthood vs. Casey* [10] the Pennsylvania abortion legislation were held valid, except for the spousal-notice provisions, under the due process clause of the Fourteenth Amendment. In this case, the Pennsylvania abortion statute was challenged. In 1988 and 1989, the said statute was amended to provide that (1) a woman seeking a divorce is required to give her informed consent prior to the abortion procedure and to be provided, at least 24 hours before the abortion is performed, with certain information concerning her decision whether to undergo an abortion, (2) a minor seeking an abortion is required to obtain the informed consent of one of her parents or guardians, but has available a judicial bypass option if the minor does not wish to or cannot obtain such consent, (3) unless certain exceptions apply, a married woman seeking an abortion is required to sign a statement indicating that she has notified her husband of her intended abortion, (4) compliance with the foregoing requirements is exempted

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10. 120 L Ed. 2d 674.

in the event of a "medical emergency", which term is defined in another statutory provision as a pregnant woman's medical condition that on the basis of a physicians good-faith clinical judgment, necessitates an immediate abortion to avert the woman's death or to avert a serious risk of substantial and irreversible impairment of a major bodily function, and (5) facilities providing abortion services are subject to certain reporting and record-keeping requirements, which do not include the disclosure of the identities of women who have undergone abortions, but which include a requirement of reporting of a married woman's failure to provide notice to her husband of her intended abortion. Before any of these provisions took effect five abortion clinics and one physician representing himself as well as a class of physicians who provided abortion services brought suit seeking declaratory and injunctive relief on the basis of the allegation that each provision was unconstitutional on its face. The United States District Court for the Eastern District of Pennsylvania, after entering a preliminary injunction against enforcement of the provisions held that all the provisions were unconstitutional and entered a permanent injunction against the state's enforcement of the provisions. The US Court of Appeals for the Third Circuit affirmed in part and reversed in part, upholding all the provisions except for the spousal-notice requirement.

On *certiorari*, the United States Supreme Court affirmed in part, reversed in part, and remanded. A majority of the members of the Court joined portions of an opinion holding that (1) the statutory provision defining a medical emergency did not violate the due process clause, (2) the provision requiring spousal notice violated the due process clause, and (3) the essential holding of *Roe vs. Wade* which

held that (a) a woman has the right to choose to have an abortion before her foetus is viable and to obtain an abortion without undue interference from a state, (b) a state has the power to restrict abortions after foetal viability, if the state law imposing such a restriction contains exceptions for pregnancies which endanger a woman's life or health, and (c) a state has legitimate interest from the outset of a pregnancy in protecting the health of the pregnant woman and the life of the foetus that may become a child - should be retained and reaffirmed. Although unable to agree on an opinion as to the other statutory provisions, (1) seven members of the court (O' Connor, Kennedy, and Souter, JJ., Rehnquist, Ch. J., and White, Scalia and Thomas, JJ.) agreed that the provisions requiring informed consent, the 24-hour waiting period, and parental consent did not violate the due process clause, (2) eight members (O' Connor, Kennedy, Souter and Stevens, JJ., Rehnquist, Ch. J., and White, Scalia and Thomas, JJ.) agreed that the provisions requiring record keeping and reporting at least, except for the provision requiring reporting of failure to provide spousal notice, did not violate the due process clause, and (3) five members (O' Connor, Kennedy, Souter, Stevens, and Blackmun, JJ.) agreed that the provision requiring reporting of failure to provide spousal notice violated the due process clause.

A related issue is the issue of foetal wrongs and foetal abuse. In October, 1986, Pamela Roe Stewart was charged with child abuse for willfully omitting to furnish medical services. The "child" she allegedly abused was the foetus she was carrying in her womb. According to police reports, Ms. Stewart abused the foetus by disregarding a physician's advice to discontinue amphetamine use during her pregnancy, to abstain from sexual intercourse because her placenta had

detached, and to seek immediate medical attention if she began to hemorrhage. Her child was born with brain damage and died less than two months later as a result of prenatal injury. [11]

On February 26, 1987, a California state judge dismissed the charge against Ms. Stewart reasoning that the statute under which she had been charged was intended not to penalize women for conduct during pregnancy but rather to enforce child support arrangements: the inclusion of foetuses within the statute's definition of "child" was aimed only at husbands who abandon their pregnant wives and refuse to pay their own share of pregnancy expenses. Consequently, the court in *People* vs. *Stewart* did not reach the issue of the constitutionality of criminalizing maternal prenatal conduct, nor has any other court. No state has yet passed a statute that explicitly criminalizes "foetal abuse", but several commentators have called for such laws, and the *Stewart* case reflects pressure for movement in this direction. The constitutionality of foetal abuse legislation, like that of abortion law, requires consideration of both maternal rights and state interests. *Roe vs. Wade* [12] and later abortion cases offer a good starting point for a discussion of foetal abuse, because they provide an analytical framework for resolving the conflicts between these rights and interests. The abortion cases make clear that a statute that infringes upon a constitutionally protected privacy right must undergo strict scrutiny; it will be upheld only if it is narrowly tailored to achieve a

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11. *See,* Maternal Rights and Fetal Wrongs: The Case Against the Criminalization of "Fetal Abuse", 101 *HLR* 994 (1988).

12. 110 U.S. 113 (1973).

compelling state interest. [13]

Roe provides the framework in which to analyze conflicts between maternal privacy rights and the state interest in protecting foetuses, weighing the two to determine when the latter becomes compelling. One need not, however, assume that *Roe's* result – the trimester system – provides a solution to the problems raised by foetal abuse legislation. The state and maternal interests implicated by foetal abuse statutes are different from those in the abortion context. The maternal privacy right at issue in foetal abuse cases focuses not on a woman's decision whether to continue her pregnancy – the abortion question – but rather on her decisions regarding how to conduct her life during her pregnancy. In the foetal abuse context, the state's interest are not preservation of the mother's health and the protection of potential life against intentional termination, but the enhancement of the born child's quality of life through protection of the foetus from reckless or negligent harm. *Roe's* holding that the state's interest in the birth of a foetus does not become compelling during the first two trimesters of pregnancy does not rule out the existence of a compelling state interest in ensuring that foetuses that will be carried to term are born unharmed. States may have a greater interest in preventing future suffering of those who will be born than in ensuring that any particular foetus will be born. Conversely, *Roe's* holding that states are allowed to protect foetuses from abortion in the third trimester does not necessarily imply that states have an equally compelling interest in protecting foetuses from all other harms during that period. Furthermore, R*oe's* trimester framework may be simply illogical in the context of foetal abuse

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13. *See, Ibid,* note 11, at 995- 996.

because it permits increasing regulation as pregnancy progresses, whereas foetuses are most vulnerable in the earliest stages of pregnancy. Despite these important differences, however, the US Supreme Court's abortion jurisprudence provides an appropriate approach to the task of balancing maternal rights against state interest. [14]

Foetal abuse statutes should be subject to strict scrutiny because they infringe upon a woman's constitutionally protected right to privacy. These statutes implicate two different aspects of the right to privacy; the right to make decisions that affect the spheres of family, marriage, and procreation and the right to control one's own body.

The Right to Reproductive and Familial Privacy

Statutes designed to prevent foetal harm could affect a wide range of personal decisions. Almost any decision that pregnant woman makes with respect to her own body – decisions regarding eating, drinking, taking medication, or not seeing a doctor – may injure a foetus and thus take on legal significance if foetal abuse is criminalized. The *Stewart* case itself provides a telling example, the police report cited taking drugs, refraining from seeing a doctor, and engaging in sexual intercourse as reasons for Ms. Stewart's arrest – unwise activities but arguably not analytically distinct from drinking wine, missing a doctor's appointment, or carrying heavy groceries. Regulation of such activities implicates the right to privacy in reproductive decision making first articulated in *Griswold* vs. *Connecticut.* [15] Writing for the

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14. *Ibid,* at 997-98.

15. 381 U.S. 479 (1965).

Court, Justice Douglas stated that various constitutional guarantees – those located in the language and "penumbras" of the First Third, Fourth, Fifth and Ninth Amendments – create "zones of privacy". The *Griswold* Court, in striking down a Connecticut law that prohibited married couples from using contraceptive devices, recognized that certain intimate decisions observe constitutional protection. Later cases built on *Griswold* to reinforce an understanding of this privacy right as the right to make decisions within the familial and procreative spheres, free from state interference. In *Eisenstadt* vs. *Baird,* [16] for example, the Court struck down a statutory prohibition against distributing contraceptives to unmarried persons, declaring the right of privacy to be "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". *Roe* itself strengthened this understanding of privacy as a right to make personal decisions: *Roe* represents less a decision in favour of abortion than a decision in favour of leaving the matter, however it might come out in particular cases, to women rather than to legislative majorities. [17]

This recognition that privacy rights encompass the decision whether to begin a pregnancy or carry it to term is part of a larger body of law that recognizes decisional privacy rights in matters related to the family. For example, the Court has upheld the right of persons to determine the family group with which they live and the right of parents to decide how their children will be educated. In general, courts have accorded much weight to the parental right to raise a child in the

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16. 405 U.S. 438 (1972).

17. *See, ibid,* note 11, at 998-99

way the parent sees fit - a right bounded only by child abuse statutes directed at the most egregious conduct. Although the Court restricted the expansion of privacy rights in personal sexual decision making in *Bowers* vs. *Hardwick,*[18] which upheld the criminalization of homosexual sodomy, the court explicitly preserved "family, marriage and procreation" as spheres in which decisional rights of privacy exist. Furthermore Justice White's majority opinion in *Hardwick* identified "rights qualifying for heightened judicial protection" as those "deeply rooted in this Nation's history and tradition" [19]

This right of the individual to control procreative and familial decisions should also apply to the maternal decisions potentially infringed upon by foetal abuse legislation. The decisions in question here - what to eat or drink, when to go to the doctor, whether to have sex and so forth - have both procreative and nonprocreative aspects. Indeed, regulating such decisions for all people – for example, banning all alcohol consumption – has no procreative significance. If states limit consumption only for pregnant woman, however, they would be regulating the procreative aspect of the decision whether to drink. Such laws seek to control the incidents of procreation, infringing on a woman's power to make decisions about how she will live her life during her pregnancy. [20]

The two rationales behind protecting the decision whether to procreate apply equally to the decisions about the manner in which one procreates. First, in both contexts, women are more affected than the

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18. 106 S.Ct. 2814 (1986).

19. *See, ibid,* note 11, at 999 -1000.

20. *Ibid,* at 1000.

state by the consequences of the decision. Second, women have better knowledge of their individual circumstances and thus are in a better position than the state to decide how to act. Although the state may at times have more scientific information, women know more about their particular life circumstances - for example, whether they can afford extensive parental care. Of course, in the foetal abuse context unlike the abortion context, women may not have full information with which to make their decisions - as a practical matter they may *not* know that they are harming their foetuses. Although the state can and should educate women about the effects on foetuses of certain activities during pregnancy, constitutional protection of procreative decisions should not hinge on whether women have such information. The state's belief that a woman has made an ill-considered choice does not entitle it to criminalize her procreative decision. The abortion cases show that the Constitution puts a value on personal autonomy the state cannot abridge this autonomy simply because it finds that approach easier than education. [21]

The Right of Bodily Integrity

Another privacy right implicated by foetal abuse statutes is the mother's right of bodily integrity. Courts and commentators have recognized, in a variety of contexts, that an individual has a right to make decisions that affect her body. As in the procreative choice area, cases delineating the right to bodily integrity can be viewed as protecting an aspect of an individual's life traditionally respected as

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21. *Ibid*, at 1000-01.

private the right to control over one's own physical self. Foetal abuse statutes wrest from competent pregnant women the power to make decisions that affect their own bodies, placing it instead in the hands of the state. [22]

The recognition that government regulation of maternal or foetal relations infringes upon maternal privacy rights represents only one side of the constitutional balance. Under strict scrutiny, courts must also determine whether and when the state interests that lie on the other side become compelling. Among the broad state interests that could be offered to justify criminal foetal abuse statutes are the protection of foetuses from the risk of birth defect caused by prenatal injury. These state interests could be legitimate either as an outgrowth of the states power to protect potential life, discussed in *Roe*, or as an extension of its ability to protect born persons. The fact that a born child may suffer as a result of foetal abuse adds to the state's interest. As a logical matter, the strength of the state interest in preventing any particular maternal activity depends on the likelihood that the activity will lead to harm and the significance of such harm to the foetus or the born child [23]. Given the strength of the maternal privacy interests at stake, foetal abuse statutes should be subject to strict scrutiny. In order to pass constitutional muster under this standard, the harm that the statute prevents must be likely to occur and severe in nature, and the statute must utilize the least restrictive means of preventing such harm [24].

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22. *Ibid*, at 1001-02.

23. *Ibid*, at 1003.

24. *Ibid*, at 1005.

Broad foetal abuse statutes that are patterned on child abuse statutes those that make neglecting or abusing a foetus a crime without specifying what constitutes neglect or abuse- would be unconstitutional for two reasons. First, such statutes would be void for vagueness because they do not define the specific forms of abuse that constitute crimes and thus would not give notice to mothers of the scope of their duties towards their foetuses. Second, such statutes could be interpreted to require a degree of infringement on maternal rights not justified by the extent of foetal protection they offer; thus they would be narrowly tailored enough to survive strict scrutiny. For example, a child abuse statute that included foetuses could be interpreted to punish the taking of drugs that are essential to the mother's health but harmful to the foetus. This result stands in opposition to the standard articulated in the abortion cases – that concerns for maternal health constitutionally outweigh concerns for foetal health throughout pregnancy. [25]

When applied to narrower statutes targeted at specific conduct, strict scrutiny yields less obvious results. Statutes banning specific types of conduct by pregnant women would not fail for vagueness as would the broad statutes. Under a strict scrutiny standard, the state has the burden of establishing that the banned maternal activity bears a clear relation to significant foetal harm and that banning the activity is not an over encompassing means of protecting the foetus from that harm. The following factors should bear on how much weight courts should assign to both the maternal and state interests. First, because the rights of both procreative privacy and bodily integrity are justified by

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25. *Ibid*, at 1006.

reference to tradition, the maternal right to decide should be given more weight when the decision is one traditionally accorded to the individual. Second, the state's interest becomes stronger as the likelihood increases that the banned activity will lead to harm as the harm becomes more significant .[26]

It might seem that foetal abuse statutes that cover only a narrow range of activities resulting in harm to fetuses will always survive strict scrutiny. A court might view the woman's "fundamental right" as trivial - a right to drink alcohol or to eat junk food. Throughout the inquiry, however, it is essential to understand that more is a stake – the state in these situations is seeking to regulate the procreative aspects of particular decisions and thus the procreative process. In considering the constitutionality of foetal rights legislation, therefore, courts should assign greater weight to maternal decisional rights than they might at first perceive as appropriate, in order to protect the woman's right of procreative autonomy.[27]

Even if some foetal abuse statutes could pass constitutional muster, legislatures and courts should consider the negative social effects of such statutes and the possibility that there may be a better approach to solving the problem of foetal abuse. In advocating protection of foetal rights through the imposition of criminal liability, commentators focus on the problem of the injured foetus. They discuss the harms that mothers can cause to foetuses, as well as the constitutionality of the proposed maternal liability. What these commentators ignore, however, are the detrimental effects of their

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26. *Ibid,* at 1006-07.

27. *Ibid,* at 1007.

solution and the promising prospects of other solutions. They mistake the conclusion that criminal liability is *a* solution for the conclusion that it is *the* solution [28].

Imposing criminal liability on pregnant women for conduct harmful to their foetuses is detrimental in two ways: it discourages maternal-foetal bonding and it encourages a system in which women are deprived of control over their own bodies and pregnancies. The recognition of opposing foetal rights emphasizes the antagonistic dimension of maternal-foetal relations. In essence, foetal abuse legislation forces women to see their foetuses as things that curtail their legal rights. Whereas abortion law allows women to define their relationship with their foetuses; foetal abuse laws can threaten pregnant women by making pregnancy a legally precarious situation, and thus can foster hostility between mother and child. A second negative effect of criminalizing foetal abuse is the removal of women's control of their own lives in favour of control by doctors. This effect is destructive because it reinforces an understanding of women as persons deserving less than full autonomy criminalizing foetal abuse also emphasizes an instrumentalist view of pregnancy that sees women as "foetal containers" rather than thinking and feeling beings. In the final analysis, these negative effects may not be sufficient to preclude enacting foetal abuse statutes if such statutes are truly effective and if no better approach is available. However, there are alternatives that do not create negative conceptions of women and that avoid infringing on maternal privacy rights. These are government expansion of educational efforts aimed at pregnant women and promotion of the

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28. *Ibid,* at 1009.

availability and quality of prenatal care.[29] This approach encourages bonding between mother and child as a way of curbing foetal harm. Moreover, whereas criminal liability would foster an inferior conception of women, increased funding of and education about prenatal care would represent a social commitment to benefiting women and would emphasize the humanistic aspects of pregnancy .[30]

As far as the situation in India is concerned, we find that the Medical Termination of Pregnancy Act,1971 liberalized the law relating to abortion to a great extent and achieved the stage of present US position by the enactment in 1971. The MTP Rules as revised by the Government of India in 1975 have made it competent for a woman to have her unwanted pregnancy terminated under the Act, on the certificates of a physician. She can avail herself of this legal protection in any Government hospital or a government-approved Medical termination of pregnancy centre by filling a form under her signature, in case her pregnancy posed a threat to her physical or mental health. Under the rules, only the consent of pregnant woman is mandatory. The consent of her guardian is required only in those cases where she is a minor or a lunatic. The Rules also enjoin a duty upon the doctor performing the operation of observing complete secrecy and confidentiality to his patient, even the husband of the patient is not to be informed of the fact of abortion .[31] The MTP Act, along with the revised Rules was, therefore, envisaged as a milestone in the modernization of the Indian society through the instrumentality of law.

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29. *Ibid*, at 1009-10.

30. *Ibid*, at 1012.

31. The Medical Termination of Pregnancy Act, 1971 (Act No. 34 of 1971)

Sec 3 : "*when pregnancies may be terminated by registered medical practitioners*" -

(1) Notwithstanding anything containing in the Indian Penal Code (45 of 1860), a registered medical practitioner shall not be guilty of any offence under that code or under any other law for the time being in force, if any pregnancy is terminated by him in accordance with the provisions of this Act.

(2) Subject to the provisions of sub-section (4), pregnancy may be terminated by a registered medical practitioner –

(a) Where the length of the pregnancy does not exceed twelve weeks, if such medical practitioner is, or

(b) Where the length of the pregnancy exceeds twelve weeks but does not exceed twenty weeks, if not less than two medical practitioner are, of opinion, formed in good faith, that –

(i) the continuance of the pregnancy would involve a risk to the life of the pregnant woman or of grave injury to her physical or mental heath; or

(ii) there is substantial risk that if the children were born, it would suffer from such physical or mental abnormalities as to be seriously handicapped.

Explanation I – where any pregnancy is alleged by the pregnant woman to have been caused by rape, the anguish caused by such pregnancy shall be presumed to constitute a grave injury to the mental health of the pregnant woman.

Explanation II – where any pregnancy occurs as c result of failure of any device or method used by any married woman or her husband for the purpose of limiting the number of children, the anguish caused by such unwanted pregnancy may be presumed to constitute a grave injury to the mental health of the pregnant woman.

(3) In determining whether the continuance of a pregnancy would involve such risk of injury to the health as is mentioned in sub-sec (2) account may be taken of the pregnant woman's actual or reasonably foreseeable environment.

(4) (a) No pregnancy of a woman, who has not attained the age of eighteen years, or, who having attained the age of eighteen years, is a lunatic, shall be terminated except with the consent in writing of her guardian.

(b) Save as otherwise provided in cl (a) no pregnancy shall be terminated except with the consent of the pregnant woman.

Sec 4 : "*place where pregnancy may be terminated*" -

No termination of pregnancy shall be made in accordance with this Act at any place other than –

(a) a hospital established or maintained by Government, or

(b) a place for the time being approved for the purpose of this Act by Government.

Sec 5 : "*Sections 3 and 4 when not to apply*"-

(1) the provisions of sec 4 and so much of the provisions of sub-sec (2) of sec 3 as relate to the length of pregnancy to the termination of a pregnancy by a registered medical practitioner, shall not apply to the termination of a pregnancy by a registered medical practitioner in a case where he is of opinion, formed in any good faith, that the termination of such pregnancy is immediately necessary to save the life of the pregnant woman.

(2) Notwithstanding anything contained in the Indian Penal Code (45 of 1860), the termination of a pregnancy by a person who is not a registered medical practitioner shall be an offence punishable under that code, and that code shall, to this extent, stand modified.

Explanation – For the purposes of this section, so much of the provisions of cl. (d) of sec 2 as relate to the possession, by a registered medical practitioner, of experience or training in gynaecology and obstetrics shall not apply.

B. Dignity, Modesty and Self-respect

Privacy is the guarantor of individual moral autonomy, a basic value in a democratic system of government. Privacy can be defined as the right to control one's information system and one's physical being. The latter right has been traditionally conceived in American society as the right to be secure against unauthorised entries and seizures. Both rights are closely related to the principle of respect for persons. Both must be reinterpreted in the light of changing technological and social contexts. Privacy is violated whenever a person's moral autonomy or self-image are impinged upon, even without affecting his conduct. Altering an individual's self-perception against his will offends human dignity. If we are able to regulate a person's conduct or keep it under surveillance, we are, in fact curtailing his responsibility as a moral agent making free choice. This limits the option open to persons regarding relationship with others, their physical mobility and their own self-perception. Privacy, the control of one's own person and of the extension of one's person in the form of information, is at the basis of man's claim for human dignity.[1]

Clinton Rossiter has said 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 pressures of modern society. Privacy according to him, seeks to erect an unbreakable wall of dignity and reserve against the entire world. The free man is the private man, who keeps some of his thoughts and

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1. S. K. Sharma, *Privacy Law-A Comparative Study*, Atlantic publishers and Distributors, New Delhi, 1994, at 211.

judgments entirely to himself, who feels no overriding compulsion to share everything of value with others, not even with those he loves and trusts.[2] Some of the Justices of the Supreme Court of America, who have spoken about it, have attempted to define privacy as an aspect of the pursuit of happiness.[3] Pursuit of happiness required certain amount of liberty to do as one likes. Privacy requires a private enclave as it were where an individual is at liberty to do what he wants. An intrusion on privacy threatens that liberty just as assault, battery or imprisonment. It is really an offence "to the reasonable sense of personal dignity". There can perhaps be no objection in regarding intrusion into 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 in damages. The injury is to the spiritual element in our otherwise mundane composition.[4]

One may desire to live a life of seclusion, another life of publicity. Still another life of publicity concerning certain matters and privacy as respects other matters of life. Neither an individual nor the public has a right arbitrarily to take away from him that liberty. It is difficult to find words adequate to express the mental conditions resulting from the pain on the violation of the right of privacy. We speak without sufficient discrimination of it as distress, anguish, anxiety, mental illness, indignity and mental suffering. The common interest involved in all these conditions resulting from violation of privacy is spiritual in character

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2. *Ibid*, at 211-212.

3. *See*, *Poe* vs. *Ullman*, 367 U.S. 497; *Goldman* vs. *United States*, 316 U.S. 129; *Public Utility Commissioner* vs. *Pollock*, 343 U.S. 451.

4. *See*, *Ibid*, note 1, at 212.

rather than any interest in reputation or property.[5]

What distinguishes the invasion of privacy as a tort from other torts which involves insult to human dignity and individuality is merely the means used to perpetuate the wrong. The woman who is petted indecently suffers the same indignity as the woman whose birth pangs are overseen. The woman whose photograph is exhibited for advertisement is degraded and demeaned as surely as the woman who is kept aboard in a pleasure yacht against her will. This is an example of intrusion upon personal intimacy and using techniques of publicity to make a public spectacle of an otherwise private life.[6]

The right of privacy attempts to preserve individuality by placing sanction upon outrageous or unreasonable violations of conditions for its sustenance. This then is the social value to be served by the law of privacy. It is served not only in the law of tort but in other areas. Protection of privacy is the central purpose of the privilege against self-incrimination in Article 20(3).[7] The privilege reflects the respect which we accord to the inviolability of human personality and the right of each individual to a private zone where he may have his private life. It reflects the private inner sanctions of the individual feeling and thought and prescribes state intrusion to extract self condemnation.[8]

We are all of necessity subject to some minimum amount of scrutiny by our neighbours as a condition of civilized life in a society.

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5. *Ibid.*

6. *Ibid*, at 212-13.

7. Art. 20(3) of the Constitution of India reads "No person accused of any offence shall be compelled to be a witness against himself.".

8. *Ibid*, at 213.

Man has always relished the knowledge of the intimate details of lives and doings of others especially his neighbours. The most obvious and conflicting value is the public interest in news and information which much of necessity run counter to the individual interest of privacy. Even if the nature of the interest involved in privacy is understood it will not resolve this conflict of values, except perhaps to make it clear that one of the values to be weighed is that interest. All tort privacy cases involve the same interest in preserving human dignity and individuality will have important consequences for this development of tort.[9]

Society has a strong interest in protecting the sanctity, the dignity and the integrity of the human person. John Stuart Mill once wrote:

> "There is a circle around every individual human being, which no government, be it that of one of a few, or of the many, ought to be permitted to overstep; there is a part of the life of every person who has come to years of discretion, within which the individuality of that person ought to reign uncontrolled either by any other individual or by the public collectively. That there is, or ought to be, some space in human existence thus entrenched around and sacred from authoritative intrusion, no one who professes the smallest regard to human freedom or dignity will call in question ."[10]

The American judiciary has generally acknowledged that there is such a societal interest – an "*inherent right* of *bodily integrity*". Furthermore the privacy of the individual from assault upon his person by

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9. *Ibid*, at 213-14.

10. J. S. Mill, *Principles of Political Economy* (1848) Vol. II, at 560,561.

officers of the state is a right so basic and fundamental that it is binding upon the states under the due process clause of the Fourteenth Amendment .[11]

One of the most important societal interests is that of safeguarding and protecting the public health and it can be expected that this interest will prevail over most other interests. Perhaps a majority of our people feel that society has a legitimate interest in preventing the propagation of congenital mental defectives. Such interest, according to the US Supreme Court justifies a state in exposing such defectives to compulsory sterilization.[12] In *Skinner* vs. *Oklahoma* [13] the US Supreme Court has referred to the right to enter into the marriage relation and procreate children as 'fundamental" among "the basic civil rights of man" truly a basic liberty. In areas involving interests less precious than the sanctity of the person, the court has demanded that the state explore reasonable alternatives that will as adequately protect the interest of society without infringing upon the person. Here reasonable alternatives seem to be available to a state concerned with the perpetuation of congenital mental defectives – these unfortunate individuals can be institutionalized and segregated from members of the other sex without prohibitive costs to society.

The United States Supreme Court has invalidated a state sterilization Act which authorized the sterilization of those convicted for the third time of larceny but made no similar assault upon the bodies of those for the third time convicted of such crimes as embezzlement. The

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11. *Rochin* vs. *California*, (1952) 342 U.S. 165.

12. *See*, *Buck* vs. *Bell*, (1927) 274 U.S. 200.

13. (1942) 316 U.S. 535.

Supreme Court stated that when the law lays an unequal hand on those who have committed intrinsically the same quality of offence and sterilizes one and not the other, it has made as invidious a discrimination as if it had selected a particular race or nationality for oppressive treatment.[14] Under equal protection of the laws any resemblance of unreasonable differentiation in sterilization statutes or their practice will invalidate the same. Sterilization cannot be imposed upon a person as punishment for crime; courts rather generally agreeing that such is cruel and unusual punishment .[15]

Society has a legitimate interest in suppressing crime and detecting criminals. However, it is established by an abundance of authority that the officers of the state cannot degrade the individual in their search for proof of crime and the identity of criminals. The Court in *Breithaupt* vs. *Abram* [16] observed:

> "As against the right of an individual that his person be held inviolable, even against so light an intrusion as is involved in applying a blood test of the kind to which millions of Americans submit as a matter of course nearly everyday must be set the interests of the society in the scientific determination of intoxicant, one of the great causes of the mortal hazards of the road."

The Supreme Court in *Schemerber* vs. *California*[17] noted that the overriding function of the Fourth Amendment is to protect personal

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14. *Ibid.*

15. *See, Davis* vs. *Berry*, (1914) D. C. Iowa, 216 F. 413 ; *Mickle* vs. *Henrichs*, (1918) D. C. Nev. 262 F. 687.

16. (1957) 352 U.S. 432.

17. (1966) 384 U.S. 757.

privacy and dignity against unwarranted intrusion by the state. It added:

> "The integrity of an individual's person is a cherished value of our society. That we today hold that the Constitution does not forbid the state's minor intrusions into an individual's body under stringently limited conditions in no way indicates that it permits more substantial intrusions, or intrusions under other conditions".

Justice Fortran in his dissenting opinion said:

> "As prosecutor, the state has no right to commit any kind of violence upon the person, or to utilize the results of such a tort, and the extraction of blood, over protest is an act of violence".

Society has a worthy interest in attempting to prevent anti-social conduct, and it is sometimes thought that physically punishing those convicted of crime deters them and others from wayward behaviour. The Eight Amendment in the case of the Federal Government and the Fourteenth in the case of the States, prevent the imposition of cruel and unusual punishment even upon those convicted in the most heinous offences. Another way of protecting society's interest in the dignity of the individual notwithstanding his anti-social behaviour is the free exercise of religion guarantee of the First Amendment. [18]

Article 21 of the Constitution of India prevents the state from treating the human life as that of any other animal. It is now well established by the decisions of the Supreme Court that the word "life" occurring in Article 21 has spiritual significance as the word "life" occurring in the famous Fifth and Fourteenth Amendments to the American Constitution. In those constitutional provisions of the American

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18. *See*, *Ibid* note 1, at 216.

Constitution "life" is interpreted by Justice Field in *Munn* vs. *Illinois* [19] to mean and signify more than a person's right to lead animal or vegetative existence. He said, "By the term life as here used something more is meant than mere animal existence". The contrast drawn by Field, J., emphasizing the difference between existence of a free willing human and that of an unfree animal was accepted by Indian Supreme Court in *Kharak Singh* vs. *State of UP* [20] and next in *Govind* vs. *State of MP* [21] transforming Article 21 of Indian Constitution into a charter for civilization.

In *Govind* vs. *State of MP* [22], Mathew, J., taking the lead given by the minority judgment of Subba Rao, J., in *Kharak Singh's* case and adverting to the American legal and philosophical literature on right to privacy and to the American cases reported in *Griswold* vs. *Connecticut* [23] and *Jane Roe* vs. *Henry Wade* [24] ruled that Article 21 of Indian Constitution embraces the right to privacy and human dignity. The centerpiece of the judgment in *Govind's* case is to hold that right to privacy is part of our Constitution and to stress its constitutional importance and to call for its protection. The learned judge then examined the content of the right to privacy and observed that "any right to privacy must encompass and protect the personal intimacies of the home, the family, marriage, motherhood, procreation and child rearing". The learned

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19. (1877) 24 L Ed. 17.

20. AIR 1963 SC 1295.

21. AIR 1975 SC 1379.

22. *Ibid.*

23. (1965) 14 L Ed. 510.

24. (1973) 35 L Ed. 2d. 147.

judge stressed the primordial importance of the right to privacy for human happiness and directed the courts not to reject the privacy-dignity claims brought before them except where the countervailing state interests are shown to have overweighing importance meaning thereby 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. *Govind's* case thus firmly laid it down that Article 21 protects the right to privacy and promotes the individual dignity mentioned in the Preamble to our Constitution.

The question of individual dignity and the right to privacy came up before the Andhra Pradesh High Court in *T. Sareetha* vs. *T. Venkata Subbaiah.* [25] In this case the petition was filed against an order of the subordinate judge under Section 9 of the Hindu Marriage Act for restitution of conjugal rights mainly on the ground that the said judge had no jurisdiction to pass the order. The claim of the petitioner was rejected by the High Court. In the mean time, she filed another petition challenging the constitutional validity of Section 9 on the ground that it was violative of right to 'life, personal liberty and human dignity and decency' under Article 21 of the Constitution.The Court held that the right to privacy was a fundamental right under Article 21. Justice Chaudhary extended the protection of privacy to inhuman and degrading treatment of forcible sexual cohabitation. The Court struck down Section 9 of the Hindu Marriage Act. In the opinion of the Court the matrimonial remedy

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25. AIR 1983 AP 356.

provided therein during a moment's duration would not only alter the entire life style but also would destroy the same. This situation was treated as a violation of individual dignity and right to privacy. It is, however, submitted that in view of American experiences it may create complex problem in relation to family law in India. [26]

The right to privacy was extended to protect the modesty and self-respect of woman in *Neera Mathur* vs. *Life Insurance Corporation of India.* [27] In this case the petitioner, a lady candidate, applied for the post of Assistant in the Life Insurance Corporation of India. She was successful in written test and interview. She was asked to fill a declaration form. On the same day, she was also examined by a lady doctor and found medically fit for the job. The doctor who examined the petitioner was in the approved panel of the Corporation. The petitioner was directed to undergo a short term training programme. After successful completion of the training she was appointed as Assistant in the Corporation. She was put on probation for a period of six months. Meanwhile she took leave for about three months and delivered a full term baby. Subsequently she was discharged from service. There was nothing on record to indicate that the petitioner's work during the period of probation was not satisfactory. It was alleged that she gave a false declaration regarding the last menstruation period with a view to suppress her pregnancy at the stage of entering the service. The Court held that the petitioner could not be

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26. *See*, Sampath, B.N., 19 ASIL (1983) 295, in *Saroj Rani* vs. *Sudarshan Kumar*, AIR 1984 SC 1562, the court rightly rejected the claim of right to privacy in relation to family law,*see* also, Dwivedi, B.P., *The Changing Dimension of Personal Liberty in India*, 1998, Wadhwa & Co.,Allahabad.

27. AIR 1992 SC 392.

blamed for giving false declaration when she was medically examined by the doctor who was in the panel approved by the Corporation and was found medically fit to join the post. It said that the petitioner would therefore be entitled to reinstatement.

The court also observed that the real mischief though unintended is about the nature of the declaration required from a lady candidate. The particulars to be furnished under clauses in the declaration are indeed embarrassing if not humiliating. The modesty and self respect may perhaps preclude the disclosure of such personal problems like whether her menstrual period is regular or painless, the number of conceptions taken place; how many have gone full term etc. The corporation would do well to delete such columns in the declaration.

In a landmark judgment in *Vishaka* vs. *State of Rajasthan,*[28] the Supreme Court has laid down exhaustive guidelines to prevent sexual harassment of working woman. The court held that it is the duty of the employer or other responsible person in work places or other institutions whether public or private, to prevent sexual harassment of working woman.

The judgment of the court was delivered by J. S. Verma, C. J., on behalf of Sujata V. Manohar and B. N. Kirpal, JJ., on a writ petition filed by Vishaka, a non-governmental organization working for gender equality by way of Public Interest Litigation, seeking enforcement of fundamental rights of working woman under Article 14, 19 and 21 of the Constitution. In holding so the Court relied on international conventions and norms which are significant in interpretation of guarantee of gender equality, right to work with human dignity in Articles 14, 15, 19(1) (a) and 21 of

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28. AIR 1997 SC 3011

the Constitution and the safeguards against sexual harassment implicit therein. The immediate cause for filing the petition was alleged brutal gang rape of a social worker in Rajasthan. The Supreme Court, in absence of enacted law to provide for effective enforcement of basic human rights of gender equality and guarantee against sexual harassment, laid down the following guidelines.

(1) All employers or other responsible persons in charge of workplaces whether in the public or private sector, should take appropriate steps to prevent sexual harassment without prejudice to the generality of his obligation; he should take the following steps.

a) Express prohibition of sexual harassment which include physical favours; sexually coloured remarks; showing pornographic or any other unwelcome physical, verbal or non-verbal conduct of sexual nature should be noticed, published and circulated in appropriate ways.

b) The rule or regulation of Government and Public sector bodies relating to conduct and discipline should include rules prohibiting sexual harassment and provide for appropriate penalties in such rules against the offender.

c) As regards private employers, steps should be taken to include the aforesaid prohibitions in the standing orders under the Industrial Employment (Standing Orders) Act, 1946.

d) Appropriate work conditions should be provided in respect of work, leisure, health and hygiene to further ensure that there is no hostile environment towards woman at workplace and no woman should have reasonable grounds to believe that she is disadvantaged in connection with her employment.

(2) Where such conduct amounts to specific offences under the Indian Penal Code or under any other law, the employer shall initiate appropriate

action in accordance with law by making a complaint with the appropriate authority.

(3) The victims of sexual harassment should have the option to seek transfer of perpetrator or their own transfer.

Verma, C.J., said, "The fundamental right to carry on any occupation, trade or profession depends on the availability of a "safe" working environment. Right to life means life with dignity. The primary responsibility for ensuring such safety and dignity through suitable legislation, and the creation of a mechanism for its enforcement, is of the legislature and the executive. When instances of sexual harassment resulting in violation of fundamental rights of woman workers under Articles 14, 19 and 21 are brought before for redress under Article 32, an effective redressal requires that some guidelines should be laid down for the protection of these rights to fill the legislative vacuum". This decision of the court will go a long way in increasing a sense of security in the minds of working woman that their honour and dignity will be safe in their place of work.

Apparel Export Promotion Council vs. *A. K. Chopra* [29] is the first case in which the Supreme Court applied the law laid down in *Vishaka* vs. *State of Rajasthan* and upheld the dismissal from service of a superior officer who was found guilty of sexual harassment of a subordinate female employee at the place of work on the ground that it violated her fundamental right guaranteed by Article 21 of the Constitution. The respondent was working as a private secretary to the Chairman of the Apparel Export Promotion Council, a private company. He tried to molest a woman employee of the Council who was working as a clerk-

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29. AIR 1999 SC 625.

cum typist. She was not trained to take dictations. The respondent, however, insisted that she go with him to the business centre at Taj Palace Hotel for taking dictation from the chairman and type out the matter. Under the pressure of the respondent, she went to Taj Hotel to take the dictation from the chairman. While she was waiting for the Director in the room, the respondent tried to sit too close to her and despite her objection did not give up his objectionable behaviour. After taking the dictation, the respondent told her to type it at the Business Centre of the Taj Hotel which was located in the Basement of the Hotel. He volunteered to show her the Business Centre and taking advantage of the isolated place again tried to sit close to her and touch her despite her objections. The Chairman corrected the draft matter and asked her to retype it. The respondent again went with her to the Business Centre and repeated his overtures. According to her, the respondent had tried to molest her physically in the lift but she saved herself by pressing the emergency buttons. She orally narrated the whole incident to the Director and submitted a written complaint also. The respondent was suspended and a charge sheet was served on him. The respondent denied the allegations and said that they were imaginary and motivated. He contended that he merely attempted to molest her but had not actually molested her. The inquiry officer found the charges levelled against the respondent to be proved. The Disciplinary Authority agreed with the report of inquiry officer and imposed the punishment of removing him from service.

The Supreme Court held that the act of the respondent was wholly against moral sanctions, decency and was offensive to female subordinate's modesty and undoubtedly amounted to sexual harassment and hence the punishment of dismissal from service imposed on him was commensurate with the gravity of his objectionable behaviour and valid.

The Court held that in a case involving charge of sexual harassment or attempt to sexually molest, the courts are required to examine broader probabilities of the case and not swayed by significant discrepancies or narrow technicalities or dictionary meaning of the expression "molestation" or "physical assault". They must examine the entire material to determine the graveness of the complaint. The statement of the victim must be appreciated in the background of the entire case. The entire episode reveals that the respondent had harassed her by a conduct which was against moral sanctions and decency and modesty and amounted to sexual harassment.

The court said that each attempt of sexual harassment of female at the place of work results in violation of the fundamental right to gender equality in Article 14 and the right to life and liberty in Article 21 of the Constitution and courts are under constitutional obligation to protect and preserve those fundamental rights. In cases involving human rights, the courts must be alive to the international conventions and instruments and as far as possible to give effect to the principles contained in those international instruments. The message of international instruments such as the Convention on the Elimination of All Forms of Discrimination Against Woman, 1979 (CEDAW) and the Beijing Declaration which directs all state parties to take appropriate measures to prevent discrimination of all forms against woman besides taking steps to protect the honour and dignity of woman is clear and loud.

The mother's right of bodily integrity, a privacy right, is implicated by foetal abuse statutes. Courts and commentators have recognised, in a variety of contexts, that an individual has a right to make decisions that affect her body. Deriving a right of bodily integrity from the Fourth Amendment's prohibition of unreasonable searches, courts have refused to

grant the government permission to pump the stomach of suspects to force civilly committed patients to take antipsychotic drugs, or to compel competent patients to undergo treatment for their own health or to provide for their families. As in the procreative choice area, case delineating the right to bodily integrity can be viewed as protecting an aspect of an individual's life traditionally respected as private – the right to control over one's physical self. Foetal abuse statutes wrest from competent pregnant woman the power to make decisions that affect their own bodies, placing it instead in the hands of the state.[30]

30. *See*, Maternal Rights and Fetal Wrongs: The Case Against the Criminalization of 'Fetal Abuse', 101 *HLR* 994 (1988) at 1001-02.

C. Sexual Autonomy

It cannot be denied that among the few points that distinguish human existence from that of animals, sexual autonomy an individual enjoys to choose his or her partner to a sexual act, is of primary importance. Sexual expression is so integral to one's personality that it is impossible to conceive of sexuality on any basis except on the basis of consensual participation of the opposite sexes. No relationship between man and woman is more rested on mutual consent and freewill and is more intimately and personally forged than sexual relationship. The famous legal definition of marriage given by Lord Penzace in *Hyde vs. Hyde,* [1] as a voluntary union between man and woman only highlights this aspect of free association. The ennobling quality of sex of which Mavelock Ellis wrote in his *Studies on the Psychology of Sex* ensues out of this freedom of choice. He wrote that "the man experiences the highest unfolding of his creative powers not through asceticism but through sexual happiness". Bertrand Russel declared that: "I have sought love, first, because it brings ecstasy - ecstasy so great that I would often have sacrificed all the rest of life for few hours of this joy". Forced sex, like all forced things, is a denial of all joy. Yet in conceivable cases, sex may statutorily be denied and even forbidden by law between specified groups of persons. But no positive act of sex can be forced upon the unwilling persons, because nothing can conceivably be more degrading to human dignity and monstrous to human spirit than to subject a person by the long arm of the

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1. (1866) LRIP & D 130 (Divorce Court).

law to a positive sex act. [2]

In India, the right to sexual autonomy came up before the Andhra Pradesh High Court in *T. Sareetha* vs. *T. Venkata Subbaiah* .[3] In this case the petition was filed against an order of the subordinate judge under Section 9 of the Hindu Marriage Act for restitution of conjugal rights mainly on the ground that the said judge had no jurisdiction to pass the order. The claim of the petitioner was rejected by the High Court. In the meantime, she filed another petition challenging the constitutional validity of section 9 on the ground that it was violative of right to 'life, personal liberty and human dignity and decency' under Article 21. The court held the right to privacy as a fundamental right under Article 21. Justice Chaudhary extended the protection of privacy to inhuman and degrading treatment of forcible sexual cohabitation. Relying on western sexologists the court upheld the sexual autonomy of wife and struck down Section 9 of the Hindu Marriage Act, which provides for restitution of conjugal rights. In the opinion of the court:

> "The remedy of restitution of conjugal rights provided for by Section 9 is savage and barbarous remedy, violating the right to privacy and human dignity guaranteed by Article 21 of the Constitution. Section 9 is constitutionally void. Any statutory provision that abridges any of the right guaranteed by Part III of the Constitution will have to be declared void in terms of Article 13 of the Constitution."[4]

The Court added that the decree for restitution of conjugal rights

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2.*See, T. Sareetha* vs. *T. Venkata Subbaiah,* AIR 1983 AP 356, at 365-66.

3.*Ibid.*

4. *Ibid.*

constitutes the grossest form of violation of an individual's right to privacy. It denies the woman her free choice whether, when and how her body is to become the vehicle for the procreation of another human being. 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. The woman loses her control over her most intimate decisions. Clearly, therefore, the right to privacy guaranteed by Article 21 is flagrantly violated by a decree of restitution of conjugal rights. A wife who is keeping away from her husband because of permanent or even temporary estrangement cannot be forced, without violating her right to privacy to bear a child by her husband. During a time when she is probably contemplating an action for divorce, the use and enforcement of Section 9 against the estranged wife can irretrievably alter her position by bringing about forcible conception permanently ruining her mind, body and life and everything connected with it. During a moment's duration the entire life style would be altered and would even be destroyed without her consent. If that situation made possible by this matrimonial remedy is not a violation of individual dignity and right to privacy guaranteed by the Constitution and more particularly Article 21, it is not conceivable what else could be a violation of Article 21. [5]

The Court said that a court decree enforcing restitution of conjugal rights constitutes the starkest form of governmental 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

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5. *Ibid.*

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 an unwilling victim's body a soulless and a joyless vehicle for bringing into existence 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. It is of constitutional significance to note that the ancient Hindu society and its culture never approved such a forcible marital intercourse. Our ancient law-givers refused to recognize any state interests in forcing unwilling sexual cohabitation between the husband and wife although they held the duty of the wife to surrender to the husband almost absolute. State coercion of this nature can neither prolong nor preserve the voluntary union of husband and wife in matrimony. Neither State coercion can soften the ruffled feelings nor clear the misunderstandings between the parties. Force can only beget force as action can only produce counter-action. It is only after considering the various factors that the Scarman Commission recommended for the abolition of this matrimonial remedy in England and the British Parliament enacted a law abolishing it. It is, therefore, legitimate to conclude that there are no overwhelming state interests that would justify the sacrificing of the individual's precious constitutional right to privacy.[6]

The decision of the Andhra Pradesh High Court in *T. Sareetha's* case was, however, not followed in subsequent cases.[7] It is submitted that

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6. *Ibid.*

7. *See, Harvinder Kaur* vs. *Harmander Singh*, AIR 1984 Del 66, *Saroj Rani* vs. *Sudarshan Kumar*, AIR 1984, SC 1562.

in view of American experiences, the decision in *T. Sareetha's* case may create complex problem in relation to family law in India.

The right to privacy was extended to protect a prostitute from sexual assault in *State of Maharashtra* vs. *Madhukar Narayan Mardikar*.[8] In this case, a police inspector was dismissed from service on his proved involvement in an act of rape. The Bombay High Court quashed his dismissal on the ground that the woman, whom he was alleged to have raped was a woman of easy virtue. The Supreme Court on appeal held that a woman even of so-called easy virtue was entitled to protect herself against unwilling sexual assault. This was part of her personal liberty which was included in the right to privacy, Ahmedi, J., as he then was, aptly observed:

> "Even a woman of easy virtue is entitled to privacy and no one can invade her privacy as and when ones 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." [9]

Another related issue in this respect is whether the right to privacy protects consensual homosexual relations between adults. Some cases came up before the American Supreme Court on this issue.

In *Bowers* vs. *Hardwick*,[10] the Supreme Court of the United States upheld, against a constitutional challenge, the application of Georgia's sodomy statute to consensual same-sex sodomy. Justice White, framing

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8. AIR 1991 SC 207.

9. *Ibid*, at 211.

10. 478 U.S. 186 (1986).

the issue in terms of the existence of a fundamental privacy right to engage in homosexual sodomy, found that no such right existed. Justice White read *Griswold* vs. *Connecticut*[11] and its progeny [12] as encompassing only those privacy rights integral to procreative choice and family autonomy and concluded that the recognition of a fundamental right requires that the right be either deeply rooted in this nation's history and tradition or implicit in the concept of ordered liberty. Finding homosexual sodomy unprotected under either standard, the court engaged in a highly differential analysis of the state's interest involved, and found a rational relationship between the statute and the state's interest in regulating morality. [13]

Justice Blackmun and Stevens each filed a dissenting opinion. Justice Blackmun criticized the majority opinion's focus on the particular act rather than the underlying right to freedom from government intrusion. Justice Blackmun found that private consensual sodomy is protected under the right to privacy as a decision properly left to individuals and as involving places afforded privacy regardless of the particular activities taking place there. According to Justice Blackmun, a fair reading of the Court's prior privacy cases discloses a commitment to individual autonomy in matters of personal choice - a principle that should apply with full force to the decision to engage in sodomy. Justice Blackmun also

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11. 381 U.S. 476 (1965).

12. *See, Eisenstadt* vs. *Baird,* 405 U.S. 438 (1972). The Court held that the right to privacy protects the distribution of contraceptives to unmarried couples. *Roe* vs. *Wade,*410 U.S. 113 (1973). held that the right to privacy protects a woman's right to decide to have an abortion in the first trimester of pregnancy.

13. 478 U.S. 186 (1986).

criticized the majority's state interest analysis and concluded that Georgia's interest in enforcing private morality could not sustain the statute. Both Justice Blackmun and Stevens criticized the majority for analyzing the Georgia statute as if it applied only to homosexuals.[14] The majority's analysis of the right at stake in *Hardwick* solely in terms of marriage, procreation, and the family departs from the privacy doctrine established in the Court's prior cases. Had the majority examined the regulated conduct in *Hardwick* at the same level of generality employed in previous privacy decisions, it would have found constitutional protection for private, consensual, same sex sodomy. Although *Griswold* and *Eisenstadt* involved procreative freedom, these decisions cannot be limited to procreative matters. If constitutional protection extended only to procreative decisions the government could constitutionally restrict the use of contraceptives because couples could simply abstain from sexual relations. The constitutional protection of private, consensual, nonprocreative sex established by the right to privacy does not depend on any relation to marriage, procreation and the family. *Stanley* vs. *Georgia* [15] ruled that the right to privacy allows an individual to view pornography in the privacy of his home. *Roe* vs. *Wade* [16] held that the right to privacy encompasses a woman's right to decide not to use her body to procreate. In both cases the court protected a person's conduct regardless of his or her family status because of the centrality of sexual freedom to individual autonomy and identity.

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14. *Ibid.*

15. 394 U.S. 557 (1969).

16. *See, Ibid,* note 12.

The majority in *Hardwick* applied its "history and tradition" test in an arbitrary manner to conclude that privacy protection should not encompass same-sex sodomy. First, the majority, choosing the eighteenth and nineteenth centuries as its historical benchmark, selectively examined history to find condemnation of homosexuality. Had the Court explored earlier or later periods, it would have found ambiguity or social tolerance. Second, requiring that the specific activity confirm to traditional values and historical teachings in order to receive constitutional protection is inconsistent with the court's privacy jurisprudence. For example, had such an approach been taken in *Griswold* and *Eisenstadt,* the Court likely would have found the use of contraceptive (even within marriage) condemned historically and therefore unprotected. The only distinction between the activity protected in the Court's previous privacy cases and the behavior found unprotected in *Hardwick* is an unpersuasive one – a majoritarian consensus against homosexual sodomy. Moreover, the Court's previous privacy cases do not rely entirely on history and tradition but also consider the burden on individuals and the strength of the state interests involved. The burden imposed on individuals by sodomy statutes is comparable to that imposed on pregnant woman in *Roe* vs. *Wade,* and the state interests justifying the regulation of abortion are far more compelling than those justifying the regulation of sodomy.

If the court had, consistent with its privacy jurisprudence, framed the issue at stake in *Hardwick* more broadly, it would have concluded that Georgia's sodomy statute implicated the right to privacy. Had the court recognized that the criminalization of private, consensual, adult intimacy between persons of the same sex implicates a fundamental right to privacy, the state interest in advancing morality would not have supported the statute. Giving its reliance on history, *Hardwick* should not extend

beyond its facts to apply to other types of same-sex sexual activity that have not been the subject of historical prohibitions. However, in *State* vs. *Walsh* [17] the Missouri Supreme court has involved *Hardwick's* privacy rationale to uphold a Missouri statute prohibiting contact between the genitals of one person and the hand of another person of the same sex. This sweeping prohibition of "deviate sexual misconduct" exceeds the offence of sodomy as defined by the historic condemnation considered so important by Justice White in *Hardwick*. Moreover, because the historical prohibitions relied on only condemn male homosexual sodomy; *Hardwick* should not apply to sodomy between lesbians.[18]

In *Commonwealth* vs. *Wasson,*[19] the Kentucky Supreme Court expanded homosexual rights and struck down a state statute that criminalized homosexual sodomy, despite the United States Supreme Court's refused to do so in *Bowers* vs. *Hardwick*. In *Wasson,* the state charged the defendant with solicitation to commit sodomy. The district court held that the sodomy law infringed upon the defendant's state constitutional rights to privacy and dismissed the claim. On appeal, the Circuit Court affirmed and further held that the law denied the defendant equal protection under the State Constitution. The Supreme Court of Kentucky affirmed. In a 4-3 decision, the Court held that the criminalization of homosexual sodomy violated the defendant's right to privacy and to equal protection under Kentucky's Constitution. Disposing

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17. 713 S.W. 2d 508 (Mo. 1986). However, another lower Court has limited *Hardwick* to sodomy. *See, High Tech Gays* vs. *Defense Indus. Sec. Clearance Office,* 668 F. Supp. 1361, 1368 – 69 (N. D. Cal. 1987).

18. *See,* Sexual Orientation and the Law, 102 *HLR* 1508 (1989), at 1521-25.

19. 842 S.W. 2d 487 (Ky. 1992)

of the state's contention that Kentucky had to adhere to the Supreme Court's decision in *Bowers* vs. *Hardwick*, the Court declared that it is not bound by decisions of the United States Supreme Court when deciding whether a state statute impermissibly infringes upon individual rights guaranteed in the State Constitution so long as state constitutional protection does not fall below the federal floor.

The Court then considered the state right to privacy in the light of the unique text of the Kentucky Constitution and the common law at the time of the Constitution's adoption. The Court stated that, unlike the Federal Constitution, the Kentucky Constitution of 1891 made repeated references to positive liberty and imposed upon Kentucky an affirmative duty to protect individual liberties. The *Wasson* court thus concluded that long before the United States Supreme Court first took notice of whether there were any rights of privacy inherent in the Federal Bill of Rights, Kentucky had recognized a right of privacy in the Kentucky Constitution – a right broad enough to encompass consensual homosexual sexual behaviour.

Turning to the defendant's equal protection claims, the court stated that regardless of the status of homosexual under federal equal protection law, homosexuals constituted a separate and identifiable class for Kentucky constitutional law analysis because no class of persons can be discriminated against under the Kentucky Constitution. The state failed to meet its burden of demonstrating a legitimate governmental interest justifying a distinction based on sexual preference, and the Court held that a belief by a majority of the public in the immorality of homosexual conduct does not provide a rational basis for criminalizing the sexual preference of homosexuals.

The majority opinion met a vigorous dissent. Justice Lambert criticized the majority's refusal to adhere to *Bowers* and its embrace of "state constitutionalism", a practice in vogue among many state courts as a means of rejecting the leadership of the Supreme Court of the United States. He argued that the majority opinion had failed to find any textual support for a right to privacy in the 1891 Constitution, and that its reading of the contemporaneous case law was flawed. In 1909, for example, the Supreme Court of Kentucky had declared that oral sex is "as much a crime against nature as if done in the manner sodomy is usually committed", and urged the legislature to add "such an infamous act" as homosexual sex to the statute criminalizing anal intercourse. Justice Lambert argued that morality must and will remain a part of the criminal law, and that constitutional protection of all private conduct that is not "harmful to another" would result in the invalidation of many other criminals statutes. Rejecting the majority's equal protection analysis Justice Lambert asserted that homosexuals do not constitute a suspect class, and that the Kentucky sodomy statute need only satisfy the lowest level of judicial scrutiny and demonstrate that it bears a rational relationship to a legitimate legislative objective.

With *Wasson,* the Kentucky Supreme Court became the highest state court to extend the privacy protection to homosexual sodomy since *Bowers* vs. *Hardwick. Wasson's* value will come in its ability to transcend the state of Kentucky and inspire other states to follow.[20]

In India, the protection of privacy of homosexuals even between consenting adults, has hardly any scope in view of the facts that neither it has been regarded as moral nor legal. Moreover, such acts even if

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20. *See,* 106 *HLR* 1370 (1993)

practised privately have been condemned as immoral and have been declared as specific offence punishable under the law. [21]

The fundamental underlying assumption here is that the homosexual acts are "unnatural" and a person's right to personal liberty or his right to privacy is not wide enough to cover such acts. The right to privacy, it is submitted, cannot be extended to protect such immoral acts and nonetheless it cannot give a licence to commit any offence.

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21. Sec. 377 of the Indian Penal Code says: " Whoever voluntarily has carnal intercourse against the order of nature with any man, woman or animal, shall be punishable with imprisonment for life or ten years and fine".

CHAPTER-8

EPILOGUE

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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 there 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.

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