

CHAPTER-1

INTRODUCTION

CHAPTER-1

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.