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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.