Chapter Three

Right to Privacy: International Perspective

3.1 Introduction
3.2 Origin of concept of Right to Privacy
3.2.1 Initial Stage of Development
3.2.1.1 Crystallisation of Property Rights as Personal Property Rights
3.2.2 Later Stage (14 to 18 Century)
3.3 Development of the Concept of Privacy in Modern Era
3.3.1 Shift in the focal point from Property to Person to Data
3.3.1.1 United States of America
3.3.1.1.1 Concept of Privacy: Instances
3.3.1.1.2 New Dimensions to Concept of Privacy
3.3.1.1.3 Impact of Mass Media on Concept of Privacy
3.3.1.1.4 Use of Information Technology and Invasion on "Privacy".
3.3.1.1.5 Discussion
3.3.1.2 United Kingdom
3.3.1.2.1 Notion of Privacy under English Law
3.3.1.2.2 Notions of Privacy in Modern Times
3.3.1.2.3 Privacy and Data Protection
3.3.1.3 European Union
3.3.1.3.1 Notions of Privacy
3.3.1.3.2 Protection of Personal Information
3.3.1.4 India
3.3.1.4.1 Right to Privacy: Indian Position
3.3.1.4.2 Right to Privacy and Constituent Assembly
3.3.1.4.3 Right to Privacy and Constitution of India
3.3.1.4.4 Concept of Right to Privacy: Judicial Creativity
3.3.1.4.5 Data Protection and Right to Privacy
3.3.2 Phases of International Development

3.3.2.1 Universal Declaration of Human Rights
3.3.2.2 International Covenants
3.3.2.2.1 International Covenant on Civil and Political Rights
3.3.2.2.2 International Covenant on Economic , Social and Cultural Rights
3.3.2.3 General Assembly Resolution
3.3.2.4 Discussion

3.1 Introduction

The concept of privacy has evolved and developed over the centuries. The development over the past few centuries has witnessed the shift of the focal point of concept of privacy from property to person to the latest inclusion of data/ information as well. Privacy is originally called 'Privatus' in Latin. Its basic Latin form is adjective 'privus'. Its archaic meaning is 'single'.[1] Later, over the period of time, it is used as 'one's own'. The ownership has extended from ownership of the things which are tangible i.e. property to ownership of intangible things. These intangible things may be feelings, intellect or information. Privacy originally concerned with the property of the person. Desire for privacy in respect of the property was and is basically dealing with the control of the same. With the sociological, political or technological changes in society, privacy in respect of one's property and possessions diminished gradually. The concept of privacy extended to one's own person-personal space- and one's own time as technology is developed. The concept was broadened gradually from right to be in seclusion. The scientific and technological developments in the society have left its imprints in the understanding of the concept of Privacy. After industrial revolution, structure and texture of the society is changed. Today there is revolution in information. Man likes to control the information about him.

Invasion on proprietary right of the person was and is dealt with provisions in law of Torts. Such rights are available against private persons in trespass, malicious acts as well as against the government in cases of unreasonable search and seizure. Invasion and encroachment on the Right to Privacy have increased considerably with advent of means of communications like telephone, computers and internet. 'Right to privacy' evolved with the growth of print media like newspaper, which were printing sensational information about an individual's personal life. This right is protected first by court recognising and developing the concept. Legal enactments in different legal systems followed this development. Notion of privacy is different in Indian Society than western one. As India was governed by Briton, India was also following English concept

[1] https://latin-dictionary.net/definition/31662/privus-priva-privum (Last visited on February 9, 2017)

of 'Privacy' and follow decisions given by English Courts. This right is not recognised specifically by the Constitution of India as a fundamental right. But this right was recognised and upheld by Supreme Court decisions in various cases as fundamental right under art. 21 of Constitution of India, which provides protection of life and liberty of a person.

In this chapter, the researcher shall attempt to trace the origin of the concept of privacy by reviewing the definitions of the concept by different jurists, philosophers, sociologists and writers. The researcher shall also try to trace its development through cases and legislations in countries like US, UK, European Union, and India.

3.2 Origin of the concept of Privacy

It is important to define privacy for finding its origin and for its protection. Therefore, we have to decide what amounts to privacy. There is no clarity regarding the meaning of privacy. It starts with the relationship of the person with the society. In this way, its roots can be searched in philosophy and sociology also. Historical use of the term is not uniform and lacks clarity of meaning and scope. Privacy is often synonymously mentioned with two other terms like secrecy and confidentiality.

But secrecy is outer layer of privacy.[2] According to **Posner**, 'secrecy is ability to control dissemination and use of information by oneself.'[3] Facts of the meeting with the minister are secret and need not be private. Some facts about a person can be called 'secret', e.g. his tastes regarding foods which his culture or religion does not permit, but for the person the declaration of the fact to society is losing his reputation in the society. That fact is not privacy in full sense for the person but only an aspect to his privacy.

[2] Jack Hirshleifer, "Privacy-Its Origin, Function and Future", UCL at www.econ.ucla.edu/workingpapers/wp166.pdf. Also at www.jstore.org/sstable/724176?seq=1 (Last visited on February 9, 2017)

[3] Posner R.A., "The Economics of Privacy" (1981) The American Economic Review Vol. 71, No.2

'Privacy implies legitimate denial of access, while secrecy implies that denial of access which is illegitimate.'[4] This access is of strangers to the person. As **Barrington Moore** aptly defined, 'without public nothing can be private'. "People are more likely to seek escape from watchful eye of strangers than intimates. Escape from the watchful eye of intimates is more often solitude, isolation or loneliness perhaps but not privacy."[5] Most often, however, what we do not revel to intimates are secrets. "Escape from the scrutiny of strangers, is however, privacy."[6]

For confidentiality and privacy, the difference is explained aptly by The Belmont Report prepared by National Commission for the Protection of Human Subjects explained it in its report regarding human subjects in Bio-medical and Behavioural research' as "confidentiality is relating to an information that an individual has disclosed in a relationship of trust and with expectation that it will not be disclosed to others without permission. Therefore, in this sense, it is extension of privacy. Privacy is about people and confidentiality is about treatment to information or data**"[7].**

With the privacy, a person attains freedom, and extension of freedom is autonomy. Sociologist Steven Nock said, "Reputation is shared or collective perception about person. Without reputation freedom is empty."[8] What is in its core is 'autonomy within society' and particular kind of social structure together with its supporting social ethics.[9] So there should be decisional autonomy and personal choices shall be protected.

As Beate Rossler observes it is like layers of onion, mainly of three layers, a) Its inner most layer represents privacy of body and other intimate interests, b)

[4] Warren C. and Laslett B., "Privacy and Secracy:A Conceptual Comparison, Journal of Social Issues, (1977) Vol. 33, Issue-3, Pp-43-51.
[5] Barrington, Moore, Jr., "Privacy Studies in Social and Cultural History" (1984), Tyler and Franscis Group London and New York, Kindle Edition.
[6] Steven, Nock, " Cost of Privacy: Surveillance and Reputation in America".(1993) Aldeine Transactions
[7] Available at: https://www.research.uci.edu/compliance/human-research-protection/researchers/privacy-and-confidentiality. (Last visited on February 9, 2017)
[8] Nock, Steven "Cost of Privacy:Surveillance and Reputation in America" (1993) Aldeine Transactions
[9] Jack, Hirshleifer, UCLA, at www.econ.ucla.edu/workingpapers/wp166.pdf . Aslo at www.jstore.org/stable/724176?seq=1 (Last visited on February 9, 2017)

Second layer represents family and home, c) And the third, outer most layer represents economic structure or public civil society as corporation but not State.[10] Richard Epstein said "Plea for privacy is often a plea for right to represent oneself to others or to the rest of the world".[11]

One of the tests for defining privacy was described by R. Gavison, as concept of "privacy" must be distinct and coherent. It has to be coherent in 3 ways: a) it must be neutral, so loss of privacy can be identified, b) it must have coherence as value, for legal protection of privacy is compelling, if loss of privacy and its effects are undesirable for similar reasons, c) it must be useful in legal contexts because it helps to identify the occasions when privacy is lost, otherwise law will not interfere to protect against every undesirable event.[12]

Privacy is essential not only to humans but to animals also. This fact is recognised by many anthropologists. Margaret Mead, a famous anthropologist, elaborated the practices of animals to go in seclusion. She had drawn the attention towards the practice of an animal to draw its own territorial boundary by excretion which means that the animal wants other animals to keep out of territory and leave his space non-encroached.

Privacy is dynamic concept and its changes depend upon the atmosphere in which it emanates. Cultural and sociological background of society affect the development of privacy positively or negatively. It is a principle of natural law. Though it is not well defined, majority people agree with its meaning through their own reason and intellect in various situations. E.g. privacy to the married couple is well accepted behaviour and people readily agree to follow it as they think that such right is inherent to the human being. When these rights are breached, people reach to court for their enforcement.

3.2.1 Initial Stage of Development

[10], Beate, Rossler., "The Value of Privacy"English Edition, Polity Press (2005).
[11], Richard, Epstein "Privacy, Property Rights and Misrepresentation",12 Georgia Law Review, 455 (1978).
[12] R. Gavison, "Privacy and Limits of Law", The Yale Law Journal, Vol. 89 No.3, p-423, Jan. 1980

What is exactly the meaning of the word 'privacy'? The dictionary meaning is 'seclusion, place of seclusion, retreat, retirement, avoidance of notice or display etc. It can be said that privacy like freedom is natural feeling of every human being.[13] Prehistoric man had no self-awareness as he was living in clans and collectivism was the way of life which was essential to survive. Privacy was first used to define the possession and through possession the control over the material objects. It had started with the 'land', which was the first possession of the person. After emergence of agriculturist society from the stage of wandering for food and shelter, man came into possession of land which was essential for self- reliance and self-acclamation.

Locke (1689) in his 'Second Treaties of the Government' explains "every man has a property in his own person this is something that nobody else has any right to the labour of his body and work of his hands, we may say, are strictly his. So , when he takes something from the state that nature has provided and left it in, he mixes his labour with it, thus joining to it something that is his own, and in that way he makes it **his property**."[14]

By employing labour, man creates private property. In the beginning, the land was the part of public realm and was owned collectively. Person only possessed a few essential things. But with the growth of the society and politics, concept of Nation or State emerged. Concept of 'sovereignty' was also developed with the emergence of nation or state. Relationship of person to the state was changed as he was considered as citizen. In this changed situation, possession and then ownership of land and other material things by the citizen was recognised. Privacy was recognised in relation to the ownership of such property possessed by an individual. Territorial privacy can be claimed through civil liberties under rule of law and protection has given to homes and family life traditionally. When the control over such material thing is undisputed, possession could be permanent and respected by other members of the society.

[13]M.Tugendhat-I Christie (eds). "The law of Privacy and Media", Oxford, 2002.p. ix
[14] John, Locke, (1689), Edited and amended by Jonathan Bennett(2017), available at www.earlymoderntexts.com/assets/pdfs/locke1689a.pdf (Last visited on February 9, 2017)

3.2.1.1 Crystallisation of the Property Rights as Personal Property Right

The possession of individual at first was associated with the land. But all land was considered as public property. Only few personal things were considered as private property. The concept developed in association with social relations of an individual to his fellow humans. Privacy is relationship of person with the society. It includes private and public spheres of activities. It is interesting to see the development of the concept in earliest of legal provisions like Roman Law. We can trace the term privacy in Roman law also but not in the same words. Relation of property and privacy is very old. Ownership of property supports privacy.[15]During Roman period, before 449BC, private law comprised the Roman Civil Law (Jus Civile Quirtium) that applied only to Roman Citizens. It did not provide a complete and coherent system of applicable rules or give legal solutions for all possible cases.

Aristotle's distinction is also between 'Polis'-public and 'Okios'-private i.e. family and domestic life. One possesses oneself and one's body. One can acquire property by mixing his labour. It is private or personal property in this sense. Privacy protection was justified largely on moral grounds. Public realm is for government authority and private realm is kept for self- regulation. We find Aristotle's distinction between 'polis'- public sphere associated with 'okioas'- family and domestic life. It was dependant of the concept of personality. 'Privacitas'-privacy was not the word used in its modern meaning. It was used with the term 'actio injuriarum' i.e. action for injury. The term 'actio injuriarum is described as "outrageous behaviour" by D.J. Ibbetson.[16] This actio injuriarum had two functions –redress for physical injury and to redress non-physical aspects of personality[17]. In both these aspects, only Roman Citizen and Patres Familias can take action in jus civile. In its penal nature[18], its procedural field is 'ordo judiciorum privatorum'- it means that offence is regarded as private or personal attack. Here, only the person who was directly or indirectly injured can take action. This is different from the criminal accusation. In this

[15] M. Tugendhat-I Christie.(eds), "The law of Privacy and the Media", Oxford, (2002).
[16], David, Ibbetson J."A Historical Introduction to Law of Obligations". Oxford University Press, (1999), p112 ff.
[17] R. Zimmerman, The Law of Obligation, Roman Foundations of Civilian Tradition, Oxford 1996, P.1052.
[18] See Gai 4,112.

type, the compensation was the remedy and not the punishment. To make the person liable in actio injuriarum, dolus is necessary. Seclusion and privacy, in Roman law seems to be connected with the enjoyment of property.

In the year 449 BC law of XII Tables was approved. These earliest sources of Roman law, the provisions of Roman XII tables- provides that owner of the property, in enjoyment of his property, had to respect to the rights of his neighbour.[19] This civility was requirement of private law and Roman building law set out private remedies by way of servitudes to prevent obstructions of light and prospectus (View). Justinian law distinguished windows and light from the windows and view. For visual trespass-his 113th constitution, amendment to earlier decrees- he issued, "10 feet space shall be left between buildings to prevent violation of privacy." "No one should place such balconies nearer than ten feet from adjoining buildings unless there is an agreement of servitude with other." From above it may be construed as a right inherent in property and not in person. Another way of injuring someone's property is beating another's slave. This offence specifically repressed by Praetor's edict with roots in the XII tables.[20] 'Civitas' originally mean citizenship and then whole of the holders of Roman citizenship and now legal person created by citizens to administrate common matters in Rome.

In Rome, citizenship was essential and crucial from legal point of view to think about the existence of true right to privacy. In Roman legal system 'actio injuriarm' was specifically protected but some outrageous behaviour was also termed as aggressions to inner core of person. These factors were connected to social values and important in privacy of a person. This was termed as moral offences related to honour. E.g. defamation.

Situations relating to private sphere of individual specially regarding women and young Romans, male or females like chasing a respectable woman in street (acsectari) or uttering complements on her way in order to persuade her (appellare blanda oration), these attacks have consequences for public image of

[19] J.A. Borkowaski, Textbook on Roman Law, (Oxford; 1994), 160-61.
[20] (Ulp. D. 47,10,15,34)

person and so they were related to personality. This concept of image/personality was crystalized in dignitas or fama (honour) as the values were offended by non-physical aggression. As Bernardo Perinan observes, "There is a connection between dignitas and fama which are Roman Values and personality and also they are modern legal values. Social values may change but basis of idea of personality of individual which is the basis of modern privacy is already present in Rome".[21]

The idea of private residence -domicilium is referred back to 2nd Century B.C. This element identifies the person with the territory to which the individual is legally bound as centre of his/her activities."[22] "Word domicilium comes from 'domus' which is a seat of family and a therefore separate entity from civitas. It is presided by pater familias." As Piero Bonfonte observes.[23]

This public-private spheres as in Roman law was followed in many civilizations for many years as the concept of state had emerged but it was in its infancy and ideas were not developed full. The core concepts explained in Roman system were adapted with the particular situation in the respective countries.

3.2.2 Later Stage: (14-18 Century)

Since 14th to 18th Century people went to court for eavesdropping or for opening or reading of personnel letters. In 16th and 17th Century, there was development of the concept 'sovereignty' and modern state. In this period, demarcation of public and private realms was nearly complete. There was increase in public realm. In public realm, duties of the State, regulation of social and economic behaviour of citizens were the elements present. For liberalism division of public and private sphere is essential.

[21] Bernardo Perinan, "The origin of privacy as a legal value: reflection on Roman and English Law" https://www.academia.edu// (Last visited on February 9, 2017)
[22] Bernardo Perinan, "The origin of privacy as a legal value: reflection on Roman and English Law" https://www.academia.edu// (Last visited on February 9, 2017)
[23] (He recognised family as a political structure in pre-civic Rome. P Bonfante, "scritti giuridici varii Faniglia e successione, Torino 1916, P 30 ff.

In 19th Century, there were separate parts between Public law (Constitutional law, Criminal Law, and regulatory law) and law of private transactions (Torts, Contract, Property and commercial Law). If we follow this distinction, then we come to the inevitable conclusion that the privacy was related to property and personality of person. This personality consists some inner things like freedom, liberty in its core. With freedom and liberty, autonomy of will is achieved. Individual personality and identity are based on these core values which is the most intimate part of each one. This core is unique and based on privacy and flourished with the privacy.

Different jurisdictions define the term 'privacy' differently and their approach to safeguard the individual's rights differs from one jurisdiction to other. "Every society sets a distinctive balance between private sphere and public order based on society's political philosophy. Privacy norms are set in two alternative social models. Authoritarian societies reject concept of legally or socially protected privacy for individuals, families, social groups. In contrast democracies have strong commitment to individualism and freedom of association. They regard private sphere as major force for social progress and morality." [24]

"The Government is seen as useful and necessary mechanism for providing services and protection. But in democratic government structure, they are expressly barred by guarantees of civil liberty from interfering with citizen's private beliefs, associations, and acts except in extra-ordinary situations. That is only through controlled procedures. It is a challenge to keep the balance with changing social values, technologies and economic conditions. At socio cultural level, wealth and race shape the notion of privacy. A rich can withdraw from society when they wish and lower class cannot. The affluent do not need to obtain subsidizing support from government by revealing sensitive information to authorities, while those in economic or social need must disclose or go without",[25] as **Allen Westin** observes.

[24]Allen Westin, "Privacy and Freedom", Ig Publishing,(1967)
[25] Allen Westin, "Privacy and Freedom", Ig Publishing,(1967).

Since end of 19th Century, the focus of protection of privacy has changed towards protection of informational privacy. General discussion of privacy protection has started shortly after World War II. People have become more aware about the protection of their privacy.

3.3 Development of Concept of Privacy in Modern Era

By uttering the word 'privacy', it gives the impression of bodily privacy. Norms of privacy are different in different societies. Western society puts impetus on "Individualism", but eastern societies like India is collectivistic and promotes social cohesion and inter-dependence. **Aldine De Gruyter**, approached the concept from the aspect of 'shame' and 'guilt. "Shame presumes complete knowledge of other's actions. To shame another, that person must be known and must be a member of group applying the same. In modern societies, there is widespread privacy." [26]

3.3.1 Shift in focal point from Property to Person to Data

Man is a social animal and his rights or duties are to be defined in respect of society. So in same way reputation or image of an individual in the society depend upon the knowledge of others about information about him and his activities. **Edward Shills** argued that urbanisation and industrialisation in 19th century increased the amount of privacy enjoyed by average citizen. According to him 'amount' means the proportion of their total range of activity and thought disclosed only to those to whom the action taker chose to disclose it. He describes it as "violation of privacy involves acquisition or transmission without the voluntary consent or initiative of those, whose actions and words generate the information." [27] This definition of privacy directs us to see it as relationship other than a property. As **Allen Westin** says "Privacy is ability of individual or group of individuals to seclude them or information about themselves and hereby express themselves selectively."[28]

---

[26] Aldine De Gruyter, 1993.

[27], Edward, Shills. "Privacy: Its Constitution and Vicissitudes", Law and Contemporary Problems, Vol.31 No.2 (1966), p.282. Available at www.jstore.org/stable/190672/read-now=1?seq=1. (Last visited on February 9, 2017)

[28], Allen, Westin. "Privacy and Freedom.", Ig Publications, New York.(1967)

Focal point of 'Privacy' has shifted from property rights-tangible as well as intangible- of the person to his personality, liberty and ultimately freedom. These changes can be seen in development of the concept over the years of progress in the various aspects and strata of the democratic societies. The change in psychology of the people due to economic conditions, technological advancement and also changes because of some judicial decisions contributed for development of ideology regarding 'privacy'. These changes cannot be separated from each other. Now which influenced whom is difficult to be told. Sometimes the change in psychology of people reflected in the opinions of thinkers and jurists and influenced the judicial decisions and sometime judicial decisions furthered the ideology and influenced the psychology of people. But judiciary contributed a lot in development of the concept by exploring various contours of the term. It is interesting to note the changes in norms through this exploration which resulted in to the change in psychology in different countries.

3.3.1.1 United States of America

Like all other civilizations, privacy was first associated with the possession and ownership of property in USA. Government's power to search the property i.e. houses or business places and seizure of any offensive material without any restriction ignited the protest among people. In 1776 John Adams wrote that it had been the British right to search the houses without justification that sparked the fight for independence.[29]

Flaherty, explains, 'In colonial America, prior to 1750, virtually every one lived in towns having population fewer than 1500 people. Unmarried people lived as boarders or lodgers in others' household. Everyone was known by everyone virtually since with only 1500 people, there are not that many families. Anonymity was virtually impossible. In close- knit society of inmates' friends, neighbours and associates' social life involves frequent, perhaps almost constant submission to judgement of peers. It is difficult then to live down one's reputation because it is difficult to change villages, jobs or associates." [30] In

[29] Adams John, Charles Francis Adams and John Adams, Letters of John Adams Addressed to his wife, Boston, c.c. Little and J. Brown, 1848. 338

[30] Flaherty, "Some Reflections on Privacy and Technology" 1972.

these days also there was limited protection of privacy. Man's home was protected from long time. Every man's home is castle was recognised long back from Semayne's Case.[31]So earlier the protection was against the unreasonable search and seizure of the property.

3.3.1.1.1 Concept of Privacy: Instances

The state of privacy in early American society was elaborated by David Seipp.[32] He explained the "development of concept considering the two situations. He had stated about the breach of privacy in respect of information regarding persons. In early America, two types of people, eavesdroppers and gossipmongers, these were considered as privacy breakers. These people try to get the information about people, to which they were not concerned. Because of them, the information privacy of people was compromised. They were punished through courts"[33].

As explained by David Seipp, "Another source for getting the information was the letters sent by persons. In those days, there was no institutionalized postal service. British took over American post in 1710 and imposed regulations on it that no one shall open, detain, delay or suffer to be opened any letter or letters packet or packets under Post Office Act, 1710. But then post-masters used to open the letters, packets for getting gossips and news. Afterwards in two postal Acts, Post Office Act, 1782 and 1792 provisions for penalising of letter opening were enacted. Over the years, security of mail was observed by special locks on bags of mails. In Postal Act, 1825, fine was levied for opening or taking the letter or packet before its delivery. The provisions were for postal employees and others.[34]

---

[31] Semayne's case 77 Eng. Rep. 194 (KB) (1604)

[32], David Seipp J. "Right to Privacy in American History",(1978) A publication of program on Information Resources Policy. Available at www.pirp.harvard.edu/pubs_pdf/seipp/seipp-p78-3.pdf. (Last visited on February 9, 2017)

[33] David Seipp,J. "Right to Privacy in American History",(1978) A publication of program on Information Resources Policy. Available at www.pirp.harvard.edu/pubs_pdf/seipp/seipp-p78-3.pdf. (Last visited on February 9, 2017)

[34] David Seipp,J. "Right to Privacy in American History", A publication of program on Information Resources Policy. Available at www.pirp.harvard.edu/pubs_pdf/seipp/seipp-p78-3.pdf. (Last visited on February 9, 2017)

Thomas Jefferson, Arthur Hamilton and George Washington complained about lack of privacy in their letters, and they would sometimes wrote in code[35].- In Ex parte Jackson, (1877) The Supreme Court held that Fourth Amendment prohibited government officials from opening letters without warrant, "The constitutional guarantee of the right of the people to be secure in their papers against unreasonable searches and seizures extends to their papers, thus closed against inspection, whatever they may be"[36].

"The security and confidentiality of personal information was in question in the collection for the census also. The periodic census was taken in 1787 for the first time. In 1790, the penalty of $20 was imposed for refusal of an answer on person over 16 years of age. The amount of fine was increased gradually up to $100 in 1880. The information received was disclosed by the collectors for monetary gratification. Census information included information regarding agriculture, commercial and manufacturing interests etc. This information was gathered for many more areas like quantity and value of products ascertained, statistics relating to occupation and agricultural holdings etc. The census was taken at 10 years intervals, every time increasing the fields for collection of data. The promise was made not to disclose personally identifiable economic data." "Since 1790, census reports were posted in public so that people can check errors. There was an outcry regarding this practice. This practice stopped in 1870"[37].

"After the invention of Telegraph its use was also invaded. After Civil War Congress began to seek access to telegraph messages maintained by Western Union for various investigations" [38] "The New York Times termed the practice

[35] Flaharty, David H., "Privacy in Colonial New England" 1 (1972) 115-27
[36] Ex parte Jackson, (1877) 96 U.S. 727
[37], David Seipp J. "Right to Privacy in American History", A publication of program on Information Resources Policy. Available at www.pirp.harvard.edu/pubs_pdf/seipp/seipp-p78-3.pdf. at 19. (Last visited on February 9, 2017)
[38] David Seipp, J. "Right to Privacy in American History", A publication of program on Information Resources Policy. Available at www.pirp.harvard.edu/pubs_pdf/seipp/seipp-p78-3.pdf. At p. 30 (Last visited on February 9, 2017)

as "an outrage upon the liberties of the citizens",[39] and New York Tribune editorials called that seizure of telegrams "it violates the commonest legal maxims as to the right to call for papers, and outrages every man's sense of his right to the secrets of his own correspondence.[40]" Several courts quashed subpoenas for telegrams, analogizing them to letters.[41] More than half the states enacted the law.[42]

"Civil war led to breaches of privacy for census data. Economic data, statistics came into new uses. In late 19th century new scales of economic stakes and new conceptions of role of government made the collection of economic information, like other personal information. A privacy problem was to be resolved at the highest levels of government. To protect the people from violation of their privacy rights, the Bill of Rights was included in the Constitution of America. David Seipps discussed the invasions on the right to privacy firstly- government had powers of search and seizure and secondly by press.[43] Protection against these invasions was through courts.

3.3.1.1.2 New Dimensions to Concept of Privacy

New dimensions to the Bill of Rights were given by the United States of America as a civilized country (ratified in 1789-1791). In that process the concept of privacy has emerged as a fundamental right. In United States, the right to privacy is not specifically provided in the Constitution but it is considered as a fundamental right conferred under the first, third, fourth, fifth and ninth amendments. The right to privacy is given to people to be secure in their persons, houses, papers and effects. According to US approach, an

[39], David Seipp J. "Right to Privacy in American History", A publication of program on Information Resources Policy. Available at www.pirp.harvard.edu/pubs_pdf/seipp/seipp-p78-3.pdf. P.31 (Last visited on February 9, 2017)

[40], David Seipp J. "Right to Privacy in American History",(1978)A publication of program on Information Resources Policy. Available at www.pirp.harvard.edu/pubs_pdf/seipp/seipp-p78-3.pdf. P. 35 (Last visited on February 9, 2017)

[41], David Seipp J. "Right to Privacy in American History", (1978) A publication of program on Information Resources Policy. Available at www.pirp.harvard.edu/pubs_pdf/seipp/seipp-p78-3.pdf. P. 40 (Last visited on February 9, 2017)

[42], David Seipp J. "Right to Privacy in American History", (1978) A publication of program on Information Resources Policy. Available at www.pirp.harvard.edu/pubs_pdf/seipp/seipp-p78-3.pdf. P.65 (Last visited on February 9, 2017)

[43], David Seipp J. "Right to Privacy in American History", (1978)A publication of program on Information Resources Policy. Available at www.pirp.harvard.edu/pubs_pdf/seipp/seipp-p78-3.pdf. (Last visited on February 9, 2017)

intrusion into privacy threatens liberty and offends reasonable sense of personal dignity. The US Supreme Court has since then given intimate decisions regarding birth, education, marriage, divorce and death.

The courts in USA were following the English notions in terms of privacy which was connected to property rights of the person and which can be restored through law of torts like trespass and defamation. In 1881, in **De May v. Roberts**[44], a young man intruded upon a woman in childbirth and the court, invalidating her consent because of fraud, had allowed recovery without specifying the ground, which may be trespass or battery. Introspecting this, it was privacy case. That time this concept was rarely known to people. Moreover, there was no specific legal definition to be followed.

Different aspects of a person and his personality were recognised in need of the time. The first attempt was made by **Judge Cooley** as 'right to be let alone' in the judgement in the year 1888. But the term was first explored by **Warren and Brandeis** in their article in 1890.[45] This article is attributed as the origin of privacy as a legal value in United States. In their essay "The Right to Privacy" defined that 'privacy' means a right to be let alone, and object of privacy is to protect 'inviolate personality'.[46] They conceived that privacy as right of personality. As observed by them, "where the value of production is found not in the right to take profits arising from publication but in the peace of mind or the relief afforded by the ability to prevent any publication at all, it is difficult to regard the right as one of the property."[47]

They stated, "The principle which protect personal writings and all other personal productions are 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".[48] They argued that with the changes in political, social, and economy new rights emerge and the common law has to meet the

[44] 46 Michi. 160, 9 N.W. 146 (1881)
[45] Warren and Brandeis, "Right to Privacy", (1890)Harvard Law Review, Vol. IV, no.5,
[46] Warren and Brandeis, "Right to Privacy", (1890) Harvard Law Review, Vol. IV, No.5, p 205.
[47] Warren and Brandeis, "Right to Privacy, (1890) Harvard Law Review, Vol. IV, No.5. p.200
[48] Warren and Brandeis, "Right to Privacy, (1890) Harvard Law Review, Vol. IV, No.5.

demands of the society. They recognised the man's spiritual nature, his feelings and his intellect.[49] "These rights are not based on property, rather they are based on more general right of the individual right to be let alone"[50].

They recognised that the property includes tangible as well as intangible also. They explored the scope of this right and stated that modern business methods invade the personal space of the individual. Instantaneous photography and newspaper invade the sacred area of private and domestic life. For them privacy invasion concerned press intrusion on privacy of individual by printing gossip about them. They assumed that privacy regulation would always involve information identifiable to a person. Recognition of privacy is recent and related to the values of the society.

According to **Prof. Dean Prosser,** "Privacy is a collective interest in reputation, emotional tranquillity and intangible property." Development of the concept of privacy can be traced and examined through the various judicial pronouncements made by the court from time to time. The U.S. courts trace the right to privacy to the English common law which treated it as a right associated with 'right to property', which was declared that right of privacy is protected by law against trespass to property in **Entick (1765).** Lord Camden observed: "The great end for which men entered into society was to secure their property. This right is preserved sacred and incommunicable in all instances where it has not been taken away or abridged by some public law for good of the whole. By the laws of England, every invasion of private property, be it even so minute, is trespass. No man can set foot upon my ground without my licence but he is liable to an action though the damage be nothing"[51].

This aspect of privacy as a property right was accepted by US Supreme Court in Boyd (1886)[52] and other cases. The American Courts accorded full consideration to the views of Warren and Brandeis on privacy for the first time

[49] Warren and Brandeis, "Right to Privacy, (1890) Harvard Law Review, Vol. IV, No.5.p.198
[50] Warren and Brandeis, "Right to Privacy, (1890) Harvard Law Review, Vol. IV, No.5.p.205
[51] Entick v/s Carrington (1765) EWHC (KB) J 98, 19 Howell's State Trials.
[52] Boyd v. United States (1886)116 US 616 (627).

in 1902 in the case of Rochester Folding Box Co. (1902)[53], wherein the defendants made use of the Plaintiff's picture without her consent, in their advertisement. The court held that the right to privacy did not exist as there is lack of precedent. Justice Gray, (minority opinion) vigorously argued for the active protection of the right of privacy.

In 1905, for the first time the right of privacy was recognised and enforced by the American Courts in Pavesich (1905),[54] where Defendant's insurance company in advertisement, made use of Plaintiff's name and picture, as well as spurious testimonial from him. Georgia court accepted views of Warren and Brandeis and recognised the existence of distinct right of privacy.

For next thirty years, there was a continued dispute as to whether the right of privacy existed at all as courts elected to follow Roberson or Pavesich. Some cases followed Pavesich, like Young (1929)[55]**,** where defendant has been held liable for intruding plaintiff's home, in New Comb Hotel Co. (1921)[56], defendant was held liable for intruding hotel room.

In democracies, government is expressly barred from interfering with citizen's private beliefs, associations, and acts by guarantees of civil liberties except in extraordinary situations and only through controlled procedures. But the majority cases at that time were regarding the encroachment of privacy by government through its power in terms of search and seizure and surveillance. In Sutherland,[57] it was illegal search of plaintiff's shopping bag in a store was challenged and defendant was held liable.

It was soon carried beyond such physical intrusion. It was extended to eavesdropping from private conversations by wire-tapping which covers the area of informational privacy. In Olmstead (1928)[58] which was a case of wire-tapping or electronic surveillance and where there was no actual physical

[53] Roberson v. Rochester Folding Box Co. (1902), 171 N.Y. 536.
[54] Pavesich v. New England Life Insurance Co (1905), 122 G.H. 190.
[55] Young v. Western & A.R. Co,(1929) 39 Ga. App 761, 148, S.E. 414
[56] New Comb Hotel Co. v. Corbett 27 Ga.App. 365, 108 S.E. 309 (1921)
[57] Sutherland v. Kroger and Co;110 S.E. 2d 716 (W. Va. 1959)
[58] Olmstead v. United States (1928) 277 US 438.

invasion, the majority held that the action was not subject to Fourth Amendment restrictions. But, in his dissent, Justice Brandeis, stated that the Amendment protected the right to privacy which meant 'the right to be let alone', and its purpose was 'to secure conditions favourable to the pursuit of happiness' while recognising 'the significance of man's spiritual nature, of his feelings and of his intellect', the right sought 'to protect Americans in their beliefs, their thoughts, their emotions and their sensations'. This dissent came to be accepted as the law after another four decades.

This was also followed in McDaniel (1939).[59] Supreme Court of Ohio, under the name of privacy –in a case where a creditor hounded the debtor for considerable length of time telephone calls at his home and his place of employment -held against the defendant.[60]

3.3.1.1.3 Impact of Mass Media on Concept of Privacy

With the development of mass media especially television created again the change in criteria and norms of privacy. Trends of intrusive mass media and confessional television can generate strong voyeuristic threats to privacy. Threats involved are regarding reputation, liberty and freedom –of decision making by exposing the personal information.

William Prosser [61]put forward the concept of privacy with regard to this intrusive mass media, first by newspapers then by television, by highlighting four types of torts inclusive of other torts. He enlisted them as—

(A) intrusion upon a person's solitude-where he explained that intrusion must be offensive or objectionable for reasonable man. In a public street a man has no right to be let alone, but in his home or placed where he generally expects that he has right to be in seclusion, intrusion in such areas is objectionable.

(B) public disclosure of embarrassing facts of person's private life. There will be liability only for publicity given to those things which the customs and ordinary views of the community will not tolerate. This is distinct from intrusion. This interest protected is that of reputation with some overtones of

[59] McDaniel v. Atlanta Coca-Cola Bottling co.60 Ga. App.92, 2 S.E. 2d 810 (1939)
[60] House v. Peth, 165 Ohio. St. 35, 133 N.E. 2d 340 (1956).
[61]Prosser W., 1960, 'Privacy', California Law Review, 48: 383-423.

mental distress that are present in libel and slander. It is really an extension of defamation. Here the facts must be private and they are made public. He referred the case of Sidis (1938)[62], the case was decided on privilege of reporting on matters of public interests which supported the publication." But outcome of the story suggests that intrusion can be destructive.

(C) He explained the third tort as-"publicity which places an individual in false light in public eyes. He gave an example of Lord Byron- who, in 1816, succeeded in enjoining the circulation of spurious and inferior poem attributed to his pen.[63] Publicity falsely attributed to Plaintiff some opinion or utterance. He further described another form of this type – i.e use of Plaintiff's picture to illustrate a book or an article in which he has no reasonable connection. In public interest it is somewhat agreeable but where a face of some innocent and unrelated citizen is employed to ornament an article on 'Negligence of children' as in Leverton (1951)[64] or peddling of narcotics as in Thompson. (1950)[65] there is an obvious innuendo that article applies to him, which places him in a false light before the public and is actionable."

(D) The fourth tort is explained by Prosser is "Appropriation to a person's advantage of another's name or likeness.[66] He explained this with the help of cases, Macanzie (1891)[67] and Kerby (1942)[68] Name of the plaintiff has been used without his consent to advertise defendant's product. Anybody can take name of any great and famous person but when he uses it to pirate the person's identity for some advantage of his own, he becomes liable. It is in this sense that 'appropriation' is to be understood. If this name can be identified with the name of plaintiff then Plaintiff is entitled to the protection against its use. There is no liability for using hand, foot or dog of famous person if nothing is there to

[62] Sidis v. F.R. Publishing Corporation 113 F 2d 806 (2d Cir. 1940); affirming 34 F Supp. 19 (S.D.N. Y.1938)
[63] Lord Byron v. Johnson, 2 Mer. 29, 35 Eng. Rep. 851 (1816)
[64] Leverton v. Curtis Publishing Co 192 F 2d 974 (3rd Cir. 1951)
[65] Thompson v. Close-up, Inc 277 App. Div. 848, 98 N.Y.S. 2d 300 (1950)
[66] Prosser W., 1960, 'Privacy', California Law Review, 48: 383-423.
[67] Macanzie v. Soden Minaral Springs Co.27 Abb. N. Cas. 402, 18 N.Y.S. 240 (Sup.ct. 1891)
[68] Kerby v. Hall Roach Studios 53 Cal. App. 2d 207, 127 P. 2d. 577 (1942)

indicate whose they are." He only explored and assumed that privacy tort applied only when an identified person was involved.

The privacy includes right to take decisions regarding one's personal matters, this was upheld in various decisions by courts. When the right to personal privacy regarding freedom of using contraception came up for consideration in Griswold (1965)[69], the Court traced the right to privacy as an emanation from the right to freedom of expression and other rights, in the absence of specific provision in US Constitution. The learned judge stated the 'privacy is a fundamental personal right, emanating from the totality of the constitutional scheme, under which we (American) live.' In Poe v. Ullman (1961)[70]- Gynaecologist Buxton challenged with his patients. Supreme court again dismissed it as plaintiff had not been charged or threatened with prosecution so there is no controversy to be resolved by the court. J Marshall Harlan II expressed his opinion in this case- "It is rational continuum which, broadly speaking, includes a freedom from all substantial arbitrary impositions and purposeless restraints." [71]

In Warden (1967)[72], Right to birth control for unmarried couples was claimed after the right to get help in contraception and having planned parenting. Right to privacy of the married couples was recognised in Griswold but such right was not recognised for unmarried couples. In Eisenstadt (1972)[73], it was challenged on 'Equal protection' clause of 14th Amendment. J. Brennan held that it is "irrational discrimination" if it is not extended to unmarried couples as state cannot enforce it against married couples. The leading case regarding extension of the right of parenting is Roe (1973)[74].Court struck down Texas Law that criminalised aiding a woman in getting an abortion. Court held that it is a violation of Due process clause of 14th amendment.

[69] Griswold v. State of Connecticut 381 US 278
[70] Poe v. Ulman, 367, US 497 (1961)
[71] Poe v. Ulman, 367, US 497 (1961)
[72] Warden v. Hayden 387 US 294 (304) (1967)
[73] Eisenstadt v. Baird, 405 US 438 (1972)
[74]Roe v. Wade 410 US 113 (1973).

Thereafter, in Katz (1976)[75], there was a clearer enunciation when the majority laid down that the Fourth Amendment protected 'people and not places'. Harlan, J. in his concurring opinion said that the Fourth Amendment scrutiny would be triggered whenever official investigative activity invaded 'a reasonable expectation of privacy'. It depends upon what other tests in other criminal laws, i.e. old trespass standards. The test gives more flexibility to protect broader concept of human dignity at a time when information technology had outstripped what property rights alone could protect. He used this on the basis of objective standard used in the term 'reasonable man' from tort law.

He observed that two things are necessary to formulate 'reasonable expectation' – a) Person has exhibited an actual (subjective) expectation of privacy and b) expectation be one that society is prepared to recognise as 'reasonable'. When a person is in his home, this first test is fulfilled. For the second test his objects, activities or statements that he exposes to outsiders-the plain view- as his intention to keep them to himself. So everything depends upon the behaviour of the person. When such expectation is 'reasonable' according to the standards prevailed in the society, the second test is proved. Now what is 'reasonable' is again subjective to each society. So providing protection for right to privacy, a new test was suggested that there must be 'reasonable expectation of privacy'. Court has provided the protection in restricted way.

When information is used for money-In earlier times, in small towns, people knew each other and so knew their financial capacity and trust worthiness. Creditors come to know about this through gossips in society. But in twentieth century, bulging population and increased mobility of population, creditors were not in a position to know easily about people.[76]-- Creditors started relying on records and documents to assess reputation.[77] Due to numerous complaints about

[75]Katz v. United States (1976)389 US 347
[76] Steven Nock-The Cost of Privacy: Reputation and Surveillance in American society. 3, 93 (1993)
[77] Smith, Robert E. BEN FRANKLIN WEBSITE "Privacy and Curiosity from Plymouth Rock to the Internet" 12 (2000)-cited in "A Brief History of Information Privacy Law", Solove D.J. of GW Law faculty publication & other works at https://scholarship.law.gwu.edu/cgi/viewcontent.cgi?article+2076&context (Last visited on January 3, 2018)

such erroneous credit reports-[78] and non-responsiveness of the credit agencies, congress enacted Fair Credit Reporting Act, 1970.

3.3.1.1.4 Use of Information Technology and Invasion on "Privacy"

After 1960, computers were permitted in public administration and private companies to process personal data in America. It increases the amount of information and generate the data after processing of data as data could be organised, accessed and searched by which an individual becomes identifiable. So by this way individual becomes more accessible for advertising by commercial organisations which affect decisional privacy. It was used by financial institutions to check the creditworthiness of the consumer which affect the reputation of the person. This result into the invasion on the informational privacy of person. Because of this invasion, a possibility emerges that a person loses his fundamental and legal rights. The Courts dealt with such situations in some cases.

In 1962, project was developed by Special Committee on Science and Law of the Association of the Bar of the City of New York. The Director of the Research was Allan Westin. The facts and results of this research was documented in his book "Privacy and Freedom", the project titled "Impact of Science and Technology on Privacy". According to Jan Holvast, "from those period three words controlled the term 'privacy', freedom, control and self-determination. Because of advancement of technology, privacy has become ever growing concern."[79] It was explained in the paper that "Information is used for two purposes 1. For power, 2. Money. Information is power and information is money. These are the two reasons for collection, use, store and dissemination of information. These are the reasons of presence of information technology. Every

[78]Robert Smith, E. BEN FRANKLIN WEBSITE "Privacy and Curiosity from Plymouth Rock to the Internet" 12 (2000) cited in "A Brief History of Information Privacy Law", Solove D.J. of GW Law faculty publication & other works at https://scholarship.law.gwu.edu/cgi/viewcontent.cgi?article+2076&context (Last visited on January 3, 2018)

[79] Holvast, Jan, "History of Privacy", (2009)https://link.springer.com/content/pdf/10.1007/978-3-642-03315-5_2.pdf (Last visited on January 3, 2018)

information about the every aspect of human life is gathered by government and industry[80].

For controlling the invasions and encroachments on privacy of an individual legal framework is enacted by the government. It was shown by Robert Gallmen, a privacy expert that, "in 1973, advisory committees appointed by Department of Health, Education and Welfare (HEW) suggested some Fair Information Practices as set of principles for protecting the privacy of personal data in record keeping systems. The Committee was set up in response to growing use of automated data systems containing information collected and maintained about individual in public and private sector organisations. This HEW report was the origin of "Fair Information Practices", a set of privacy principles that formed the basis for modern legislation.[81]

More principles were added to these privacy principles and inculcated in the privacy protection legislations. Obama administration proposed Consumer Data Privacy Framework that incorporates a 'Privacy Bill of Rights'. It was explained, "As internet evolves, consumer trust is essential for continued growth of digital economy. For business to succeed online, consumers must feel secure."[82] But speed of advent of technology is more than enactment of legislation. Also the effects of inventions on privacy of individual were not visible at the same time. In this situation again courts provide the protection by interpreting the legal provisions in changed situations.

In Shulman,[83]it was held that unauthorised collection of data in video and audio newsgathering an intrusion into another's seclusion. In Supnick[84] **t**he law suit came after a privacy complaint filed with Federal Trade Commission by computer security expert Richard Smith. Smith alleged that company is

[80] Holvast, Jan, "History of Privacy",(2009) https://link.springer.com/content/pdf/10.1007/978-3-642-03315-5_2.pdf (Last visited on January 3, 2018)
[81] Gallmen, Robert, "Fair Information Practices: A Basic History", (2017) available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=24150207 (Last visited on January 3, 2018)
[82] The White House, Office of Secretary, "We cannot wait: Obama Administration Unveils Blue Print for a Privacy Bill of Rights" at www.whitehouse.gov/the-press-office (Feb.23, 2012) (Last visited on January 3, 2018)
[83] Shulman v. Group W. Productions Inc.; 18 Cal. 4th 200 (1998).
[84] Supnick v. Amazon.com, Inc.; 2000 US District LEXIS 7013 (W.D. Wash.2000).

gathering more private information than Amazon acknowledges. Plaintiff claimed these practices violated Electronic Communication Privacy Act, 1986 and constituted a common law invasion of privacy. Court approved settlement agreement.

In Fischer[85] defendant-employers monitoring of Plaintiff-employee's telephone conversation and accessing plaintiff's web based e-mail account. Court held that the case is covered under Stored Communication Act as defendant hired a computer expert and guessed plaintiff's password so as to access and review plaintiff's web based e-mails. Defendant was also held liable under Wire Tape Act and it was also held that defendants should have ceased to listen to conversation when they discovered it was personal in nature.

But still it was very difficult to get success when and if action was brought under the claim of privacy right only and no other ground was contended. New technologies raise new types of privacy encroachments. These are to be dealt with the existing legal provisions by applying them as they are or extending the scope of the provisions.

As in Boring[86]**,** Boring sued Google for invasion of privacy and trespass after Google's Street View car drove down their private road and captured Boring's house and pool on its camera, which was displayed in Google's Street View feature. Dismissing Boring's claim of intrusion upon seclusion and publicity given to privet life, court found no reasonable person would find a car driving down a driveway and taking picture "highly offensive". However 3rd Circuit Court reversed the District court on trespass claim and allowed the action as physical trespass is a strict liability tort and complaint did allege that Google's car entered on to Boring's private land.

Basic issues of privacy also relates to liberty of person by which his personality and communication are affected. Sending a data is communication and

[85] Fiacher v. Mt. Olive Lutheran Church Inc. 207 F. /sup. 2d 914. (W. D. Wis. 2002).
[86] Boring v. Google Inc. No. 09-2350, 2010. US App. LEXIS 1891 (3rd Cir. Jan 25, 2010)

encrypting a data is also one of the ways of data protection. There are State restrictions and regulation on basic liberties like communication, free speech and data protection. The development of concept is mostly through court decisions in U.S before privacy and data protection laws were enacted accepting the different aspects of privacy for protection.

3.3.1.1.5 Discussion

It can be observed from the above discussion, the development of the Right to Privacy has started its journey from vacuum. The concept was associated with the land which is the earliest possession of an individual, and was possessed by the state. Jurist like Locke opined that man has property in his organs also and he creates the property with his labour using these organs and it is known as personal property. The right to privacy was carved from the right to enjoyment of this personal property by a man. Privacy protects the person from unwarranted intrusion or invasion on his right to enjoy personal property. In agrarian society, the value privacy was associated with land or property. Though people were unaware about the 'privacy' specifically as a right but in practice, rules were made for protection of property. This is evident from the provisions in Roman law, where it was provided that the person shall enjoy his property subject to rights of his neighbour.

In colonial days, towns were small with few people living in it. There was nothing personal in such society as everybody knew each one and therefore there was no privacy. But the protection in limited sense was provided which was associated with home of a person. With emergence of the state, the activities of citizens were controlled by it. For maintenance of law and order and for administration of justice, state had some powers. The two important powers are of search and seizure. These powers were and are used against the citizens by searching their property. The legal provisions also provide that power of search and seizure shall not be used without obtaining legal warrant by the officers of state. These provisions show that privacy of person i.e. his home shall not be disturbed without proper authority under law. Bill of Rights recognised this right against the invasion by state as fundamental right. The right to privacy is given

to people to be secure in their persons, houses, and papers. This way right to property developed in to right relating to personal property.

In 18th and 19th century, as it was observed by David Seipp, that the privacy threats were associated with the information of the person while economy was developing. With the development in various fields in society, transactions among the people became complex. Information regarding the person became invaluable. Seipp stated many instances where information was gathered unauthorised by opening the letters and packets which were sent through posts. Privacy of information was yet another aspect which was recognised. The breach of this right was protected by courts under the provisions of torts.

Invasion of privacy of the person was recognised widely after Warren and Brandeis explored the term as 'right to be let alone' in 1890.[87] They recognised the right in respect of the personality, feelings of the person. Concept of privacy in America emphasized more on privacy in respect of liberty, freedom and dignity of a person. According to it, to preserve the liberty, freedom and dignity, privacy of property, thought, expression, information is essential. Right to privacy was protected as tort of privacy as no law was enacted for protection of it. Prosser developed this tort in four different torts, in which using the information, publication of information, false light on the person, and intrusion in the life of person are included. Three torts out of four dealt with the privacy of information. Due to scientific inventions, the information published in newspaper may encroach the privacy of person. Photos captured by instantaneous camera are also published to increase the authenticity of news. These publications may harm the privacy interests.

In protection of privacy, the courts have stretched the fine line between state's power of search and seizure and right of an individual. The protection was provided by interpreting the amendments to constitution especially First[88],

[87] Warren and Brandeis, "Right to Privacy", (1890)Harvard Law Review, Vol. IV, no.5,
[88] First Amendment protects freedom of free speech, freedom of press etc.

Fourth[89], Fifth[90] and Fourteenth amendment[91]. In Boyd, the search of property was challenged and court has provided the protection under Fifth Amendment and held the search was illegal as conducted without warrant, it breaches fundamental right against self-incrimination.

The Court has widened the ambit of search and has extended it to search conducted by third parties as well. Also, with the advancement of technology, the traditional mode , method changed and the meaning of search connoted newer meaning . And the discussions in the foregoing cases has established as to how the notion of privacy was protected by interpreting and including the newer technological advances in the traditional concept of search and extended the protection of privacy of individuals.

In one of the cases discussed above, where the search was conducted by a 3rd party and not government but protection was provided against this search. For accessing the information for search in Katz (1976), the tapping of the telephones were considered as search and held illegal under Fourth Amendment. Protection was extended to the person where the search was conducted using advanced technology. The court guarded the privacy by interpreting 'search' in terms of the use of GPS device to the vehicle of person, in Jones (2012), holding that affixing GPS device to vehicle for tracking the whereabouts of person without his consent amounts to search. In Carpenter(2018) obtaining the data from mobile service provider was held as 'search' by the police under Fourth Amendment.

The court had protected the decisional freedom in respect of his personal – marital life i.e. in cases of using contraceptives. In Poe(1961) and Griswold (1965) the decisional privacy was protected in respect of use of contraceptives by the married persons under Fourteenth Amendment. In Eisenstadt (1972) the same protection was extended to unmarried persons on the issue of 'equality' under Fourteenth Amendment. In Roe (1973) ,decision of a woman for abortion

[89] Fourth Amendment protects against warrantless search
[90] Fifth Amendment protects right against self-incrimination
[91] Fourteenth Amendment protects right to equality, liberty, autonomy, self-determination.

was upheld by the court invalidating the law under Fourteenth Amendment. For disclosure of personal information, the right to privacy was decided against the freedom of press. In Siddis (1940) where the information about a child prodigy was published by newspaper. But court held that the press has freedom of expression under First Amendment as people have right to know about famous persons. But when this information is disclosed about the common person, in Schulman (1998), court held that without consent of person who has faced the accident, the coverage of this news cannot be published. The person has right to privacy.

After the invention of computer and information technology, information became source of power and money. More the use of information technology, more information is generated. Information is used for two purposes, power and money as per the opinion of Halvast. With such use, privacy threats have increased many folds and in very non-presumptive way. For controlling the invasions and encroachments on privacy of an individual legal framework is enacted by the government. Government enacted sector specific privacy protection legislations in USA.

In protection of privacy, courts were and are great contributors. From the beginning of the development of 'right to privacy', courts provided protection for this privacy right. Earlier the decisions were based on trespass to property and person. Then with the passing time, new contours were developed. They recognised the liberty of person to make choice for their personal matters like family, marital life, procreation etc. Protection was provided on the basis of fundamental rights, amendments to it. Contribution of American Courts are invaluable for broadening the concept with introduction of the principle 'reasonable expectation of privacy'. With the rise of information technology, the protection was provided on the basis of right to privacy along with the protection under sector specific legislations like Wire Taping Act, Stored Communication Act etc. For data protection, the courts give protection under these Acts. In short, the concept privacy was developed through the courts as well as by the contribution of jurists and writers.

3.3.1.2 United Kingdom

In colonial England, protection of right was not available under the term 'privacy'. Flaharty explained "religious beliefs and primitive physical conditions maintained the system of moral surveillance over the behaviour. But construction of more scattered and developed structures for residence, larger settlements, general waning of authority and control of family members contributed for more personal privacy by eighteenth century. There were only few instances of balancing the interests of privacy such as privacy of letters".[92]

3.3.1.2.1 Notion of Privacy under English Law

Under English law there are no provisions for protection of privacy in Constitution or other laws. Right to privacy starts in English law with the concept of his right to enjoy the property. As laws were not enacted for protection of privacy in earlier times, the protection of this right was sought through courts under the principles of Torts. The Right to Privacy and the power of the State to interfere-by search, seizure, interception in any way- have been the debate in almost every democratic country where fundamental freedoms are guaranteed. This takes us back to the case of Semayne (1603), where it was laid down that 'Every man's house is his castle'[93]. But no general right to privacy was existed in England. Partial protection is existed through Torts remedies like trespass, defamation and breach of confidence. The latter two were dealing with the exposing or disclosing the personal information.

Information was used for creating money also. Through the information exchange money was created and protected. Personal data is important for businesses. Its importance can be traced in the history. Businesses got credit on familiarity and creditworthiness. It is explained by Olegario that "in small towns people know each other and it is easy to do business with them. When town grew larger, urban traders felt risky to do business with strangers. These developments spawned credit reporting agencies, companies which obtain and report information about credit history of persons. Credit reports contain

[92] David, Flaharty, "Privacy in Colonial New England" (1972) University Press of Virginia..
[93] Semayne, (1603) (5 Coke's Rep. 91a) (77 Eng. Rep.)

detailed financial history, financial account information, outstanding debt, bankruptcy filing, mortgage, lien etc. Tradesmen began to band together for their own protection. E.g. in London the Society of Guardians for protection of Trade against Swindlers and Sharpers in 1776. By 1812, it had over 550 members spanning nearly every trade in the city of London."[94] Business of credit reporting prospered for facilitating businesses. However, in order to stand out among the competition, credit rating businesses began to collect more and more information about the individuals, information which not directly financially relevant but indicative of their ability to pay[95].

As there was no legal right to privacy, exposing the information to public was dealt with the law of tort in defamation or breach of trust. The law of confidence prevents other party to disclose the information about the person. In Pope v. Curll (1741),[96] Curll published five volumes of Pope's private letters, including the twenty-seven years of history of correspondence with Swift. Pope challenged him. Court found it difficult to punish him in copyright law therefore protected him in right to privacy in correspondence. The court recognised that there was a value in personal communication.

In a landmark judgement in Entick (1765)[97], the king's messengers broke into the house of writer Entick and searched his house for writings. They broke opened the locked door, cabinets, drawers. Search was ordered by Secretary of State. Lord Camden declared the behaviour as subversive 'of all the comforts of society' and Secretary of State does not have any authority under any Statute or precedent to issue warrant. Gee v. Pritchard (1818)[98] case was brought by Mrs. Gee against her step son, Rev, Pritchard, who had tried to publish his private correspondence with her. Court issued injunction order preventing publication as Mrs. Gee has property rights in letters.

[94], Rowena Olegario "A Culture of Credit: Embedding Trust and Transparency in American Business" (Harvard University Press, 2009).
[95] Rahul, Matthan, "Privacy 3.0: Unlocking Our Data-Driven Future", (2018) Harper Collins Publishers 2018 ed.
[96] Pope v. Curll (1741)26,Eng. Rep. 608(Ch)
[97] Entick v. Carrington (1765) (19 Howells' State Trials 1029) (95 Eng. Rep. 807)
[98] Gee v. Pritchard (1818)36,Eng. Rep. 670

In Albert V. Strange, (1848),[99] Strange an art dealer tried to exhibit the etching done by Queen Victoria without the Royal permission. Lord Chancellor granted injunction on the ground of breach of privacy. In Ashberton v. Pape (1913)[100] injunction was given against Pape who tried to use letters between Lord Ashberton and his solicitor in bankruptcy proceedings.

In Saltman Engineering Co.(1948)[101] confidential information obtained from plaintiff used by defendant for his use without express or implied consent of plaintiff is guilty of breach of plaintiff's rights. The court allowed a breach of privacy against a larger universe of people who shared confidential relationship. This was held in Argyll v. Argyll (1967)[102] Duke of Argyll attempted to disclose evidence of his wife's letters to press. He was fighting the case of divorce against her. Court prevented him, observing that 'there could be hardy anything more intimate or confidential than is involved in a marital relationship.'

In Coco v. Clerk (1969),[103]court gave test for the breach of confidence, 1. Information must have the necessary quality of confidence about it, 2. It must have been imparted in circumstances imparting an obligation of confidence and 3. There must be an unauthorised use of that information to the detriment of the party communicating it. Law of privacy revolved around privacy violations as consequences of breach of confidence. Historically, the law of confidence arose only in special well-known relationship of trust or in commercial trade secret context. Though England is signatory to the European Convention, the right to privacy is not enacted under the English law. Person's right to protect his reputation is recognised in action for defamation but not for right to privacy.

3.3.1.2.2 Notion of Privacy in Modern times

After advancement in the communication technology, the invasion of privacy was manifold. The print media and afterwards electronic media violated and

[99] Albert V. Strange, (1848)41, Eng. Rep. 1171. (Ch).
[100] Ashberton v. Pepe, 2 Ch.D. 469 (C A.)
[101] Saltman Engineering Co.(1948) 3 All E.R 413
[102] Argyll v. Argyll (1967)Ch. 302, U.K.
[103] Coco v. Clerk R.P.C 41 U.K

encroached the privacy. In Kaye v. Robertson [104](1991) the actor Kaye was hospitalised after car accident. Two journalist interviewed him and took photograph. Action was brought for injunction of publishing the photo and interview. Court held there is no right to privacy and only remedy available is under malicious falsehood.

The issue in Douglas was right to privacy for publication of personal photos. In this case of Douglus v. Hello! (2001)[105] injunction for publication of photos of Michel Douglus and Catherine Zeta-Jones was discharged holding that there is no breach of privacy. English courts refused to declare tort of privacy explained by Prosser as in House of Lords in Wainwright (2003)**[106]**. In absence of privacy tort to protect against press intrusions, claimants have tried to bend other legal principles, B Pictures, (2003)[107], Douglas (2003)[108] where equitable remedy of confidence was applied and in Ellis(2003)[109] which argued administrative law principles governing police powers. Defamation clauses are made to silence the press especially investigative journalism.

3.3.1.2.3 Privacy and Data Protection

The Human Rights Act, 1998 also contributed for protection of right to privacy in England. It has inculcated the right to life and family as provided under European convention. Robert Walker in his paper discussed the cases of Campbell v. MGN[110] and Wainwright v. Home Office[111] and other privacy cases and elaborated that Right to Privacy is not separate right in UK but evolved as a human right after enactment of Human Rights Act.[112]

After EU's OECD principles, Briton had enacted the Data Privacy Law in 1984 and Access to Personal Files act, 1987. After Directive in 1995 /95/46/EC,

[104] Kaye v. Robertson (1991) FSR 62
[105] Douglus v. Hello!(2001) 2 All E.R. 289
[106] Wainwright v. Home Office (2003)3 All E R 943
[107] A v. B Pictures, (2003)QB 195
[108] Douglas v. Hello! (2003)EWHC (ch) 786
[109] Ellis v. Chief Constable, Essex Police (2003)EWHC 1321.
[110] Campbell v. MGN, (2004) 2 AC 457, UKHL 22
[111] Wainwright v. Home Office (2004) 2 AC 407
[112] Robert, Walker., "THE ENGLISH LAW OF PRIVACY- AN EVOLVING HUMAN RIGHT" At www.supremecourt.uk/docs/speech_100825.pdf (Last visited on January 3, 2018)

Briton enacted another Data Protection Law in 1998. Both earlier laws were replaced by Data Protection act 1998. Briton has accepted the directives as she was the part of European Union. In all these Acts, the privacy of person is connected with personal information and data of such person. All these Acts were enacted for the protection of human, fundamental and legal rights of an individual if his information is collected, used, stored or disseminated without his consent and for the purpose other than for which it is collected. So, in true sense, these Acts are data protection Acts.

For publishing the confidential information of the person, Right to Privacy was claimed in many cases. A v. B Plc. (2003)[113], where publishing the news with photographs about extramarital relationship of premier footballer was held as breach of Right to privacy. In Campbell v. MGN Ltd. (2005)[114], publishing the information about attending Narcotics Anonymous meeting by famous model Naomi Campbell was challenged under s. 13 of Data Protection Act, 1998 and s. 6 of Human Rights Act which was held in favour of Ms. Campbell as breach of her privacy rights guaranteed underArt.8 of ECHR.

In Mosley v. News Group Ltd. (2008)[115] video clip regarding president of Federation of International de Automobile, the governing body of motor sport worldwide, was filmed engaging in sado-masochistic activities with five hookers in a private flat. An edited version of the footage was made available on NGN's website with a news of world. Article was published. The clip was removed after the objection was taken but in the meantime millions of people watched the clip. It was held that it is breach of privacy of the person.

In AAA v. Associated News Paper (2012)[116] and Weller v. Associated News Papers Ltd. (2014)[117] the misuse of photographs taken without consent of the children and published. It was held that it is breach of privacy of persons involved and substantial amount of damages were given. In Halliday v. Creation

[113] A.v. B Plc. (2003) QB 195.
[114] Campbell v. MGN Ltd. (2004) UKHL 22
[115] Mosley v. News Group Ltd. (2008) EWHC1777 QB
[116] AAA v. Associated News Papers (2012) EWHC 2163 QB
[117] Weller v. Associated News Papers Ltd. (2014) EMLR 24

Consumer Finance Ltd. (2013)[118], the issue of unlawful processing of data was raised. Damages were awarded to the claimant.

In Cliff v. BBC (2018)[119], Sir Cliff Richard, a renowned singer was arrested on allegation of a person that he was assaulted by Sir Cliff when he was a child. BBC covered the news by engaging photographers using helicopter to take photos of Sir Cliff's house while arrest and published it. When challenged under Data Protection Act, 1998 and Human Rights Act, court held that Sir Cliff was not given fair chance to clarify before publication. Moreover, publication was made sensational by using helicopters. It is a breach of privacy as personal information is disclosed.

Use of new technology for maintaining law and order is also raising privacy challenges. The use of CCTV and Automated Face Recognition system was challenged in R v. Bridges (2019)[120]. It was challenged on the ground that it is in contravention of Privacy and Data Protection Act. Court held that police has power for prevention and detection of crime and therefore has authority to use devices for control. Therefore, it was held that use of Automated Face Recognition system is not in contravention of Privacy and Data Protection Acts.

After the General Data Protection Regulation 2016/679 by European Union, England has accepted the principles and standards provided for the data protection and included in the Data Protection Act, 2018 repealing the Data Protection Act, 1998.

Privacy was never recognised as a value by English system. The development of privacy as a value is not very strong. In colonial England, privacy was associated with some religious beliefs and moral principles for monitoring the behaviour. Privacy starts with the control over house, property or belongings in limited sense in England. As it is evident from above discussion, laws in England have never recognised right to privacy. England has unwritten

[118] Halliday v. Creation Consumer Finance Ltd. (2013) EWCA Civ. 33
[119] Cliff v. BBC (2018) EWHC 1837 (Ch.)
[120] R.v. Bridges (2019) EWHC 2341.

constitution. But there are no provisions as fundamental rights to protect privacy.

Even courts were reluctant to provide protection on 'Right to Privacy.' The protection was provided under the Laws of Torts, defamation and breach of confidence. The proprietary rights were protected under laws of Torts and rights relating to information were protected under defamation or breach of confidence. Courts even protected the information in letters holding that the person whose information in those letters was compromised, had a property in the letter and the relief was awarded to him.

After the growth of economy, demand for protection of privacy was increased. Government appointed a committee to ascertain whether right to privacy shall be provided. The committee opined that the existing legislations are sufficient to protect the right and there is no need for separate legislation for protection of right to privacy.

Publication or disclosure of information was protected under the breach of confidence and not on the right to privacy. Significant change was experienced when the data protection principles were declared by European Union. Being a member of European Union, England has recognised the principles and the Directive issued. Briton has enacted Data Protection Acts and protection was provided under these Acts. Major change in granting the relief for privacy rights was brought when Human Rights Act was enacted. Under the provisions of this Act, right to privacy is recognised in limited way. But on the whole, under British system, right to privacy is protected in limited sense.

3.3.1.3 European Union:

In European countries the notion of privacy is different from American concept. Whitman explains "In Europe, 'Dignity' is privacy. There nudity, baby names, official ID card number is not connected to privacy. In Germany, you have to register with local police when you move to new place. 'Dignity' means protecting individual control over use of his image, name, reputation and

information regarding that. It is a control over one's public image. You have right not to be humiliated or embarrassed in public. Concept of dignity 'descends' from honour and so-called law of 'insults' that accumulated over centuries around it. Aristocrats and high status individuals protected their Honour (i.e. their public image) through duelling. Gradually they used to meet in court instead of for duelling."[121]

"After World War II, all persons of whatever status could expect to be addressed by other adults as 'Vous' or 'Sie'. German lawyers went back to Roman Law of 'Insult' (Injuria). They constructed the concept of 'ersonlichkeit (personality or personhood) in context same as 'liberty' used by Americans."[122] Europeans detest of talking about their salary or net worth in public and conscious about keeping information about themselves secret. But Americans do not. So the meaning of privacy is different in European countries, which is related more to personal information than proprietary rights in America.

After World War II, the value privacy attained legal and cultural status of fundamental rights in Europe. The Council of Europe was formed in the aftermath of the Second World War to bring together the states of Europe to promote the rule of law, democracy, human rights and social development. For this purpose, it adopted the European convention on Human Rights in 1950, which entered into force in 1953. Originally it was mentioned in United Nation's Declaration of Human Rights (UDHR)[123] and afterwards it was followed in other post war international instrument such as European Convention of Human Rights (ECHR)[124]. States had an obligation to comply with the ECHR in their national law, which requires them to act in accordance with the provisions of

[121] James, Whitman, Q, "The Two Western Cultures of Privacy: Dignity versus Liberty".(2004). Faculty scholarship series.649. Available at https://digitalcommons.law.yale.edu/fss_papers/649. (Last visited on January 4, 2019)
[122] James, Whitman, Q, "The Two Western Cultures of Privacy: Dignity versus Liberty".(2004). Faculty scholarship series.649. Available at https://digitalcommons.law.yale.edu/fss_papers/649. (Last visited on January 13, 2019)
[123] Universal Declaration of Human Rights, art. 12 G.A. Res. 217 (III) A, U.N. Doc. A/Res/217(III) (Dec.10, 1948)
[124] Convention for the Protection of Human Rights and Fundamental Freedoms art. 8, Nov. 4, 1950.

the Convention. After World War II, until 1986, scope and size of European economy grew.

3.3.1.3.1 Notions of privacy

The norms of privacy of European Union is compared with notions of privacy in United States by Hoofngle.[125] In his article, he had mentioned the opinions of various writers like Fuster, which explains that "Europe has recognised privacy explicitly as a human right".[126]Koops et. el explains "Europeans' commitments go beyond the home, the focus of so U.S. law, as to include protections for family life, communications, reputations[127], and with rise of information age, for privacy in context of data processing. While U.S. lawyers may refer broadly to 'privacy' or to 'information privacy; European law discusses informational privacy as 'data protection'.[128] In Europe data protection is increasingly seen as separate form of privacy. Data protection focuses on whether data is used fairly and with due process,[129] while privacy preserves the Anthenian ideal of private life."[130]

"After 1970, U.S accepted Fair Information Practices (FIPs), the basis of all informational privacy laws, but applied them only to government and to private sector.[131] Europe accepted them, expanded them to all informational processing, both vertically, i.e. government to citizens and horizontally i.e. business to citizen," he explained.[132]

---

[125] Hoofngle, Chris Jay, Sloot Bart van der & Borgesius Frederik Z, "The European Union general data protection regulation: What it is and what it means", (2019) Journal of Information & Communication Technology Law, Vol. 28, 2019 issue-1. At https://www.tandfonline.com/doi/full/10.1080/13600834.2019.1573501 (Last visited on January 13, 2019)

[126], G. Gonzalez, Fuster, "The Emergence of Personal Data Protection as Fundamental Right", (Springer 2014)

[127] "Constitutional Protection of Privacy in European Union Countries", Koops, B.J, Newell, B., Timan T., 'Typology of Privacy' (2017) 38(2) University of Pennsylvania Journal of International Law 483.

[128], P. M Schwartz & D. J. Solove. "Informational privacy concerns, the collection, use and disclosure of personal Information". Informational Privacy (Aspen 2009).

[129], Gonzalez Fuster G. "The Emergence of Personal Data Protection as Fundamental Right", (Springer 2014)

[130], Chris, Hoofngle Jay, Sloot Bart van der & Borgesius Frederik Z, "The European Union general data protection regulation: What it is and what it means", (2019) Journal of Information & Communication Technology Law, Vol. 28, 2019 issue-1. At https://www.tandfonline.com/doi/full/10.1080/13600834.2019.1573501 (Last visited on January 13, 2019)

[131], Robert, Gellman "Fair Information Practices: A Basic History", (2017) at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=24150207 (Last visited on January 13, 2019)

[132], Chris, Hoofngle Jay, Sloot Bart van der & Borgesius Frederik Z, "The European Union general data protection regulation: What it is and what it means", (2019) Journal of Information & Communication

The advent of automated Data Processing Convention and later Additional Protocol, Data protection authorities were created in member states. In 1981, a convention for the protection of the individuals with regard to the automatic processing of personal data (Convention 108) was enacted Convention 108 applies to all data processing carried out by both the private and public sector, such as data processing by the judiciary and law enforcement authorities. It protects the individual against abuses, which may accompany the collection and processing of persona data.

3.3.1.3.2 Protection of Personal Information

In European Union member countries, the impetus is put and importance is given to protection of personal information or personal data of an individual. This thing is underlined from the various decisions given by Court of Justice of European Union in following cases.

As it is discussed in **S and Marper**[133]'s case, the application was made by the applicants as their action for breach of privacy of personal data was failed in UK. DNA samples and finger prints of the claimants were preserved by the Authorities for unlimited time. Preservation of such samples for unlimited time is provided according to the law applicable in the country. Applicants demanded erasure of this data and filed an action when their request was denied. Court of Appeal rejected their contention and dismissed the appeal. House of Lords also dismissed the petition.

Application was made to European Court of Human Right for the breach of rights under Art. 8(1) and Art. 14 of Convention. European Court considered that whether retention of fingerprints, DNA profiles and cellular samples constitute an interference in their private life under Art. 8 of the Convention. It

Technology Law, Vol. 28, 2019 issue-1. At https://www.tandfonline.com/doi/full/10.1080/13600834.2019.1573501 (Last visited on January 13, 2019)

[133] S and Marper v. UK (2008) ECHR 1581 (application no. 30562/04, 30566/04)

is provided in the Art. 8(2) that the interference shall be a. in accordance with the law, b. in pursuit of legitimate aim, c. necessary in democratic society. Court has verified the facts on these parameters. It was held that such retention is unjustifiable on the grounds provided under Art. 8 (2) of the Convention and unreasonable and therefore against the right to privacy of the persons.

In Swedish case, **Bodil Lindqvist**[134] for the first time the scope of Directive 95/46 and freedom of movement of such data on internet was discussed. Mrs. Lindqvist, on her computer published personal information of herself and her 18 colleagues. She also mentioned injury to the leg of one of them. Mrs. Lindqvist was fined for processing of personal data by automatic means without Datainspektion (Swedish authority for protection of electronically transmitted data), for transferring data to third countries without authority and for processing sensitive personal data (foot injury of a colleague). She appealed against the decision. The case was referred to Court of Justice European Commission (CJEC) for consideration that whether activities of Mrs. Lindqvist are contrary to provisions of Data Protection Directive 95/46.

Court had held that act of referring on internet page, to various persons and identifying them by name or other constitutes 'processing of personal data wholly or partly by automatic means'.[135] Moreover reference to state of health of an individual amounts to processing of data concerning health within the meaning of Directive.[136] The appeal was dismissed.

In **Von Hannovar v. Germany (2004)**[137], the applicant, Princess Caroline, belongs to Royal Family of Monaco. The applicant made an application for injunction regarding publication of her photographs published in German magazine Bunte and Renzeit Revue. She has submitted that because of the

[134] Bodil Linqvist v. Aklagarkammaren I Jonkoping (2003), C-101/01, ECLI:EU:C:2003:596, Retrieved from https://curia.europa.eu/en. (Last visited on October 14, 2019)
[135] Bodil Linqvist v. Aklagarkammaren I Jonkoping (2003)Para.27 at https://curia.europa.eu/en (Last visited on October 14, 2019)
[136] Bodil Linqvist v. Aklagarkammaren I Jonkoping (2003)Para.51 at https://curia.europa.eu/en (Last visited on October 14, 2019)
[137] Von Hannovar v. Germany (2004) ECHR 294

publication of photos her right to protect her personal life is breached. There were three series of photos.

The Courts in these re-applications refused to grant relief and dismissed the appeal. The Constitutional Court of Germany refused to grant an injunction restraining the publication of photographs and held that "the photos of applicant wearing swimming suit and falling down were not capable of constituting an infringement of her right to respect her private life"[138].

The application was made to Court of Justice of European Union. Court of Justice reiterated the principle which it had held in many cases that "concept of private life extends to aspects relating to personal identity, person's name or person's picture, his physical psychological integrity"[139]. The court considered that "It is clear in instant case that there is no contribution since the applicant has not exercised no official function and the photos and articles related exclusively to detail of her private life. The every one including celebrities has right of 'legitimate expectation' that his private life shall be protected." [140]It was held that the publication of photos was the breach of privacy under art. 8 of the Convention.

The issue of health data protection was raised by an applicant in **V v. Parliament (2011)**,[141] for medical examination for appointment as staff. The fitness in medical examination was a precondition for the appointment. His appointment was cancelled by European Parliament after the medical examination was done. The issue was raised by the applicant that transfer of medical data between the institutions is breach of protection of privacy because of processing of it under Art. 8-Right to respect for private life. The Civil Service Tribunal held that it is breach of protection of privacy.

[138] Von Hannovar v. Germany (2004) ECHR 294Para. 38, html version of judgement at www.bailii.org (Last visited on October 14, 2019)
[139] Von Hannovar v. Germany (2004) ECHR 294 para. 50 html version of judgement at www.bailii.org (Last visited on October 14, 2019)
[140] Von Hannovar v. Germany (2004) ECHR 294Para. 76-81 html version of judgement at www.bailii.org (Last visited on October 14, 2019)
[141] V v. Parliament, F-46/09(Staff case-2011/C/282/92) (2011). Retrieved from https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=oj:c:2011:282 . (Last visited on October 14, 2019)

European Union is so strict about privacy protection of the European Union citizens that European Union data rules prohibit the transfer of personal data outside the Union by default except if the other country to which the personal data is transferred is providing adequate data protection according to norms provided by Directive. The decision of European Commission is final. In July, 2000, European Commission has decided that United States is providing adequate safeguards to data protection as per the Safe Harbour Principles for transferring the data in which American companies voluntarily subscribe for the cross-border data transfer.

But after the revelation by Edward Snowden, **Max Schrems**,[142] an Austrian, privacy activist and Facebook user, filed complaint with Irish Data Protection Commission. He asked the Commissioner to prohibit Irish subsidiary (Facebook-Ireland) to transfer his personal data to the servers based in America (Facebook-Inc.) He contended that according to revelation by Snowden, USA did not adequately protect personal data from National Security Agency (NSA) surveillance activities. The Irish authority refused to investigate the complaint on the ground that in 2000, European Commission had decided that USA is providing adequate privacy protection by its decision 2000/520. Schrems then challenged the decision before Ireland's High Court. It stayed the case and referred the question to CJEU.

Court of Justice answered the question in affirmative and held that safe harbour principles did not adequately protect personal data from interference from US Government. So the decision 2000/50 was declared invalid. [143]

European Union was and is vigilant about the invasion and breach of privacy from period when information technology was used by technologically developed countries only. The OECD principles of privacy in 1981 had sensitized the world about invasion and breach of data/information. Data protection directive 95/46 and General Data Protection Regulation in 2016 are

[142] Max Schrems v. Data Protection Commissioner (2015) ECLI:EU:C:2015:650
[143] Max Schrems v. Data Protection Commissioner (2015) ECLI:EU:C:2015:650. Para. 107 at https://eur-lex.europa.eu (Last visited on October 14, 2019)

the steps taken by the Union which provide guideline for many countries who are lacking any type of legislation for protection of information or data. So , it can be seen that the concept of 'privacy' was associated with the 'privacy of personal information or personal data' in European Union from the beginning.

3.3.1.4. India

In ancient Indian scriptures the concept of privacy is associated with the physical space and property. Classical Hindu law includes Shruti, Smriti, Purana. Shruti includes Vedas, Brahmanas, Aranyaks and Upanishad. Smriti involves various interpretations of Sruti. In Smrities, laws are arranged according to topics. The scriptures provide laws relating to security of person and property. It is equivalent to the notion of common law that every person's home is his castle. The common denominator is recognition of claim to privacy against the sovereign and society at large also.

Yajnavalkya Samhita and Manusmriti condemn the usage of another person's property without his permission. This is for protection of the property of a person. Property of woman is also protected under the concept 'Stridhan' by both. On this 'Stridhan', a woman has exclusive right to enjoy, use or dispose of the property and the interference with this was considered illegal.

'Arthshastra' by Kautilya is also important book for rules of administration of kingdom. It provides that boundaries of every residential property shall be clearly demarcated by pillars at the corners with wires strung between them. (3.8.3, 4, 23)[144] person's house should be built at a suitable distance from neighbour's house to prevent inconvenience. Doors and windows should ideally not face a neighbour's doors and windows directly. Occupants should ensure the doors and windows are suitably covered. In absence of compelling justification, interference in neighbour's affairs is penalised.(3.8.14-17, 19-21)[145]

[144] "The Arthshastra" by Kautilya-Translated by L. N. Rangarajan, Published by Penguin Books, India (P) Ltd. 1992. Pp- 371.
[145] "The Arthshastra" by Kautilya-Translated by L. N. Rangarajan, Published by Penguin Books, India (P) Ltd. 1992. Pp- 371.

In Smritis for privacy of thought, privacy and solitude were considered essential for self-actualisation. Intangible regime is accessed and attained in meditation. It gives a solitude to person for introspection and development of personality. Arthashastra prescribed that forest areas to be set aside for meditation and introspection.

Privacy of information and communication was also provided for. It deals with affairs of sovereignty. Both Manusmriti and Arthashastra acknowledge the importance of secret council which aids the kings. Apart from governance, privacy of information also pertained to certain types of documents i.e. partition, giving gifts etc. It was provided that such documents shall not be shown to the parties who were not concerned with them. The aim is to guard them against disruption of transaction by intrusion of third party.

Arthashastra provides for security of governance related matters should take place in seclusion. No unauthorised person was allowed to approach such meetings (1.15.2-5).[146] Only those who have to implement, should know when the work has begun or it has been completed. (1.15.13-17)[147] It provides that intelligence to be communicated or transmitted by means of songs, signs or messages in code.[148] It was said in Subhashit[149]-"Shadkarno Bhidyate Mantra"-means if important information is heard by three people (Shadkarna=six ears=three people), it loses its secrecy and does not remain firm.

India is collectivistic society. Unlike western society, which puts impetus on "Individualism", the Indian society promotes interdependence and co-operation with the family. Indians do not have the same type of definition of Privacy as perceived by Americans or Europeans. Privacy is the notion which was more or less absent from the Indian society. People felt very weird in demanding the privacy in their personal and social life. In personal life due to the social culture

[146] "The Arthshastra" by Kautilya-Translated by L. N. Rangarajan, Published by Penguin Books, India (P) Ltd. 1992, pp- 198.
[147] "The Arthshastra" by Kautilya-Translated by L. N. Rangarajan, Published by Penguin Books, India (P) Ltd. 1992, pp-198.
[148] "The Arthshastra" by Kautilya-Translated by L. N. Rangarajan, Published by Penguin Books, India (P) Ltd. 1992, pp- 505.
[149] Texts by unknown learned persons defining the eternal values of human life.

which is highly dependent upon the agriculture, help of persons in the peer and neighbourhood was a precondition for smooth working. Every person and his family is connected to every person in the village, which was the smallest unit in society. Many villages contained less than 25 to 30 houses which were huts. To lessen the dependency on the peers and to get the pecuniary support also there was evolution of joint family system. Majority of people live in hutments and they are so near to each other that right to privacy is unthinkable or impracticable.

A vast majority of Indians were staying in joint families traditionally. Still joint families exist in some parts of India. These families are like mini-states. The major decision making is concentrated in the hands of head of the family and there is no autonomy of decision for any member. These members have to obey the decisions given in important matters. At times, family as a whole unit decides matters like marriage, child education etc. Indian people are accustomed to this collective living, therefore they rarely feel need for privacy. A person who may be a stranger or acquaintance, is always welcome in the home. Average Indian is not offended by a knock at door at any time.

As Prof. Upendra Baxi observes, "It is question whether 'Privacy' is a value of human relations in India. Marriage parties and midnight music, wedding processions and morning 'Bhajans', unabated curiosity at other people's illness or personal vicissitudes, manifestations of good neighbourliness through constant surveillance by the next door neighbour(large number of Indian houses do not use curtains) are some of the common experiences. A question may arise whether Privacy is not after all a value somewhat alien to Indian culture.[150]"

In post-independence era, people are preoccupied with the idea of earning the basic necessities like food, clothes and shelter. To get next meal on time is the important worry and job on hand for majority of people. They hardly have any time to bother about right to privacy. The rich and affluent class can safeguard

[150] K.K. Mathew on Democracy, Equality and Freedom. Introduction at p. LXXIV, Note 262, (edt.) by Upendra Baxi.

their right to privacy with their wealth. The growth of urbanisation, rise in population; various shortages including shortage of living space caused a contraction in the living. Due to this increased industrialisation and urbanisation, the old living style could not be continued. These factors with deficient resources available for survival lead to craving for privacy. Things have changed with the rapid and radical advancements in social, political, scientific and industrial spheres and today Indian man is also asserting his right of privacy in all its dimensions.

3.3.1.4.1 Right to Privacy: Indian Position

This protection to right to privacy was extended to Indian person under Property laws and Indian Penal Code. These provisions protected the person's right regarding property by provisions of trespass and personal right by provisions of defamation as under the British system. All these cases connect the idea of privacy in respect of person's property i.e. his house. There is ample evidence to show that right to privacy was broadly recognised in India before the idea expressed in United States of America in 1890.

For the first time, this concept can be found in decisions given by the courts before independence. These decisions were given by British India Courts and the Judges of Sardar Diwani Adalats. In 1855, in the decision of North-Western Province in Nuth Mull (1855)[151], the question of privacy arose. In this case Begbie, Smith and Jackson JJ held on appeal from the decree of the principal Sadr Amin of Delhi, that the erecting by the defendant of a new house, so that the plaintiff's premises were overlooked from the roof of the new house and their privacy thereby interfered with, gave the plaintiff a cause of action against the defendants. This case was referred by Chief Justice Edge in Gokal Prasad (1888)[152], where the court observed that due to destruction of records during mutiny of 1857, it is not possible to ascertain whether there was a custom of privacy in this part of India. It was never proved or called in question prior to 1855 and owing to same cause and to absence from the report of the case on

[151] Nuth Mull v/s Zuka-Oolah Beg Sr.D.A.N.W.P.R.1855, P.92
[152] Gokal Prasad v.Radho ILR Allahabad (10), 358 (1888), p. 384.

Nuth Mull and Kureem Oolah Beg of information on the point it is not possible to ascertain whether the judges of Sadr Diwani Adalat of North-Western Provinces were following the law as it was found existing or decided the case from the facts found.

In this case of Gokal Prasad, C.J. Edge referred to a number of cases on privacy. They were, Gunga Prasad (1862)[153], where Ross and Roberts, JJ. it did not suggest any doubt that a right to privacy could exist, in Banaras case of Goor Das(1867)[154]-and also in Moradabad case of Ram Baksh (1867)[155], Morgan C.J. and Spankie J. expressly recognised the existence of a right to privacy. In 1886, Mata Prasad v. Behari Lal,[156] Straight and Mahmood JJ. Evidently considered that the right to privacy could exist in respect of a house in the city of Allahabad. Pro. Winfield[157] in 1931, had to fall back on Indian cases to persuade the House of Commons to extend the right of privacy to British nationals. But the right was not given by recognising right to privacy. This right was given by provisions of trespass and defamation. So the emphasis was only on proprietary rights. It was against the interests of the government to grant right to privacy in full as British were ruling the country. After independence Indian government was following the footsteps of British and right to privacy was not provided under Indian laws.

3.3.1.4.2 Right to Privacy and Constituent Assembly

When the Constitution of India was drafted, it was thought that fundamental rights shall include 'Right to Privacy'. Privacy of correspondence was also suggested by Constituent Committee as stated by Mr. R. K. Sidhwa, member of Fundamental Right Committee that "Committee has suggested that secrecy of correspondence should be guaranteed and that there should be no interception of correspondence, telegrams and telephones but main Committee deleted it.[158]" Fundamental Rights Sub-Committee's distinguished members like K.M.

[153] Gunga Prasad v. Salik Prasad S.D.A.N.W.P. Rep. 1862 Vol. II, 217
[154] Goor Das v. Manohar Das N.W.P.H.C. Rep. 1867, 269
[155] Ram Baksh v. Ram Sookh N.W.P.H.C. Rep. 1867, 269
[156] S.A. No.8 of 1856 (unreported)
[157] Percy H. Winfield, "Privacy" 47, L.Q.R. 29-30 (1931)
[158] 'Constituent assembly of India Debates (Proceedings)-Vol. III', 29 April 1947, at https://164.100.47.194/Loksabha/Debates/cadebatefiles/C29041947.html (Last visited on October 14, 2019)

Munshi had suggested "every citizen should have a) the right to be informed within 24 hours of his deprivation of liberty by what authority and on what grounds he is being so deprived, b) the right to the inviolability of his home, c) the right to secrecy of his correspondence, d) the right to maintain his person secure by the law of the Union from exploitation in any manner contrary to the law or public morality."[159]

Dr. B.R. Ambedkar had suggested that "the right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures shall not be violated and no warrants shall issue but upon probable cause, supported by oath of affirmation and particularly describing the place to be searched and the persons or things to be seized."[160] But these rights were strongly opposed from the beginning. Alladi Krishnaswami Ayyar opposed on the ground that "in secrecy of correspondence, every private correspondence will assume the status of State paper or record relating to affairs of the State.[161]"

B. N. Rau himself had opposed this inclusion of right to privacy in Constitution, as he felt that, "if there is no search without a court's warrant, it may seriously affect the powers of investigation of the police. After receiving an information about theft, a police officer searches the premises then he has a chance to get the stolen property. But if he has to apply for a court's warrant, giving full details, delay involved, under Indian conditions of distance and lack of transport in the interior, may be fatal."[162] His main objection was because of concern that allowing such right would make the administration of justice in a country as large as India difficult. But finally it was not included in the Constitution.

3.3.1.4.3 Right to Privacy and Constitution of India

Under Indian Constitution, there is no specific enactment for Right to Privacy as such. Right to Privacy is not enumerated as a Fundamental Right. But Courts, in many cases touched the various aspects of right to privacy and upheld this

[159] Rao, B. Shiva, (ed).,The Framing of India's Constitution (Universal Law Publishing, 2004)
[160] Rao, B. Shiva, (ed).,The Framing of India's Constitution (Universal Law Publishing, 2004)
[161] Rao, B. Shiva, (ed).,The Framing of India's Constitution (Universal Law Publishing, 2004)
[162] Rao, B. Shiva, (ed.),The Framing of India's Constitution (Universal Law Publishing, 2004)

right under the fundamental right governed under Article 21 i.e. Right to Life and several other provisions of the Constitution read with the Directive Principles of the State Policy. The first tort explained by Prosser i.e. intrusion upon person's solitude was upheld by Hon'ble Supreme Court in Kharak Sing (1963)[163], where the Police Regulations in UP were challenged. The petitioner was arrested in dacoity but released as no evidence was against him. The police opened history sheet against him and he was put under police surveillance. Under the Regulation 236 of Police Regulation UP, Surveillance involves— Secret picketing of house or approaches to the houses of suspects, domiciliary visits at night etc.

The Petitioner challenged the validity of Chapter XX of UP Police Regulation and in particular Regulation 236. The majority judges held the regulation valid. It was held in minority judgement by Subba Rao and Shah JJ that out of other surveillances, surveillance by domiciliary visit was held against the person's right to privacy under Article 21. So for the first time it was acknowledged that Right to Privacy could be implied from existing fundamental rights.

In Gobind (1975)[164], the Supreme Court undertook a more elaborate appraisal of the right to privacy. It considered the constitutional validity of a regulation which provided for surveillance by way of several measures indicated in the said regulation. The court upheld the regulation. It was ruled that regulation is 'procedure established by law', and therefore it is not violating the Art. 21. The Court had accepted the fundamental right to privacy in limited scope emanated from Art. 19(1)(a), (d) and 21. It was also held that this right is not absolute and reasonable restrictions can be placed thereon in public interest under Art. 19(5).

The Supreme Court's decision in Gobind reintroduced the right to privacy into Indian legal system. Pooranmal(1974)[165], the Court held the evidence collected by illegal search cannot be excluded on ground that it is invasion of privacy because there is no specific fundamental right to privacy. This decision

[163] Kharak Sing v/s /State of Uttar Pradesh AIR 1963 SC 1295
[164] Gobind v/s State of Madhya Pradesh AIR 1975 SC 1378
[165] Pooranmal v. Director of Inspection (Investigation) of Income Tax, New Delhi AIR 1974 SC 348

weakened the right of individual against the illegal search and seizure of the evidence. Moreover, Right to Privacy was also derecognised. V.S. Kuttan Pillai (1980)[166], Supreme Court held that general warrant for searching and seizing listed documents would not entail invasion of privacy even if the search did not yield any result because of counter availing state interests.

In R. Rajgopal (1994)[167], the Supreme Court has asserted that in recent times the right to privacy has acquired constitutional status; it is implicit in the right to life and liberty guaranteed to the citizens by Art. 21. It is 'right to be let alone'. A citizen has "right to safeguard the privacy of his own, his family, marriage, procreation, motherhood, child bearing, and education among other matters." The court had tried to reconcile the two fundamental rights, right to privacy and right to speech and expression, which may be in conflict at times. The Court put forward some propositions also and held that the right to privacy is implicit in the right to life and liberty, guaranteed to the citizens of this country by Art. 21.

Another aspect of breach of privacy by intrusion and invasion on it is by tapping of the telephone which dealt with disclosure of information. In 1973 Supreme Court stated that telephonic conversation of an innocent person would be protected by the courts against wrongful or high-handed interference by tapping of the telephone conversation by the police in R. M. Malkani (1973)[168]. Though it was not linked to right to privacy but the protection was given.

The question whether tapping of telephone is constitutional was more fully considered by the Supreme Court in People's Union for Civil Liberties (PUCL) (1997)[169]. The Court has ruled in the instant case that "the right to privacy is a part of the right to 'life' and 'personal liberty' enshrined under Article 21 of the constitution. Once the facts in a given case constitute a right to privacy, Article 21 is attracted and the said right could not be curtailed "except according to procedure established by law". Whether the right to privacy can be claimed or

[166] V.S. Kuttan Pillai v. Ramkrishnan AIR 1980 SC 185
[167] R. Rajgopal v/s State of Tamilnadu AIR 1994 SCC 632
[168] R.M.Malkani v/s State of Maharashtra AIR 1973SC 157
[169] People's Union for Civil Liberties v/s Union of India AIR 1997 SC 568

has been infringed in a given case would depend on the facts of the said case. The Court has ruled further that "telephone conversation is an important facet of man's private life". The right to hold telephone conversation in the privacy of one's home or office without interference can certainly be claimed as "right to privacy". This means that telephone tapping would infract Article21 unless it is permitted under the procedure established by law. The procedure has to be "just, fair, and reasonable".

Telephone tapping is permissible in India under S. 5(2) of the Telegraph Act, 1885. The Court has held that this section is constitutionally valid. This section lays down the circumstances and the grounds when an order for tapping of telephone may be passed. The Court held that tapping of telephone shall be done on the grounds mentioned in Article 19 (2) of Constitution of India.[170]
Disclosure of personal information is one aspect where courts guarded the right to privacy in recent years. Claims for unauthorised disclosure which breaches the right to privacy are often heard and decided by the Court.

In Indu Jain [171], (High Court of Delhi, 12th October,2007), a suit for injunction order to prevent the defendants from publishing the Plaintiff's name in Forbes list of Indian billionaires on the grounds of a breach of right to privacy, the court noted that right to privacy can be claimed only against state instrumentalities, but it hinted in further paragraphs of the order that despite the absence of any statute granting a right to privacy, the guidelines provided by Hon'ble Supreme Court in R. Rajgopal develop such right. But in this case, the court held that right to privacy of famous personalities is restricted as people like to know about them and journalist have right to print their name. So decision went against the applicant.

In Managing Director, Makkal Tholai, (2007)[172], a case concerned an application filed for injunction order filed by the respondent, a widow of

[170] PUCL v. Union of India (1997) 1 SCC 301
[171] Indu Jain v. Forbes Incorporated, IA 12993/2006 in CS(OS) 2172/2006
[172] Makkal Tholai v.Mrs. Muthulakshmi, (2007) 5 M.L.J. 1152 at http://indiankanoon.org/doc/47400 (Last visited on October 17, 2019)

infamous outlaw Veerappan, against the defendants, in order to prevent the defendants from telecasting a television serial on his life. The application contended that depicting the private life of Veerappan in the serial is against the right to privacy of the respondent and her daughters. The Court recognised the right to privacy of the respondent but allowed the defendants to produce and telecast the serial on undertaking that it will not telecast personal life of Verrappan.

Courts generally examine a) the existence of person's right to privacy, b) the conduct of another causing a breach in to the privacy; and c) whether such breach is legally permissible. Here Courts seemed to recognise the right arising from relationship between parties where information is shared by a person voluntarily. Hence the second tort recognised by Prosser i.e. public disclosure of embarrassing facts of a person's private life found recognition in Indian Courts.

But where disclosure of information is necessary to protect the fundamental right of another person or the interest of the public then court did not hesitate to hold against the right to privacy. In Mr. X (1999)[173], the Supreme Court, while rejecting the appellant's contentions, held that the "right to privacy has been culled out of the provisions of Article 21 and other provisions of the Constitution relating to Fundamental Rights read with the Directive Principles of State Policy. The right, however, is not absolute and may be lawfully restricted. Where there is clash of two fundamental rights, as in this case, right of privacy of one party as part of right to life and right to lead a healthy life of another party which is also a 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 consideration cannot be kept at bay…" [174]

[173] Mr. X v. Hospital Z AIR 1999 SC 495, (1998) 8 SCC 296
[174] Mr. X v. Hospital Z AIR 1999 SC 495, (1998) 8 SCC 296

In Sharda (2003)[175], it was held that in divorce proceedings an order to undergo medical examination on strong ground of necessity to establish a contention is not invasive of right to privacy. It was held by Supreme Court that right to privacy in terms of article 21 of the Constitution is not an absolute right. If there is a conflict between fundamental rights of two parties, that right which advances public morality would prevail. In this case public policy requirement was permitted to prevail over private interests. So as if today in India, Court recognised right to privacy in very limited sense.

The Government had established a National Commission to Review the Working of the Constitution vide Govt. Resolution dt. 22/02/2000.[176]The object was to recommend changes, if any, that are required in the provisions of Constitution without interfering with its basic structure or features.[177] On Right to Privacy, the Commission had proposed that as Right to Privacy is included in Art. 21 by Supreme Court, so it is proposed that a new Article, named 21-B should be inserted on the following line, "Art. 21-B (1) Every person has right to respect for his private and family life, his home and his correspondence. (2) Nothing in the clause (1) shall prevent the State from making any law imposing reasonable restrictions on the exercise of the right conferred by clause (1), in interest of security of the State, public safety or for the prevention of disorder or crime or for protection of health or morals or for protection of the rights and freedoms of others."[178]

3.3.1.4.4 Concept of Right to Privacy: Judicial Creativity

Right to privacy was never recognised in Indian society as an essential value. Ancient scriptures like Manu Smriti and Arthashastra by Kautilya provided for privacy for limited actions in limited scope. Otherwise, Indian society has always considered rights of human as subsidiary to the interests of society and state. Before independence, the decisions in favour of the right to privacy were given by the Sardar Diwani Adalats which were established by British. The Court recognised that right to privacy is available in India. After independence,

[175] Sharada v. Dharampal,(2003) 4 SCC 493.
[176] www.legalaffairs.gov.in/ncerwc-report (Last visited on October 17, 2019)
[177] www.legalaffairs.gov.in/ncerwc-report (Last visited on October 17, 2019)
[178] www.legalaffairs.gov.in/sites/default/files/chap3.pdf (Last visited on October 17, 2019)

there is no provision was made for protection of right to privacy under Fundamental Rights Part-III of the Constitution. The Constitutional Committee denied to provide for the separate right of privacy. The protection was provided which is a blanket provision for protection of Right to life and liberty under Art. 21.

Right to Privacy emerged from the judicial decisions discussed above wherein the Supreme Court of India provided protection for Right to Privacy by interpreting Art. 21. The power of State was balanced against the right of an individual on various grounds. The protection was not on right to privacy initially. In M.P.Sharma (1954), for the first time, the right to privacy was advocated. It was contended that power of search of the premises of a person for investigation violates his right to privacy. Supreme Court negated the contention holding that right to privacy is not available under Constitution of India as it is provided under Constitution of USA. But in Kharak Singh (1963) Court held that right to privacy is infringed when the police puts night surveillance on the suspect. This was held in minority opinion. So Right to Privacy was acknowledged partially. In Govind (1975), Supreme Court decided in favour of right to privacy but held that it is not absolute and can be dispensed with in the interest of the State. Thus, it is observed that was developed and expanded gradually. First aspect was relating to search and right to privacy.

Another aspect of right to privacy is privacy of communication. It is pertaining to tapping of the telephone, in PUCL (1997) Supreme Court extended the protection under Art. 21 right to life holding telephone conversation is part of personal life and privacy right is available to such conversation. The protection was extended to the disclosure of personal information by publishing the information in book, newspaper or electronic media. In Rajgopal (1994), Makkal Tholai (2007), Phoolan Devi (1995), Supreme Court held that right to privacy is invaded and breached where the information is published without the consent of person. The leading decision relating to protection of information in the document which is in possession of third party is given in Canara Bank (2005). The Court held that law protects person and not places so even the

documents are deposited with bank by the person, the information in them shall be protected because person has 'reasonable expectation of privacy'.

For protection of personal data including biometric data, Supreme Court arrived at the decision emphatically in favour of Right to Privacy in 2017. The issue was challenged by J. Puttaswamy. After initiation of the scheme for provision of services, subsidies to the needy persons, the Government issued Unique Identity Card known as Aadhaar card. For issuance of the card, all personal information including finger prints, iris print are also collected. The collection of such sensitive information by government was challenged on the ground of breach of right to privacy of person by J. Puttaswamy in 2012. There was a dispute that whether right to privacy is fundamental right or not. The main objection for deciding in favour of it was that it is not provided under Constitution of India. But in Puttaswamy (2012), Supreme Court decided in favour of it and held that Right to Privacy is a fundamental right which is covered under Art. 21 Right to life and liberty. It also held that Aadhaar Act, 2016 is also constitutional and collection of information is valid.

3.3.1.4.5 Data Protection and Right to Privacy

Internet was commercially introduced in India in the late 90s.The beginning of Internet was very slow and growth of subscriber was also not fair. But as this developed to its fullest capacity, it was necessary to frame cyber laws to regulate it. The arrival of internet triggered the rise of new and complex legal issues. All the existing laws were enacted according to the social, political and economic situation in the country. But existing laws could not be interpreted in the light of cyber space and to include all the aspects relating to different activities on it. In the year 2000, Information Technology Act was enacted. The objective of the Act was to provide necessary legal infrastructure for the commercial activities conducted by the means of electronic data interchange. So, the main focus of this enactment was to protect and control commercial activities.

This law was amended in 2008 after including the provisions regarding bodily privacy harmed by an act of voyeurism, pornography, and other acts are provided. This provision also aims to include the act with spying cameras, and

web cameras which are installed without the permission of the person so as to invade their privacy. But this provision is insufficient to protect the privacy as data protection is also important aspect but it is not covered under the Act.

After the information technology is used for business transactions, government was also intended to use it for good governance and delivering social benefits. Most of the Government departments are using information technology to provide better service to people. For this purpose government of India created The Unique Identification Authority of India (UIDAI) and has issued Aadhar number i.e. unique identification number. For this purpose, the personal information with biometric data of the people was collected and registered with government. Government has connected the bank accounts of beneficiaries with Aadhar number and transfer benefits and subsidies to the bank accounts of people directly.

The questions were raised about the privacy and security of this personal information or data collected by government. Apart from the threat that this data is misused, abused by outsiders, it was also feared that government agencies may use this data for other purposes than the purpose for which that are collected. After some incidents, the issue was raised in Supreme Court of challenging the validity of Aadhar by Justice K.S. Puttaswamy (Retd.) and Anr. (2012)[179]. It was contended that collection of personal and biometric information by government is violation of right to privacy of a person. Contention of the government was that Right to Privacy is not protected by our Constitution. But Supreme Court held that Right to Privacy is intrinsic part of fundamental right under Article 21 of Constitution of India. But this right is not absolute. It can be restricted in state and public interests.

3.3.2 _ Phases of International Development

After discussing the development of the concept of right to Privacy in United States of America, United Kingdom, European Union and India, it is important to discuss the various International instruments protecting the right to Privacy.

[179]Justice K. S Puttaswami (Retd.) and Anr. v. Union of India and Ors. (W.P.) Civil 494 of 2012.

3.3.2.1 Universal Declaration of Human Rights (UDHR)[180]

In 1948, United Nation passed a resolution in its General Assembly and declared that the human being is entitled to some inherent rights which cannot be curtailed by any authority and State. The preamble of the United Declaration incorporated a form of natural law language and inserted that "recognition of 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". The preamble simply proclaims the Declaration as a common standard of achievement of all peoples and all nations.

Every individual and every organ of society shall strive to promote respect for these rights and freedoms and Member states shall strive to strive to secure effective recognition and observance in people of Member states and among the people of territories under their jurisdiction. The Universal Declaration contains 30 articles. It enumerated the basic principles of human rights. Articles 2 to 21 deal with civil and political rights which have been generally recognised throughout the world.

Art. 12 -**Right to privacy, family, home, and correspondence.**

Art. 29 talks about the scope of restrictions put on these rights. It provides certain limitations to these rights and freedoms, by providing that everyone has duties to the community in which alone the final and full development of his personality is possible. Para 2 of Art. 29 provides that rights shall be provided to the individuals subject to just requirements of morality, public order and the general welfare inn a democratic society. This means that these rights are not absolute. Declaration does not permit a State to derogate from their obligations in public emergency which threatens the life of the nation. In such situations also these rights are not suspended.

This declaration was the Magna Carta of Rights. These human rights in the form of norms mentioned in Declaration are fundamental in a moral sense and are

[180] www.un.org/en/universal-declaration-human-rights/ (Last visited on October 17, 2019)

universal, indivisible, interdependent and interrelated. It is a duty of States regardless of their social, political and economic systems to promote and protect human rights. But this Declaration does not have legal binding as it does not impose legal obligation on the States to give effect to its recommendations. The General Assembly proclaimed it as "Common standard of achievement for all people and all states". The Assembly had declared that the Charter precepts embodied in the Declaration constitutes basic principles of International law.[181] But the Declaration offered no means of implementation other than State's goodwill.[182]

3.3.2.2 International Covenants

The United Declaration of Human Rights stated the common standard of enjoyment and protection of Human rights. These are not binding on member states but only have a persuasive value. The Commission on Human Rights in 1947 decided to draw up a separate Covenant which would be a Covenant on such specific rights as would lend themselves to binding legal obligations. The Drafting Committee prepared the draft and forwarded to the governments. The Committee redrafted and completed it in 1949.[183] It was decided that it would be presented to the Economic and Social Council for submission to General Assembly in 1950 after it was considered by governments.

In 1950, the General Assembly recommended the inclusion of economic, social and cultural rights in the Covenant. Accordingly, Commission in its 1951 session drafted the articles on economic, social and cultural rights. In 1952, the General Assembly, on the recommendation of Economic and Social Council, decided that the two covenants shall be drawn up and directed the commission on Human Rights to prepare two drafts, one dealing with civil and political rights, and other with economic, social and cultural rights.[184] The Commission prepared the drafts of two covenants and presented to Economic and Social

[181] General Assembly Resolution 2625 (XXV), dated October 24, 1970.
[182] David Forsythe, 'Human Rights and World Politics', P.9.
[183] Report of the Commission on Human Rights, Fifth Session (1949), Doc.E/1371.
[184] General Assembly Resolution 543(VI) and 545(VI), February 5, 1952.

Council in 1954. The Council after considering them presented to General Assembly.[185]

The General Assembly assigned consideration of this question to its Third Committee, which thoroughly discussed and vigorously scrutinised the provisions. On recommendation of Third Committee, the General Assembly on December 16, 1966 adopted the two Covenants[186]; International Covenant on Civil and Political Rights and International Covenant on Economic, Social and Cultural Rights. They came into force on January 3, 1976 and March 23, 1976 respectively.

3.3.2.2.1 International Covenant on Civil and Political Rights

The Covenant on Civil and Political Rights consists of 53 Articles and is divided into six parts. Article 1 refers to the right of the people to self-determination, i.e. right freely to determine their political status and freely pursue their economic, social and cultural development and may, for their own ends freely dispose of their natural wealth and resource without prejudice to any obligations arising out of international economic co-operation, based upon the principles of mutual benefit and international law. The Article further states that in no case may a people be deprived of its own means of subsistence, and that the State parties shall promote the realisation of the right of self-determination and shall respect the right.

Part II stipulated rights and obligations of the State Parties to the Covenant. State parties have obligation to take necessary steps to incorporate the provisions of Covenant in the domestic laws and to adopt such legislative or other measures as may necessary to give effect to the rights recognised in the Covenant.

Part III deals with the specific rights of the individuals and obligations of the State parties. They are: Under Art. 4 para. 1-These rights are not absolute and are subject to certain limitations. The limitations deferred from article to article but by and large these rights can be restricted by provisions of law regarding

[185] ECOSOC Resolution 545 (XVIII) July 29, 1952.
[186] General Assembly Resolution 2200A (XXI), December 16, 1966

provisions to protect national security, public order, public health, or morals or the rights and freedoms of others. The declaration of emergency permits a state to suspend certain human rights. However the restriction must be provided by law and applied solely for the purpose for which they have been provided. Further they should not give rise to any discrimination on the grounds of race, sex, colour, language, religion or social conditions. The scope and ambit of judicial review and judicial independence must be ensured at all times.

Under para 2 of Art. 4, it is provided that there are certain rights in respect of which no derogation can be made. Ie. In Right to life (Art. 6), Freedom from inhuman or degrading treatment (Art. 7), Freedom from slavery, slave trade and servitude (Art. 8), Freedom from imprisonment for inability to fulfil a contractual obligations (Art. 11), Non-retroactive application of criminal law (Art. 15), right to recognition as person before the law (Art. 16); **Art. 17 provides for Right to privacy, family, home and correspondence** and the freedom of thought, conscience and religion (Art. 18). The above rights are non-suspendable rights as they have been identified as "core of essential human rights".

3.3.2.2.2 International Covenant on Economic, Social and Cultural Rights

It consisted of 31 articles which are divided in five parts. Part I deals with the rights of the people to self-determination as provided in Art. 1 of the Covenant on Civil and Political Rights. Other rights are enumerated in Part III of the Covenant which included the following rights:

Art. 6-Right to work, Art. 7 -Right to just and favourable conditions of work, Art. 8-Right to form and join trade unions, Art. 9-Right to social security, Art. 10- Right relating to motherhood and childhood, marriage and the family, Art. 11 -Right to adequate food, clothing, housing and standard of living and freedom from Hunger, Art. 12 -Right to physical and mental health, Art. 13 -Right to education including a plan for implementing compulsory primary education, Art. 14 -Right relating to science and culture.

It is significant to note that the ICESCR does not permit a state to derogate from their obligations even in public emergency which threatens the life of the nation.

Part II, Article II provides for the undertaking by the state party that it will take steps individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, with a view to achieve progressively the full realization of the rights recognised in the covenant by all appropriate means including particularly the adoption of legislative measures.

So it is obvious that its provisions shall be implemented progressively by the States depending on the resources available to them. Thus, the covenant is essentially a 'promotional convention' and does not require the implementation at once. If we observe all the rights enumerated in these articles, they can be fruitfully granted only after respecting the liberty of the person and by that maintaining his right to privacy in his choices.

States subject to the Charter of the United Nations have an obligation to promote universal
respect for, and observance of, human rights and freedoms. Moreover, each of the States parties to the Covenant undertake to take the necessary steps, in accordance with their own constitutional processes and with the Covenant to adopt such laws or other measures as maybe necessary to give effect to the rights in the Covenant. This includes providing effective remedies, including developing judicial remedies for violations of the Covenant rights and that any of these remedies are effectively enforced.

3.3.2.3 UN General Assembly Resolution 68/167(19) of January 2014[187]

It reaffirmed the Covenant's rights and: acknowledged the balancing of the interests involved in privacy and security, noting that public security may justify the gathering and protection of certain sensitive information, but States must ensure full compliance with their obligations under international human rights law; affirmed that the same rights that people have offline must also be protected online, in particular the right to privacy and called on States to protect these

[187] UN General Assembly resolution 68/167, 21 January 2014
http://www.un.org/en/ga/search/view_doc.asp?symbol=A/RES/68/167(Last visited on October 14, 2019)

rights on all digital platforms; called upon States Party to take any measures to stop existing violations of these rights and moreover that they create conditions to prevent any violation; and to review their national procedures, practices and legislation (particularly relating to the surveillance of communications, their interception and collection of personal data, including massive surveillance, interception and collection) to ensure that the legislation in force does not currently allow violation of the Covenant's rights; and that the Parties ensure full and effective implementation of their international human rights obligations.

This Resolution also called upon States party to the Covenant to establish independent national oversight mechanisms capable of ensuring transparency and accountability of State surveillance of communications, their interception and collection of personal data. The UN Resolution therefore coincided with the Working Party work on examining existing practices for supervision over the national intelligence services in EU Member States in Working Party Opinion WP215 adopted on 10 April 2014.

The Working Party identified the need, following the surveillance revelations in 2013, to conduct an overview of the existing oversight mechanisms in existence for intelligence and national security services' activities at a national level in the EU. The Working Partýs view was that these mechanisms often have an impact on effective EU data protection and privacy enforcement.

3.3.2.4 Discussion

Since the beginning of the society, 'privacy' has been the most precious thing for human being. Our personal space is valuable to us. We love our privacy to remain in peace. But being a member of society, we live in full public view. Different jurisdictions defined privacy rights differently and their approach to protect the individual's right also differs.

The researcher in the foregoing discussion has traced the development of the right to privacy and has also emphasised the role of the judiciary in developing and widening the scope of this right. Over the phases of its development, it has

been observed that the concept of right to privacy has undergone a transformational change. A paradigm shift in the concept is witnessed ; beginning with relating and limiting itself only to property, went on to include within its scope and meaning the protection of individual, protection of health and many other aspects .Later, with the development in the science and technology, right to privacy also expands to data protection.

With scientific inventions and advent of computer, internet and information technology privacy of information and data of people got affected. The advancement of technology also had an impact on the nature and concept of privacy. In fact, the technological developments posed several legal and ethical challenges. But the concern for its protection is very important in information technology age. The concept of privacy has broadened and has come to include the protection of data also within its scope. The technological developments posed challenge to the right of privacy and called for legislative control.

Evolution from protection of rights regarding property now it has reached to protection of personal information or personal data. It is recognised today that if along with other aspects, if the personal information or personal data is compromised, then because of this an individual may lose his freedom or liberty to exercise his rights. The researcher shall discuss about the legislative measures and mechanism in United Kingdom, United States of America, European Union and India and the interface with the right to privacy in the next chapter.