CHAPTER 4

STATUTORY PROTECTION TO RIGHT TO PRIVACY

The further inquiry before is to find out the legal protections to right to privacy. 'Privacy' is concerned with a man's dignity and liberty. It is a fundamental human right guaranteed by international laws. It has been an inalienable and integral part of human life since long. Initially, it had a very narrower scope as such thought to be included only 'right to be let alone'. Later, the increasing maturity levels of the democratic systems, rapid development in science and technology, made its scope wider. Now the right to privacy covers many aspects such as, freedom of thought, control over one's body, identity, solitude in one's home, control over self-information, freedom from surveillance, protection of one's reputation, and freedom from searches etc. The USA is the motherland of right to privacy in present form. Privacy's origin could be traced back to an article written by Warren and Brandy published in 'Harvard Law Review' in 1890\(^1\), in which the concept of Right to Privacy was discussed for the first time.

"The stand for privacy, however, need not be taken as hostility against other individuals, against government, or against society. It is but an assertion by the individual of his inviolate personality." \(^2\)

---

\(^1\) Originally published in 4 Harvard law review 193 (1890).

\(^2\) Dean and Justice Irene Cortes as quoted by Irene Cortes, "The Constitutional Foundations of Privacy" 1 (UP Law Center, 1970). See also the Albino Z. SyCip
The right to privacy is the only Constitutional right with a birthday, the 1890 publication of Samuel Warren and Louis Brandeis’s The Right to Privacy in the Harvard Law Review. This initial article, however, dealt with torts, and was in fact inspired not by an Orwellian state but by irritation with paparazzi at the debut of Samuel Warren’s daughter and their increasingly portable cameras.

4.1 Privacy under Law of Torts-

Tort is a wrongful act or damage (not involving a breach of contract) for which a civil action can be brought. The Right to Privacy is further encompassed in the field of Torts. This is a branch of law governing actions for damages for injuries to certain kinds of rights like, the rights to personal security, property and reputation. The term ‘tort’ is the French equivalent of the English word ‘wrong’ and of the Roman law term ‘delict’. It was introduced in English law by Norman jurists. The word ‘tort’ is derived from the Latin term tortum or twist and implies conduct which is twisted or tortuous.

The law of torts is fashioned as “an instrument for making people adhere to standards of reasonable behaviour respect the rights and interests of one another”. This is does by protecting interests by providing for situation when a person whose protected interest is violated can recover compensation for the loss suffered by from the person who

---

3 4 HARV. L. REV. 193 (1890).
6 Setalwad, Common Law in India p.109 as quoted by Ratanlal at p.12.
has violated the same. By “interest” here is meant a claim want or desire of a human beings which the human being or group of human beings seeks to satisfy and of which therefore the ordering of human relations in civilized society must take account. The Raw determines what interests need protection and it holds the balance when there is a conflict of protected interest. A protected interest gives rise to a legal right, which in turn gives rise to a corresponding legal duty. Some legal rights are absolute and others are where it is necessary to prove actual damage so constitutes of tort are-

1. There must be a wrongful act committed by a person.
2. The wrongful act must give rise to legal damage and
3. The wrongful act must be of such nature as to give rise to a legal remedy in the form of an action for damages.

In 1960, eminent legal scholar William L. Prosser documented how privacy as a legal concept had come to constitute four distinct torts. That is, a person whose privacy has been invaded could sue the invader for damages. These torts still exist today, and are contoured as four separate branches: Intrusion upon seclusion or solitude, or into private affairs;

1. Public disclosure of embarrassing private facts;
2. Publicity which places a person in a false light in the public eye; and
3. Appropriation of name or likeness.

---

8 Pound Selected Essay p 86, Street, Torts (6th ed.) p.3 as quoted by Ratanlal, ibid.
9 Ratanlal at p.12
It has also described as-

- **Intrusion** - A physical, electronic or mechanical intrusion into someone's private space. This is an information gathering, not a publication, tort. The legal wrong occurs at the time of the intrusion; no publication is necessary.

- **Public Disclosure of Embarrassing Private Facts** -- Publication of non-newsworthy, private facts about an individual that would be highly offensive to a reasonable person (true defamation) (so intimate that outrage the public's sense of decency).

- **False light** -- Publication of false, highly offensive (but not necessarily defamatory) information about an individual.

- **Appropriation** -- Use of a person's name, likeness or identity for trade or advertising purposes without consent.\(^1\)

Common law principles of tort as accepted in Indian law do not provide for a direct action for in vision of Privacy. The law of tort seeks to provide protection by the use of civil wrongs such as defamation trespass & breach of confidence.\(^1\)

The tort of Defamation involves the right of every person to have his reputation preserved inviolate. It protects an individual’s estimation in the view of the society and its defenses are ‘truth’ and ‘privilege’, which protect the competing right of freedom of speech. Essentially, under the law of torts, defamation involves a balance of competing interests. The only concession for an action, which involves infringement of right to

---

\(^1\) [http://www.cas.okstate.edu/jb/faculty/senat/jb3163/privacytorts.html](http://www.cas.okstate.edu/jb/faculty/senat/jb3163/privacytorts.html) visited on 2.4.13 at 3.17 p.m. IST.

\(^1\) *Supra.*, Dean and Justice Irene Cortes as quoted by Irene Cortes, “The Constitutional Foundations of Privacy” 1 (UP Law Centre, 1970).
privacy, would be for reasons of, prevention of crime, disorder, or protection of health and morals or protection of rights and freedom of others. Although privacy violations may be pleaded as many different torts depending on the actual circumstances, the main tort remedies are the privacy torts proposed by Dean Prosser and recognized by both Justices Cortes and Carpio. There are four main privacy torts:

1. Intrusion upon the plaintiff’s seclusion or solitude, or into his private affairs.\(^ {12} \)

2. Public disclosure of embarrassing private facts about the plaintiff.

3. Publicity which places the plaintiff in a false light in the public eye\(^ {13} \).

4. Appropriation, for the defendant’s advantage, of the plaintiff’s name or likeness\(^ {14} \).

5. Infliction of mental distress\(^ {15} \).

Justice Vicente V. Mendoza enjoys repeating that “law has two elements: logic and rhetoric. ... [L]ogic forms the bedrock of our jurisprudence, but it is rhetoric that makes Constitutional Law so potent and so seductive. That is, he cautioned, one must read cases with great care, lest one be ensorcelled by the rhetoric and miss the actual logic.”\(^ {16} \)

\(^{12}\) Nuisance and trespass under Indian Law of Torts.

\(^{13}\) Defamation.

\(^{14}\) Tort of Passing of.

\(^{15}\) Nervous break down.

4.1.1 Privacy Torts under Indian Law-

There are very few cases in which right to privacy has been recognized as a tort. One of them is *Sunkara Satyanarayana v. State of Andhra Pradesh*\(^\text{17}\). The questions of privacy tort of trespass and the violation of constitutional rights were raised. In this case the police opened a ‘rowdy sheet’ in 1973 recording that he became a thief for want of money due to lack of parental control and circumstances, and the rowdy sheet was continued though there were no complaints against him. When human right is invaded a citizen has remedies in both public and private law. Public law remedies included prerogative writs as also award of compensation. In private law, the trespass which is an offence under the IPC is also a torts and an action lies for damages by way of a suit.

The court observed that a citizen could sue the police for damages in civil suit for trespass or seek compensation in public law asserting that Human Rights courts constituted under the protection of Human Rights Act 1993 would be competent to entertain complaints of violation of the right to privacy and to give relief under criminal law as well as civil law. The court issued a writ of mandamus to close the history sheet, which had been arbitrarily kept alive over 26 years and lift it to petitioner to pursue such other remedies as are available to him under law.\(^\text{18}\)

The phrase right to privacy is used in the Indian case law to refer to the right, which an owner of a house may have under local custom to seclusion of his inner apartments from the view of his neighbor. Invasion

---

\(^{17}\) (1999) 6 ALT 249.

of the privacy and seclusion of a man’s premises, properly speaking, is part of the law of trespass\(^{19}\) or nuisance\(^{20}\).

4.1.2 Privacy and Defamation-

4.1.2.1 Meaning of Defamation-

Broadly speaking, the term ‘defamation law’ is used to refer to any law related to the protection of individuals’ reputation or feelings. All countries have defamation laws, although a range of terms are used to describe these, including libel, slander, insult, and so on. The form and content of these laws differs widely from country to country. In some places, there is a dedicated ‘defamation code’, but in most countries articles dealing with the subject can be found in more general laws, such as the civil code or criminal code.\(^{21}\)

It is said that a good defamation law is one, which lays the groundwork for striking a proper balance between the protection of individuals’ reputation and freedom of expression – could be defined as follows: a defamation law is a law which aims to protect people against false statements of fact which cause damage to their reputation. This definition contains four elements. In order to be defamatory, a statement must:

1. be false
2. be of a factual nature
3. Cause damage; and

\(^{19}\) Harrison v. Duke of Rutland (1893) 1 QB 142; Hickman v. Maisey (1900) 1 QB 752; Byrne v. Kinematograph Renters Society, (1958) 1 WLR 762, False reasons were given for access to premises).

\(^{20}\) Lyons v. Wilkins (1899) 1 Ch 255.

4. This damage must be to the *reputation* of the person concerned, which in turn means that the statement in question must have been read, heard or seen by others.\(^\text{22}\)

**4.1.2.2 Distinguishing Defamation from other Concepts-**

Many countries have other types of laws, which may be confused with, but should be distinguished from, defamation laws, even if that term is understood broadly. These include hate speech, blasphemy and privacy laws.

Hate speech laws are laws, which prohibit statements which incite to discrimination, hostility or violence against a group with a shared identity, such as nationality, race or religion. In some cases, the term ‘group defamation’ is used to refer to such laws. There are, however, two important differences with defamation laws: first, hate speech laws are intended to protect the safety and social equality of vulnerable groups\(^\text{23}\), rather than their reputation; and second, hate speech laws protect groups of people, identified by certain shared characteristics, rather than individuals or legal persons (such as businesses or non-profit organizations).\(^\text{24}\)

Blasphemy laws are laws, which prohibit the denial or mockery of religion(s). The difference with defamation laws is again that blasphemy laws do not specifically protect individuals or even the reputation of the religion. Rather, they protect the sensitivities of adherents to the religion.\(^\text{25}\)

\(^\text{22}\) Ibid.


\(^\text{24}\) Ibid

\(^\text{25}\) Ibid
Privacy laws are laws, which prohibit unauthorized intrusion into or publication of the details of a fellow citizen’s private life. In contrast to defamation laws, privacy laws can be used to prevent the dissemination of truthful facts, such as genuine photos taken surreptitiously in a private home. Furthermore, the effect that these facts have on the reputation of the person concerned is immaterial. The deciding factor is whether the plaintiff has proven wrongful intrusion into his or her privacy. In some situations, privacy laws and defamation laws could overlap. This might be the case, for example, if someone draws false conclusions from surreptitious photographs, such as that the person portrayed is having an affair.26

4.1.2.3 Press and Libel Laws-

1925, the Minnesota Legislature enacted a public nuisance law that permitted judges, sitting without juries, to enjoin publication of newspapers and periodicals that regularly and customarily published materials that were, “obscene, lewd, and lascivious” or “malicious, scandalous and defamatory.” The regular daily newspaper in the state did not oppose the law’s enactment. In 1927, Minnesota court enjoined the publication of the Statutory Press, a small weekly Minneapolis newspaper, on the grounds that it had published malicious, scandalous, and defamatory material about the police chief, mayor, country attorney, and others. The injunction applied to all future issues of the newspaper. After the Minnesota Supreme Court upheld the law’s constitutionality, Jay M. Near, the Statutory Press’s editor, appealed to the Supreme Court.27

---

26 Ibid

Speaking through Chief Justice Hughes delivering decision in *Near v. Minnesota Ex Rel. Olson*\(^{28}\) the United State’s Supreme Court delivered-

“This statute, for the suppression as a public nuisance of a newspaper or periodical, is unusual, if not unique, and raises questions of grave importance transcending the local interests involved in the particular action. It is no longer open to doubt that the liberty of press and of speech is within the liberty safeguarded by the due process clause of the Fourteenth Amendment from invasion by state action.”

The law of defamation, assumed after the invention of printing, a good deal of importance, which has been considerably enhanced in modern times by the swift development of journalism. The invention of broadcasting by wireless has by extending the area of dissemination of the spoken word added to its power just as the invention of printing did in the case of the written words centuries ago. The advent of television, internet and 24 hours news channel on TV and radio, has multiplied that power. The aim of the law in modern condition is not merely to prevent breaches of peace but also to make people adhere to standards of speech and writing which will preserve social order and harmony and make public life and cooperative efforts possible. For many modern types of defamation the action for damages is more suitable remedy than a criminal prosecution.

**4.1.2.4 Defamation under Indian Law of Torts**-

Every man has a right to have his reputation preserved inviolate. This right to reputation is acknowledged as an interest personal right of every person as part of the right of personal security.\(^{29}\) It is a ‘*jus in rem*’

---

\(^{28}\) SC of USA, 1930.283, 697, 51 S. Ct. 625, 75 L.Ed. 1357.

a right good against the entire world. A man’s reputation is his property more valuable than other property.\textsuperscript{30} The law of defamation like many other branches of the law of torts provides for balancing of interests. The competing interest which has to be balanced against the interest which a person has in his reputation is the interest which every person has in freedom of speech. The wrong of defamation protects reputation and defences to the wrong, viz, truth and privilege protect the freedom of speech. The existing law relating to defamation is a reasonable restriction. The fundamental right of freedom of speech and expression conferred by Article 19(1) (a) of the Indian Constitution and is saved by clause (2) of Article 19.\textsuperscript{31}

The wrong of defamation may be committed either by way of writing, or its equipment, or by way of speech. The term libel is used for the former kind of utterances ‘Slander’ for the later. Libel is written & slander is a spoken defamation. In a case,\textsuperscript{32} it was held that bridegroom and his father in refusing to take the bride to their home after marriage in full gaze of the guests committed the tort of defamation and damages could be awarded for loss of reputation.\textsuperscript{33} In this court leaned judge held that they may be a hybrid type of defamation.

A defamatory statement is a statement calculated to expose a person to hatred contempt or ridicule or to injure him in his trade business profession calling or office or to cause him to be shunned or avoided in society.\textsuperscript{34}

\textsuperscript{30} Dixon v. Hoden, (1869) LR7 Eq 488.
\textsuperscript{31} Seervai, Constitutional Law of India (3\textsuperscript{rd} ed. Vol I), p. 495 as quoted by Ratanlal and Dheerajlal at p. 264.
\textsuperscript{32} Noor Mohd. V. Mohd. Jiauddin AIR 1992 MP 244 p. 249 (para 15)
\textsuperscript{33} Ratanlal Dheerajlal at p. 264.
\textsuperscript{34} Ibid at p.264.
A Libel is a publication of a false and defamatory statement tending to injure the reputation of another person without lawful justification or excuse. The statement must be expressed in some permanent form e.g. writing, printing, pictures, statue, waxwork effigy etc. A slander is a false and defamatory statement by spoken words or gestures tending to injure the reputation of another.\(^{35}\)

Injury to reputation amounts to violation of person’s right to personality and privacy.

Following ingredients must be proved to establish Libel-

1. Statement complained of is false.\(^{36}\)
2. It is in writing.\(^{37}\)
3. It is defamatory &\(^{38}\)
4. It is published.\(^{39}\)

In the civil action for defamation, falsity of the statement must be proved and truth is the complete defence to the defendant. The test to defamation is whether the words would tend to lower the plaintiff in the estimation right-thinking members of society generally.\(^{40}\) The plaintiff must show that the defamatory statement refers to him. Sometimes words *prima facie* innocent may be actionable if their lateral meaning is

---

\(^{35}\) *Ibid* p.264.

\(^{36}\) *Bet v. Lawes*, (1882) 5 I LT QB 359.


\(^{38}\) *Sim v. Strech*, (1936) All ER 1237, (1240).

\(^{39}\) *Kunwar Radha Krishan v. H.S. Bates*, (1951) ALJ 268.

\(^{40}\) *Ibid. Sim v. Strech.* (1936) 52 TLR 669 at 671.
defamation.\textsuperscript{41} Defamation of diseased person is actionable if his defamation affects the reputation of his living near relatives. Publication of defamatory statement is must for the action of defamation. It means the third person comes to know about such statement. A person cannot excuse himself on the ground that he published the Libel by accident or mistake with an honest belief in its truth.

4.1.2.5 Defamation under Common Law -

(A) Newspaper Libel-

Newspapers are subject to the same rules as other critics and have no special right or privilege, and in spite of the latitude allowed to them they have no special right to make unfair comments or to make imputations upon a person’s character or imputations upon or in respect of a person’s profession or calling. Newspapers a duty to their readers to publish any and every item of news that may such a duty as makes every communication in the paper relating to a matter of public interest a privilege one.\textsuperscript{42} Just because something interests the public it is not necessarily in public interest to publish it.\textsuperscript{43}

A journalist like any other citizen has the right to comment fairly and, if necessary, severely on a matter of public interest, provided the allegation of facts he has made are accurate and truthful, however defamatory they may be otherwise. Since his right to comment on matters of public interest is recognized by law the journalist owes an obligation to the public to have his facts right.\textsuperscript{44} Investigative journalism does not enjoy any special protection. Therefore, when newspapers publish

\textsuperscript{41} Cassidy v. Daily Mirror Newspaper Ltd, (1929) 2KB 231: 141 LT 404.
\textsuperscript{42} Mitha Rustomji Murzban v. Nusserwanji Engineer, (1941) 43 Bom LR 631.
\textsuperscript{43} London Artists Ltd v. Litteler, (1968) WLR 607, 615.
\textsuperscript{44} Danik Bhaskar v. Madhusudan Bhaskar, AIR 1991 MP 162, p.166.
accusations of criminal guilt against a person as a result of their investigation, they do so at their own risk and they do not enjoy any qualified privilege.\(^\text{45}\)

(B) Slander-

As in case of Libel, it must be proved that the words complained of are-

(1) False (2) Defamatory (3) Published & (4) Special damages Indian Law

The common law rule that slander is not actionable *per se* has not been followed in India except in a few decisions. Both Libel and Slander are criminal offences under s.499 of the Penal Code & both are actionable in civil court without proof of special damage.\(^\text{46}\)

In a case,\(^\text{47}\) Calcutta H.C. held that imputing unchastity was actionable without proof of special damage and further that it was also actionable at the suit of the husband as the imputation involved that the husband at the food cooked by an unchaste woman and had therefore lost his caste.\(^\text{48}\)

(c) Defences-

These are the defences available in case of defamation-

1. Justification by truth
2. Fair & bonafide comment


\(^{47}\) *Suxam Teli v. Bipal Teli*, (1905) 4CLJ 388.

\(^{48}\) Ratanlal Dheerajlal at p.288.
3. Privilege

Privilege mean that a person stands in such relation to the facts of the case that he is justified in saying or writing that would be slanderous or libelous in anyone else.

A) **Absolute**- A statement is absolute privileged when no action lies for it even thought it is false and defamatory and made with express malice. On certain occasions the interests of society require that a man should speak out his mind fully and frankly without thought or fear of consequences for e.g. Parliamentary Proceedings, Judicial Proceedings, Military/Naval Proceedings, State Proceedings.

B) **Qualified**- A statement is said to have a qualified privilege when no action lies for it even though it is false and defamatory unless the plaintiff proves express malice. For e.g. communications made in the course of legal, social or moral duty; for self protection; for protection of common interest; for public good and; parliamentary reports judicial proceedings and proceedings at public meetings. Communications made in cases of confidential relationship also come under qualified privilege. For e.g. relationship between husband & wife, father and son, guardian and ward, master and servant, principal & agent, Solicitor and client, partner or even intimate friends.

**(D) Remedy for Defamation**-

As to the remedies for defamation a suit for damages may be brought. The publication of defamatory statement may be restrained by injunction either under s. 38 or 39 of the Specific Relief Act, 1963.\(^{49}\) The person aggrieved may file a suit for damages. The courts can grant the exemplary damages also when the award of compensatory damages is not

\(^{49}\) *K. V. Ramaniahs v. Special Public Prosecutor*, AIR 1961 AP 190.
itself though sufficient to punish the defendant and to deter him. There can be aggravation or mitigation of damages depending upon facts & circumstances of the case.

The court has jurisdiction to interfere on an interlocutory application to restrain the publication of a libel. But this justification will not in general be exercised unless the applicant satisfies the court that the statement in the document complained of are untrue. The specific Relief Act, 1963, enables the court to grant an injunction to restrain publications of a libel which would be an offence under the penal code even though it may not be injurious to Plaintiff is person or property.

4.1.3 Breach of Confidentially and Privacy-

The action for breach of the confidence is being used as the basis for orders passed by the courts with clear objectives to provide a relief against unauthorised publications of personal information by media. The common law wrong of breach of confidence has evolved to enhance its ambit from being limited to employment & commercial relationship. Breach of confidence is a common law tort. That accords protection to private information conveyed in confidence. A claim for breach of confidence ordinarily involves certain information of a confidential nature, which was communicated in confidence but came to be disclosed to the detriment of the claimant. The court of Appeal has accepted the

50 Quartz Hill Con. Mining Co. v. Beall, (1882) 20 Ch D 501; Bonnard v. Perryman, (1891) 2 Ch 269.
51 K.V. Ramaniah, Ibid.
53 Dean and Justice Irene Cortes as quoted by Irene Cortes, “The Constitutional Foundations of Privacy” 1 (UP Law Center, 1970). See also the Albino Z. SyCip Lecture Series delivered at the University of the Philippines College of Law, Feb. 21 and 28, 1970. As quoted by Oscar Franklin B. Tan.
obligation cast upon the British courts as a consequence of Article 8 European convention on human rights to interpret the domestic to develop effective protection against the unjustified invasion of citizens’ private lives\textsuperscript{54}.

The course of evolution transverse by British Law with respect to a privacy right has led to the fruition of a robust remedy against privacy invasion. As a phone hacking scandal unravels (Murdoch) & the Loveson Inquiry proceeds to its conclusion in Britain; the law is all set to take firm steps in the direction of effective protection of the privacy right.

A right to undisturbed privacy is not recognized by the English Law\textsuperscript{55}. However, it interference with privacy is of such a nature as to amount to a recognized tort, resort to that tort action may be taken to prevent the interference. For example, harassment by persistent telephone calls may amount to trespass, and installation of a secret eavesdropping device may amount to trespass. The courts have also recognized that an obligation of confidence can arrive out of particular relationship apart from contract; and branch of confidentiality can be prevented by restraining by injunction publication of confidential information to the detriment of the plaintiff.\textsuperscript{56} The basis of the jurisdiction is the equitable principal of confidence. The particular relationships which give rise to an


\textsuperscript{55} R. v. Khan, (1996) 3 All ER 289 (HL), In this case opinion on the question of right to privacy was not expressed. It was however, held that tape recorded conversation recorded in an electronic device installed in a private house without the knowledge of the owner occupier was admissible in a criminal trial, Ratanlal Dheerajlal at P.422.

\textsuperscript{56} Attorney General v. Guardian Newspaper Ltd. (No.2), (1988) 311 ER 545 (HL), P. 639.
obligation of confidence may be professional, commercial, matrimonial or even political.\textsuperscript{57}

The relationship of doctor and patient given right to right of confidentiality and the doctor is under a duty not to disclose the secrets of a patient that have been learn by him in the course of professional work.\textsuperscript{58} But if the disclose is safe a person from risk is not breach of duty.

Solicitors and Accountants also owe continuing professional duty to a former client to preserve the confidentiality of information imparted during the subsistence of that relationship and not to misuse it. But the duty of confidentiality may be overridden by a higher duty. Thus if the auditors of a company discovered that a senior employee was defrauding the company on a massive scale, there would normally be a duty to report the discovery immediately to the management. Management might be involved in or condoning fraud a duty may rise be report directly to a third party without the management’s knowledge or consent. The duty to report in such a situation will override the duty of confidentiality.\textsuperscript{59} In matrimonial relations, the invasion of personal privacy amounts to breach of duty.

\textbf{4.1.4 Right to Privacy as a Customary Right-}

Indian law further recognizes a right to privacy to protect females from observation. This right to privacy may be acquired by virtue of a local custom or grant or special permission.\textsuperscript{60} The right to privacy does not arise from prescription but is a creation of custom. It is limited to

\textsuperscript{57} Ratanlal Dheerajlal, p. 422.

\textsuperscript{58} Mr. X v. Hospital Z, AIR 1999 SC 495.

\textsuperscript{59} Sason Finance Ltd. v. KPMG, (2000) All ER 676.

\textsuperscript{60} The Indian Easement. Act, S. 18 Ill (b).
particular apartments secluded from general observation. Such an easement, founded as it is on the oriental custom of excluding females, is of much importance in India.

The Bombay High Court has held that on accordance with the usage of Gujarat, an invasion of privacy is an actionable wrong and that a man may not open new doors or window in his house, or make any new apertures, or enlarge old ones, in a way will enable him to overlook those portions of his neighbour’s premises which are ordinarily seclude from observation and so intrude upon his privacy.

Bengal and Patna High Court held that right to privacy is based upon prescription or grant, or express local usage. It is not inherent right to privacy. Madras H.C. also opined that a right to privacy is not an actionable wrong unless such a right has been in enjoyment by the plaintiff as a custom.

The Allahabad held that a substantial interference with such a right, where it exists, affords such owners good cause of action. But the custom of privacy should not be carried to an oppressive length. The customary right of privacy is confined to the protection of paradanashin women and to those parts of the house, which are ordinarily occupied and used for a period sufficiently long to establish a right of privacy. It is the customary right and courts can see whether the custom is operative and

---

61 Nathubhai v. Chaganlal, (1900) 2 Bom LR 454.
62 Ratanlal Dheerajlal at p.428.
64 Prasanna Kumar Datta v. Secretary of state for India in Council, (1933) ILR 61 Cal 245 (251); Kesho Sahu v. Musammat Muktakiman (1930) ILR 10.
reasonable or not. In the same way, the former chief court of Punjab was of opinion that a right to privacy existed in Punjab, and if opening of new windows invaded such a right, an action may be brought.\textsuperscript{67} Madhya Pradesh H.C. also recognized the right to privacy as a customary right.\textsuperscript{68}

### 4.1.5 Intentional Infliction of Emotional Distress-

It is the intentional infliction of harm which is not strictly trespass but invasion of interests like privacy for e.g. in an English case \textit{Wilkinson v. Downton}.\textsuperscript{69} The claimant’s husband had gone to the races for the day, and the defendant came to her house and as a practical joke falsely told her that her husband had an accident and was lying with both his legs broken at the Elms public house at Leytonstone. The claimant went to fetch he husband and later became ill from nervous shock. Held the defendant was liable. The court held that the defendant infringed her legal right to personal safety. A possible implication of the principal in Wilkinson could to restrain offensive invasion of privacy. An action for nervous shock & bodily illness or disorder caused by words has been accepted as a good law in India.\textsuperscript{70}

### 4.1.6 Privacy and Nuisance-

Unlawful interference with a person’s use or enjoyment of land or some right over, or in connection with it is called nuisance.\textsuperscript{71} It is a wrong done to a person by unlawfully disturbing him in the enjoyment of his property or, in some cases, in the exercise of common right, for e.g., noise, vibrations, heat, smoke, smell, fumes, water, gas, electricity,

\textsuperscript{67} \textit{Nanuck Chand v. Lalla} (1869) PR No. 21 of 1869.

\textsuperscript{68} \textit{Abirchand Gulabchand Jain v. Mahik Ramnarian Tailor}, 1978 MPLJ 204.

\textsuperscript{69} Queen’s Bench Division (1887) 2 QB 57.

\textsuperscript{70} \textit{G G in Council v. Surajmal} AIR 1949 256.

\textsuperscript{71} \textit{Bhanwarlal v. Dhanraj}, AIR 1973 Raj 212.
excavations or disease producing germs. Nuisance is similar to trespass in so far as in either case the plaintiff has to show his possession of land. In India, there is no comprehensive enactment in relation to nuisance which cover all aspects of nuisance. However, Indian Easement Act, 1882 and the limitation act 1963 have made some provision in this regard. In this way nuisance does not expressly covers the privacy but by implication of nuisance tort the unnecessary interference in the enjoyment of the property may secured & in this way securing privacy of home. The tort of nuisance is not much developed in India, there are a number of reasons, one of them is probably people are more tolerant towards such inferences. An easement is a right of person in possession of Land to do and continue to do something, or to prevent something being done, on another’s land e.g. a right to way, right to light. It belongs to a class of rights known in the Roman law, as *jura in re aliena* or servitude. Under the English law and under the Indian Easement Act, the list of Natural right and easement is well defined, e.g. natural right to support, of flow, user of purity of water in natural streams, easement of way and light. They do not recognize any natural or acquired right to an unobstructed view or prospect, to the free passage of light or air to an open space of ground or otherwise than through apertures like doors or windows, to permanently collected in a pool or tank, or to underground water not passing in a defined channel. The law of England does not recognize a right to privacy, i.e. a right of an owner of a house to prevent his neighbour from building so as to overlook the rooms in his house. However, where there

---

73 Sec. 4 of the Indian Easement Act, 1882.
74 Ramaswamy Ayer at p 275.
75 Sec. 7, 15.
anything like watching or besetting a house, it constitutes nuisance.\textsuperscript{78} Under the Indian Easement Act,\textsuperscript{79} such a right may be acquired by local customs, as in Gujarat, the United provinces, Punjab and Rajasthan.\textsuperscript{80}

4.1.7 Privacy and Trespass-

4.1.7.1 Trespass to land-

Trespass, in its widest sense, signifies any transgression or offence against the law of nature of society, or of the country, whether relating to a man’s person or to his property but the most obvious acts of trespass are- (1) trespass \textit{quare clausum fregit} “because he (the defendant) broke or entered into the close” or land of the plaintiff; and (2) trespass \textit{de boris asportatis}, wrongful taking of goods or chattels. Trespass to land is also an offence under the Indian Penal Code (s.441). To constitute the wrong of trespass neither force, nor unlawful intention, nor actual damage, nor the breaking of an enclosure is necessary.\textsuperscript{81} “Every invasion of private property, be it ever so minute, is a trespass.”\textsuperscript{82} Trespass may be committed (1) by entering upon the land of the plaintiff, or (2) by remaining there or (3) by doing an act affecting the sole possession of the plaintiff, in each case without justification.\textsuperscript{83} If a person, who has a limited right of entry upon land, exceeds that right, he is a trespasser. If a man uses the land, over which there is a right of way for any purpose, lawful or unlawful, other than that of passing and re-passing, he is a trespass.\textsuperscript{84}

\textsuperscript{78} Lyons \& Sons \textit{v.} Wilkins (1899) I Ch 255.

\textsuperscript{79} Sec 18, illustration (b)

\textsuperscript{80} Ramaswany Iyer at p. 276

\textsuperscript{81} Ratanlal Dheerajal at p.374.

\textsuperscript{82} Entick \textit{v.} Carrinton, (1765) 19 st Tr 1066.

\textsuperscript{83} Ratanlal at p.374.\textsuperscript{84} Dovaston \textit{v.} Payne, (1795) 22 HB 527.
Every interference with the land of another for example throwing stones or materials over a neighbour’s land, driving a nail into a person’s wall, by planting tress in his land, by placing anything above and overhanging his land.

The owner of land is entitled to the column of air space above the surface ad infinitum. The ordinary rule of law is that whoever has got the solum – whoever has got the site- is the owner of everything up to the sky and down to the centre of the earth. An ordinary proprietor of land can cut and remove a wire placed at any height above his land. At least in modern times, this is an overstatement. The correct view is that the owner’s right to air and space above his land is restricted to such height as is necessary for the ordinary use and enjoyment of his land and the structures on it. Sec 17 of the Indian Aircraft Act 1934 provides that no suit shall be brought in respect of trespass or nuisance, by reason only of the flight of aircraft over any property at a right above the ground which having regard to wind, weather, and all the circumstances of the case is reasonable, or by reason only of the ordinary incidents of such flights. But for willful damages to person or property there is provision for imprisonment for six months or a fine of Rs. 1,000 or both.

In this way the Law, relating to trespass protects privacy of a person in certain respect. “The house of every person is to him as is his castle and his fortress, as well as defence against injury and violence as for his repose.”

85 Muhammad Shafi v. Bindeshi Saran Singh, (1923) ILR 46 All 52.
86 Wandsworth Board of Works v. United Telephone co., (1884) 13 QBD 904, 927.
87 Bernstein of Leigh (Baron) v. Skyviews & General Ltd, (1977) 2All Er 903.
88 Seymayne’s case (1603) 5 co. Rep. 91, 916
4.1.7.2 Privacy & Trespass to person-

Trespass to person is a positive act of direct invasion of a protected interest if it is without justification. Trespass can be used for protection of one’s liberty and indication of constitutional rights.

Assault and battery are main trespass to person. An assault is an attempt or a threat to do corporeal hurt to another, coupled with an apparent present ability and intention to do the act. Actual contact is not necessary in an assault, though it is in a battery. However, it is not every threat, when there is no actual personal violence that constitutes an assault; there must, in all cases, be the means of caring the threat into effect.\textsuperscript{89}

A civil action lies for an assault and criminal proceedings may also be taken against the wrong doer.

False imprisonment is also another form of intrusion on person’s liberty. It is a total restraint of the liberty of a person, for, however, short a time, without lawful excuse.\textsuperscript{90} The detention may be actual or constructive.

4.1.7.3 Trespass to Person: Tort of sexual Harassment-

Traditional trespass torts protect the person property from unnecessary interference with the possession of property. Interference with such possession is actionable & it is indirectly protecting the right to privacy of the person in relation to that property.

A new civil remedy was recognized by the S.C. in the Visakha\textsuperscript{91} case. The S.C. held that every incident of sexual harassment of women in

\textsuperscript{89} Stephens v. Myers, (1830) 4C & 349.
\textsuperscript{90} Bird. v. Jones (1845) 7QB 742, 752.
\textsuperscript{91} Visakha v. State of Rajasthan, AIR 1997 SC 3011.
workplace results in the violation of the fundamental rights of gender
equality and right to life and personal liberty under arts 14, 15, 21 of the
constitution.\textsuperscript{92} Invasion of the autonomy of a female by sexual offences is
violation of her right to privacy.

4.2 Protection of Privacy under Criminal Law-

4.2.1 Criminal Libel/Defamation-

The privacy may be invaded of a person by unauthorized
publication of facts about that person which are embarrassing. The most
crimes are also torts. But the most conspicuous illustration of this is
afforded by the defamatory or private libel. It is a crime which not only is
a tort, but is constantly treated as such in actual practice. For it is only a
misdemeanour and accordingly not affected by the rule which delayed and
therefore, usually frustrated civil proceedings for crimes that were of the
degree of felonies. Again, it is a crime which, unlike most others, is often
committed by persons whose pecuniary means one large enough to enable
them to pay whatever compensation a civil court may award. Hence Libels
are much more frequently followed up by civil than by criminal
proceedings.\textsuperscript{93}

There are the fundamental principles constituting civil and the
criminal law of libel-

(1) Anyone who publishes a defamatory document concerning another
person, so as to tend to bring him into hatred.

(2) The publication need not to be malicious.

\textsuperscript{92} Ratanlal Dheerajlal at \textit{P.77}.

\textsuperscript{93} \textit{Kenny’s outlines of Criminal Law} 19\textsuperscript{th} ed., (New Delhi Universal 4\textsuperscript{th} Indian Rep.
2010) at \textit{p. 231}.
(3) The unlawful meaning which the document is alleged to have conveyed must be one which it was reasonably capable of conveying to ordinary people of the class addressed.  

(4) There are certain qualified and absolute privileges.

Under criminal law,\textsuperscript{95} the defamation has been made a crime. The following are the essential of the offence-

1. The making or publishing of an imputation concerning any person;

2. The means of such imputation are words, writings, signs or visible representations.

3. Such imputation must have been made with the intention of harming the reputation of the person about whom the imputation is published.

In this way, the reputation of a person which he possesses in the eyes of society, law rightly protects this external esteem of a person in society. There are certain exceptions to defamation. These are,

Imputation of truth for public good; public conduct of public servants; public conduct of public men; comment on cases and conduct of witnesses etc, merits of judicial proceedings, merits of public performances, censure in good faith by person in authority and complaints to authority.

In \textit{Sewakram Sobhani v. R.K. Karanjiya}\textsuperscript{96} a majority of judges in the S.C. approved the principle that journalist do not enjoy any special privilege with regard to the publication of news items in newspaper even under act 19 (1) (a) of the constitution. The matter pertaining to the

\textsuperscript{94} Kenny at p 232.

\textsuperscript{95} Sections. 499-502 of The Indian Penal Code 1860.

\textsuperscript{96} 1981 Cri. L.J. 894.
publication of a news item in the ‘Blits’ as also a government report regarding illicit sexual relation between the complainant and a married lady.\textsuperscript{97}

In \textit{Mukund Martand Chitis v. Madhuri Chitnis}\textsuperscript{98} there was a question before the court whether the husband can defame wife. Liberal view was taken by the H.C. that was confirmed by S.C. that, “But for the serious view taken by the H.C. the woman would not have been able to indicate her honour and receive compensation for the defamatory statements. In this case, on the wedding night itself, the husband had suspected the chastity of his wife. The bitterness that soon enveloped the couple was such that there were allegations and counter allegations between the two, who separated within a month. A complaint of theft was lodged against the wife resulting in the search of her house for gold ornaments allegedly stolen by her. Two cases of defamation came to be filed against the husband, in which the accused husband was acquitted by the trial court. However, the H.C. on appeal set aside the acquittal and sentenced the husband to two months rigorous imprisonment and fine of Rs 2,000. In the S.C. a compromise was reached by which the husband agreed to pay the complainant Rs. 1 lakh along with unqualified apologies.\textsuperscript{99}

\textbf{4.2.2 Right to Private Defence and Privacy-}

The right to private defence of person and property is recognized in every system of law and the extent of the right varies in inverse ratio to the capacity of the state to protect the life and property of the subject. The reason is obvious. This duty is primarily the duty of the state but no state, no matter how large its resources, can afford to depute a policemen

\textsuperscript{97} PSA Pillai’s \textit{Criminal Law} (Lexis Butterworths, New Delhi 9\textsuperscript{th} ed. 2006) p 945.

\textsuperscript{98} AIR 1992 sc 1804.

\textsuperscript{99} PSA Pillai at \textit{pp.} 452-453.
to dog the steps of every *budmash* in the country or to be present at every riot or affray. This necessary limitation on the resources of the state has given to the subject protanto the right to take the law into his own hands and to provide for his own safety.\(^{100}\)

The right is a right of defense both of person and property, not necessarily of one’s own person and property, but also of the person and property of others.\(^{101}\) The right to private defense is based on the cardinal principle that it is the primary duty of a man to help himself.\(^{102}\) Bentham in his Principle of Penal Laws say, the right of defence is absolutely necessary. The vigilance of Magistrate can never make up for the vigilance of each individual on his own behalf. The fear of the law can never restrain bad men as the fear of the sum total of individual resistance. Take away this right and you become in so doing the accomplice of all bad men.\(^{103}\) The right to private defence may extent to cause death.\(^{104}\)

### 4.2.3 Sexual Offences and Privacy-

Sexual autonomy of a lady is the guarantee of freedom of soul and body of her. Sexual offences against women are a trauma to victim and a stag on the fabric of the society. Daily reports and news of sexual assaults are occupying the enhanced space in the news world. The cases like Delhi

---


\(^{101}\) *Ibid*, Samsul Huda.


\(^{103}\) Gour at p.797

\(^{104}\) Sec 100 and Sec 103 of Indian Penal Code 1860.
rape case. Made the legislature to tighten the noose of law against sex offenders.

4.2.3.1 Rape-

The word ‘rape’ is derived from the Latin term ‘rapio’ which means to seize. Thus, rape literally means a forcible seizure and that is the essential characteristic feature of the offence. In common parlance, it means intercourse with a woman without her consent by force, fear or fraud. In other words, rape is violation with violence of the private person of a woman, it is an outrage by all canons. Remarkable changes have been made to the law on sexual offences by the criminal law (amendment) Act 2013. The definition of rape has been made very wide. Not only

---

105 The researcher wants to stress here this is just the identification of such problems the examples are numberless.
107 [Act No. 13 of 2013], Received the assent of the President on 2-4-2013 Act published in Gaz. Off India 2-4-2013, pt.II, S.1 Ext. p.1 (no.17).
108 Definition-
1. Substitution of existing section 375 of the IPC recommended – the existing section 375 be substituted by the following:

“375. Sexual Assault: Sexual assault means –
(a) The introduction (to any extent) by a man of his penis, into the vagina (which term shall include the labia majora), the anus or urethra or mouth of any woman or child–
(b) the introduction to any extent by a man of an object or a part of the body (other than the penis) into the vagina( which term shall include the labia majora) or anus or urethra of a woman
(c) the introduction to any extent by a person of an object or a part of the body (other than the penis) into the vagina( which term shall include the labia majora) or anus or urethra of a child.
(d) manipulating any part of the body of a child so as to cause penetration of the vagina (which term shall include labia majora) anus or the urethra of the offender by any part of the child’s body;
In circumstances falling under any of the six following descriptions:
has this age for consent been made from 16 years to 18 years.\textsuperscript{109}

According to Explanation of sec 375 consent means an unequivocal voluntary agreement which the woman expresses verbally or through no-verbal communication about willingness to participate in the specific sexual act as well as it she does not physically resist the act, it will not amount to consent. Another changes brought forth are the punishment has been rigorous imprisonment. Rapes, committed by Army personnel in the area deployed\textsuperscript{110} or by a relative; guardian, teacher or a person in relation

\begin{itemize}
  \item Firstly – Against the complainant's will.
  \item Secondly – Without the complainant's consent.
  \item Thirdly – With the complainant's consent when such consent has been obtained by putting her or any person in whom the complainant is interested, in fear of death or hurt.
  \item Fourthly – With the complainant's consent, when the man knows that he is not the husband of such complainant and that the complainant's consent is given because the complainant believes that the offender is another man to whom the complainant is or believes herself to be lawfully married.
  \item Fifthly – With the consent of the complainant, when, at the time of giving such consent, by reason of unsoundness of mind or intoxication or the administration by the offender personally or through another of any stupefying or unwholesome substance, the complainant is unable to understand the nature and consequences of that to which such complainant gives consent.
  \item Sixthly – With or without the complainant's consent, when such complainant is under eighteen years of age.
\end{itemize}

Provided that consent shall be a valid defence if the complainant is between sixteen years and eighteen years of age and the accused Person is not more than five years older.

Explanation: Consent means the unequivocal voluntary agreement by a person to engage in the sexual activity in question., Available at ncw.nic.in/pdffiles/Amendments%20to%20laws%20relating%20to%20women visited on 5.8.13 at 2.05 IST.

\textsuperscript{109} Sec 375 (Sixthly).

\textsuperscript{110} Sec 376 (2) (c).
of trust\textsuperscript{111}; during communal or sectarian violence\textsuperscript{112}; on women not able to give consent\textsuperscript{113}, below the age of 16\textsuperscript{114} years\textsuperscript{115}, with women suffering from mental or physical disability\textsuperscript{116}, causing grievous bodily harm or endangering life\textsuperscript{117}, committed repeatedly on the same woman\textsuperscript{118} are made subject to enhanced punished that shall not be less than ten years which may extent to the imprisonment for remainder of the life of the accused and shall also be made liable to fine.\textsuperscript{119} The amended laws also specify the enhanced punishment\textsuperscript{120} in case of death or resulting in persistent vegetative state of victim.\textsuperscript{121} Gang rape has given special mention under section 376 D of the Act.\textsuperscript{122} Repeat offender under section 376 or sec. 376 A or 376 D. are made subject to life imprisonment or with death.

This Act also provides for compensation in addition to fine\textsuperscript{123} under the new sections 375 B and 357 C of the code of criminal procedure. The State Government shall pay the compensation.\textsuperscript{124} The law also provides for

\textsuperscript{111} Sec 376 (2) (f).
\textsuperscript{112} Sec 376 (2) (g).
\textsuperscript{113} Sec 376 (2) (j).
\textsuperscript{114} Earlier the age was 12 years.
\textsuperscript{115} Sec 376 (2) (i).
\textsuperscript{116} Sec 376 (2) (l).
\textsuperscript{117} Sec 376 (2) (m).
\textsuperscript{118} Sec 376 (2) (n).
\textsuperscript{119} Sec. 376 (2) of Criminal (Amend) act 2013. Other categories put under the previous sec. 376 (2) are also made subject to the same punishment.
\textsuperscript{120} Rigorous imprisonment for twenty or life imprisonment for the remainder of the offender’s natural life or with death.
\textsuperscript{121} Sec. 376 A of Criminal Law (Amend) ct 2013.
\textsuperscript{122} RI for not less than 20 years or life imprisonment for remainder of offender’s life and fine. The fine shall be just & reasonable for medical expenses and rehabilitation of the victim.
\textsuperscript{123} Section 326 A or 376 D of Indian Penal Code.
\textsuperscript{124} This move is step in the direction to protect the rights of rape victim.
the compulsory immediate medical treatment of such victims in any public
or private hospital. The hospitals shall also be under the liability to
inform the police immediately.\footnote{Sec 357 C of the Code of Criminal Procedure.}

\textbf{4.2.3.2 Sexual Harassment-}

Every incident of sexual harassment of a woman is violation of her
right to life, personal liberty, gender equality and privacy. The new
amendment to Indian Penal Code adds new crimes to the original Sec. 354
of IPC. Sexual harassment\footnote{Sec 354 (A)} , Assault to disrobe\footnote{Sec 354 (B)} , Voyeurism\footnote{Sec 354 (C)} ,
Stalking\footnote{Sec 354 (D)} are made as specific crimes.

Assault on women to outrage her modesty under section 354 of IPC
& Insulting Modesty of woman\footnote{Sec 509, now punishment may extend to three year in place of earlier one year.}
has now been made subject to extended
punishment.\footnote{Before Criminal Law (Amend) Act 2013 maximum punishment for two years could be granted but now the maximum 5 years imprisonment which shall not be less than one year. In Ruchika’s case there was big hue and cry over the leisure punishment of 6 months for such crime because there was no provision for minimum imprisonment}

Insertion of crimes as sexual harassment\footnote{Prohibition of Sexual Harassment at Workplace Bill is under consideration. \textit{Visakha’s} case is a landmark decision of Supreme Court in which guidelines were issued against Sexual Harassment at Workplace.} Voyeurism and stalking
are the welcome step of the legislature to give respect & secure the
dignity, autonomy and privacy of a woman over her person.
4.2.3.3 Trafficking-

Trafficking of person is trading bodies and selling souls. Trafficking has now become an international organized crime. The vulnerable sections are poor, women, and children. It violates the human rights dictate of personal liberty of a person.\textsuperscript{133} The already existed provision to tackle the problem has remained unfruitful. Women form the major portion of the person under human trafficking for sexual exploitation and other purposes. The problem has been addressed by the modified newly conceived sections- section 370 and section 370 A of IPC. These sections make elaborate provisions against trafficking of person and sexual exploitation.

4.2.3.4 Statutory and Procedural safeguards to Victim of Sexual Offences-

1. Non publication of the names of victims of certain offences-

Section 228-A of IPC for non publication of the victim of certain offences.

2. The information of the sexual offences shall be recorded by the woman police officer or woman officer and if such information is about a victim person who is mentally or physically challenged, shall be recorded at such person’s home or convenient place. Such information shall be video graphed.\textsuperscript{134} A woman police officer or any woman officer shall record the statement of victim of sexual offences under section 161\textsuperscript{135}.


\textsuperscript{134} Sec. 154 of Cr. P.C.

\textsuperscript{135} Criminal Procedure Code, 1973.
3. Non-confrontation of victim of sexual offences by accused during the cross-examination.\textsuperscript{136}

4. Inquiry or trial of an offence under section 376, sec 376A - 376D\textsuperscript{137}, be complete within a period of two months from the date of filing of a charge sheet.\textsuperscript{138}

5. By the insertion of sec-53 A to Indian Evidence Act 1872 in cases of sexual offences, the evidence of the character of the victim or of such person’s previous sexual experiences with any person shall not be relevant in the issue of consent.

6. Presumption of consent in case of Rape- In cases of rape if woman states in her evidence before the court that she did not consent, the court shall presume that she did not consent.\textsuperscript{139}

4.2.3.5 Indecent Representation and Privacy-

Prohibition on Sale etc. of obscene books, sale etc. of obscene objects to young person and obscene acts and songs are justified on the reasoning.

The fundamental object and purpose of criminal law is not only to protect and to conserve the safety and security of primary personal rights of individuals, such as right to life, right to body, right to property, right to habitation, etc. but also to protect and guard public morals and public decency and to conserve the moral welfare of the people at large.\textsuperscript{140} Thus it is the duty of the state to guard the citizens against attacks, which may

\textsuperscript{136} Proviso added to Sec. 273 of Cr. P.C.

\textsuperscript{137} The Indian Penal Code,1860.

\textsuperscript{138} Amendment to Sec 309 of Cr. P.C.

\textsuperscript{139} Sec 114-A of Cr. P.C.

\textsuperscript{140} Sections 292, 293, 294.
be insidious (harmful) and punish individuals for obscene publication, which tend to corrupt public morals and decency.  

Exposure to obscene objects, books and songs is the violation of person’s right which may amount to violation of his privacy right. In *Ranjit D. Udeshi* Justice Hidayatuallah said, “No doubt this article 19(1) (a) guarantees freedom of speech and expression but it also makes an exception in favour of existing laws which impose restrictions as the exercise of the right in the interest of public decency and morality............ section 292, IPC manifestly embodies such a restriction because the law against obscenity, of course, correct understood and applied, seeks no more than to promote public decency.

### 4.2.3.6 Indecent Representation of Women (Prohibition) Act 1986-

None of sections 292, 293 and 294 deals with indecent representation of women in publication and advertisements, etc, which have an effect of corrupting and depraving person. Accordingly, in 1986 the parliament enacted the Indecent Representation of Women (Prohibition) Act, 1986 to effectively prohibit indecent representation of women through advertisements, publications, writings, paintings, figures, pamphlets, etc. and to provide punishment against those indulging in such nefarious activities. This Act imposes imprisonment to the extent of two years and fine which may extend to two thousand rupees on first conviction and in the event of second and subsequent conviction with


143 *Ibid.*, (paras 7 and 8)
imprisonment for a term for minimum six months and maximum 5 years
and also with a fine from 10,000 rupees to 1 lakh rupees.

4.2.4 Arrest and Detention and Privacy-

Arrest means the deprivation of a person of this liberty by legal
authority or at least by apparent legal authority. In a free society like
ours, law is quite jealous of the personal liberty of every individual and
does not tolerate the detention of any person without legal sanction. The
right to personal liberty is a basic human right. Our constitution
recognizes it as a fundamental right.\textsuperscript{144} Further, the procedure
contemplated by this article must be ‘right, just and fair’, not arbitrary,
fanciful or oppressive; otherwise it would be no procedure at all, and the
requirement of Art-21 would not be satisfied.\textsuperscript{145}

After the code of criminal procedure (Amendment) Act, 2010\textsuperscript{146}
significant changes have been made in the code of civil procedure
regarding arrest without warrant in case of cognizable offences. Prior to
the amendment there were allegations that police might misuse is power
by arresting any person without warrant because of suspicion only. This is
violation of person’s right to liberty. By this amendment the cognizable
offences\textsuperscript{147} are categorized into three categories- 1) Cognizable offences
committed in the presence of police officer, 2) Cognizable offence for
less than seven years punishment if the conditions under (a) (b) & (c) part
of sub clause (ii) of clause (b) of section 41 are fulfilled, and (3)
cognizable offence which is punishable for more than seven years, for the
purpose of arrest without warrant.

\begin{footnotes}
\item[144] R.V. Kelkar’s Criminal Procedure, (Eastern Book Company, 5\textsuperscript{th} ed. 2008) at p.68.
\item[145] Maneka Gandhi v. Union of India (1978) 1 SCC 248, 284.
\item[146] (Act No. 41 of 1020), sec. 2 (w.e.f. 2.11.2010)
\item[147] Sec 41 of Cr. P.C.
\end{footnotes}
While making an arrest the police officer or other person unnecessary force will not be used against arrested person. The person arrested shall not be subjected to more restraint than is necessary to prevent his escape.

The case law produced by the courts in response to the demand for protecting women has made the parliament to enact sub section (4) to section 46 laying down that no woman shall be arrested after sunset and before sunrise, and where such exceptional circumstance exist, the woman police office shall, by making a writing report, obtain the prior permission of the Judicial Magistrate of first class within whose jurisdiction the offence is committed or arrest is to be made.

Thought police have been given various powers for facilities the making of arrests, the powers are subject to certain restraints. These restraints are primarily provided for the protection of the interests of the person to be arrested and of the rights of the arrested person. The imposition of the restraints can be considered to an extent as the recognition of the rights of the arrested person. These are as under-

1. Right to know the ground of arrest and of right to bail- Apart from procedural protection and criminal code recognizing the right to know the grounds of arrest, our constitution has also conferred on this right the status of a Fundamental Right. The rules emerging form

---

148 Sec 46 of Cr. P.C.
151 Kelkar at p.77
152 Sec. 50 (1) & (2) of Cr. P.C. 1973.
153 Art 22 (1) of the Constitution provide; “No person who is arrested shall be detained in custody without being informed as soon as may be of the grounds for such arrest
decision such as *Joginder Singh*\textsuperscript{154} and *D.K. Basu*\textsuperscript{155} have been enacted in section 50 A of Criminal Procedure\textsuperscript{156} making it obligatory on the part of the police officer not only to inform the friend or relative of the arrested person about his arrest but also to make an entry in the register maintained by police.

2. Right to be taken before the magistrate without unnecessary delay- Whether the arrest is made without warrant, the person making the arrest must bring the arrested person before a magistrate without unnecessary delay. He must be presented before a magistrate within 24 hours of the arrest except the journey time.\textsuperscript{157} He should not be confined in any place other than a police station before presenting before the magistrate. This right has further strengthened under art 22 (2) of the constitution\textsuperscript{158}.

3. Right to consult a legal practitioner- Right to consult a legal practitioner of the accused is the constitutional mandate also\textsuperscript{159}. It has been held by the S.C. that non-compliance with this requirement and failure to inform the accused of this right would vitiate the trail.\textsuperscript{160}

\begin{footnotesize}
\begin{itemize}
    \item nor shall be denied the right to consult, and to be defended by a legal practitioner of his choice."
    \item \textsuperscript{154} *Joginder Singh* v. *State of U.P.* (1994) 4 SCC 260
    \item \textsuperscript{155} *D.K. Basu* v. *State of West Bengal* (19970 ISCC 416.
    \item \textsuperscript{156} Ins by Act 25 of 2005.
    \item \textsuperscript{157} Sections- 76 & 57 of Cr. P.C. 1973.
    \item \textsuperscript{158} Every person who is arrested and detained in custody shall be produced before the nearest magistrate with a period of twenty four hours of such arrest excluding the time necessary for the journey from the place of arrest to the court of the Magistrate and no such person shall be detained in custody beyond the said period without the authority of a Magistrate.
    \item \textsuperscript{159} Art 22 (1) and Art 21 (as interpreted by the court): *Hussainara Khatoon (IV)* v. *Home secy, State of Bihar*, 1981 SCC (Cri) 228, *Suk Das v. U.T. of Arunanchal Pradesh*, 1986 SCC (Cri) 166.
    \item \textsuperscript{160} *Suk Das v. U.T. of Arunanchal Pradesh*, 1986 SCC (Cri) 166.
\end{itemize}
\end{footnotesize}
Section 303 of Cr. P C. also provides the right to be defended by a pleader of accused’s choice.

4. Right to free Legal Aid State is under a constitutional mandate (implicit in art 21) of to provide free legal aid to an indigent accused person.\textsuperscript{161} Even in \textit{Suk Das}\textsuperscript{162} the S.C. laid down that this constitutional right cannot be denied it the accused failed to apply for it.

5. Right to examined by a medical practitioner\textsuperscript{163}. The frequent instances of police atrocities and custodial deaths have prompted the S.C. to have a review of its decisions like \textit{Joginder Singh}\textsuperscript{164} and \textit{Nilabati Behara}\textsuperscript{165} and issued certain instruction in \textit{D.K. Basu}\textsuperscript{166} which found expression in the Criminal procedure (Amendment) Act 2009\textsuperscript{167} which inserted sections 41-A, B, C and D to the Code. These provisions secures the rights of accused as to know the identity of the police officer making an arrest, get prepared memo of arrest and signed information about arrest to relative or a friend. There shall be establishment of police control rooms at district level by the State Government. There shall be a notice board displaying the name and addresses of the arrested persons and the names and designation the police officers who made arrests. The police Headquarters’ Control rooms at state level shall prepare a data base of such details for the information of public. It is important to note here such safeguards have been necessary because of an alarming number of missing persons. The arrested person can meet his advocate during interrogation. In this way the police custody torture can be avoided.

\textsuperscript{161} \textit{Khatri II v. State of Bihar} (1981) 1SCC 627.

\textsuperscript{162} \textit{Ibid.}

\textsuperscript{163} Section 54,53 and 53A.

\textsuperscript{164} \textit{Ibid.}

\textsuperscript{165} (1993) 2SCC 746.

\textsuperscript{166} \textit{Ibid.}

\textsuperscript{167} W.e.f. 1.11.2010.
It is also important that non-compliance with provisions relating to arrest by any public servant may result in his prosecution under section 220 of the penal code. Any private person who illegally arrests another is punishable under section 342 of IPC for wrongful confinement. The aggrieved person can also seek relief in a civil court in form of damages for false imprisonment.

4.2.5 Search and Seizure and Privacy Protection

A coercive search of any place is an encroachment upon the right of the occupant of the place as well his privacy. However, even in a free society like ours, such encroachments will have to be tolerated in the larger interests of the society. The law strives a balance between the interests of the individual and of the society by providing certain safeguards in favour of the individual. It has been observed,

“An Indian citizen’s house, it must always be remembered, is his castle, because next to his personal freedom comes the freedom of his house. Just as a citizen cannot be deprived of law, similarly, no officer of the state has a prerogative right to forcibly enter a citizen’s house except under the authority of law......................”

It has been ruled that the court before issuing a search warrant must have reasons to believe that the person to whom summons under section 91 has to issue would not produce the document. The court further ruled that the expression “reason to believe” ould mean that there must be some justifiable ground for the court to form the opinion.

The police officer or other person conducting the search is empowered to enter the place in order to effect an entrance into such a

---

place to break open any outer or inner door or window of any house or place if after notification of his authority and purpose, and demand of admittance duly made he could not otherwise obtain admittance\footnote{Sec. 47 (2).} section 47 (2) also provides a safeguard in favour of a \textit{paradanashin} lady and the same is applicable in case of search also further if the person to be searched is a woman then in order to protect her modesty it has been provided that the search shall be made by another woman with strict regard to decency.\footnote{R.V. Kelkar at \textit{p.111}.}

\section*{4.2.6 Consequences of non-compliance with the provision relating to searches-}

A search warrant for a search of place suspected to contain stolen property, forged document etc. can only be issued by a District Magistrate, Sub Divisional Magistrate or Magistrate of the First Class.\footnote{Sec 94.} It, however, such a search warrant is issued by any other magistrate erroneously and in good faith, such a warrant shall not be the ineffective merely on the ground that the Magistrate was not empowered to issue the same. This has been specifically provided by section 460. If any other magistrate purports to issue a search warrant under section 97, the warrant will be illegal any entry into any place in consequence of such illegal warrant would be without any legal authority.\footnote{Kelkar at \textit{p 115}.} In addition to this search without warrant by police officers is not authorized except under sections 153, 165 and 166 by a police officer of a certain rank or by one specially authorized according to the provisions of law. A search conducted by any other police officer or other person would be illegal and the entry into the house or place of such search would be unlawful. The contravention of the
provisions under sections 165 and 166 would make search illegal or at least irregular.\textsuperscript{174}

\textbf{4.2.7 Cyber Breach of Privacy-}

With the advent of multi channel television all over the world, and fast spreading internet network, the privacy of an ordinary person is increasingly under threat. Breach of privacy is the kind of cyber tort which affects a common man.\textsuperscript{175} Privacy to a large extent signifies the right to be left alone.\textsuperscript{176} The first wire tapping cases heard by the supreme court of USA. Cyber stalking may be a direct “corollary” to violation of privacy laws on the Internet. There are several situation one may countenance when one deals with privacy laws on the internet. The following may be the key areas of concern when one comes across privacy related issues.

(a) Interception via wire tapping the phone line on the senders end E-mailing may, thus, be conveniently intercepted in such a manner.

(b) Disclosure of contents.

(c) Disclosure of essential data while registering onto a particular domain such a chatting site, where precautions and registration policies for the surfer are not conveniently out lined.

Section 71 of the Information Technology Act 2000, prohibits interception of e-mail during transit. Similarly reading e-mailing during storage on a computer system is also prohibited by the above section & sec 43 of the Act. The recipient of the e-mail is generally free to share the

\textsuperscript{175} Ramaswamy Iyer at p. 45
\textsuperscript{176} Judge Brandeis used the phrase in his dissent in Olmsted v. United States, 227 U.S. 438 (1978).
mailing material with anyone provided it is subject to legal implications of confidentiality.\textsuperscript{177}

\subsection*{4.2.7.1 Cyber Obscenity-}

One of the major side effects of cyber revolution is spread of obscenity. Cyber space offers a very high potential scope for pornography, and makes children and women vulnerable to trafficking. Through, India has no specific legislation to tackle this problem, the general criminal law, Information Technology Act 2800 and the recently enacted Protection of children from sexual offences Act, 2012. Due to technical advancement, no updated technical training of police, jurisdictional problems and difficulty in identifying criminals, it is almost impossible to enforce the regulatory mechanism to curb cyber obscenity or cyber porn. Cyber defamation is also the result of expansiveness of Internet.

\subsection*{4.2.7.2 Right to Privacy and Information Technology Law-}

The 'Right to Privacy' has assumed much importance with the emergence of internet, bio-banks (gene bank etc.,) business process outsourcing, knowledge process out sourcing, development of software industries, enactment of antiterrorist laws, deterioration of the law and order situation, rising levels of crime rates (theft and fraud cases etc.) These developments led to the rampant privacy invasions. Despite its legal guarantee as a basic human right, it is invaded incessantly by the individuals and institutions. The 'internet' has penetrated into every sphere of human activity. It is intricately and inextricably connected with the day-to-day life of the present day Netizens. Modern man's life has been changed drastically and all his transactions have become more internet-based, internet-dependent in this global village. Personal

\textsuperscript{177} Ramaswamy at p. 46.
information of an individual in this internet age is not just confined to four walls, or in our traditional desk, but is connected to the vast networked internet system. This is leading to privacy invasions. Most of our day-to-day transactions (financial, medical, school/college etc.,) are no more secure now. Our personal information is tracked, stored and later mis-utilized in the manner we do not wish often without our knowledge or consent. The law enforcing authorities too, under the veil of combating terrorism are infringing the innocent individual's Right to Privacy through their acts such as, phone tapping, surveillance of private lives and searches and seizures without complying necessary legal formalities etc.

The basic philosophy of this Right to Privacy is that every individual has a legal right to enjoy privacy over his person, property, territory and information so long it do not come in the way of the larger interests of the society. Nobody should disturb his privacy even the governments, unless warranted by law. Even in inevitable interferences, observance of certain norms, taking due care is necessary in situations where the acts of the State are likely to invade the privacy of the individuals. In other words, striking a harmonious balance between the individual's Right to Privacy and collective interests of the society at large such as nation's security, law and order, contempt of court, incitement for offence, morality and decency.

The law relating to computer and Information Technology is wide than the cyber law. Cyber law is one part of the computer and information technology law cyber law is limited to the computer, when it is connected into cyber space. In India, Law relating to computer and information technology is governed by the Information Technology Act, 2000 with some allied laws. The Information Technology Act, 2000 is the specific legislation to curb the crime and damages relating to the computer and

---

178 The Indian Penal Code, 1860.
information technology. There are other legislation also. The information technology act, 2000 attempts to change outdated laws and provides ways to deal with cyber crimes.

Computer crime, cyber crime, e crime, into tech crime or electronic generally refers to criminal activity where a computer or network is the source, tool, target, or place of a crime. Although these activities are not exclusive. Computer crime can broadly be defined as criminal activity involving an information technology infrastructure, including illegal access (unauthorized access), illegal interception (by technical means of non-public transmissions of computer data to, from or within a computer system), data interference (Unauthorised Damaging, deletion, deterioration, alteration or suppression of computer data), systems interference (interfering with the functioning of a computer system by imputing, transmitting damaging, deleting, deteriorating, altering or suppressing computer data), misuse of devices, forgery (ID theft), and electronic fraud.¹⁷⁹

In England and Wales, Section 43 of Telecommunications Act, 1984, makes it an offence to use a public telecommunications network to send ‘grossly offensive, threatening or obscene’ material, and a ‘public telecommunications network’ is defined widely enough to cover Internet traffic which goes though telephone lines of other cables. In India Information Technology Act covers all the offences after the Amendment of 2008.

Here under some cyber crimes are discussed which violates the privacy right-

Cyber Pornography- It includes pornographic websites; pornographic magazines produced using computers the Internet (to download and transmit pornographic pictures, photos, writings etc.\textsuperscript{180}

Cyber Defamation- It takes place when someone publishes defamatory matter about someone on a website or sends e-mails containing defamatory information to all of that person friends, or sends defamatory SMS or MMS.

Cyber Stalking- It involves following a person’s movements across the Internet by posting messages (sometimes threatening) on the bulletin boards frequented by the victim, entering the chat-rooms frequented by the victim, constantly bombarding the victim with e-mails etc. It involve harassment and threatening behaviour.

Breaches of Confidentiality and Privacy- According to section 72 of IT Act ‘...any person who, in pursuance of any of the powers conferred under this act, rules or regulations made there under, has secured access to any electronic record, book, register, correspondence, information, document or other material without the consent of the person concerned discloses, such electronic record, book, register, or other material to any other person shall be punished with imprisonment upto two years, or with fine up to one lakh rupees, or with both’. In this way unauthorised insemination of information is made punishable.

Disclosure of Information is breach of Lawful Contract and Data Protection- Sec. 72 A\textsuperscript{181} provides that any person, while providing

\textsuperscript{180} This may be covered u/s 67A (1) Inserted by IT (Amendment) Act, 2008.
\textsuperscript{181} Inserted by IT (Amendment) Act, 2008; Section 43 deals with civil liability which provides, “Where a body, Corporate possessing, dealing or handling any sensitive personal data or information in a computer resource which it owns, controls or operates, is negligent in implementing and maintaining reasonable security practices
services under the terms of lawful contract, has secured access to any material containing personal information about another person with the intent to cause wrongful loss or gain, discloses without the consent of the person concerned, or in breach of a lawful contract, such material to any person shall be punish.

**Preservation and Retention of Information by Intermediaries** - Intermediary shall preserve and retain such duration and in such manner and format as the central Government may prescribe. Any intermediary who intentionally contravenes such provision shall be punished.\(^{182}\)

**Violation of Privacy** - Violation of Privacy has been declared specific offence u/s 66E\(^{183}\) which makes it punishable to intentionally capturing publishing or transmitting the images of a private area of any person without his or her consent, under circumstances violating the privacy of that person. The explanation to the section clarifies the “private area” which means the private parts of body and “under circumstances violating privacy” means circumstances in which a person can have a reasonable expectation of privacy of his private parts of body, in public or private place\(^{184}\) for e.g. The trying rooms of the cloth shops or stores.

**Publishing or transmitting Children Obscenity** - IT Amendment Act, 2008\(^{185}\) makes punishable to publish or transmit child obscenity

---

\(^{182}\) Sec 67 c Inserted by IT (Amendment) Act, 2008.

\(^{183}\) Inserted by IT (Amendment) Act, 2008.

\(^{184}\) Criminal Law Amendment Act 2013 makes Voyeurism a separate crime.

\(^{185}\) Sec 67B.
inducing children to online relationship for and on sexuality explicit act, facilitating abusing children online etc.

**Unauthorised Reading of Emails of Others**- Many employers read the emails of their employees and often do so without informing them. It is undoubtedly an infringement of privacy. We don’t have any specific law in this regard, South Africa\(^{186}\), U. K.\(^{187}\) have law in this regard.

**Sending of Spams**- Unsolicited emails are a menace. They should have provision to unsubscribe them or they may not be sent unless asked for. Many states in the US have enacted laws against unsolicited mail known as, anti spam laws.\(^{188}\) Australia has also enacted the span act. It prohibits the sending of unsolicited commercial electronic messages with an Australian link.\(^{189}\) We also need similar laws.

**Spim**- Spim is to chat client, what spam is to email. Spim is a junk or unwanted instant message (IM). All IM programmes give out the blunt opinion of plocking individual users (known as “bozo filters”) or receiving IMs only from people on your contact lists.

**Phishing**- It is a fraudulent way of getting confidential information. In this unsuspecting users receive official looking emails that attempt to fool them into disclosing online passwords, usernames and other personal information. The 2008 Amendment act tries to sort out such problem.\(^{190}\) It

---

\(^{186}\) Regulation of Interception of Communication Act 2002.

\(^{187}\) Code of Practice “Employment Practice Data Protection Code” on surveillance in the work place announced by the UK Information, Commissioner. It requires companies to inform employees if they are monitoring phone calls, emails and internet use.

\(^{188}\) Controlling the Assault of Non-Solicited Pornographic and Marketing Act of, 2003(CAN-SPAM Act, 2003)


\(^{190}\) W.e.f. 27-10-2009
is entitled as punishment for sending offensive messages through communication services, etc. Cyber Stalking\textsuperscript{191}, Span and Spim\textsuperscript{192}, Phishing\textsuperscript{193} are made punishable.

\textbf{Adware and Spyware}- The problem of Adware or Spyware is quite common. These two words are often used together and there is a thin line of difference between the two. They are often referred to the programmes that get installed on your computer without or with your permission (perhaps granted unwittingly). The former category is called spyware and the latter adware. Adware generally comes with on uninstaller, and can be easily removed from a system. Spyware, in contract, installs itself surreptitiously and is difficult to remove without assistance. These programmes can drain your computer’s resources, slow your Internet connection, spy on your surfing, and even forcibly redirect your web browser. There is no legislation in this regard.\textsuperscript{194}

New York Attorney General was the first to file a lawsuit against web marketer Intermix Media, Charging it with being a source of adware and spyware programmes that hinder online commerce and security. Intermix Media not only stopped distributing such software, but also agreed to pay $7.5 million to settle false advertising and deceptive business practices charges stemming from the software. This settlement was approved by a New York Supreme Court Judge.

\textbf{DOS Attack-} Section 65 of the IT Act provides punishment for tampering with the computer source document. The punishment is up to 3 years or fine which may extend up to rupees 2 Lakh or with both. Section

\textsuperscript{191} Sec.69 A (a) of the IT Act.
\textsuperscript{192} Sec. 66 A (b) of the IT Act.
\textsuperscript{193} Sec 69 A (c) of the IT Act.
\textsuperscript{194} Yatindra Singh at p. 23; these activities could have been covered u/s 43 (c) of the Act.
66 of the IT Act deals with Computer related offences.‘ Denial of Service’ (DOS) attack means, preventing legitimate user of a service from using that service. It may happen due to flooding a network, disrupting connections between the machines disrupting services to a specific system or person, preventing a particular individual from accessing a service, or illegitimate use of resources.

Further, under the 2011 IT Act Rules, Sensitive data or information pertaining to persons may not be published by anybody corporate or other person who collects such information on its behalf. In addition to this, intermediaries are required to notify users that they may not uploaded content online, which would be invasive of another person’s privacy.\textsuperscript{195}

\subsection{4.2.7.3 Industry Initiative-}

In Indian, the efforts at complying with the demands of adhering to privacy laws have originated mainly from the private sector rather than the Government. In the absence of a specific legislation, the Indian Software and outsourcing industry has been taking initiatives on its own that would provide contort to the foreign clients and vendors. The National Associations of service and software companies (NASSCOM)\textsuperscript{196} has created a National Skills Registry, which is centralized database of employees of the IT services and BPO companies. This database is for verification of the human resources within the industry. Further, a self-regulatory organization has been launched to establish monitor and enforce privacy and data protection standards for India’s business process outsourcing industry. The rapidly growing service sector has resulted in both Indian and transnational corporate entities building up vast,

\textsuperscript{195} Nandita Saika, "The Right to Privacy, Through the Lens of Content Law" Feb 27, 2012 available at Indian copyright.lawmatters.in/2012/02/law-governing-right-to-privacy.html.

\textsuperscript{196} India’s National Information Technology Trade Group.
exhaustive and detailed customer databases with a view to providing personalized services such as insurance personal banking, credit cards etc.\textsuperscript{197}

In this regard, any use, disclosure and retention of such information need to be strictly regulated, though an established privacy enforcement regime. It may be noted here that the provisions inserted by the IT (Amendment) Act 2008, has recognized and protected such violations to some extent.\textsuperscript{198}

Further Credit Information Companies Regulation Act, 2005 provides that the credit information pertaining to individual in India have to be collected as per privacy norms enunciated in the CICRA regulations. Entities collected the data and maintaining the same have been made liable for any possible leak or alteration of this data. Based on Fair Credit Reporting Act and Graham Leach Bliley Act, the CICRA has created strict framework for information pertaining to credit and finances of the individuals and companies in India. There regulations principles has been notified by the Reserve Bank of India.

4.2.7.4 Extra Territorial Application-

It is important to note about the IT act that it has the extra territorial application also. It makes a small deviation from Indian Penal Code. It is application irrespective of their nationality, who commit an offence or contravene to the IT Act outside India provided the or conduct constituting the offence or contravention involves computers, computer


\textsuperscript{198} Discussed earlier.
system or computer network located in India. However the provisions are of little value unless the person can be extradited to India.

### 4.4 Intellectual Property Rights and Privacy-

Properties are of two types, either tangible or intangible i.e. touchable or non-touchable Intellectual Property Right comes under the second categories. It is as precious as the tangible ones. In the case *R.C. Cooper v. Union of India*, Has very rightly described the definition of property in a very compendious form:

“Property means the highest right, a man can have to anything, being that right which one has to land or tenements, goods or chattels which does not depend on another’s courtesy: it includes ownership, estates and interests in corporeal things, and also rights such as trademarks, copyrights, Patents and even rights in person capable of transfer or transmission, such as dept; and signifies a beneficial right to or a thing considered as having a money value, especially with reference to transfer of succession and to their capacity of being injured.”

It is remarkable that with every property comes the question of its protection and security. Piracy or illegal coping is the most serious concern of the intellectual property protection because it gives a jolt to the originality of the intellectual product and its creator.

---

199 Sections 1 (2) and 75 of the IT Act and Sections 51 (a) and (b) of the 2008 Amend. Act. Which amends the IPC to make this proposition clearer.
200 Yatindra Singh at p. 34.
Intellectual property is usually divided into two branches- (A) Industrial Property; (B) Copyrights and neighbouring rights. The industrial properties are patents, Trademarks, Industrial designs, Layout design and Geographical indications etc. whereas the copyright and neighbouring rights are writings Musical works, Dramatic works, Audiovisual works, Painting and drawings, Sculptures, Photographic works, architectural works, sound recordings, performance o musicians, actors and singers and broad casts etc.\textsuperscript{204}

The various types of intellectual property as envisaged by world Intellectual property organisation (WIPO) and TRIPs\textsuperscript{205} have specific aims and objects. Although various types of Intellectual property have been given in various enactments, which are as under-

1. Copyright Act, 1957 (Amendment in 1999)
2. The patents Act, 1970 (Amendment in 1999), 2002 and 2005
8. The Biological Diversity Act, 2002.

A patent confers the exclusive right on the patentee to make distribute or sell the invention in India. An infringement would be when any of these rights is violated. But a patentee many assign or license all or some of these rights. Another intellectual property right is copyright. It

\textsuperscript{204} \textit{Ibid.}

\textsuperscript{205} Trade Related Aspect of Intellectual Property Rights.
is a unique kind of intellectual property. The right which a person acquires in a work, which is the result of his intellectual labour, is called his copyright. “Copyright is an exclusive right given by law for a certain term of years to an author, composer, etc (or his assignee) to print, publish and sell copies of his original work.”

The copyright protection finds its justification in fair play. When a person produces something with his skill and labour, it normally belongs to him and the other person would not be permitted to make a profit out of the skill and labour of the original author and for this reason the copyright Act, 1957 gives to the authors certain exclusive rights in relation to the certain work referred in the Act.

Another protective Law on Trade Marks prohibits use of someone else’s trademarks as part of corporate names, or name of business concern.

The ‘trademark’ means a mark capable of being represented graphically and which is capable of distinguishing the goods services of one person from those of others. Marks includes amongst its name or word also. The owner of a common law mark had to protect his mark against acts of infringements or passing off of his mark by initiating common law proceedings. Such proceedings used to be time consuming and one rows. That brought in the need for a special legislation.

4.5 Privacy under Contract Law-

There exists certain other means by which parties may agree to regulate and collating and use of personal information gathered viz. by

---

206 Oxford English Dictionary.
207 B.L. Wadhera at p. 273.
means of a privacy clause or through a confidentiality clause. Therefore in a contact which includes a “confidential clause” i.e. where an organizations/company agrees to maintain the confidentiality of information relating to an individual any unauthorized disclosure of information, against the express terms of the agreement would amount to a breach of contract inviting an action for damages as a consequence of any default in observance of the terms of the contract.  

4.6 Right to Privacy and Privileged Communication-

Section 122 deals with the privilege affecting compellability, from disclosure of all communication between wife and husband during the subsistence of a marriage, except in some case between them for example, provide non access.  

This section rests on the obvious ground that the admission of such testimony would have a powerful tendency to disturb the peace of families to promote domestic broils, and to weaken, if not to destroy, that feeling of mutual confidence, which is the most endearing solace of married life. The protection is not confined to cases where the communication sought to be given in evidence is of a strictly confidential character, but the seal of law is placed upon all communications of whatever nature, which pass between husband and wife. It extends also to cases in which the interest of strangers are solely involved, as well as to those in which the husband or wife is party on the record. It, however, limited of such matters has been communicated, ‘during the marriage’ STEPHEN in his DIGEST (Art.110) states, “The protection afforded by this section is greater than that conferred by the English Law.”

---

209 Bijan Brahmbhatt at p. 30.
211 TAYLOR, 12th ed, 909 AP 572
The right to privacy under this section extends not only to matrimonial home but also to the litigation regarding dissolution of marriage. A third party who has nothing to do with the relationship of the spouses cannot be permitted to intrude into their privacy.\textsuperscript{212}

VISCOUNT REDCLIFFE, in a judgement dissenting from the majority view held that the legal policy of marriage in relation to the law of evidence, that the courts concerned was that no marriage relation, while it subsisted should be infected by the fear or suspicion, that things said only by reason of the special confidence might later become the material of legal evidence affecting the speaker.\textsuperscript{213}

In a later case in \textit{Duchess of Argyll v. Duke of Argyll}\textsuperscript{214} approving the dissenting judgment of VISCOUNT REDCLIFFE, it was held that the confidential communications between husband and wife during covertures were within the scope of the court’s protection against the breach of confidence.\textsuperscript{215}

\section*{4.7 Profession Communication and Privacy-}

"Confidential communications passing between a client and his legal advisor and made for the purpose of obtaining or giving legal advice are in general privileged from disclosure.\textsuperscript{216}" Legal professional


\textsuperscript{213} Ratanlal Dheerajlal at p. 1451.

\textsuperscript{214} (1965) 1 All ER 611

\textsuperscript{215} Section 43 (1) Matrimonial Clauses Act of 1965, was repeated by Sec. 16 (4), Civil Evidence Act of 1968, making it possible in England for a husband or wife to give evidence of martial intercourse. Even in civil case under section 16(3) there is no such privilege.

\textsuperscript{216} HALSBURY LAWS OF EVIDENCE, 4\textsuperscript{th} ed, vol. 17, para 237, \textit{page} 166. As quoted by Ratanlal at p. 1476.
privilege as a manifestation of the principle protecting confidentiality, it is protected under section 126-129 of Indian Evidence Act. This section is based upon the principle that if communication to a legal advisor were not privileges, a man would be deterred form fully disclosing his case, so as to obtain proper professional aid in a matter in which he is likely to be thrown into litigation.\textsuperscript{217}

It is not every communication made by a person to his legal adviser that is privileged from disclosure. The privilege extends only to communications made to him with a view to obtaining personal advice.\textsuperscript{218}

4.8 Medical Privacy-

In the doctor patient relationship, the most important aspect is the doctor’s duty of maintaining secrecy. A doctor cannot disclose to a person any information regarding his patient which he has gathered in the course of treatment nor can the doctor disclose to anyone else the mode of treatment or the advice given by him to the patient. The doctor patient relationship, though basically commercial, is professionally a matter of confidence and, therefore, doctors are morally and ethically bound to maintain confidentially.\textsuperscript{219} Circumstances in which the public interest would override the duty of confidentiality.\textsuperscript{220}

\textsuperscript{217} Greenough v. Gaskel, (1833) 1 Mye & K98.
\textsuperscript{218} Premji Bicaji v. Mohansingh Dhansingh, ILR (1893) 18 Bom 263.
\textsuperscript{219} Medical information about a person is protected by the code of professional conduct made by medical council of India u/s 33(m) read with section 20-A.
\textsuperscript{220} GATS report India. Page 41
In *Mr. 'X' v. Hospital 'Z'"*221 for the first time the Supreme Court articulated on sensitive data related to health. In this case, the appellant's blood test was conducted at the respondent's hospital and he was found to be HIV (+). His marriage, which was already settled, was called off after this revelation. Several people including the members of his family and those belonging to their community came to know of his HIV (+) status and was ostracized by the community. He approached the National Commission against the respondent hospital claiming damages from them for disclosing information about his health, which, by norms of ethics, according to him, ought to have been kept confidential. The National Commission summarily dismissed his complaint. Consequently, he moved the Supreme Court by way of an appeal.

The appellant argued that the principle of 'duty of care' as applicable to persons in medical profession also included the duty to maintain confidentially and that since the respondents violated this duty, they were liable to pay damages. "Right of privacy may, apart from contract, also arise out of particular specific relationship, which may be commercial, matrimonial, or even political. Doctor-patient relationship, though basically commercial, is professionally, a matter of confidence and, therefore, doctors are morally and ethically bound to maintain confidentiality". It however, held that although it was the basic principle of jurisprudence that 'every Right has a correlative Duty and every Duty has a correlative Right', the rule was not absolute and was 'subject to certain exceptions' in the sense that 'a person may have a Right' but there may not be correlative Duty, and the instant case fell within exceptions.

---

The court observed that even the Code of Medical Ethics carved out an exception to the rule of confidentiality and permitted the disclosure in certain circumstances 'under which public interest would override the duty of confidentiality' particularly where there is 'an immediate or future health risk to other'. According to the court, the 'right to confidentiality, if any, vested in the appellant was not enforceable in the present situation, as the proposed marriage carried with it the health risk from being infected with the communicable disease from which the appellant suffered.

As regards the argument of the appellant that his right to privacy had been infringed by the respondents by disclosing that he was HIV (+) and, therefore, they were liable in damages, the Supreme Court observed that as one of the basic human rights, the right of privacy was not treated as absolute and was 'subject to such action as may be lawfully taken for the prevention of crime or disorder or protection of health or morals or protection of rights and freedom of others'.

In spite of intensive discussion on right to privacy and legal protection, there may be certain protections available to privacy, which could not find place in this chapter. This position shows the limitation of existing statutory and even constitutional protections, as the laws recognising and protecting privacy are scattered.

Thus there is little doubt that the law not only recognizes right to privacy but also protects the privacy of persons. However, it is only if the violation of a person’s privacy is challenged under a particular statute and a contemplated manner. In other cases where it depend on law of torts and constitutional law, the law is far more fluid and it depends case by case.

There exists in India a compelling need to frame a model statute, which safeguards the right to privacy of an individual. The ethical cheeks,
Judicial Precedents and scattered provisions under different statute, in the absence of an explicit privacy law the right could not gain the de-jure position for guarantee of privacy. In today’s time, there is special need of this law in the age of e-banking, e-commerce, employer surveillance, security surveillance, CTVs and 24x7 news channels. Although there has been exercise on the privacy Bill but it could not be matured till date.\textsuperscript{222} We must not forget that legislative silence and judicial ambiguity over privacy protection strongly supports the need for comprehensive law, wherein the needs must be satisfied keeping in view the threats to privacy from modern media in Indian scenario.

\textsuperscript{222} The features of The Privacy Bill 2010 are as under,

A) It creates a statutory Right to Privacy by means of a broad definition and then creates specific of protections for it. Recognizing the Right to Privacy not to be absolute, the Bill identifies various privacy breaches that are permitted. In the Bill, certain prohibited acts are also identified for which civil remedies as well as criminal sanctions are created.

b) The government interception and telephone tapping mechanism is changed moderately from the existing system. The modification is with respect to several procedural safeguards which are put into place to avoid unauthorised and unnecessary tap orders.

c) A regulatory mechanism is created through the Data Protection Authority of India. It will exercise supervision over private parties, which will engage in the collection and storage of personal data.

d) Further, in the system suggested, the Bill identifies specific officers/position holders in various entities (that may be involved in various breach of the right) who shall be held responsible, in case of any wrong act or any default. See, Apar Gupta, “Analyses of Privacy Bill”, June 27, 2011.