CHAPTER - I

INTRODUCTION

1.0 BACKGROUND:

Today we cannot imagine a world without mass media. The newspapers, magazines, radio, television and films have become all pervasive and they have a huge impact on everybody's life. In fact, the daily routine is controlled by them. Added to these conventional media, the new medium of the internet has made inroads into every aspect of our activities. However, their power over individuals and masses has given rise to new issues-social, political, cultural and even legal. The emergence of mass society, historically speaking, prompted urbanisation and consequently the means of mass communication. Political ideologies also defined the role of mass media, for everyone recognized their power. The two World Wars brought much attention to the propaganda value of mass media. From the all-powerful media to their minimal effects, theories have sprouted leading to debates and discussions across the globe.

"The Libertarian theory of public communication which believed that individuals were by nature rational proved to be increasingly unworkable with the advent of the First World War. In the West, people were bombarded with war inspired propaganda and leaders began to get
concerned over its apparent power of mobilising people to fight and also maintain their morale in adverse conditions” (S.R. Melkote, 1991).

Of course, the Libertarian theory emphasised the importance of individual liberty and also a free market place of ideas. How much of liberty an individual should have and to what extent the State should curtail individual liberty and under what circumstances, are the questions that have raged over centuries. Modern democracies, governed mostly by written constitutions, have guaranteed fundamental rights to life and liberty, besides enunciating restrictions on those rights guaranteed. In India, Article 19(1)(a) guarantees fundamental freedoms for citizens and Article 19(1)(b) mentions reasonable restrictions upon them. These restrictions are always subject to judicial scrutiny and no government can easily abridge them through official orders. Similarly many countries have also included the guarantee of media freedom in their constitutions. The United States’ constitution explicitly mentions that the Congress shall make no law abridging the Press freedom (First Amendment). However, the Indian constitution does not consider mass media as a special category and as such there is no difference between an ordinary citizen and media or the press. An omnibus expression ‘freedom of speech and expression’ is used for this purpose. B.R. Ambedkar the architect of the Indian constitution clarified this position in the Constituent Assembly adequately.

The most common issue here is the right of individuals for their own personal privacy and the media role to inform the public that may transgress the private lives of the people. The invasion of privacy as it is called has its own social and legal ramifications. Once again the political
structure of a country determines the level of individual liberty as well as media liberty. In democratic countries both may enjoy a high degree of freedom, often leading to a flash point. In authoritarian countries individuals as well as mass media may not have that kind of freedom of democracies; all their actions are controlled by government agencies. Obviously both of them have their freedom restricted.

Media interest in private lives of the people emanates from the audience’s interest in what is sleaze and salacious. The public is curious to have a peep into the private lives of the rich and powerful to get a vicarious pleasure out of it. Perhaps tabloidization concept started with the publication of newspapers themselves. The individuals became the focus of journalistic report and the newspapers in the West in particular revelled in them, to boost circulation and revenues as well. Joseph Pulitzer and William Randolph Hearst used their newspaper in the United States for a display of their power in public sphere.

In India the first newspaper itself indulged in personal attacks against the Governor General Warren Hastings, his wife and also the Chief Justice of the Supreme Court for which the editor-publisher James Augustus Hickey was punished. Since the tabloid newspapers in the West indulged in such reporting the word ‘tabloidization’ has come into use to refer to salacious publications. The Western trend has slowly but surely percolated into journalistic ethics in other parts of the world. Sensational or yellow journalism as it is described has come to stay, triggering repeated moral panics and public debates over it.
1.1 PRIVACY DEFINED:

An individual is a person or any specific object in a collection. In the fifteenth century and earlier and also today within the fields of statistics and metaphysics, individual means “indivisible” typically describing any numerically singular thing but sometimes meaning “a person”. From the seventeenth century individual indicates separateness as in individualism. Individuality is the state or quality of being an individual; a person separate from other persons and possessing his or her own needs, goals and desires.²

Ayn Rand (1967)³ in her concept of objectivism regarded every human being as an independent sovereign entity who possesses an inalienable right to his or her own life, a right derived from his or her nature as a rational being. “The moral worth of the individual” is stressed upon by the concept of individualism which denotes the moral stance, political philosophy, ideology or the social outlook. Individualists promote the exercise of one’s goals and desires and so value independence and self-reliance while opposing external interference upon one’s own interest by society or other institutions such as the government.

Individualism and objectivism hold that a civilized society or any form of association, cooperation or peaceful coexistence among humans can be achieved only on the basis of the recognition of individual rights and that a group as such has no right other than the individual rights of its members.⁴

In virtually every democratic society a right to privacy is recognized by the legal system. This reflects its great importance in providing us with security against the intrusive activities of others.⁵
Privacy (from Latin privatus) is the ability of any individual or group to seclude themselves or information about themselves and thereby reveal themselves selectively. Privacy may also be associated with anonymity, the wish to remain unnoticed or unidentified in the public realm. The concept of privacy varies across people, culture and nations and can be broadly classified under (a) personal privacy (b) informational privacy (c) organizational privacy and (d) spiritual and intellectual privacy.

1.2 PERSONAL PRIVACY:

People have different ways to protect their privacy the chief mode being wearing of cloth and or creation of fences, walls or partitions. The Fourth Amendment to the US Constitution guarantees “the right of the people to be same in their persons, houses and effects against unreasonable searches and seizures”. Broadly personal information is under threat from various quarters like:

a) **Internet**-People share a lot of personal information over the Internet on social networking sites such as Twitter and Facebook but have no control over who can access this information. These concerns include whether e-mail can be stored or read by third parties without consent or whether third parties can continue to track the web sites someone has visited. It is also difficult to identify the website which secretly collect and share data about its users. It is essential to be extremely cautious while surfing websites with dubious identities. While accessing social networking sites it is also very important that private
information or photos may not be shared as this can be used by an anonymous person to profile a person.

b) **DTH services or cable television**- Any interested person can track IP TV programs watched by viewers at any point of time.

c) **Medical** - A person’s revelation of medical data that include medical or psychological conditions or treatment may be embarrassing. A patient also may not wish to divulge such information which may hamper complete and accurate treatment. Hence adequate laws need to be framed to safeguard doctor-patient confidentiality.

d) **Financial** - Information about a person’s financial worth and access to his credit or debit cards may lead to him falling a prey to victim of fraud or identity theft. Moreover, the data may be used to map the nature of activities and area of interest which may not be desired by him.

e) **Political** - Often information relating to the voter exercising his political choice through secret ballot is made public which is undesirable.

f) **Educational** - This pertains to creating database of a child’s school life including exam results, attendance, internal assessment and other details. The United Kingdom maintains a National Pupil Database which is rich in information and could be used by marketing firms to sell their products.
1.3 INFORMATIONAL PRIVACY:

Informational privacy refers to the privacy expected to be protected after collection and storage of personal data. It is the relationship between collection and dissemination of data, technology, the public expectation of privacy and the legal and political issues surrounding them. Information on privacy issues can arise in response to information from a wide range of sources such as:

a. Healthcare records

b. Criminal justice investigations and proceedings.

c. Financial institutions and transactions

d. Biological traits such as genetic material.

e. Residence and geographical records

f. Ethnicity

g. Privacy breach

h. Location based service and geo-location

1.4 ORGANISATIONAL PRIVACY

It refers to the privacy sought for by government agencies, corporations and others for security purposes or executive privilege. Organisations engaged in online activities or electronic commerce have a responsibility to adopt and implement a policy for protecting the privacy of individual user information. The privacy policy should be applicable to the user prior to the collection of information and should be in clear and easy language for the
user to read and understand. The user should be able to know what information is being collected, the use of that information and the choices available to him regarding collection, use and distribution of the collected information, a statement of the organisation’s commitment to data, security and what steps the organisation takes to ensure data quality and access. Individuals should have the option to exercise choice on how the information about them may be used and the purpose for which it is used.

Companies or organisations maintaining data bases of individually identifiable information should take steps to see that the data is not misused and any data transfer to a third party should be supported by a legal framework to safeguard the individual’s interest and privacy.7

1.5 SPIRITUAL AND INTELLECTUAL PRIVACY:

Privacy may involve recognition of a person’s spiritual self, his feelings or intellects.

1.5.1: Spiritual Privacy

People who believe in God have certain hidden secrets which they like to share with the Almighty in absolute solitude. What is private are actually hidden sins which cannot be shared with anybody. People believe that whatever sin they may have committed will be forgiven by God if we seek mercy in front of Him. Some religious organisations like the Ontario Multipath Council on Spiritual and Religious Care have their own privacy policy.

Their privacy policy complies with applicable privacy legislation in Canada and contains the following principles:
(a) accountability (b) identifying purpose (c) consent (d) limiting collection
(e) limiting use, disclosure and retention (f) accuracy of personal
information (g) safeguarding personal information (h) openness (i) access to
personal information and (j) challenging compliance.

1.5.2: Intellectual Privacy

Protection of intellectual privacy or protection of records of our intellectual
activities is vital to the freedom of expression as it safeguards the integrity
of our intellectual activities by shielding from unwanted gaze or
interference of others. For new ideas to flower or new philosophies to
develop we need to be in a solitary environment where our thinking can
take shape and flow of ideas will emerge. This private space should be our
own and intrusions of such moments will inhibit human thinking. Prof Neil
M. Richards (2008) of Washington University (St. Louis) in ‘Intellectual
Privacy’ defines Intellectual Privacy “as the ability, whether protected by
law or social circumstances to develop ideas and beliefs away from the
unwanted gaze or interference of others”. According to him “surveillance
or interference can warp the integrity of our freedom of thought and can
skew the way we think, with clear repercussions for the content of our
subsequent speech or writing. The ability to freely make up our minds and
to develop new ideas thus depend upon a sustainable measure of
intellectual privacy” ‘Intellectual privacy is different from other conceptions
of privacy such as those that protect individuals from the emotional harm
of information disclosure. Prof Richards says “it is not concerned with
remedying tort injury but rather with the way our cognitive processes, and
ultimately our public disclosures are constituted”.

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William Parent (1983) proposes to defend a view of privacy that is at par with ordinary language and does not overlap or confuse the basic meaning of other fundamental terms. Parent defines privacy as ‘the condition of not having undocumented personal information known or possessed by others’. He defines privacy as a moral value for people who prize individuality and freedom and not a moral or legal right to privacy.\textsuperscript{10}

Gerstein (1978) argues that privacy is necessary for intimacy and intimacy in communication and interpersonal relationships is required for us to fully experience our lives. Intimacy without intrusion or observation is required for us to have experiences with spontaneity. Shoeman (1984) endorses these views and stresses that privacy provides a way to control intimate information about oneself and that has other benefits as a spinoff for the development of one’s personality and inner self.\textsuperscript{11}

Adam Moore (2003) building on the views of Ruth Gavison, Anita Allen and others offered a “control over access” account of privacy. According to Moore privacy is a culturally and species relative right to a control over access to bodies or places and information. While claiming the view that privacy is relative to species and culture, he argues that privacy is objectively valuable—human beings that do not have a certain amount of control over access will suffer in numerous ways. Moore believes that privacy, like education, health and social relationship is an essential component of human flourishing and well-being.\textsuperscript{12}
1.6 RECENT DEFINITIONS:

In recent years there have been only few attempts to clearly and precisely define “a right to privacy”. Experts like Dean Prosser have attempted but failed to find “a common ground” between the leading types of privacy intrusions to arrive at a conclusion. A particular law school of Israel has come out with a definition of ‘right to privacy’. The right to privacy is our right to keep a domain around us which includes all those things that are part of us such as our body, home, property, thought, feelings, secrets and identity. The right to privacy gives us the ability to choose which parts in this domain can be accessed by others and to control the extent, manner and timing of the use of those parts we choose to disclose.

Now the question arises why privacy should be valued and protected. Privacy entails personal relationship—protection of which gives control over the flow of personal information by an individual which is an aspect of human dignity and autonomy. People may have a reasonable expectation of privacy while exposed to public view. The European Court of Human Rights observed that Article 8 of the European Convention of Human Rights is to secure individual personality vis-à-vis relationship with others from outside interference. This judgement was pronounced in Von Hannover Vs Germany where the Court declared that publication of photographs of the appellant Princess Caroline of Monaco cannot be justified as these constituted of her activities within the home and fall in the ambit of her private life. This points out to the fact that there should be a balancing act between privacy and freedom of expression and a relation should be struck between protection of confidential information which may
be considered private and the freedom of the press if the information pertains to an eminent personality or a celebrity.

After the Cold War, the transformation of the press did not change the essence of press ethics but increased the problems connected with it. Faithful conveying of the truth remained an ideal but this aim began to shift metaphorically and literally. The norms of international law never kept pace with mass media development and did not make a real obstacle for the abuses and the governments themselves were often responsible for these deformations. Arguments of the media are that if law of the land infringes on the public’s right to know than this will facilitate public figures and politicians to engage in corruption and unfair practices that may crack the foundations of social morals and ethics upon which a society thrives. However, for journalists especially those engaged in investigative journalism need to be careful to ensure that they do not put public figures under stress and strain and create mental and social problems for them.

1.7 TECHNOLOGY IMPACT:

In the present times rapid changes in technology and increased pressure of a free market economy are forcing media houses for a frantic rush to go ahead in TRP ratings. The lead is being taken by the tabloid newspapers by selling news about the juicy personal details of celebrities to satisfy the consumer’s insatiable desire for gossip. According to Durga Das Basu (1995), this is due to over industrialisation and over urbanisation which has led to a general degeneration of the moral standard for which people now find pleasure from prying into other people’s affairs even though they may have no bearing on public issues or causes. The problem has been
accentuated by the availability of information relating to private matters through the medium of the expanding coverage of media in response to a popular demand for ‘lusty journalism’ and the freedom of speech and expression has now become a license for the press to publish gossip and scandal.\footnote{15}The result is the modern era of the paparazzi famous for their unruly behaviour while in pursuit of celebrity photographs. In Von Hannover Vs Germany the European Court of Human rights observed that “…….photos appearing in the tabloid press are often taken in a climate of continual harassment that induces in the persons concerned a strong sense of intrusion into their private lives or even of persecution”

Humanity loves Rousseau for confessing his sins not to a priest—but to the world; and it is not the green and gold Perseus that Cellini wrought that shows the moon the terror that once turned a life to stone that gives pleasure to the world, but his autobiography in which ‘that rascal of the Renaissance’ tells the story of his glory and his shame. Mankind always took a sadistic pleasure when men and women are pulled down from the pedestal. The fault may not be that of the media but of the reading public which wants a juicy anecdote about exalted personalities\footnote{Basu, 1995, pg80}

Media especially journalists have certain obligations in the manner news items are prepared for the consumption of the general public. In democratic countries a special relationship exists between the media and the government. Although the freedom of the media may be constitutionally enshrined and have precise legal definition and enforcement, the exercise of that freedom by individual journalists is a matter of personal choice and ethics.\footnote{16}Taking a cue from the 1947 Hutchinson Commission the Society of
Professional journalists created a code of ethics for the media where it is said that “recognize that private people have a greater right to control information about them than do public officials and others who seek power, influence or attraction. Only an overriding public need can justify intrusion into anyone’s privacy”.\textsuperscript{17}

It may be interesting to mention in the Indian context that the common law does not know a general right of privacy and the Indian Parliament has so far been reluctant to enact one. However, the Indian Constitution has provided for many rights (Fundamental Rights) which cannot be taken away by the state and are legally enforceable against the state. The Supreme Court of India has come to the rescue of the common citizen time and again by construing right to privacy as a part of the Fundamental Rights to protection of life and personal liberty under Article 21 of the Constitution which states “no person shall be deprived of his life or personal liberty except according to procedures established by law.” (Sharma, Vakul, 2007).\textsuperscript{18}

In recent times exposes such as the Radia tapes and Wikileaks have thrown open the debate of right to information taking precedence over the right to privacy. The Supreme Court of India under Article 19(1)(a) has upheld the freedom of speech and expression guaranteeing the right to receive information on matters of public interest.

Though the impetus for recognizing privacy as a specific legal right of the individual has been continuing for about a century, in no country has such right been so far incorporated in any national constitution or statute, notwithstanding the declaration of such right in International Charters on Human Rights such as Article 12 of the Universal Declaration of Human
Rights 1948 and Article 17 of the International Covenant of Civil and Political Rights, 1966. The result is that the scope of this right differs in various countries basically in interpretations of common law or judicial pronouncements taking into consideration other fundamental rights guaranteed by the constitution or fragmentary legislation but the interpretations are abstract and vague.

So, the concern for protection of individual privacy needs to be weighed against the argument by media houses that revelation of information that is deemed to be private is necessary for the sake of public interest.

1.8 PRIVACY LAW IN OTHER COUNTRIES

The subject of privacy awareness and privacy studies are issues which are hotly debated in the United States, UK or other developed countries in the West. However this is yet to generate any interest in India and very little information is available about the attitude of the Indian people towards privacy.

In the U.K., the Press Complaints Commission (PCC) has drawn up a code of ethics for the media to safeguard the right of privacy while reporting news items. Reporting of a person’s race, colour and sexual orientation is barred by the guidelines. The only exception to revealing private facts is public interest which is restricted to,

a. Detecting or exposing crime or serious impropriety

b. Protecting public health and safety
c. Preventing the public from being misled by an action or statement of an individual or organisation.

In France, the right to privacy is protected under Article 9 of the Civil Code which ensures respect for private life. The French law considers violation of one's privacy as a criminal offence. Recording or transmitting private conversations or taking picture of a person in a private place without consent constitutes violation of privacy. In France, publication of any information that reveals the identity of a victim of sexual offence, information on witness and information on court proceedings involving a person’s private life is prohibited.

Privacy is protected in Sweden by its constitution under four fundamental laws—the Instrument of Government, the Act of Succession, the Freedom of the Press Act and the Fundamental Law on Freedom of Expression.

In Japan, the Japan Newspaper Publishers and Editor’s Association or Nippon Shinbun Kyokai (NSK) monitors the standard of reporting and promotes the interests of the media. The organisation has developed the Canon of Journalism which provides for ethics and codes members of the body should follow. The code provides that journalists have a sense of responsibility and should not hinder public interest. In Japan, the right to privacy is recognized as a human right. The Personal Information Protection Act formulated by Japan in 2003 requires that the purpose of collecting personal information and its use should be specified and information should be acquired by fair means and should not be supplied to others without proper consent.19
In Australia, the handling of personal information about individuals is regulated by the Privacy Act, 1988. The Privacy Act includes several aspects as follows:

a. Thirteen Australian Privacy Principles that apply to the handling of personal information by most Australian and Norfolk inland government agencies and some private sector organizations.

b. Credit reporting provisions that apply to the handling of credit related personal information.

The Privacy Act also

a. Regulates the collection, storage, use, disclosure, security and disposal of individual’s tax files.

b. Permits handling of health information

c. Allows for privacy regulations to be made.20

In Singapore, the Personal Data Protection Act (PDPA) establishes a data protection law that comprises various rules governing the collection, use or discloses personal data for legitimate and reasonable purposes. The PDPA is going to be implemented in phases starting with the provisions relating to the formation of the Personal Data Protection Commission (PDPC) on 2nd January, 2013. The Do Not Call (DNC) registry came into effect on 2nd January, 2014 while the main data protection rules has been implemented on 2nd July, 2014.21
China, one of the largest economies in the world has had a long standing policy on privacy dating to the fourth century B.C. Chinese law states that the ‘freedom and privacy of correspondence of citizens are protected by law’.

Article 252 of China’s criminal law states that “those infringing upon the citizen’s right of communication, freedom by hiding, destroying or illegal opening other’s letters, if the case is serious, are to be sentenced to one year or less in prison or put under criminal detention”.

Article 245 also provides that “those illegally physically searching others’ residences are to be sentenced to three years or fewer in prison or put under criminal detention”.

China’s Internet Regulations and Legislations are guided by the principle of ‘guarded openness’ seeking to preserve the economic benefits of new information and communication technologies while guarding against foreign economic domination and the use of technology to coordinate anti-government activity.

China’s Ministry for Public Security (MPS) passes all international connections through proxy servers at official gateways. MPS officials identify individual users and content, define rights and carefully monitor traffic.22

In this era of globalization when India is striving towards becoming a leader in trade and commerce, service outsourcing, adequate safeguards need to be taken by Indian companies as well as the government for privacy protection as large amount of personal information from other countries is
flowing into India. A recent survey revealed that around 10% of the Indian population of around 120 crores have access to the Internet. Using the Internet often comprises of use of social networking sites, e-mail facilities and browsing of various websites. Social networking sites often ask for personal details to be furnished. Personal details are also sought by online marketing firms and matrimonial sites. This makes the users highly vulnerable to privacy attacks as these information can easily be tracked. In recent times, large media houses have opened shops in India in search of greener pastures and the audio visual media has taken precedence over print media. Previously newspapers had limited penetration ability as a large portion of the populace was illiterate. Now the penetration level of audio visual media is quite high which has made it a powerful social instrument. As there is no effective regulatory mechanism to check cases of privacy intrusion by media, it is all the more important that an in depth study be undertaken to analyse the issues surrounding modern media and the effect on the right to privacy of individuals. The present research will endeavour to explore what constitutes privacy and cases of privacy intrusion by media. It will also dwell on the legal framework currently in force in India to check privacy intrusions and suggest measures to strengthen the same.

1.9 OBJECTIVES OF THE STUDY

a. Analyse the issue of privacy as an individual right.

b. Explain the status of and need for privacy laws in India.

c. Examine the ethical objectives of media invasion of personal privacy through case study.
d. Assess the impact of new media on individual privacy leading to legal and ethical issues in public domain, and or invasion of privacy.

e. Suggest measures related to protection of privacy when it involves security and sovereignty of the country, privacy of celebrities and a balance between the right to privacy and the public’s right to know.

1.10 SOCIAL SIGNIFICANCE OF THE STUDY

In modern day world, individuals would love to have their own private space. Even public personalities prefer to keep their private lives away from the snooping eyes of media persons and public glare. The thin line of distinction between personal privacy and public right to know has further complicated the issue. The study is important in the Indian context for the Indian culture rarely recognizes individual freedom to such an extent that the Westerners have. The absence of privacy concept as well as the consequent privacy needs has necessitated a look into the relevance of privacy law in the country. In this context, the present study assumes significance. The study explores both academic and legal dimensions of to privacy and to provide meaningful insight into the discourse on privacy.

References


7. Ontario Multifaith Council Privacy Policy at www.onc.ca/pdf/privacy


