CHAPTER - II

RIGHT TO PRIVACY AS A HUMAN RIGHT
– A CONCEPTUAL ANALYSIS

2.0 Introduction

"Every breath you take and every smile you fake, Every move you make
and every step you take, Every claim you stake and every vow you
break, I'll be watching you".

- Disgruntled Lover

The concept of privacy is not new to India. The ancient Indian theory of
knowledge, based on all Upanishad literature, prescribes meditation, which has to be
performed without any outside disturbance. The houses and the Arthashastra manifest
ample consideration and respect for one's privacy. The use of curtains is described in the
Ramayana and other classical literature is pioneered in the same direction.¹

Private life is what everyone wants to confine to himself and other feel crazy in
earting the same. It is this private life which enhance or reduces or in other words
shapes public life. Your contribution to the world would be a nullity, no matter what
efforts and dedication you might have put for the public, if you carry a bad private life-be
it living in luxury with resources which are in excess of your known source of income or
you are found spending night elsewhere. So, you are always under scrutiny for a life
which is yours-own, personal and precious and therefore you can conclude that there is
no privacy.²

During the laissez-faire era, an individual's relationship with the government was
minimal. But in a modern administrative state, he has to deal with the government in
almost all walks of life. The distance between the public life and private life of an
individual has reduced. Whenever an individual enters into a relationship with the

¹ Atul Kumar Tiwari "Threat to privacy in cyber age-need for an effective veil" Vol. 31, IBR, 2004, at p.467.
government he has to furnish a lot of personal information. In certain cases the
government itself may collect information regarding individuals.  

Information about people may be necessary for a government for framing its
policies in an enlightened and democratic way. The surveillance by government over its
citizens is a fundamental means of social control. When it provides welfare benefits, the
government may have to probe deep into society and gather information. Collection of
Personal information becomes necessary also to take to task modern organized law
breakers. Persons working in departments related to the military sector, foreign affairs
and atomic energy may have to be watched by the government this process of
information gathering definitely affects the privacy of the individual but such a process
is often necessary for an efficient functioning of government and particularly when it is
the national interest. But there should be a guarantee that the governmental authority
uses such personal information only for the official purposes for which they are required.

The right to privacy is inherent and inalienable in any society though its degree or
depth may vary depending on the culture, religion, scientific progress and the political
and legal systems. However there is a hard core of the personal information which be
protected from intrusion and a hard core of personal information which can be disclosed
to the public. The reason for such privacy and publicity is the public interest. In between
them lies a flexible part which may or may not be protected under the head of right to
privacy depending on a particular situation in a society.

Privacy is a concept related to solitude, secrecy, and autonomy, but it is not
synonymous with these terms; for beyond the purely descriptive aspects of privacy as
isolation from the company, the curiosity and the influence of others, privacy implies a
normative element: the right to exclusive control of access to private realm.

A right of privacy is recognized both in law and in common parlance, but
different legal systems emphasize different aspects, and customs related to privacy differ
greatly from culture to culture and from situation to situation. Many of the claims to the

\[3\] M.C. Pramodan, "Right to Privacy" Vol. 14, CULR, 1990, at p. 60.
\[4\] Ibid. p.61.
right to privacy are difficult to distinguish from other claims to rights of the personality, from claims to respect for personal integrity, and from claims against interference by govt. and other external agents.\(^5\)

2.1 Concept of Right to Privacy

2.1.1 Meaning of Privacy and its Definitions

The concept of Privacy is difficult to define because it is exasperatingly vague and evanescent, often meaning strikingly different things to different people. This is because privacy is a notion that is emotional in its appeal and embraces a multitude of different rights, some of which are intertwined others often seemingly unrelated or inconsistent.\(^6\)

Privacy has been interpreted, the ability of an individual or a group to keep their live and personal affairs out of public view, or to control the flow of information about themselves. Privacy is sometimes related to anonymity although it is often most highly valued by people who are publicity known. The simplest definition of privacy is given by judge Cooley—he called it as “the right to be left alone.”\(^7\)

Of late, however, lawyers and social scientists have been reaching the conclusion that the basic attribute of an effective right of privacy is the individual’s ability to control the circulation of information relating to him—a power that often is essential to maintaining social relationship and personal freedom correctly, when an individual is deprived of control over the spigot that governs the flow of information pertaining to him in some measure he becomes subservient to those people and institutions that are able to manipulate it.\(^8\)

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\(^7\) Dhruv Jain, “The Right to Privacy in India : An overview”, Vol.6, LAWZ, No. 11 Issue 63, Nov. 2006, p. 37

\(^8\) Arthur R. Miller, *Supra note 6*
Common law was certainly the first to attempt to describe this concept. According to Justice Cooley, the right to respect for private life is this right to be let alone. 

According to an American court, it is right to live one's life in seclusion, without being subjected to unwarranted and undesired publicity. In short, it is, as Cooley said, the right to be let alone. The Restatement of the law of Torts lays down that a person who unreasonably and seriously interferes with other's interest in not having his affairs known to others or his likeness exhibited to the public is liable to the other.  

The protection of privacy may be viewed as having three facets: onlookers and eavesdroppers are to be kept out of the individual's private sphere; the individual is not to be called to account in respect of matters which property belong to his private sphere and the individual whose privacy is invaded in either two ways is to have an effective legal remedy against such invasion. 

The growth of technology and the increase in the flow of information induced by the computer threatens the individual's ability to control the flow of information about himself-in other words, his privacy is endangered. The right to privacy is difficult to define. A panel on office of Science and Technology defined it as follows:

"The right to privacy is the right of the individual to decide for Himself how much he will share with others his thoughts his Feelings and the facts of his personal life ... Actually what is Private, varies from day to day and setting to setting."

The Panel recognized that privacy depends on many factors, the nature of the society and the particular circumstances of the occasion. 

Today the most serious problem facing man is 'information'. In fact, the technical and scientific devices made it easier to gather private or public data and more difficult to control the use made of them. Information about a person constitutes a threat to the confidential nature of his private life, his family and his home. Invasion of privacy means  

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10 Ibid, p.170
"an unjustified exploitation of one's personality or intrusion into one's personal activity, actionable under tort law and sometimes under constitutional law."¹¹

Nordic Conference of Jurists in May 1967 gives a considerably broader definition of right to privacy. They conclude that, the right to privacy means, the right of the individual to lead his life protected against....

1) Interference with his private, family and home life.
2) Interference with his physical or mental integrity or his moral or intellectual freedom.
3) Attacks on his honor or reputation.
4) Being placed in a false light
5) The disclosure of irrelevant embarrassing facts relating to his private life.
6) The use of his name, identity or likeness.
7) Spying, prying, watching and besetting
8) Interference with his correspondence
9) Misuse of his private communications, written or oral.
10) Disclosure of information giving or received by him in circumstances of professional confidence.¹²

2.2 Different Dimensions of Privacy

There are many dimensions to the Right to Privacy. They are:

2.2.1 Political Privacy

It may sound like an oxymoron but in today's world with ever growing number of net users, e-campaigning is the future. Through cookies, online donation forms etc. it is possible to gather vast amount of information as to which candidate the voter prefers, which sites he surfs etc.

¹¹ Dhruv Jain, supra note 7, p.37
¹² A.H. Robertson, supra note 9, p.33
2.2.2 Medical Privacy

Information concerning a person's health is kept confidential and in most countries the patient must grant permission before anyone other than the hospital staff can see it. However it may be illegal to fail to disclose one's medical condition in certain cases. With the increase in number of medical breakthrough like brain mapping, DNA testing which are unique to every person, medical privacy is hotly being debated.

2.2.3 Genetic Privacy

The concept of genetic privacy has only recently entered our vocabulary. It is necessary in order to prevent genetic discrimination on basis of apparent or perceived genetic abnormalities. A person may get fired from his job, may lose his friends etc., because of his Family history of a particular genetic disorder whether or not he is affected by it. Thus genetic privacy is very important.

2.2.4 Internet Privacy

Using the internet leaves a trail of information about the use unless a privacy software or a proxy server is used. A web browser's history, cache or logs can be accessed to reveal what the user done. Further the sites visited also have their own logs showing the internet protocol addresses and other data of each computer to which it provides access.

Besides the above there are other types of privacy like privacy during an online job search, privacy from corporations, privacy from government interference etc.13

2.3 Scope of Right to Privacy

Privacy is something cherished by almost all the people in the world. It is the right to live life without the government prying into what we do have right to be let alone. Privacy allows us to develop into individuals with our own thoughts, beliefs, hopes, and dreams. It permits us to decide how to live our lives in our own homes. Privacy allows

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13 Dhruv Jain, supra note 7, p.37
adults to decide who to marry, whether to have children, and how to raise a family. The right to privacy restricts how the government can investigate our lives.

Surprisingly, the words "privacy" and "right to privacy" do not appear in the U.S. Constitution. Instead, certain parts of the Constitution protect specific kinds of privacy. For example, the freedoms of expression and religion in the First Amendment protect the right to have private thoughts and ideas. The Fourth Amendment says the government may not arrest a person or search his house without good reasons. The Fifth Amendment says a criminal defendant does not have to testify against himself at trial. That means he can keep private any information about the crime he is charged with committing.

These Amendments, however, do not say Americans have a general right to privacy. Where, then, does the right of privacy come from? The Supreme Court developed it through decades of interpreting the U.S. Constitution.

2.3.1 Developing the right of privacy

The first Americans to mention the right to privacy were Boston lawyers named Louis D. Brandeis and Samuel D. Warren. In 1890, they published an article called "The Right to Privacy." Brandeis and Warren said Americans needed protection from newspapers that invaded privacy by exposing private lives to the public. As they do today, newspapers then often wrote embarrassing or humiliating articles about people. Brandeis and Warren said Americans should be allowed to sue newspapers to protect their privacy.

In 1916, Brandeis became a justice on the U.S. Supreme Court. Twelve years later in *Olmstead v. United States*¹⁴, he wrote a famous dissenting opinion. Justice Brandeis said the Constitution was written to protect privacy to help Americans pursue happiness: "The makers of our Constitution ... sought to protect Americans in their beliefs, their thoughts, their emotions and their sensations. They conferred, as against government, the

right to be let alone, the most comprehensive of the rights of man and the right most valued by civilized men.  

Almost four more decades passed before the Supreme Court recognized a general right of privacy. In between, some justices wrote opinions supporting such a right. In Public Utilities Commission v. Pollak, Justice William O. Douglas said "the right to be let alone is indeed the beginning of all freedoms." Then in Poe v. Ulman, Justice John Marshall Harlan II referred to a Connecticut law that interfered with marriage as "an intolerable invasion of privacy."

In Griswold v. Connecticut, the Supreme Court finally recognized a right to privacy in the U.S. Constitution. The case involved a Connecticut law that made it illegal for married couples to use contraceptives, or birth control. Nothing in the Constitution specifically says married couples have a right to use birth control. The Court, however, said the law interfered with "the right of privacy in marriage." In other words, privacy for married couples in America allows them to decide whether to use contraceptive devices.

Since Griswold, the Court has had to decide what the right of privacy protects. The issue arises in cases involving marriage, sexual reproduction, abortion, family life, the right to die, and right to have information kept private. Sometimes the Supreme Court recognizes the right to privacy in these cases, but other times it does not.

2.3.1.1 Marriage

As Griswold made it clear, marriage is one of the relationships protected by the right of privacy. That is because families are an important part of the American way of life. People growing up often dream of the day when they will have their own family. Settling down with a family is one way Americans pursue happiness in life.

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Many privacy cases, then, have been about the family. Two years after *Griswold*, for example, the Supreme Court decided *Loving v. Virginia*¹⁹. *Loving* involved a Virginia law that made it illegal for people of different races to marry each other. The Lovings were a white man and black woman who were convicted under this law. The Lovings appealed their convictions and won. The Supreme Court said marriage is one of the "basic civil rights of man." Laws that prevent people of different races from marrying each other violate the right to privacy and are unconstitutional.

Other marriage cases have included *Zablocki v. Redhai*²⁰ and *Boddie v. Connecticut*²¹. In *Zablocki*, the Supreme Court said laws that make it financially difficult for poor people to get married violate the right to privacy. Logically, the freedom to marry also must include the freedom to end a marriage. In *Boddie*, then, the Court struck down laws that make it financially difficult for poor people to get a divorce.

### 2.3.1.2 Sexual reproduction

As privacy protects marriage, it also protects the decision whether or not to have children. As described above, the Court in *Griswold* said the government may not prevent married couples from using contraceptive devices. In *Eisenstadt v. Baird*²², the Court said unmarried couples also have a privacy right to use contraceptives. Then in *Carey v. Population Services International*²³, the Court said the government may not prevent people under sixteen years old from using birth control. Taken together, these decisions protect every American's right to determine whether or not to have children.

Some people believe these decisions also protect a couple's right to engage in sexual relations, whether or not they are trying to have children. The question soon arose

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whether the right to privacy protects homosexual\textsuperscript{24} relations. Many states have laws that make homosexual relations a crime.

In \textit{Bowers v. Hardwick}\textsuperscript{25}, the U.S. Supreme Court said laws that make homosexual relations a crime do not violate the right of privacy. The Court said the right of privacy protects traditional relationships in America, which means marriage, family, and sexual reproduction by a man and a woman. Homosexuals, then, are still struggling to get the Supreme Court to recognize their right to privacy.

\subsubsection*{2.3.1.3 Abortion}

If privacy protects the right to avoid getting pregnant by using birth control, does it protect a right to end pregnancy by having an abortion? This is one of the most fiercely debated questions in the United States. Abortion rights activists, say women, whose bodies are the ones affected by pregnancy, have a constitutional right to have an abortion. They say the medical risks and long term consequences of having a baby give women this right. Opponents of abortion say an unborn fetus is a living person with a right to life. For them, abortion is murder.

In the landmark decision of \textit{Roe v. Wade}\textsuperscript{26}, the Supreme Court said privacy protects the right to have an abortion until the fetus, the unborn, can live outside the mother's womb. At that point, the state can protect the unborn's life by preventing abortion unless it is necessary to save the mother's life. After \textit{Roe}, people continue to argue, sometimes violently, about whether abortion should be legal.

\subsubsection*{2.3.1.4 Family life}

After people marry and have children, they spend many years raising their families, trying to make them as healthy, safe, and happy as possible. The right to privacy allows people to make many family decisions. For example, in \textit{Pierce v. Society of}

\textsuperscript{24} Homosexuals are people who have sexual relations with members of the same sex.


Sisters\textsuperscript{27}, the Supreme Court said parents do not have to send their children to public schools. As long as parents make sure their children get a good education, they can send their children to public or private schools, or teach them at home.

Another privacy case about family life was Moore v. City of East Cleveland\textsuperscript{28}. East Cleveland had a law that required people living in a house to belong to one family. The law defined a family as a mother and father and their parents and children. Cleveland enforced the law by convicting Inez Moore, a woman who lived in a house with her unmarried son and two grandchildren, who were cousins. Moore said the law violated her right of privacy and the Supreme Court agreed. The Court said Americans are allowed to live with family members outside the traditional "nuclear" family of mother, father, and children.

2.3.1.5 The right to die

The right of privacy lets Americans decide how to live. Does it also protect a right to die? If a person has only six painful months to live while dying from cancer, does she have a right to end her life to avoid the pain? Can a family shut off the life support system for someone who will be in a coma for the rest of her life?

The last question was the issue in Cruzan v. Director, Missouri Department of Health\textsuperscript{29}. After an automobile accident in 1983, Nancy Cruzan was alive but unable to move, speak, or communicate almost no hope of recovery. Believing Nancy would not want to live like that, her family decided to shut off her life support system. The State of Missouri would not allow it, so Nancy's family took the case to the U.S. Supreme Court.

Although the Supreme Court decided in Missouri's favor, it also said Americans have a right to refuse unwanted medical treatment, even if it will result in death. In other words, the right of privacy includes a right to die. Nancy's family was allowed to remove

\textsuperscript{27} 268 U.S. 510 (1925), http://www.law.cornell.edu/supct/html/historics/USSC_CR_0268_0510ZO.html visited on 19\textsuperscript{th} January 2013.
the life support system only after coming up with more evidence that Nancy would not want to live that way.

The right to die came up again in *Washington v. Glucksberg*\textsuperscript{30}. Washington, like most states, had a law making it illegal to help someone end her life. A group of physicians and terminally ill patients filed a lawsuit saying the law interfered with the right to die. They argued that people who are dying from painful illnesses have a right to end their lives with dignity rather than suffer until death. The Supreme Court disagreed. It said the right to die in *Cruzan* was a right to refuse medical treatment. The right of privacy does not include a right to be killed with medical assistance.

2.3.1.6 Private information

The end of the twentieth century has been called the beginning of the Information Age. Computers store vast amounts of information about people. Americans naturally are concerned about private information becoming available to the public. They also fear invasion of privacy by governmental agents trying to investigate criminal activity. At the same time, the government needs to investigate and catch criminals to bring them to justice.

To a certain degree, Americans are protected by privacy laws. The federal Omnibus Crime Control and Safe Streets Act of 1968 regulate the government's use of wiretapping to listen to telephone conversations. The Privacy Protection Act of 1974 and the Freedom of Information Act require the government to be fair when it collects, uses, and discloses private information. Sometimes, however, people file lawsuits saying the government has gone too far with an investigation.

That was the case in *Watkins v. United States*\textsuperscript{31}. In the 1950s, Congress was investigating communist activity in the United States. Communists were members of a political party that wanted to overthrow the federal government. John T. Watkins, a labor union official, was called before Congress to testify about known communists. Watkins,


\textsuperscript{31} 354 U.S. 178 (1957), www.law.cornell.edu/supct/.../USSC_CR_0354_0178_ZS.html visited on 19\textsuperscript{th} January 2013).
however, refused to identify people who used to be, but no longer were members of the Communist party. Watkins was convicted of contempt of Congress for refusing to answer such questions, but the Supreme Court reversed his conviction. The Court said Congress does not have unlimited power to investigate the private lives of American citizens.

Right to privacy cases came into the Information Age in *Whalen v. Roe*[^32]. New York State had a computer system that stored the names and addresses of patients who received prescription medicines and drugs. The system was designed to control the illegal use of such drugs. Patients filed a lawsuit saying the computer system violated their right to privacy. The patients were afraid they would be called drug addicts if the public got access to the prescription information.

The U.S. Supreme Court held that the computer system did not violate the right of privacy because the law required New York to keep the prescription information secret. As computers become more powerful and store ever increasing amounts of information, Americans need to work harder to protect their right to privacy.

2.4 Significance of Right to Privacy as a Human Right

Human rights are those minimal rights individuals need to have against the state or other public authority by virtue of their being members of the human family, irrespective of any other consideration. The concept of human rights is founded on the ancient doctrine of natural rights based on natural is founded on the ancient doctrine of natural rights based on natural law. Ever since the beginning of civilized life in a political society, the shortcomings and tyranny and ruling powers have led people to seek higher laws. The concept of higher law binding human authorities was evolved and it came to be asserted that there were certain rights anterior to society. These were superior to rights created by human authorities, were universally applicable to have existed prior to the development political societies. These rights were mere ideologies and there was no

agreed catalogue of them and no machinery for their enforcement until they were
codified into national constitutions, as a judicially enforceable Bill of rights.\textsuperscript{33}

Ever since the United Nations General Assembly adopted the Universal
Declaration on Human Rights in 1948 and declared "all human beings are born free and
equal in dignity and rights and everyone is entitled to rights and freedoms without
distinction of any kind……., the concern for human rights has assumed global dimension.
It has been a subject of discussion in almost all national and International conferences,
discourses deliberations, negotiations and transactions.

Awareness to protect human rights has grown to such an extent that today it is
being used as an yardstick to measure the civilization of societies, states, regimes and
positive laws. It is being used as criteria for making value judgments, both the individuals
and Government. It is being used as limitations on the Governments and authorities. It is
being used as vehicle of development in every International monetary and humanitarian
aid.

Promotion and protection of human rights ensures prevalence of freedom justice,
peace and order in each society. It ensures recognition of worth of individual on equal
basis. It ensures that every human being fulfils a quality, life based equality, dignity,
respect and concern.

Observation of human rights is very essential and vital for every society to live in
peace harmony and brotherhood. Observance of human rights is a complex one, more so
in this multi-cultural, multi-lingual society like ours. Yet it is possible through co-
operations with each individual observes it in his relations with other individuals, groups
and society. It is possible when each individual respects the life of other as his own and
when each thinks the dignity of the others is as important as his own. For it's a human
rights culture has to be developed in each component society.\textsuperscript{34}

\textsuperscript{33} Chairanjivi J. Nirmal, \textit{Human Rights in India, Historical, Social and Political Perspective}, New Delhi:
Oxford University Press, 2002, p.1
According to Art.253 of constitution of India our legislators can give effect to any conservation in the form of law for the betterment of society. Human rights jurisprudence played a very vital role in developing the concept of personal liberty. On the basis of International convention, Honorable Supreme Court recognized the right to privacy in various pronouncements.35

2.5 Conclusion

Privacy is the ability of an individual or group to seclude them or information about themselves and thereby reveal them selectively. The boundaries and content of what is considered private differ among cultures and individuals, but share basic common themes. Privacy is sometimes related to anonymity, the wish to remain unnoticed or unidentified in the public realm. When something is private to a person, it usually means there is something within them that is considered inherently special or personally sensitive. The degree to which private information is exposed therefore depends on how the public will receive this information, which differs between places and over time. Privacy partially intersects security, including for instance the concepts of appropriate use, as well as protection, of information.

Privacy, as the term is generally understood in the West, is not a universal concept and remained virtually unknown in some cultures until recent times. Most cultures, however, recognize the ability of individuals to withhold certain parts of their personal information from wider society - a fig leaf over the genitals being an ancient example.

So far the law relating to the right to privacy has been relegated to a penumbral status and is stilling going through the state of infancy. It is the high time that the government and information technology industry come together to check out ways and means to curb the problem of intrusion of privacy. Our legislatures have to protect privacy rather than laws that facilitate violation of individual’s privacy in the name of governmental functions.

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