
RIGHT TO PRIVACY AND FREEDOM OF PRESS: EMERGING TRENDS

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Media is considered such a social instrument which is powerful enough to mould a society, to develop or destruct it. It is a such type of force that could be put to much constructive use in the right hands. But, unfortunately the social motive behind it is being lost in the present era. It is necessary to keep such a force in check which has a huge social impact. In the present times, the lack of a properly defined system of law regulating the media has given way to increasing incidences of infraction of right to privacy of individuals and derailment from the true purpose of the media in society. While information given by the media on factual basis must be given protection and deals the wrongful wielding of pen and power should be condemned. The article deals with the analytical study of the issues freedom of press and its effect on the right to privacy of individuals.¹

INTRODUCTION

The law relating to right to privacy is of recent origin and it recognizes an individual's right to be let alone. This right is not restricted merely to his physical being and property but it also extends to his mental faculty. He possesses the right to control the flow of information with him and keep it out of the purview of the public. Before the advent of visual and electronic media the question of right to privacy was a subtle one as newspapers had only a limited impact on the society. But with the modern media finding green pastures in India the issue of right to privacy has gained importance. The lack of centralization which existed prior to the era of internet has changed since its onset by which now a big amount of personal information about an individual is accessible with one tap on a button. The risk of information reaching the wrong hands has become very high. There has been an unprecedented information revolution and the regulatory mechanisms existent now to control the spread of

¹ Ayn Rand: The Fountainhead (1943)

information are very limited in many ways and have failed in curtailing the exceeding limits of the media. The legislative work in India have proved to be inadequate to counter these situations and it is now necessary to have an overhauling of the system.

The freedom of speech and expression has been regarded as 'the very life of civil liberties' in the Constituent Assembly Debates.² The *Newyork v. Sullivan*, the Supreme Court of USA held that the main purpose of a free press is to guarantee an institution outside the government providing an additional check on the three branches - executive, legislative, and the judiciary.³ Press is the cornerstone of a democratic society. It possesses the greatest power imaginable i.e. the power to influence the minds of an entire nation. Though the Indian Constitution does not use the expression "freedom of press" in Article 19, it is included as one of the guarantees in freedom of speech and expression under Article 19(1) (a). The law on this aspect has been adverted to in the decision of the Supreme Court in *Indian Express Newspapers (Pvt.) Ltd. v. Union of India*⁴, where the court referred to the importance of freedom of press in a democratic society. The court held that the freedom of press is one of the items around which the greatest and bitterest constitutional struggles have been waged in all countries where liberal constitutions prevail. Free press is regarded as one of the characteristics of democratic set up. In the case of *Terminiello v. Chicago*, US Supreme Court has observed that the democratic credentials of a state are judged today by the extent of freedom of press enjoys in that state.⁵ In India, newspapers were, for many years, the primary source of information to the public. Even then, newspapers had a relatively limited impact upon the society as a vast majority of the population was illiterate. This has changed today with a growth in the public consciousness, due to the rise in literacy and perhaps most importantly the sudden boom of visual and electronic media which facilitated the ways for information revolution.⁶

Press possess responsibility towards people of India; it is expected that it will work for the people. Unfortunately, in modern India, it wilfully takes advantage of liberal approach of Courts and continues to make fun of individual's right to privacy. The right to freedom of speech and expression and the right

² Volume VII Constitutional Assembly Debates Official Delhi, (1946-50), at 18.

³ 376 U.S. 254 (1964)

⁴ 1986 AIR 872.

⁵ M.P. Jain, Indian Constitutional Law, 6th Ed. at p. 113

⁶ Madhvi Goradia Divan, Facets of Media Law

to privacy are two sides of the same coin. One person's right to know and be informed may violate another right to be left alone.⁷ Both of these right are joined together i.e. on the one hand, there is fundamental right to disseminate, receive information on the matters of public interest while on the other hand, the right to safeguard the private life of an individual to the extent that it does not harm public duties or matters of public interest.

LEGAL PROTECTION TO RIGHT TO PRIVACY

Since privacy is a recent development in the realm of law and the stream of its development is still flowing, it is difficult to give an exhaustive definition of what 'privacy' means in law. Theoretically, right to privacy is clearly a vital element in any system of individual rights designed to support the individual and to protect the core of individuality; in relation of the individuals to the collective society.⁸ Privacy is a broad term, encompassing within it various aspects of individual life, such as, privacy from press, unreasonable government surveillance etc. In a civilized society, reverence for one's autonomy over his affairs is a foremost rule. It should be the absolute discretion of an individual over his personality traits; over what he wants to expose to the world.

In the year 1890, Warren and Brandeis, for the first time defined the privacy as clear as 'right to be let alone'⁹. Their article focussed on the legal protection of personal privacy against unwanted private invasion. They demanded seclusion from the prying eyes of yellow journalists and gossip mongers.¹⁰ Those journalists or press, who regardless of any bounds of propriety and of decency and for their vested interests make public the affairs of individual's life, are not worthy enough.¹¹ They called on courts to use the common law to safeguard some retreat from the world and to provide a legal remedy through law of tort against journalistic and other invasions of private life.¹² Since then, it was adopted by the US courts in defining privacy in various decisions.

In India, the term privacy refers to use and disclosure of personal information and is only applicable

⁷ Id. at p. 113.

⁸ Thomas I. Emerson, *Right to privacy and freedom of press* 337, Yale Law School legal scholarship repository, 1979, at p. 337

⁹ 4 Harv L Rev 193, 195 (1890).

¹⁰ DD Basu, *Law of Press* 83, 5th Ed. at p. 83

¹¹ Id. at 83.

¹² 4 Harv. Law rev. 193, 195 (1890).

specifically to individuals. Since personal information is manifestation of an individual personality. The Supreme Court, in *Kharak Singh v. State of UP*¹³, recognised the right to privacy as an integral part of right to life and personal liberty under Article 21, which is a fundamental right guaranteed to every individual under constitution of India. In the same judgment, dissent opinion was given by Justice Subba Rao which was subsequently elaborated by Supreme Court in *Gobind v. State of Madhya Pradesh*¹⁴.

RIGHT TO PRIVACY IN UNITED STATES OF AMERICA

'Privacy' is a heavily loaded and much debated term in American Law. The First Amendment to the constitution of United States of America guarantees freedom of speech and the press. The constitutional protection afforded to the freedom of speech has limited the development of Warren and Brandeis's pioneering idea of a free-standing legal right to privacy. Most of the states now recognize some form of right to privacy right i.e. either in the statute or at common law. But the starting point is always the freedom of speech i.e. protecting speech is the American approach.¹⁵

US courts always strive for the protection of freedom of speech and press against unnecessary bondages. So, the right to privacy dealt with very cautiously by the courts. The need for a law to protect privacy was articulated as early as 1890 when an article titled "The Right to Privacy" was published by Samuel Warren and Louis Brandeis, in the Harvard Law Review.¹⁶ This article laid down the intellectual foundation for the law on privacy and explicitly advocated for the legal protection of personal privacy against unwanted private invasion. Though the expression "Right to privacy" was first referred to in *Olmstead v. United States*¹⁷, it was fully discussed in *Time Inc., v. Hill*¹⁸ when the court held that we create grave risk of serious impairment of the indispensable services of a free press with the impossible burden of verifying to a certainty the facts associated in a news article with a person's name, picture or portrait, particularly as related to non-defamatory matter. Those

¹³ AIR 1963 SC 1295

¹⁴ AIR 1975 SC 1378

¹⁵ Eric Barendt, "Privacy and the Press" Freedom of the Press 362.

¹⁶ 4 Harv L Rev 193(1890).

¹⁷ 277 U.S. 438 (1928).

¹⁸ 385 U.S. 374 (1967).

guarantees are not for the benefit of the press so much as for the benefit of all of us... ”.¹⁹

It is clear that Courts were inclined towards the ideology that allows the freedom of press till it is not burdensome or onerous. However, in spite of these limitations, the US law of tort is highly developed and influential. In 1960, four types of privacy related rights were identified by Dean Prosser. These four categories of the tort are now contained in the Restatement of Laws, Second, Torts²⁰ viz. Intrusion, Misappropriation and Rights of publicity, Public disclosure of Private Facts and False Light. The first three types are interference of a personal nature involving an element of hurt, grief, or embarrassment to the claimant. The fourth one interferes with the property interests or commercial relationships.

As the First Amendment protection is comprehensive in nature, in order to support claim, the conduct complained of has to be ‘highly offensive to a reasonable man’. Mere annoying conduct will not suffice. Moreover, in *Time v. Hill*²¹, the court held that under the guarantee of freedom of expression, every individual has a right to know about the matters of public interest. Hence, once it is shown that the person whose privacy has alleged to have been infringed is public official or a public figure or the news reporter is related to public interest, then with regards to First Amendment, the news report cannot be punished unless it was false or the defendant published it with knowledge of its falsity or in reckless disregard of truth.²² The press could not be punished for innocent errors or mere falsity without doing violence to the freedom of press. This shows the ‘Clear Speech protective approach’ of US courts. In the matters of disclosure in public interest, a good defence is, if the news report published or information disclosed outweighs the interest in preventing disclosure.²³ Therefore, to summarize, in USA, privacy is being guarded but for this freedom of press cannot be compromised. Leaving aside some States²⁴, all others deal with privacy with the help of common law principles.

RIGHT TO PRIVACY IN ENGLAND

In *Sahara India Real Estate Corp. Ltd. v. SEBI*²⁵, the Supreme Court of India held that protecting justice is

¹⁹ Id. at p. 395

²⁰ Eric Barendt, “Privacy and the Press” *Freedom of the Press* 113.

²¹ 385 US 374, 396-397 (1967).

²² Id. at 396.

²³ Id. at p. 397.

²⁴ States like, NY, Ohio.

²⁵ (2012) 10 SCC 603

the English approach. Under the English common law, fair trials and confidence in courts for settlement of disputes are given greater weight than the goals served by unrestrained freedom of press.²⁶ England does not have a written constitution. Hence, freedoms are largely determined by parliament and courts. After the enactment of Human Rights Act 1998, the right to free speech or right to access the courts for the determination of legal rights cannot be excluded, except by clear words of statute.²⁷

In *Francome v. Mirror Newspapers*²⁸, the court held that in UK, an action for damages for intrusion into private affairs of a person or his right to solitude is not maintainable unless the alleged intrusion fits under the specific or in any recognized categories of torts; For example- trespass to person, nuisance, defamation or breach of confidence etc. Law on right to privacy is not much developed in U.K as Courts so far refuse to recognize the invasion privacy as an independent tort. It works on the basis of the infamous Pigeon Hole Theory²⁹ i.e. an aggrieved person will not be successful in his claim for infraction of privacy unless he is able to fix his grievance/infringement into a preexisting category of torts.

Moreover, the inadequacy of existing common law in protecting privacy of individuals and lack of categories of torts is evident from the decision of English courts in the case of *Bernstein v. Skyviews*³⁰ where the Plaintiff brought an action for trespass and invasion of privacy against the defendant for having taken an aerial photograph of the plaintiffs estate and publishing it. Even though, it appears to be clear cut invasion of right to privacy, the Honourable Court came to the conclusion that no trespass has been committed by flying over the airspace above the one's estate or taking a photograph. It did not constitute an actionable 'nuisance' because it didn't interfere with the user of his land as there was no specific wrong to tort of privacy in English common law.³¹ Nevertheless, the Court observed that repeated instances of taking photographs would be actionable under the 'nuisance', but not a single one. A conclusion may be drawn that invasion of privacy is not an independent wrong under the existing law of torts in England. The situation is pretty much the same in India.³²

²⁶ Id. at p. 610.

²⁷ Id. at 611.

²⁸, [1984] 1 W.L.R. 892.

²⁹ John w. Salmond, the Law of Torts (Glanville Williams ed. Stevens & Hayens, 1957).

³⁰ (1977)2 All ER (QBD).

³¹ Madhvi Goradia Divan, Facets of Media Law, 1st Ed. (2006) at p. 116

³² DD Basu, Law of Press 88, 5th Ed. (2010) at p. 88

In the case of *Kaye v. Robertson*³³ which pertains to the publication of hospitalized pictures of an injured actor in a magazine named Sunday sport. The Court expressed its inability to protect the privacy of the individual and blamed the failure of common law and statute to protect this right. The court by majority that “the case highlighted, yet again, failure of common law of England and of statute to protect in an effective way the personal privacy of individual citizens. Whereas Lord Justice Leggatt, in his concurring opinion, said that: We do not need first amendment of US constitution to preserve the freedom of the press, but abuse of that freedom could only be ensured by the enforcement of right to privacy. Court emphasised that the right to privacy had been disregarded for so long here that it could only be recognised by the legislature now. An inference may be drawn here that right to privacy and transgression of it by press have been a matter of concord in the UK; even though courts interpreted it in a restricted manner.

In *Campbell v MGN*³⁴, an international super model brought an action against the mirror group of newspapers claiming damages for breach of confidence and invasion of privacy for disclosing that she was receiving treatment for drug addiction. Campbell’s claim was not that the disclosure that she had a drug problem was a breach of confidentiality, but that obtaining and publishing information about her treatment at rehabilitation centre was in breach of confidence. The Trial Judge upheld her claim. The House of Lords reversed the verdict holding that the details of Campbell’s treatment were private and laid down a two-step test³⁵ i.e. is the information obviously private; and where it is not, is it of such a nature where the disclosure was likely to give substantial offence to the subject of the information? Ironically, even though it was borrowing from English case laws and thereafter by their creative interpretation, the American law has developed and matured, whereas the law of privacy in England has lagged far behind. With the enactment of the Human Rights Act, 1998, the condition of English common law improved considerably. It imposed a positive obligation to act in accordance with the European convention on human rights and the fundamental freedoms specifically provided in the Convention³⁶ which may be construed as, proper respect must be paid to an individual privacy.³⁷ This was also further further developed by the House of Lords in the Campbell case, shifting the focus from

³³ (1991) FSR 62.

³⁴ (2003) 1 All ER 224 (C.A)

³⁵ DD Basu, Law of Press 5th ed. (2010) at p. 89.

³⁶ Article 8, European Convention on Human Rights

³⁷ Madhvi Goradia Divan, Facets of Media Law 116 (1st ed. 2006).

the violation of confidential relationship by unauthorized disclosure to the actual nature of information disclosed.³⁸ English law is unusual, though not unique in its refusal to recognize a right to privacy. Similarly, there is no such right in Australia or Ireland. But it is recognized in most of the states of America and in France and Germany.³⁹ However, the oddity in the UK system is that broadcasters are subject to redress for invasion of privacy, while the press and other media are not.⁴⁰ There is no redress of any kind if a book reveals private information, while there is an opportunity to complain to the Press Complain Commission as an extra legal remedy if a newspaper or magazine makes a similar disclosure; but the Broadcaster Complaint Commission (BCC) provides a legal remedy if a broadcaster does a same thing.⁴¹

RIGHT TO PRIVACY IN INDIA

In our Country, courts are more cautious while deciding cases pertaining to infringement of right to privacy of individuals by public authority or press. The case-laws related to freedom of press vis.-a-vis right to privacy are relatively less, because the term privacy is not much debated in India. The concept of right to privacy in general was raised for the first time in the case of *Kharak Singh v. State of UP*⁴², where Justice Subba Rao in his minority opinion, laid down the foundation for development of the law of privacy in India. The court held that the concept of liberty under the fundamental right to life and personal liberty⁴³ was comprehensive enough to include privacy. A more elaborate appraisal of this right took place in the decision of Supreme Court in *Gobind v. State of Madhya Pradesh and Anrs*⁴⁴. Like other countries, India also does not have a very specific or codified law on the right to privacy. Nevertheless, it has acquired constitutional recognition through the case-laws and thus, was carved out by the creative interpretation of the fundamental right to life under and personal liberty of the Constitution. Law on privacy has been developed in India by following certain US decisions. But even today, picture is not clear regarding some aspects of right to privacy and require a thorough revision.

³⁸ DD Basu, Law of Press , 5th Ed. (2010) at p. 89

³⁹ Eric Barendt, "Privacy and the Press" Freedom of the Press 364.

⁴⁰ Id. at p. 365.

⁴¹ Id at p. 366.

⁴² AIR 1963, SC 1295

⁴³ Article 21, Indian Constitution

⁴⁴ AIR 1975 SC 1378

The extent of freedom of press and right to privacy of an individual is one of such aspect, which needs to know its parameters and boundaries and consequences of its overstepping. In recent times, there have been number of incidents which required the Courts to step in and restrain newspapers and other media from intruding into individual privacy. Whenever, such matters of invasion of privacy reach the court, journalists put forward a common defence that the disclosure was privileged because it was newsworthy and try to cover it with the 'public interest' blanket defence, where more often than not, the Courts too become helpless.

The main reason behind this is absence of statutory recognition of right to privacy and weak regulating bodies and guidelines for media. There is no doubt that newspapers do a commendable job in bringing certain long buried issues to the forefront. However, it needs to be realized that even while reporting those news, some amount of restraint must be exercised. Every titbit of information or surmise about individuals cannot and should not be forced into the category of 'news'. Most conspicuous example of such reporting is *R.R. Gopal @ Nakkheeran Gopal and A. Kamaraj v. J. Jayalalitha and Mrs. N. Sassikala*,⁴⁵ a recent case of publication of private affairs of Tamil Nadu's chief minister Ms. Jayalalitha, in a magazine, without her permission. In the instant case, the Madras High Court held that citizen has right to safeguard privacy of his own and his family and none can publish anything in reference to above matters without his/her consent.⁴⁶

Another instance is the judgment of the Supreme Court in the famous case of *R. Rajagopal @ R.R. Gopal v. State of Tamil Nadu*⁴⁷. The right to privacy of citizens in this country was dealt in the instant case and the parameters of the right of the press to criticize and comment on acts and conduct of public officials. The case is related to the alleged autobiography of Auto Shankar who was convicted and sentenced to death for committing six murders. In the autobiography, he had commented on his contact and relations with various police officials. The Supreme Court tried to reach a solution regarding infringement of one's privacy. Private affairs of public official remain an easy target for the press, because people show more interest in the personal lives of known personalities.

The *Arushi Talwar Murder case*⁴⁸ is a recent example to this. Not even a single newspaper took care

⁴⁵ AIR 2006 Mad 312

⁴⁶ Id

⁴⁷ AIR 1995 SC 264

⁴⁸ Justice for Arushi Talwar, (Nov., 1st, 2014 2:23 am). www.justiceforaarushitalwar.com/blog/the-aarushi-talwar-case-diary

about the right to privacy before publishing news about the deceased's character and relations between her and the domestic help. The media went into tailspin and all the conjectures and surmise did irreparable damages to her and her family. There are other instances as well where media consciously appears to overstep its own ethics, and perpetrate into the core private zone of individuals life. There are certain acts, though not illegal as there is no statutory prohibition, but highly improper or unethical for a journalist because injury to the individual's interest is likely to be caused by such act.⁴⁹ It is necessary to remember that freedom of press is founded on public interest and therefore cannot survive if it offends others interest of magnitude. Though media didn't reveal the name of the victim but they certainly made public enough information about the victim that if anyone interested easily can know the identity of the victim, information like the name of institute and the very course she was studying there.⁵⁰ Every such media reports which publish any information regarding the discovery of identity of real victim amounts to a punishable offence under Indian Penal Code, 1860.⁵¹ Also, this is clearly in violation of Press Council of India Norms.⁵² Moreover, the norms laid by Press Council of India prohibits viz., "All subjects should be treated with respect and dignity. Special consideration be given to vulnerable subjects and victims of crime or tragedy be treated compassionately. Private grief be intruded by media only when the public has an overriding and justifiable interest in sharing or viewing it."⁵³ Broadcasting of personal grief and emotional moments of family members of the victim live.⁵⁴ Though, while reporting Arushi murder case, media was perhaps looking over these norms as many channels broadcasted the misery of her parents. If we look into the emerging trends, the visual representation of personal grief over television has become a norm now-a-days. The Supreme Court discussed about the rights of the individual to privacy vis-a-vis invasion by journalists in *Sheela Barse v. Union of India*⁵⁵, *Prabha Dutt v. Union of India*⁵⁶ and also in *State v.*

⁴⁹ Dd Basu, Law of Press, 5th ed. (2010) at p. 92.

⁵⁰ Ananth Krishnan, Women's groups protest newspaper report on rape case, THE HINDU, April 19, 2009.

⁵¹ , Section 228A, Indian Penal Code, 1860

⁵² Press Council of India, Principles and Ethics.

⁵³ Id.

⁵⁴ Id.

⁵⁵ (1987)4 SCC 373

*Charulata Joshi*⁵⁷. In all these cases, the journalists sought permission from the Supreme Court to interview and take this photograph prisoners. Although, the issue of privacy was not directly dealt with, the court implicitly acknowledged the right to privacy by holding that the press had no absolute right to interview or take the photograph a prisoner but could do so only after the required permission.⁵⁸

RIGHT TO PRIVACY AND FREEDOM OF SPEECH IN INDIA

Privacy is vital to the mental, spiritual and physical well being of all individuals and also to the morality and personality of the individual.⁵⁹

The right to freedom of speech and expression and right to privacy are intricately connected. In a liberal democracy like India, citizens have a right to talk on the telephone, send e-mail, watch television and surf the internet without interference of government unless for compelling reasons such as legitimate defense and national security considerations.⁶⁰ A person who exercises his right to know and be informed may violate another person's right to privacy. According to the New Oxford dictionary⁶¹ privacy is the 'absence or avoidance of publicity or display; the state or condition from being from society of others, or from public interest, seclusion'. The Black's law dictionary⁶² has defined it as 'the right to be let alone; the right of a person to be away from unwanted publicity; and the right to live without unwanted interference by public in matter with which the public is not necessarily concerned.'

The Right to privacy in India has derived itself from two sources i.e. the common law of torts and constitutional law.⁶³ Under common law, a private action for damages lies for unlawful invasion of privacy. In *Gobind v. State of Madhya Pradesh*⁶⁴, the Supreme Court held that the printer and publisher of a journal, magazine or book are liable damages if they publish any matter concerning the private life of the individual, which would include his family, marriage, procreation, parenthood, child bearing, education etc. without his consent. However, this is with two exceptions which are, this right is not

⁵⁶ (1982)1 SCC 1

⁵⁷ (1999)4 SCC 65

⁵⁸ Madhvi Goradia Divan, *Facets of Media Law*, 1st Ed. (2006) at p. 122

⁵⁹ Charl's Fried, *Privacy* 77 Yale LJ 475

⁶⁰ Vikram Raghavan, *Communications Law in India*, Lexis Nexi (2007)

⁶¹ New Oxford Dictionary Vol 2, 1993

⁶² Black's Law Dictionary, 6th edition, 1990

⁶³ Madhavi Goradia Divan, *Facets of Media Law*, Eastern Book Company, 1st edn 2006

⁶⁴ (1975) 2 SCC 148

applicable where the publication has become public record and publication which relates to discharge of official duties of a public servant, unless the publication is proved false, malicious or untruthful.

Under the constitution of India, the right to privacy is not a specific fundamental right but has nevertheless gained recognition. Despite not being enumerated in various reasonable restrictions to the right to freedom of speech and expression provided under Article 19(2), the Courts have carved out a Constitutional right to privacy through a liberal interpretation of the right to life and liberty under Art 21.⁶⁵ In *Kharak Singh v. State of Punjab*⁶⁶, the Supreme Court conferred judicial recognition upon the right to privacy as an aspect of the fundamental right to life and personal liberty enunciated under Article 21 of the Constitution. The right to privacy vis-à-vis invasions by journalists were observed in *Sheela Barse v Union of India*⁶⁷, *Prabha Dutt v Union of India*⁶⁸ and also *State v Charulata Joshi*⁶⁹. The Supreme Court also considered the nexus between right to privacy and electronic communications. In *RM Malkhani v. State of Maharashtra*⁷⁰ the Supreme Court held that it was important to protect citizen's telephonic conversations and declined the argument of the accused that secret taping violated his fundamental right⁷¹ as his privacy had been disturbed. In *People's Union for Civil Liberties v. Union of India*⁷² the Supreme court held that unauthorized⁷² telephone interception infringes the right to privacy.

Further, in international treaty⁷³, to which India is a signatory, contain provisions for the protection of individual privacy. Therefore, India has the responsibility to incorporate the ideals safeguard therein in the domestic laws also.

ISSUES OF RIGHT TO PRIVACY AND FREE OF PRESS: EMERGING TRENDS IN INDIA

Every democracy including India gets the Government it deserves and every society its media. In a country like India, media plays a very significant role in balancing the interests of public and exercise of its powers. Just as the media is blessed with freedom of speech and expression for spreading awareness and catering to the right to know of the public, it is equally important to ensure the privacy of

⁶⁵ Mahendra P.Singh, V.N.Shukla's Constitution of India, , Eastern Book Company, 11th edn 2008

⁶⁶ AIR 1963 SC 1295

⁶⁷ (1987) 4 SCC 373

⁶⁸ (1982) 1 SCC 1

⁶⁹ (1999) 4 SCC 65

⁷⁰ AIR 1973 SC157

⁷¹ Article 21, Indian Constitution

⁷² AIR 1997 SC 568

⁷³ Article 12, Universal Declaration of Human Rights

individuals which is an objective sought to be achieved by the law of privacy. In *PUCL v. Union of India*⁷⁴, it has been observed by the Supreme court that, When there is a competition between the right to privacy of an individual and the right to information of the citizens, the former right has to be subordinated to the latter right as it serves larger public interest.

In *State of U.P v Raj Narain*⁷⁵ the Supreme Court has observed that, the people of this country have a right to know every public act, everything that is done in a public way, by their public functionaries. They are entitled to know the particulars of every public transaction in all its bearing. The right to know, which is derived from the concept of freedom of speech, though not absolute, is a factor which should make one wary, when secrecy is claimed for transactions which can, at any rate, have no repercussion on public security.

Nowadays, the unbridled expansion of media poses a severe threat to privacy of individuals. Now with the boom of the internet and coming of the age of information revolution almost all barriers have been removed in accessibility of information. The Right to Information Act, 2005 also stresses on an open society for reasons of transparency and according to the provisions of the Act, unwarranted invasion of privacy has been listed as an exception to the right to information⁷⁶.

Since, privatization and globalization has taken its toll on information dissemination. we see a shift in the purposes attributed to the media; there is a rat-race for enhanced readership and high TRP ratings. Media now is controlled by large corporate entities which are driven by the sole motive of profit-making, wherein the success and efficiency of media is measured on a scale of commercial ratings and not on one of social contributions. The race for high ratings has reflected as a major setback in the quality of media itself. Even in news channels, the TRP factor is given foremost importance and sensationalism being the key word leads to information overkill. Media has been time and again criticized for sensationalism, exaggeration of news, reporting false and fabricated news and yellow journalism. The result is that media has ignored public interest in the struggle to satisfy the viewer/reader interest.

An outrageous example of sensationalisation of news was the 26/11 issue where a national tragedy was turned into bait for profit using emotional trivia by the various competing channels. They try to create

⁷⁴ AIR 2003 SC 2363

⁷⁵ AIR 1975 SC 865

⁷⁶ Section 8, Right to Information Act, 2005

hype out of factual news and attract viewers using the private life of celebrities and other citizens through scrupulous efforts. In *People's Union for Civil Liberties v. Union of India*⁷⁷, the Supreme Court observed that the interception of telephonic conversations and unauthorized tapping impinges on the right to privacy of individuals and formulated guidelines to be adopted by the government when it intercepts telephonic conversations. These guidelines were also included in the Telegraph rules.

The Supreme Court further observed that the power of media in reporting of trials must not adversely affect the ideal of fair trial and tarnishing the image of parties to the case. Any opprobrious judgment made by the media either with malice or ignorance, with regard to the cases can sway public opinion. Regulations must be put in place while disseminating information to the media by police officers and lawyers during pendency of litigation and investigation. The introduction of camera in courts will also facilitate more transparency in proceedings. Hence utmost caution must be exercised by the media in such matters and responsible journalism should be practiced.

LEGISLATIVE FRAMEWORK IN INDIA

In the Indian context, although there is no statutory enactment expressly guaranteeing a general right of privacy, elements of this right, as traditionally contained in the common law and in criminal law are recognized by the Indian Courts. These include the principles of nuisance, trespass, harassment, defamation, malicious falsehood and breach of confidence. The right to privacy in India has derived itself from two sources i.e. the common law of tort and constitutional law.⁷⁸

RIGHT TO PRIVACY UNDER INDIAN CONSTITUTION

Under the Indian Constitution, Article 21 is a fairly innocuous provision in itself which reads that no person shall be deprived of his life or personal liberty except according to procedure established by law.

However, the above provision has been deemed to include within its ambit, inter-alia, the Right to Privacy which include The Right to be let alone as the Supreme Court termed it in the *Auto Shankar*

⁷⁷ AIR 1997 SC 568

⁷⁸ Section 327 (1), Criminal Procedure Code, 1973 Section 3 & 4, the Indecent Representation of Women (Prohibition) Act, 1980, the Medical Termination of Pregnancy Act, 1971 (s.7(1)(c)), the Hindu Marriage Act(s.36), and the Juvenile Justice Act.

case⁷⁹. The concept of right to privacy finds its genesis in the case of *Gobind v. State of Madhya Pradesh*⁸⁰ wherein Justice Matthew of the Supreme Court cited the Preamble of the Constitution of India which is designed to "assure the dignity of the individual".

On the other hand, the *Express Newspaper v. Union of India*⁸¹, the Supreme Court held that the freedom of press is not expressly mentioned in Article 19 but has been held to flow from the general freedom of speech and expression guaranteed to all citizens. But this freedom is not absolute and it is subject to reasonable restrictions mentioned in Article 19 (2) of the Constitution. Initially, it was implied for the press not to indulge in any unethical activity like infraction of privacy but with the increased professionalism, it seems it has forgotten and remembers only its rights, but not the duties attached therein. Due to the absence of privacy as one of the ground for reasonable restriction on freedom of press many-a-times they escape from their misdeeds. Such circumstances demand an effective and adequate regulation. A kind of proper and harmonious balance between the rights of citizens and the Press has become need of the hour.

RIGHT TO PRIVACY UNDER LAW OF TORT

Under the Common law, a private action for damages for unlawful invasion of privacy is maintainable. In *Express Newspaper v. Union of India*⁸², the Supreme Court held that the printer and publisher of a (newspaper) journal, magazine or book are liable for damages if they publish any matter concerning the private life of a citizen which includes his family, marriage, procreation, parenthood, child-bearing, education etc. without his consent. Nevertheless, it is subjected to two exceptions i.e. when the publication is based on public records, including court records- because the right of privacy no longer subsists once a matter becomes a matter of public records⁸³ and when the offending publication relates to the acts and conduct relevant to discharge of the official duties of a public servant. Unless the publication is proved to be false or actuated by malice or reckless disregard for truth.⁸⁴

Sometimes, when the privacy action is covered under the Tort of Defamation, it is insufficient to protect

⁷⁹ AIR 1995 SC 264

⁸⁰ AIR 1975 SC 1378

⁸¹ AIR 1957 SC 896

⁸² AIR 1958 SC 578.

⁸³ Id. at paragraph 28.

⁸⁴ AIR 1995 SC 264

the individual's privacy. There is a fundamental distinction between defamation and the privacy tort of public disclosure of embarrassing private facts. Truth is an absolute defence to the former, but not to the latter. This difference is crucial. This is the reason behind need of specific law protecting privacy of individual.

In *Rajat Prasad v. CBI*⁸⁵, the Supreme Court held that Another crucial aspect of ever-expanding media is the sting operations. Sting operations, recently, have been the eye of storm in high profile cases. There is no legal mandate for conducting sting operations in India. Being essentially a deceptive operation, though designed to nab a criminal, a sting operation raises certain moral and ethical questions. Unlike the US and other certain countries where Sting operations are recognized as legal methods of law enforcement, although in a limited manner⁸⁶, the same is not the position in India. A sting operation carried out in public interest had the approval of the Hon'ble Supreme Court in *R.K Anand v. Registrar, Delhi High Court*⁸⁷ though there are still no clear legal directions to be applied in all other cases of invading privacy infringements.

SUGGESTIONS

'Privacy' no longer remains a nebulous legal activism. It has become a pre-requisite condition of our daily life, where competition is present at all levels. So, we need to do is to respect the privacy of individual and treat it above all the immature cheap interests and techniques of corporate based news barons. In a democratic and civilized nation like India, the citizens are supreme. So, there is urgent need of a comprehensive law to protect the citizens from unwanted encroachment upon their privacy; from the press, media, unreasonable government surveillance, and many other tricks of marketing. In order to restrain the fearless, more adventurous media and press from breaking into the private affairs of individuals i.e. public official or private citizen in the disguise of 'public interest' or newsworthy is necessary to enact a law; a legislation which can clearly explain in black & white about the terms and area of press for their 'public interest.'

Though the Supreme Court has observed that the matter should be dealt on a case to case basis. But it is absolute that the Courts are merely trying to fill up the vacuum on right to privacy until a law is passed by parliament. The remedy through the Court to the people is only when we approach to the

⁸⁵ CA No.747/2010, Decided on 24 April 2014

⁸⁶ *Supra* at 59.

⁸⁷ (2009)8 SCC 106

court and by that time the loss or damage has already been occurred to the individual.’ Hence, the Government should come up with a specific law, clearly laying down the guidelines for press while dealing with such threshold issues as soon as possible. There is no doubt that freedom of press in a democratic country like India is indispensable, and also it is a fourth pillar of democracy. So, while enacting a legislation for the press is the work which requires more diligence so that it does not become a tool to control the press but merely a regulation.⁸⁸

In this direction, the Planning Commission set up a Group of Experts on Privacy. This Expert Group was appointed to set out the principles that Indian privacy law should abide by. Even though privacy has been held to be a fundamental right as long back as in 1962 in the case of *Kharak Singh v. State of UP*⁸⁹, India does not have laws that specify safeguards to privacy. Moreover, recent government initiatives, such as the UID, involve collection of personal information and storage in electronic form. The absence of a law on privacy increases the risk to infringement of the fundamental right. All this mandates for a specific law on privacy, but still this law is nowhere near to reality.

Need for Amendment in Provisions of Indian Constitution

Freedom of press owes its genesis to the fundamental right guaranteeing the freedom of speech and expression 19 (1) (a) of the Constitution. Article 19 (2) prescribes the grounds on which the said freedom can be restricted in a reasonable manner i.e. in the interests of the sovereignty and integrity of India, the security of the State, friendly relations with foreign States, public order, decency or morality or in relation to contempt of court, defamation or incitement to an offence. It can be inferred that freedom of press may also be restricted on the mentioned grounds albeit in a reasonable manner. Now, ‘privacy’ is a pervasive concept and it should not only be protected in the case of press but there are other mechanisms too which infringe privacy on a regular basis i.e. Customer haunting - marketing, surveillance etc. It is entirely plausible and in fact, desirable to add ‘privacy’ as a ground under Article 19(2) of the Constitution.

Need to Strengthen Quasi-Legal Remedy

There is a dispute regarding infringement of privacy of a minor child. The decision of the Press Council of India in *Ms. Priyanka Gandhi (through advocate), New Delhi v. The Editor, “Today” English Afternoon” New Delhi*⁹⁰ endeavoured to struck a balance between freedom of press vis-a-vis right to privacy of

⁸⁸ Retd. Justice Markandey Katju, A Jury of their Peers, SATYAM BRUYAT, Nov.,1, 2014

⁸⁹ 1964 (1) SCR 332

⁹⁰ F. No. 14/457/04-05-PCI, Nov.,1, 2014

public person and moreover, a minor child of a public official. Dispute was brought to the knowledge of the Press Council about the unauthorized publication of two articles/photographs of Priyanka Gandhi's son in "Today", an English daily afternoon newspaper of New Delhi published by the India Today Group. It was alleged in the complaint that such an article/photograph un-necessarily brings the child into public focus, which inter-alia infringes his right to privacy. The Press Council on the basis of its prior guidelines regarding privacy came up with the observation and agreed that there is a need to balance between citizens' right to know and individual's right to privacy. Occasionally, the press surpasses its line and directly encroaches upon the right to privacy, while exercising the right to freedom of press. Therefore, dignity of a public person stands infringed. The Press Council agreed that individual's right to privacy is an inviolable right which must be protected and preserved.

As per the Press Council Act, 1978, the Press Council has the power to take up issues regarding infraction of one's privacy. It can admonish, or censure a newspaper too. The Press Council should have powers like punitive powers, and power to suspend licences and impose fines⁹¹. Nevertheless, decision should be by a proper, legible procedure and it should not be against the natural principle of law. An alert, conscious, fair and effective regulation by press council will not be cruel.

In 2012, the Press Council of India passed a resolution⁹² urging the government to bring electronic and social media within the PCI's regulatory framework and to rename it as Media Council. But the resolution met opposition and the idea had to be dropped.⁹³ The Print and Electronic Media Standards and Regulation Bill, 2012, a private member bill was introduced with the proposal of the establishment of an overall media regulatory authority, though it shelved before passing the final stage of introduction in the parliament owing to the opposition from large section. Media houses both print as well as electronic took this as a step to gag the media.⁹⁴ Hence the PCI still remains a tooth less tiger.⁹⁵

Need for Amendment in Indian Penal Code, 1860

The Indian Penal Code, 1860 is one of the master pieces of codification of penal law in legal world. It already contains offences related to various possible subjects, runs into five hundred eleven sections as

⁹¹ Retd. Justice Markandey Katju, A Jury of their Peers, Nov 1, 2014

⁹² Law Commission of India, Consultation Paper on Media Law, May, 2014.

⁹³ Swapna Das Gupta, The media is already governed by law, The Hindu, Nov., 19th, 2012

⁹⁴ Id

⁹⁵ Manash Pratim Gohim, The PCI Council for Media Council, TIMES OF INDIA, Jan., 31st, 2015

a whole, it is also known as a comprehensive code of substantive law. If a new chapter named “offences against privacy” is added into the IPC, it would be a useful step, certainly. Most important advantage of such amendment will be the before-hand knowledge it will provide about the acts which constitute offence against privacy.

CONCLUSION

No doubt, a pen is mightier than a sword. But when the pen becomes uncontrollable and begins to intrude into the individual’s private life, it is time to control its use. Free press is considered to be an important part of a true democracy. The Constitution of India itself guarantees the freedom of press, as integral part of freed of speech and expression. Though as is with all things in life, a balance must be maintained; here between the freedom of speech & expression of Press and right to privacy of the individuals. Be it print media or electronic, both have their critical roles to play in a nation’s life and policies. However, it is also necessary to keep a check on the extent of its role and when it starts to forget the thin line between public and private interest, it is our duty to remind it so.

Unfortunately, Media in India consider its freedom to be an absolute one and by ignoring all the boundaries, directly encroaches into the very private affairs of persons, in the name of public interest. A line i.e. a Lakshman Rekha, must be drawn to determine its limits. Media cannot have unbridled power to publish any information in the name of ‘public interest’; there have to be some checks and balances.

The rights to privacy and to freedom speech appear to be of equal value. A proportionate analysis should be applied to both. The court should ask whether it was necessary to restrict publication in order to protect privacy, and vice versa, whether to allow the publication would disproportionately sacrifice the individual’s privacy. Protection awarded to the right to privacy must be weighed against public interest. State cannot impose prior restraint upon the freedom of the press on the ground that relevant publication would offend the privacy of an individual or would defame a public official. The remedy in all such cases would be for the aggrieved person under the appropriate law after the offending matter is published. However, it is also to be expatiated that the right to privacy should not be allowed to mask illegal activities.

A proper balance need to be struck between a fearless and free right to speech and proving the supremacy of law over pugnacious, malignant and unethical behavior from the fourth estate. This can be done only when the media holds aloft the spirit of values and truth and rise above vested interests and lower loyalties to be truly a part of the democratic system.

Every profession functions by certain norms of professional conduct evolved over the years by practice,

with an objective to improve its standards, prevent its abuse, and above all, contribute to the society and development of the nation as a whole. There was a time when journalism was a mission; then it became a profession and now, it is a business; run like one and certainly protected like one. Journalism has expanded its role and activities and has also grown in power. Codification of its work ethics is therefore an urgent need of the hour.

The Press Council of India, in keeping with its mandate to build up a code of conduct for newspapers, news agencies and journalists in accordance with high professional standards, has, on the basis of its adjudications of cases from time to time, built up a code of journalistic norms. However, these norms are not enough to prevent the press from encroaching upon an individual's privacy. The fundamental objective of press is to serve the people with news, views, comments and information on matters of public interest in a fair, accurate, unbiased, sober and decent manner. To conclude the press is expected to conduct itself in keeping with certain norms of professionalism, universally recognised. It is true that some substantial steps against the press which have been exploiting its far reaching limits. Although the doctrine of privacy is a recent development in legal world, still it cannot be denied that it is gradually gaining recognition globally. The only thing remains is the balancing of the right to privacy against freedom of press being it a complex process and demands sensitivity to both interests. It requires a clear precision and one can only hope that we succeed in achieving it.