

**INVASION OF PRIVACY RIGHT BY VISUAL  
MEDIA-NEED FOR REGULATION**

**THESIS SUBMITTED TO  
THE NATIONAL UNIVERSITY OF ADVANCED LEGAL  
STUDIES**

**FOR THE AWARD OF DEGREE OF**

**DOCTOR OF PHILOSOPHY**

**BY  
PREETHA.U.**

**UNDER THE SUPERVISION OF  
DR. K.P.KYLASANATHA PILLAY**



**NUALS, KALAMASSERY, HMT COLONY (P.O.)  
KOCHI, KERALA – 683 503, INDIA**

**2019**

## **DECLARATION**

I do hereby declare that the thesis entitled '**Invasion of Privacy Right by Visual Media-Need for Regulation**' for the award of Doctor of Philosophy is the record of the original work carried out by me under the guidance and supervision of Dr. K. P. Kylasanatha Pillay. This work has not previously been submitted either in whole or in part for any other Degree, Diploma, or Associateship or any other title or recognition from any University or Institution.

Date:

**Preetha. U**

Research Scholar

## **CERTIFICATE**

This is to certify that the thesis entitled '**Invasion of Privacy Right by Visual Media-Need for Regulation**' submitted by Preetha.U for the award of the degree of Doctor of Philosophy is to the best of my knowledge, a bonafide research work carried out by her, as a part time research scholar, National University of Advanced Legal Studies (NUALS) Kochi, under my guidance and supervision. This work has not previously been submitted either in whole or in part for any other Degree, Diploma, or Associateship or any other title or recognition from any University or Institution.

Kochi

**DR. K. P. Kylasanatha Pillay**

Date:

Supervising Guide

## **CERTIFICATE**

This is to certify that the thesis entitled '**Invasion of Privacy Right by Visual Media-Need for Regulation**' has been presented in the pre-submission seminar held at The National University of Advanced Legal Studies, Kochi on 21<sup>st</sup> December 2018.

Kochi

**Dr. K.P. Kylasanatha Pillay**

Date:

Supervising Guide

## **CERTIFICATE**

This is to certify that Smt. Preetha U has incorporated all relevant corrections and modifications suggested by the audience during the pre-submission seminar and recommended by the Doctoral Committee in the thesis entitled '**Invasion of Privacy Right by Visual Media-Need for Regulation**' for the award of Doctor of Philosophy.

Kochi

**Dr.K.P. Kylasanathapillay**

Date:

Supervising Guide

## **PREFACE**

The emergence of human rights jurisprudence opened new vistas for recognising privacy right as an indispensable element for leading a dignified life. It is subjected to serious invasion both by government and private agencies. Invasion of privacy right by media is now a common phenomenon. The impact of invasion will be great if it is visual media. The legal system in India has protected the feelings in case where the reputation of an individual is adversely affected. But the law was reluctant to protect the feelings in consequence of lifting of personal space by media. But there is a tremendous social transformation in the attitude and culture of society owing to technology revolution in the world. The people are started to think of their private life from being not to be disclosed in the public.

Media is the fourth pillar of democracy and is essential for democratic functioning of the country. With the advent of modern technologies the information is reaching within seconds across all over the world. We are witnessing the sad incidents where the persons are suffering and even committing suicide when their personal details are subjected to public discussion after it had been disclosed by media. Indian privacy jurisprudence is still in the rudimentary stage which invites further research in the area. However, the recent decision of Supreme Court of India in *Justice K Puttaswamy v. Union of India* (*privacy judgment*) the state is obliged to initiate necessary steps to take in hand

the privacy issues in right direction. In this backdrop the thesis undertakes to examine the existing legal mechanisms to regulate the visual media. This incited to think of doing exploration in this area and to make contribution to the regulation of visual media with special emphasis on privacy right. There are several people without whom this thesis would not come to reality.

First of all I am very much obliged to God for giving me a space for doing this work. I have received constant guidance and advice from my most respectful guide Dr.K.P.Kylasanatha Pillay for completion of the thesis. I am truly grateful and indebted to my guide in encouraging and enlightening me through all stages of my research work in spite of his busy schedule.

I am extending thanks to former Vice Chancellor of NUALS, Prof. Dr. Rose Varghese for encouraging me to complete the work. I am also thankful to the present Vice Chancellor of NUALS, Dr.K.C.Sunny, who is always a man of inspiration. A word of gratitude is offered to Prof.(Dr.)M.C.Valson, chairman of the Research Committee, NUALS for encouraging me always to accomplish the task.

I express my sincere thanks to Dr.Balakrishnan K. Associate Professor, who is also the member of Doctoral Committee, NUALS for supporting me to achieve this goal. I should also thank Dr.Anil R Nair, Associate Professor and Dr.Jacob Joseph, Hari S Nair, Sri Raveendra Kumar Assistant Professors NUALS for their valuable suggestions at different point of time to improve the thesis.

I convey regards to Sri.M.G.Mahadevan, Registrar, NUALS for giving cooperation and support. I am thankful to other faculty members of NUALS, Kochi for giving comments and encouragement.

I cannot forget the assistance from Dr.Sheeba S Dhar, Assistant Professor and Smt.Aiswarya H., Research Associate, NUALS at the time of Pre submission seminar.

I should also appreciate Dr.Subhash, Head of Department of Communications & Journalism, University of Kerala, Kariavattom for his valuable suggestions which were relevant to the topic of the research.

I take this opportunity to mention my father Late Sri.K Unnikrishna Kurup who always encouraged me to achieve the zenith of knowledge. I am deeply thankful to my mother Smt. V.Omana Amma who always stood with me in my studies. I should acknowledge my sisters for helping me in several aspects to complete the work.

I heartily convey my grateful thanks to my husband Adv.Haridas.K., for his encouragement and help to fulfil the thesis. I am also obliged to my daughters Kavya and Bhavya for giving tips to do the typing work and also to cooperate with my busy schedule.

I express sincere thanks to my friends and colleagues, Dr.Moneveena.V.R., Assistant Professor in Law, Govt. Law College, Thiruvananthapuram, Dr. Sonia K Das, Smt. Bhavana A.K, and



Smt.AA.Khadeejabi Assistant Professors in Govt. Law College, Thrissur for constant support.

I am grateful to Dr.Anuja.S, Assistant Professor, National Law School of India University (NLSIU), Bangalore for making arrangements for collecting relevant materials from the library of esteemed law school. The gratitude is extending to Librarians and other library staff members of Govt.Law College, Thrissur, Cochin University of Science and Technology (CUSAT), National University of Advanced Legal Studies (NUALS), K.N.Raj Library (Centre for Development Studies, CDS), Thiruvananthapuram, Campus library, Kariavattom, Thiruvananthapuram, Library of High Court of Kerala, Department of Communications & Journalism Library, University of Kerala.

I express my special thanks to M/s. Cherupushapam Digital Press, Kalamassery, Kochi for taking efforts to print and to bring this thesis out.

..........

# **CONTENTS**

<b>DECLARATION .....</b>	<b>i</b>
<b>CERTIFICATES .....</b>	<b>ii</b>
<b>PREFACE .....</b>	<b>v</b>
<b>CONTENTS .....</b>	<b>ix</b>
<b>ABBREVIATIONS.....</b>	<b>xviii</b>
<b>LIST OF CASES.....</b>	<b>xxiii</b>
<b>CHAPTER I INTRODUCTION.....</b>	<b>1</b>
<b>CHAPTER II RIGHT TO PRIVACY-CONCEPT AND PERSPECTIVES.....</b>	<b>17</b>
<b>CHAPTER III PROTECTION OF RIGHT TO PRIVACY – INDIAN PERSPECTIVE .....</b>	<b>54</b>
<b>CHAPTER IV MEDIA FREEDOM VIS- A VIS – MEDIA RESTRAINTS –AMBIT AND CONCERNS .....</b>	<b>112</b>
<b>CHAPTER V RIGHT TO KNOW, PUBLIC FIGURES AND PRIVACY-A BALANCING EXERCISE .....</b>	<b>159</b>
<b>CHAPTER VI RIGHT TO PRIVACY-A COMPARATIVE PERSPECTIVE.....</b>	<b>216</b>
<b>CHAPTER-VII REGULATION OF VISUAL MEDIA WITH SPECIAL REFERECNE TO PRIVACY RIGHT .</b>	<b>257</b>
<b>CHAPTER VIIICONCLUSION.....</b>	<b>306</b>

## TABLE OF CONTENTS IN DETAIL

	Page
DECLARATION .....	i
CERTIFICATES.....	ii-iv
PREFACE.....	v-viii
CONTENTS .....	ix-xvii
ABBREVIATIONS .....	xviii-xxii
LIST OF CASES.....	xxiii-xxxiv
<hr/>	
<b>CHAPTER I</b>	
<b>INTRODUCTION.....</b>	<b>1-6</b>
<hr/>	
1.1. SCOPE OF THE STUDY .....	1
1.2. CONCEPTUAL BACKGROUND.....	4
1.3. INVASION OF PRIVACY RIGHT- MEANING AND KINDS .....	7
1.4. MEDIA REGULATION –CHALLENGES .....	9
1.5. HYPOTHESIS .....	11
1.6. RESEARCH PROBLEM.....	11
1.7. METHODOLOGY ADOPTED.....	12
1.8. CHAPTERIZATION .....	12
<hr/>	
<b>CHAPTER II</b>	
<b>RIGHT TO PRIVACY-CONCEPT AND PERSPECTIVES .....</b>	<b>17-53</b>
<hr/>	
2.1 INTRODUCTION .....	17
2.2 EXPLORING THE MEANING AND CONCEPT OF PRIVACY RIGHT...18	
2.2.1 Concept Developed By Warren and Brandies.....	20
2.2.2 Concept Developed By William Prosser.....	22
2.2.3 Privacy Right- Philosophical Dimension .....	23
2.3 PUBLIC AND PRIVATE DICHOTOMY.....	30
2.3.1 Plain View Principle.....	31
2.4 RIGHT TO PRIVACY-THEORETICAL PERSPECTIVE.....	32
2.4.1 Personhood Theory .....	32

2.4.2	Property Theory of Privacy .....	34
2.4.3	Theory of Reductionism.....	36
2.5	VALUE OF PRIVACY .....	37
2.5.1	Privacy as Control .....	37
2.5.2	Privacy and Autonomy.....	39
2.5.3	Privacy and Intimacy.....	41
2.5.4	Privacy and Dignity.....	42
2.5.5	Privacy and Secrecy .....	43
2.6	SOCIAL FUNCTION OF PRIVACY .....	45
2.7	PRIVACY AS AN INALIENABLE HUMAN RIGHT .....	46
2.8	DEFINITION OF PRIVACY UNDER EARLY LEGISLATIVE BILLS .....	47
2.9	PRIVACY CONCEPT IN INTERNATIONAL REGIME .....	48
2.9.1	India under International Obligation To Protect Privacy .....	50
2.10	CONCLUSION .....	52

---

**CHAPTER III**  
**PROTECTION OF RIGHT TO PRIVACY - INDIAN PERSPECTIVE.... 54-111**

---

3.1	INTRODUCTION .....	54
3.2	PRIVACY RIGHT IN ANCIENT INDIA.....	55
3.3	PRIVACY RIGHT IN PRE INDEPENDENCE ERA.....	56
3.4	42nd LAW COMMISSION REPORT AND PRIVACY RIGHT .....	68
3.5	SECOND PRESS COMMISSION AND PRIVACY RIGHT.....	60
3.6	CONSTITUENT ASSEMBLY DEBATE ON PRIVACY RIGHT .....	61
3.7	RIGHT TO PRIVACY- CONSTITUTIONAL PERSPECTIVE .....	62
3.7.1	Justice K.Puttaswamy V. Union Of India (Right To Privacy Case)-An Analysis .....	71
3.7.1.1	Freedom under Article 19 and Article 21-An Interface.....	72
3.7.1.2	Ordered Liberty as an Aspect of Privacy .....	76
3.8	PRIVACY JUDGEMENT AND MEDIA .....	80
3.9	CONTOURS OF RIGHT TO PRIVACY .....	85
3.10	PRIVACY CONCERN UNDER STATUTES .....	86
3.10.1	Privacy in Family Relations.....	87

3.10.2	Privacy Concern of Sexually Abused Victims.....	91
3.10.3	Arrested Persons and Privacy .....	92
3.10.4	Privacy in Information shared .....	92
3.10.5	Privacy in Messages.....	93
3.10.6	Privacy in Information Shared.....	93
3.10.7	Privacy and Religion.....	94
3.10.8	Privacy and Political Right .....	94
3.11	PRIVACY PROTECTION UNDER DOCTRINE OF BREACH OF CONFIDENCE .....	95
3.11.1	REMOULDING DOCTRINE OF BREACH OF CONFIDENCE.....	98
3.11.2	Transformation from Confidential Information to Private Information .....	102
3.11.3	Personal Information under Doctrine of Confidence.....	103
3.12	TORT OF BREACH OF PRIVACY IN INDIA.....	105
3.13	RIGHT TO BE FORGOTTEN (RIGHT TO BE ERASED) .....	107
3.14	PAGE 3 CULTURES .....	109
3.15	CONCLUSION.....	110

---

**CHAPTER IV**  
**MEDIA FREEDOM VIS- A VIS - MEDIA RESTRAINTS –AMBIT AND**  
**CONCERNS ..... 112-158**

---

4.1	INTRODUCTION .....	112
4.2	CONCEPT OF MEDIA-BLURRING THE LINE BETWEEN ORDINARY MAN AND JOURNALISTS .....	113
4.3	MEDIA FREEDOM IN INDIA.....	115
4.4	FREEDOM OF VISUAL MEDIA- AN OVERVIEW .....	117
4.5	MEDIA FREEDOM -INTERNATIONAL PERSPECTIVES .....	122
4.5.1	Restriction of the Right in International Instruments .....	125
4.6	FREEDOM OF SPEECH AND EXPRESSION-THEORETICAL PERSPECTIVE.....	127
4.6.1	Theory of Self-Development .....	128
4.6.2	Theory of Discovery of Truth.....	129
4.6.3	Theory of Democratic Governance.....	130

4.7	MEDIA FREEDOM AND FREE SPEECH CLAIMS .....	131
4.8	MEDIA FREEDOM – CONSTITUTIONAL PERCEPTION .....	133
4.8.1	Specific Provision for Media – A Debate .....	134
4.8.2	Media Freedom-A Cluster of Rights.....	134
4.9	MEDIA TRIAL AND PRIVACY .....	139
4.10	MEDIA FREEDOM V. MEDIA RESTRAINTS .....	140
4.10.1	Prior Restraint –As a Limitation .....	141
4.11	SUPER INJUNCTIONS .....	147
4.12	RIGHT TO REPLY .....	150
4.13	INVASION - JUSTIFICATION.....	153
4.13.1	Consent .....	153
4.13.2	Waiver.....	154
4.13.3	Public Interest .....	154
4.14	CONCLUSION.....	157

---

## **CHAPTER V**

### **RIGHT TO KNOW, PUBLIC FIGURES AND PRIVACY RIGHT -A**

#### **BALANCING EXERCISE..... 159-215**

---

5.1	INTRODUCTION .....	159
5.2	RIGHT TO INFORMATION-AN OVERVIEW.....	161
5.3	RIGHT TO INFORMATION AND INTERNATIONAL TREATIES .....	163
5.4	REGIONAL CONVENTIONS.....	164
5.5	RIGHT TO INFORMATION -INDIAN PERSPECTIVE .....	166
5.6	RIGHT TO INFORMATION AND RIGHT TO PRIVACY-A CHALLENGE TO MEDIA .....	170
5.7	PUBLIC INTEREST AS LIMITATION ON PRIVACY .....	176
5.8	‘PUBLIC DOMAIN’ -AS LIMITATION .....	179
5.9	TESTS TO BALANCE TWO CONFLICTING INTERESTS.....	181
5.9.1	Clear and Present Danger Test.....	182
5.9.2	Proportionality Test .....	183
5.10	PUBLIC FIGURES AND PRIVACY .....	185
5.10.1	Public Figures And Paparazzi.....	190
5.10.2	Public Figures and Galella Doctrine .....	191

5.10.3	Voluntary Public Figures .....	193
5.10.4	Involuntary Public Figures.....	193
5.11	PRIVACY IN PUBLIC PLACES.....	194
5.11.1	Nature of Place.....	196
5.11.2	Nature of Activity .....	197
5.11.3	Mode of Obtaining Information.....	197
5.12	NEWSWORTHINESS, PUBLIC INTEREST& IN THE INTEREST OF PUBLIC .....	199
5.13	PRIVACY RIGHT AND PUBLICITY RIGHT .....	203
5.13.1	The Philosophical Basis of Publicity Right .....	204
5.13.2	The Healan Doctrine-A Landmark Step .....	204
5.13.3	Publicity Right under English Law .....	205
5.13.4	Publicity Right in India.....	206
5.14	STING JOURNALS AND PRIVACY–NEED FOR LEGAL FRAMEWORK .....	208
5.14.1	Sting Operation-- Cases and Analysis .....	209
5.15	CONCLUSION.....	214

---

**CHAPTER 6**  
**RIGHT TO PRIVACY-A COMPARATIVE PERSPECTIVE..... 216-256**

---

6.1	INTRODUCTION .....	216
6.2	PRIVACY PROTECTION IN UNITED KINGDOM.....	217
6.2.1	Privacy and European Convention on Human Rights .....	219
6.2.2	Protection under Human Rights Act 1998.....	222
6.2.3	Dawn of Golden Age of Privacy in United Kingdom.....	224
6.3	PRIVACY PROTECTION IN UNITED STATE .....	225
6.3.1	Privacy Right and Constitutional Amendments.....	225
6.3.2	Tort of Invasion of Privacy .....	230
6.3.2.1	Intrusion Upon Seclusion.....	232
6.3.2.2	Appropriation of Name or Likeness.....	233
6.3.2.3	Publication of Private Embarrassing Facts .....	234
6.3.2.4	Publicity Placing one in a False light.....	236
6.4	PRIVACY PROTECTION IN NEW ZEALAND.....	237

6.4.1	Media Freedom and Privacy Right .....	137
6.4.2	Tort of Invasion of Privacy under Common Law in New Zealand.....	240
6.4.3	Privacy Right in Broadcast Media .....	246
6.5	PRIVACY PROTECTION IN AUSTRALIA .....	248
6.5.1	Freedom of expression in Australia .....	248
6.5.2	Implied freedom of Political Communication .....	249
6.5.3	Privacy Law in Australia .....	249
6.5.4	Intrusions and its Prevention.....	250
6.5.4.1	Territorial Intrusion.....	250
6.5.4.2	Electronic intrusion .....	251
6.5.5	Remedy for Disclosure of Private Facts in Australia.....	251
6.5.5.1	Action for Breach of Confidence .....	251
6.5.5.2	The Tort of Defamation .....	251
6.6	Media Content Regulation in Australia .....	252
6.7	Balancing Freedom of Expression, Privacy and Media in Australia.....	253
6.8	CONCLUSION.....	254

---

**CHAPTER -VII**  
**REGULATION OF VISUAL MEDIA WITH SPECIAL REFERENCE TO PRIVACY RIGHT .....** **257-305**

---

7.1	INTRODUCTION .....	257
7.2	VISUAL MEDIA-NEED FOR ETHICS .....	259
7.3	COMMITTEES IN INDIA FOR REGULATION OF MEDIA .....	261
7.3.1	Vergheze Committee (1978-79 .....	261
7.3.2	Chanda Committee (1964-66.....	262
7.3.3	P.C.Joshi Committee (1984-85 .....	263
7.3.4	Bachhawat Committee (1988.....	263
7.3.5	First Press Commission(1952-54.....	263
7.3.6	F.S.Nariman Committee Report .....	264
7.4	JUDICIARY AND MEDIA REGULATION.....	265
7.5	KINDS OF REGULATION .....	268
7.5.1	Self-Regulation .....	268
7.5.2	Co-Regulation.....	269



7.5.3	Statutory regulation.....	269
7.6	LEGAL FRAMEWORK FOR REGULATING THE MEDIA WITH SPECIAL REFERENCE TO PRIVACY RIGHT .....	270
7.6.1	Cable Television Networks (Regulation) Act, 1995.....	271
7.6.2	Prasar Bharati (Broadcasting Corporation of India) Act, 1990 .....	272
7.7	MEDIA REGULATION - RECENT DEVELOPMENTS .....	273
7.7.1	National Consultation on Media Laws, 2014 .....	273
7.7.2	Report of the Group of Experts on Privacy (Shah Committee), 2012.....	275
7.7.3	The Communications Convergence Bill, 2001 .....	278
7.7.4	The Broadcasting Services Regulation Bill, 2007 .....	279
7.7.5	Self-Regulation Guidelines for the Broadcasting Sector, Draft 2008 .....	282
7.7.6	Indian Privacy Code 2018.....	285
7.8	AUDIO-VIDEO RECORDING- REGULATION .....	286
7.9	REGULATORY BODIES IN INDIA .....	289
7.9.1	Broadcast Content Complaints Council (BCCC) .....	289
7.9.2	News Broadcasters Association (NBA).....	291
7.9.3	Electronic Media Monitoring Centre (EMMC) .....	292
7.10	JOURNALISTS NORMS AND PRIVACY.....	293
7.10.1	National Integration Council Code of Conduct for the Media, 1962.....	293
7.10.2	Code of Ethics by International Public Relations Association at Athens, 1965 .....	293
7.10.3	Code of Ethics for Broadcasters, 1969 .....	294
7.10.4	Parliament Code of Ethics, 1976 .....	294
7.10.5	International Code of Ethics,1991 .....	294
7.11	RIGHT TO PRIVACY BILL (DRAFT) AN ANALYSIS .....	295
7.11.1	Privacy Principles .....	300
7.12	CONCLUSION.....	304

---

**CHAPTER-8**  
**CONCLUSION AND SUGGESTIONS ..... 306-328**

---

**BIBLIOGRAPHY .....i-xviii**

Articles ..... i-iv

Books .....iv-viii

Dictionaries ..... viii

News Paper Reports ..... viii

Reports ..... ix

International Legal Instruments .....x

Indian Legislations ..... xi

Other Foreign Legislations ..... xiv

Websites ..... xvi

**APPENDIX**

Articles Published ..... xviii

## LIST OF ABBREVIATIONS

&	and
§	section
¶	paragraph
abb.N.Cas.	Abbott's New Cases
AC	Appeal Cases
ACHPR	African Charter on Human and People's Rights
ACHR	American Convention on Human Rights
ALJ	Allahabad Law Journal
All ER	All England Law Reports
ALR	Australian Law Reports
ALR	Australian Law Review
AM. BUS. L. J.	American Business Law Journal
AM.J.INT'L.L.	American Journal Of International Law
AM.LAW INST	American Law Institute
ART	Article
AUK.U.L.REV.	Auckland University Law Review
AWR	Allahabad Weekly Reporter
C.P	Common Plea
CA	Court of Appeal
CAL.L.REV.	California Law Review
CAMB. L. J.	Cambridge Law Journal
CAN.L.REV.	Canterbury Law Review.
Cir	Circuit
CIC	Central Information Commission
CLR	Commonwealth Law Reports
CODE.CRI.PROC	Code of Criminal Procedure
COLUM.L.REV.	Columbia Law Review

CONN. J. OF INTER. LAW	Connecticut Journal Of International. Law
Corp.	Corporation
C.R.P	Civil Revision Petition
D&R	Decisions and Reports of the European Commission of Human Rights
DCR	District Court Report
DEL.L.REV.	Delhi Law Review
DLT	Delhi Law Times
DUK.J.OF CONST. L.& PUB. POL.	Duke Journal of Constitutional Law & Public Policy Sidebar
ECHR	European Convention On Human Rights
ECO.POL.W	Economic and Political Weekly
Ed.	Edition
EDS	Editors
EHRR	European Human Rights Reports
EMLR	Entertainment and Media Law Reports
Eng. Rep	English Reports
ER	English Reports
EWCA	England and Wales Court of Appeal
EWCA.Civ.	England and Wales Court of Appeal Civil
FLR	Federal Law Reports
GEO.L.REV.	Georgia Law Review
H.C	High Court
HARV.L.REV	Harvard Law Review
HAST.L.J.	Hastings Law Journal
HL	House of Lords
HCA	High Court (Australia)
HRNZ	Human Rights of New Zealand
I.A	

Id	ibid
ILI	Indian Law Institute
ILR	Indian Law Reports
Inc	Incorporation
INT. L.& POL.	International Law and Politics
IOWA L. REV	Iowa Law Review
IPR	Intellectual Property Reports
J.SOC.SCI	Journal of Social Science
JT	Judgement Today
JILI	Journal of Indian Law Institute
IND. L. INST.	Indian Law Institute
K.B	Kings Bench
L & CONT. PROB.	Law and Contemporary Problems
L & Phil.	Law and Philosophy
L.Ed	Lawyers' Edition
L.Q.REV.	Law Quarterly Review
Mah.L.J	Maharashtra Law Journal
MICH.L.REV	Michigan Law Review
Mo.App.E.D.	Missouri Appeal Eastern District
MOD.L.REV.	Modern Law Review
N.C	National Commission
NSWLR	New South Wales Law Reports
N.W.2d	North Western Reporter second series
N.W.P.H.C.Rep	North-West Provinces High Court Reports
N.Y.S.2d	New York Supplement Second series
N.Y.Ct.C.P.	New York Court Civil Practice
N.Y.U.J	New York University Journal
N.Y.U.L.REV.	New York University Review
NY.L.REV.	New York Law Review
NZAR	New Zealand Administrative Reports

NZLR	New Zealand Law Reports
PCC	Privacy Complaint Commission
PHIL & PUB. AFF.	Philosophy and Public Affairs
Phila	Philadelphia
Qd R	Queensland Reports
REV. LIT.	Review of Litigation
S.C.L.(1Nott &McC)	Santa Clara Law Nott & Maccard
S.D.A.,N.W.P.Rep.	Sardar Diwani Adalat North Western Provinces Reporter
SC	Supreme Court
SCC	Supreme Court Cases
SET.H.REV.	Seton Hall Law Review.
STAN. L. REV.	Stanford Law Review
SUP.CT.REV.	Supreme Court Review
SUPP	Supplement
TLR	Times Law Reports
U.Penn.L.Rev.	University of Pennsylvania Law .Review
U.S	United States
UCLA L. REV.	University of California Law Review
UKSC	United Kingdom Supreme Court
UNESCO	United Nations Educational Scientific and Cultural Organisation
U.OF PENN. L.REV	University Of Pennsylvania Law Review
v.	Versus.
Vol	Volume
Vt	Vermont
WCR	Wales Court Reports
WEST.AUSTR.L.REV.	Western Australian Law Review
WIS.L.REV.	Wisdom Law Review
WLR	Weekly Law Reporter
WM. & MARY BILL RTS. J.	William & Mar Bill of Rights Journal

W.P.(C)

Writ Petition Civil

W.P.(CrI.)

Writ Petition Criminal

W.P.(C)

Writ Petition Civil

YALE.L.J.

Yale Law Journal

## TABLE OF CASES

A	
<i>Australian Broadcasting Corporation v. Lenah Game Meats</i> [2001]185 ALR	223
<i>A v.B (a company)</i> (2002) All.E.R.545	98,100, 154,189
<i>A.D. Sharma v. Municipal Corporation Delhi</i> 2013 Indlaw CIC	174
<i>A.G v. Levellor Magazine Ltd</i> [1979] A.C.440	147
<i>A.K.Gopalan case</i> AIR 1950 SC 27	71,73,77
<i>A-G. v. Guardian Newspapers LTD</i> (No.2)[1990] 1 AC 109,(1983)3 All.E.R. 545(HL)	97,101, 112,131
<i>A-G. v. Guardian Newspapers LTD</i> (1988)3 All.E.R. 545(HL)	98
<i>Ahmed and others v. United Kingdom</i> , 2 September 1998, Application no. 22954/93	126
<i>Akshaya Creations v. Muthulakshmi C.R.P(PD)</i> Nos.3943 and 3944 of 2012	145
<i>Amar Nath Sehgal v. Union of India</i> (2002) 2 Raj (Del) 248	207
<i>Amar Singh v. Union of India</i> (2011) 7 SCC 69	149,268
<i>Aniruddha Bahal v. State</i> 172(2010) DLT 269	210
<i>Anuj Garg V. Hotel Association of India</i> (2008) 3 SCC1	81
<i>Arnold v. King</i> (1914) 41 I.A.149	134
<i>Attorney General v. Gardian New papers</i> (1987)WLR 776	168
<i>Attorney General v. Times</i> (1973) 3 All E. R. 54	139
<i>Australian Council Television Property Ltd v. The Common wealth</i> (1992) 177 CLR 106	249
<i>Baldev Singh Gandhi v. State of Punjab</i> (2002) 3 SCC 667	138
B	
<i>Ballantyne and Davidson vs. Canada</i> , Communication No.385/1989.31 March 1993	125
<i>Time Inc.</i> 348 Mo.1199159 S.W.2d 291 1942	233
<i>Barbrick v.Vopper</i> 149 L.Ed.2d.787 (2000)	233
<i>Based on The News Item Uploaded on the Website of News App v. The State of Bihar</i> Civil Writ Jurisdiction case No.11689 of 2018	85



<i>Beaucharnais v. Illinois</i> , 343 US 250 (1952)	199
<i>Bennett Coleman &amp; Co. v. Union of India</i> (1972) 2 SCC 788:AIR 1973 SC 783	137,168
<i>Bhabani Prasad Jena v. Orissa State Commission for Women</i> (2011) 7 SCC	83
<i>Bhagwan Das v. Parmeshwar</i> AIR 1971 AWR (H.C)	58
<i>Bijoy Das v. State of West Bengal</i> 2017 SCC Online Cal 417	88,89
<i>Bohra Tarachand v. Must.Rayazi Begum</i> AIR 1923 All.404	57
<i>Bonnard v. Periman</i> (1891)2 Ch 269 (CA)	
<i>Bowers v. Hardwick</i> 478 U.S. 186(1986)	229
<i>Boyd v. United States</i> , 116 US 616(1886)	63,228
<i>Brady v. U.K.</i> (1997) 90 D & R 45: (1997) 24 EHRR CD 38	221
<i>Brahmanand V. Lala Jagdish Prasad</i> AIR 1969 AWR (H.C) 111	57
<i>Bridges v. Californis</i> (1911) 86 L.Ed 192	139
<i>Brij Bhushan v. State of Delhi</i> AIR 1950 SC 129	135,145
<i>Brown v. Associated Newspapers</i> (2007)EWCA Civ.295	198
<i>British Steel Corporation v. Granada Television Ltd.</i> 1981 1All.E.R.417(CA)	168
<b>C</b>	
<i>Campbell v. MGN</i> (2004) 2 All E R 995 (HL), [2004]UKHL 22, (2003) 1 All ER 224 (CA)	98,102,104, 144,183,189, 197,223
<i>Carr v. News Group Newspapers Ltd.</i> [2005] EWHC 971(QB)	
<i>Cassidy v. American Broadcasting Co.</i> 377N.E.2d 126 (III App.1978)	233
<i>Castroll Australia Property Ltd. v. Emtech Associates Property Ltd</i> (1980) 33 ALR	252
<i>Channing Arnold v. Emperor</i> AIR 1914 PC	134
<i>Charles Sobraj v. Supdt. Central Jail</i> (1978) 4 SCC	75
<i>Chintaman Rao v. M.P.</i> 759S.C.R (1950)	142
<i>Church of Scientology v. Woodward</i> (1982) 154 CLR 25	249
<i>Citizens United v. Federal Election Commission</i> 558 U.S.310 (2010)	115

<i>Coco v R.</i> (1994)179 CLR 427	250
<i>Coco v. AN Clark (England) Ltd</i> [1969]RPC414	96
<i>Common Cause (A Registered Society) v. Union of India</i> , Writ Petition (Civil)No. 963/2013	266
<i>Cook v. Ward</i> (1830)6 Bing 409, 130 ER 1338	154
<i>Court on Its Own Motion v. State</i> 2008(151) DLT 695	209
<i>Cox Board Corpn. v. Cohn</i> 420 U.S.469(1975)	226
<i>CPIO, Supreme Court of India v. Subhash Chandra Agarwal</i> (1993) 4 SCC 441	173
<i>Creation Records Ltd. v. News Group Newspapers Ltd.</i> 1997 EMLR 444	107
<b>D</b>	
<i>Dennis v. United States</i> 341,U S 494	129
<i>Derbyshire County Council v Times newspapers Ltd</i> [1993] AC 534 : (1993) 1 All E.R	143
<i>Destruction of public &amp; private properties v. State of A.P.</i> (2009) 5 SCC 212	264,266
<i>Dietman v. Time, Inc</i> ,284 F Supp 925, 930 (1968)	187
<i>Dinesh@Buddha v. State of Rajasthan</i> ,(2006) 3 SCC 771	88
<i>Dinesh Trivedi v. Union of India</i> (1997)4 SCC 306	189
<i>District Registrar and Collector, Hyderabad v. Canara Bank</i> (2005)1 SCC 496	69
<i>Douglas v. Hello!</i> [ 2000]EWCA Civ 353: (2001) 2All.E.R.289 (CA):[2001] QB 967	41,97,99,184
<i>Douglas v.Hello(No.2) Douglas II</i> [2005]3 WCR	
<i>Douglas v. Hello(No.2) Douglas II</i> [2005]3 WCR (2007) 4All.E.R. 545	189
<i>Douglas v. Hello(No.3)</i> [2003] EWHC 55 (Ch.)	100,103
<i>Duff v. Communicado Ltd</i> [1990]2 NZLR 89 (HR)	245
<i>Dutchess of Argyll v. Duke of Argyll</i> [1967]1Ch 302	41
<i>DwarakadasSrinivas v. The Sholapur Spinning &amp; weaving Co.Ltd</i> (1954)S.C.R.674	142
<b>E</b>	
<i>Earl Spencer v. United Kingdom</i> (1998) 25 EHRR CD 105	221

Engman v South western Bell Telephone Co. 591 S. W.2d 78(Moapp.W.D.1979)	233
<i>Emcorp Property Ltd v. Australian Broadcasting Corpn</i> [1988] 2 Qd R169	250
<i>Esso Australia Resources Ltd. v. Plowman</i> (1995) 128 ALR 391	
Exparte Jackson, 96 U.S 727(1877)	227
<i>Express News paper (P) Ltd. V. Union of India</i> AIR 1958 SC 578: 1959 SCR 12	117,136,145
<i>Express News papers (Pvt.)Ltd v. Union of India</i> AIR 1950 SC 129	137,142
<b>F</b>	
<i>Fist National Bank of Boston v. Bellotti</i> 435 U.S. 801	114
<i>Folconer v. Australian Broadcasting Corpn</i> (1991) 22 IPR 2015	251
<i>Florida Star v. B.J.F.</i> 491 U.S.524(1989)	226
<i>Francis Corale Mullin v. Union Territory of Delhi</i> AIR 1981 SC 746	
<b>G</b>	
<i>Galella v. Onasis</i> , 353.F.Supp196(S.D.N.Y.1972),487 F.2d.986(2d Cir.1973)	191,192
<i>Galella v. Onasis II</i> ,533.F.Supp.1076(S.D.N.Y.1982)	191,192
<i>Ganga Pershad v. Salik Pershad</i> S.D.A., N.W.P.Rep.1862, Vol.II.217	56
<i>Garrison v. Lousiana</i> 13 L Ed 2d 125: 379 US 64(1964)	187
<i>Gilbert v. Star Newspaper Co.Ltd.</i> (1894) 51 TLR	107
<i>Girish Ramachandra Deshpanday v. Central Information Commissioner</i> (2013) 1 SCC 212	174
<i>Gobind v. State of M.P</i> AIR 1975 SC 1378, (1975) 2 SCC 140	42,61,66,67, 70,76,275
<i>Gokul Prasad v Radho</i> ILR 10 All (1888)	56
<i>Google Inc. v. Judith Vidal Hall</i> [2015]EWCA.Civ.311	224,255
<i>GoorDassv.ManoharDass</i> ,N.W.P.H.C.Rep.1867,269.,	
<i>Griswold v. Connecticut</i> 381 U.S.479(1965)	70,228
<i>Gurudas v. Rasaranjan</i> AIR 2006 SC 3275	142

<b>H</b>	
<i>Haelan Laboratories v. Topps Chewin Gum (Healan)</i> 346 US 816 (1953)	204
<i>Hamberger v. Eastman</i> 106 N.H.107, 206 A.2D 239 (1964)	
<i>Handyside vs. United Kingdom</i> , Dec 1976, Application No. 5493/72, 1 EHRR 737	124
<i>Hinsa Virodhak Sangh v. Mirzapur Moti Kuresh Jamat</i> (2008) 5 SCC 33	84
<i>Hoffman v. Capital Cities /ABC Inc.</i> 255 F.3d 1180	208
<i>Holman v. Central Arkansas Broadcasting</i> , 610 F 2d 542 (8 <sup>th</sup> Cir. 1979)	233
<i>Hosking v. Runtig</i> [2005] 1 NZLR 1 (CA)	245
<i>Howard v. Des Moines Register &amp; Tribunal Co.</i> ; 283. NW 2d. 289	194
<i>Hussainara Khatoon v. State of Bihar</i> (1980) 1 SCC 81	75
<b>I</b>	
<i>ICC Development (International) Ltd. v/ Arvee Enterprises</i> (2003) 26 PTC 245	206
<i>I.R. Coelho v. State of Tamil Nadu</i> , (2007) 2 SCC 1	133
<i>Indian Express Newspapers (Bombay) Pvt. Ltd. &amp; Others v. Union of India</i> AIR 1986 SC 515: (1985) 1 SCC 641 : (1985) 2 SCR 287	127,133,137
<i>Indian &amp; Eastern Newspapers Society, New Delhi v. Commissioner of Income Tax, New Delhi</i> AIR 1979 SC 1960: (1979) 4 SCC 248	172
<i>Indira Jaising v. Union of India</i> , 1988 Mah. L.J. 745	172,260
<i>Indraprastha People v. Union of India</i> WP (C) No.1200/2011 (Del. HC)	265
<i>Indu Jain v. Forbes Inc.</i> 2007 SCC Online Del 1424	106,143,146, 147,203
<i>Intial Services Ltd v. Putorill</i> [1968] 1 QB 396	252
<i>Irvine v. Talksport Ltd</i> (2003) 2 All.E.R. 881 (CA)	205
<b>J</b>	
<i>Jayalakshmi Jaitly v. Union of India</i> 99 (2002) DLT 448	209
<i>Justice K. Puttaswamy v. Union of India</i> (2017) 10 SCC 1 (Privacy case)	3,14,36,46,50, 52,54,71,72,

	73,76,83,146
<i>Justice K.S.Puttaswamy v. Union of India</i> , W.P.(C) No. 494 of 2012.(Adhar case)	80,185
<b>K</b>	
<i>Kalanidhi Maran v. Aditya Sinha</i> , 2013 Indlaw MAD 1422	201
<i>Kanimozhi Karunanidhi v. Thiru P. Varadarajan</i> , O.A.No.871 of 2014	146
<i>Katz v. United States</i> 389 U.S.347 (1967)	228
<i>Kay v.Robertson</i> (1991)19IPR147:[1990]EWCACiv.21	97,220,242
<i>Kedar Nath Singh v. State of Bihar</i> AIR 1950 SC 124	138
<i>Keith Jacobson vs. United States</i> 503 US 540	210
<i>Kesavanantha Bharati v. State of Kerala</i> (1973) 4 SCC 225	77,79
<i>Keshao Sahu v. Dasarath Sahu</i> AIR 1961 Ori. 154	58
<i>KharakSinghv.StateofU.P.AIR1963SC1295:1964SCR(1)332</i>	42,61,64,66, 70,71,201,275
<i>Khuja v Times News papers Limited</i> [2017]UKSC 49	91
<i>Khushwant Singh v. Maneka Gandhi</i> , AIR 2002 Del 58	147
<b>L</b>	
<i>L v. G</i> [2002] DCR 234	243
<i>Lachman Prasad v. Jamna Prasad</i> , Weekly Notes, 1887,295	57
<i>Lampe v. Australian Broadcasting Corporation</i> (1997) 189 CLR 520	249
<i>Lange v. Australian Broadcasting Corp.</i> (1997) 189 CLR 520	254
<i>Lawrence v. Texas</i> 539 U.S. 558 (2003)	229
<i>Life Insurance Corporation of India v. Manubhai D Shah</i> AIR 1993 SC 171	188
<i>Lillu @ Rajesh v. State of Haryana</i> (2013) 14 SCC 643	51,87,152
<i>Lincolnhunt Australia Pty Ltd. v. Willesee case</i> (1980) 4 NSWLR 457	250
<i>Lord Browne v. Associated Newspapers Ltd.</i> [2007] EWCA Civ.295	154
<b>M</b>	
<i>M.P.Sharma v. Satish Chandra</i> AIR 1954 SC 300	62,64,71
<i>Malak Singh v. State of P &amp; H</i> AIR 1981 SC 760, (1981) 1 SCC 420	42,52

<i>Maneka Gandhi v. Union of India</i> AIR 1978 SC 597	71,73,127
<i>Manisha Koirala v. Shashilal N</i> (2003) 2 BomCR 136	106
<i>Marion Manola v. Stevens &amp; Myers</i> , N.Y.S.Ct. June 17(1890)	
<i>Mata Prasad v. Behari Lal</i> , Unreported S.A.No.8 of 1886.,	
<i>Mc Kenneth v. Ash</i> [2005]40 ECHR1	196
<i>Media Rights Agenda vs. Nigeria</i> , 31 October 1998, Communication Nos. 105/93, 130/94,128/94 and 152/96	124
<i>Maryrand v. Richardson</i> 10 S.C.L(1N0tt & McC) 347(S.C.1818)	199
<i>Media watch India (A Regd. Society) v. Union of India</i> Writ Petition (Civil) No. 1024/201391(2001)DLT 110	166
<i>Miami Herald Publishing v. Tornillo</i> 418 U.S.241 (1974)	151,152
<i>Mills v. Kingsport Times-News</i> , D.C.W.Va., 475 F. Supp.1005,1009	187
<i>Ministry of Transport v. Noort</i> [1992]3 NZLR 260	
<i>Mohamed Ajmal Mohammad Amir Kasab v. State of Maharashtra</i> AIR 2012 SC 3565	267
<i>Moonen v. Film and Literature Board of Review</i> [2000]2NZLR 9	244
<i>Mother Diary &amp; Food Processing Ltd. v. Zee Telefilms</i> (IA 8185/2003 in Suit No. 1543/2003, dated 24-01-2005	258
<i>MSN Sharma v. Srikrishnan Sharma</i> AIR 1950 SC 395	134
<i>Mukong v. Cameroon</i> , 21 July 1994, Communication.No.458/1991	125,126
<i>Munn v. Illinois</i> 94 US 113 (1876)	65
<i>Murray v. Big Pictures(UK)Ltd.</i> [2008] 3 WLR 1360: EWCA.Civ.446[2009]	198,205,224
<i>Murray v. Express News papers, Plc.</i> EWCACIV. 446 (209)	41
<b>N</b>	
<i>NASA v. Nelson</i> 562 U. S. 134 (2011)	230
<i>National Legal Service Authority v. Union of India</i> (2014) 5 SCC 438	83
<i>Nationwide News Property Ltd. v. Wills</i> (1992) 177 CLR 1	249
<i>Navtej Singh Johar v. Union of India</i> , W.P(Crl.) No. 76 of 2016	80
<i>Near v. Minnesota</i> , 283 U.S.697 (1913)	160

<i>Nebraska Press Association v. Stuart</i> , 427 U.S.539 (1976)	141
<i>New York Times co. v. United States</i> 403 U.S.713	160
<i>Nihal Chand v. Mt.Bhagwan Dei</i> AIR 1935 All.1002	57
<i>Nipun Saxena v. Union of India</i> 2018 SCC OnLine SC 2772	89
<i>Nixon v. Administrator of General Service</i> 433 U.S. 425 (1977)	230
<i>Nuthimull v. Zuka Oollah Beg.S.D.A., N.W.P.Rep.</i> 1855, 92,	56
<b>O</b>	
<i>Odyssey Communications Pvt. Ltd. v. The LokvidyanSanghathan</i> AIR 1986 SC 1642	122,260
<i>Olga Tellis v. Bombay Muncipal Corporation</i> (1985)3 SCC 545	75
<i>Olmstead v. United States</i> 277 U.S. 438 (1928)	228
<b>P</b>	
<i>P v. D &amp; Independent News Ltd</i> [ 200] 2 NZLR 91	242
<i>Paramananda Katarav. Union of India</i> (1989) 4 SCC 286	75
<i>Pavesich v. New England Insurance Co.</i> ,122 Ga.190 (Ga. 1904)	186
<i>Peck v. U.K</i> (2003) 36 EHRR 41; [2003] EMLR 287	181
<i>Pennekamp v. Florida</i> (1946)328 U.S. 331 (365)	140
<i>People’s Union for Civil Liberties v. Union of India</i> 1997) 1 SCC 301	9
<i>Peter Semayne v. Richard Gresham</i> 77 ER 194	217,225
<i>Phoolan Devi v. Shekhar Kapoor</i> (1995) DLT (57) 154	187,207
<i>PJS v. News Group Newspapers Ltd</i> [2016]UK SC 26	149
<i>Pollard v. Photographic Co.</i> 40 Ch,D 345	
<i>Porco v. Lifetime Entertainment Services, LLC</i> 1, 1 984 N.Y.S.2d 457 (App. Div. 3d Dep’t 2014)	144
<i>Prabha Dutt v. Union of India</i> (1982) 1 SCC 1: AIR 1982 SC 6	170
<i>Prince Albert v. Strange</i> (1849) 1 Mac & G 625: [1849] EWHC Ch J 20	96,217
<i>PUCL v. Union of India</i> (1997) 1 SCC 30	51

<b>R</b>	
<i>R v. Big M Drug Mart Ltd</i> , [1985] 1 SCR 295	125
<i>R v. Dean of Asaph</i> (1784)3 TR 428	145
<i>R v. Goldstein</i> (1983) 1 WLR 151	183
<i>R v. Loosely</i> [2001]UKHL 53	213
<i>R v. Mahanga</i> [2001] 1NZLR 641(CA)	245
<i>R v. Philip Oliver</i> [2011] EWCA Crim 3114	109
<i>R. v. Sang</i> (1980)AC 402	213
<i>R.C.Cooper v. Union of India</i> , (1970) 1 SCC 248	71,73
<i>R.K.Anand v. Registrar, Delhi High Court</i> (2009) 8 SCC 106	211
<i>R.Rajagopal v. State of Tamil Nadu</i> AIR 1995 SC 264, 1994 SCC(6) 632: JT 1994 (b) 514: 1994 SCALE(4)494	67,106,147, 188,201,202
<i>Rajad Prasasd Jain v. CBI</i> (2014)6SCC 495	213
<i>Rajagopal v. J Jayalalitha</i> (2006) 2 MLJ 689	146
<i>Rajendra Sail v. M.P.High Court Bar Association</i> (2005) 6 SCC 109	6
<i>Rajiv Kumar v. State of U.P</i> Writ Appeal No. 53425 of 2007	109
<i>Ram Baksh v. Ram Sookh</i> N.W.P.H.C.Rep.1868, 253	56
<i>Ram Jethmalani v. Union of India</i> (2001) 8 SCC 1	106
<i>Ramlila Maidan Incident, re</i> (2012) 5 SCC 1	112,133
<i>Ratan N Tata v. Union of India</i> (2014) 1 SCC 93	295
<i>Re McAllister</i> [1990]NZAR 324	247
<i>Red Lion Broadcasting v. FCC</i> 395 U.S.367 (1969)	151
<i>Reliance Petrochemicals Ltd v. Proprietors of Indian Express News papers Bombay Pvt.Ltd</i> (1988) 4 SCC 592: AIR 1989 SC 190	144,167, 264,268
<i>Rex v.Cobbet</i> (1804)29 How.St.Tr.1	133
<i>Roe v.Wade</i> 410 U.S.113 (1973)	70,228
<i>Romesh Thapper v. The State of Madras</i> AIR 1950 SC 124 : 1950 SCR 594	112,126, 134,135
<i>Rosanova v. Playboy Enterprises.</i> , D.C.Ga., 411 F. Supp.440	187
<b>S</b>	
<i>S.P.Gupta v. Union of India</i> (1981) Supp SCC 87: AIR 1982 SC149	169,177



<i>S.Rangarajan v. P.Jagjivan Ram</i> (1989) 2 SCC 574	126,135,188
<i>Sahara India Real Estate Corpn. Ltd v. SEBI</i> (2012) 10 SCC 603	149,182
<i>Saibal Kumar v. B.K.Sen</i> AIR 1961 SC 633	139
<i>Sakal Papers(P) Ltd v. Union of India</i> AIR 1962 SC 305: 1962 SCR(3)842	136,201
<i>Sakshi v. Union of India &amp; others</i> (2004) 5 SCC 518	88
<i>Sanjeev Gupta v. Ritu Gupta</i> First Appeal No. 296 of 2018	82
<i>Sanjoy Narayan v. High Court of Allahabad</i> (2011) 13 SCC 155	260
<i>Satwant Singh Sawhney v. D Ramarathnam APO</i> (1969) 3 SCR 525	75
<i>Schenck v. United States</i> 249 U.S.47(1919)	
<i>Schering Chemicals v.Falkman</i> (1981)2AII.E.R.32(330,347)CA	146
<i>Scott v. Scott</i> (1911) All ER 1	139,147
<i>Secretary General, Supreme Court of India v. Subhash Chandra Agarwal</i> , AIR 2010 Delhi 159	169
<i>Selvi v. State of Karnataka</i> (2010) 7 SCC 263	
<i>Shashank Shekhar Mishra v. Ajay Gupta</i> [2011] 184 DLT 675	147
<i>Sheikh ZahirMukhtar v. State of Maharashtra</i> 2016SCCOnlineBom 260	84
<i>Sheela Barse v. State of Maharashtra</i> (1983) 2 SCC 96	75
<i>Sheonath Rai v. Ali Hussain</i> ALJ(1904) 118	57
<i>Sherman v. United States</i> 356 US 359(1958)	212
<i>Smith v. Baker</i> [1891] A.C. 325	153
<i>Sorrell v. United States</i> 287 US 435(1932)	213
<i>Sri Vasunathan v. The Registrar</i> General Writ Petition No. 62038 of 2016	108
<i>State of Karnataka v. Puttaraja</i> AIR 2004 SC 433	88
<i>State of Karnataka v.Krishanappa</i> (2000) 10 SCC 743	87
<i>State of Madras v. V.G.Row</i> (1952) S.C.R. 597	141
<i>State of Maharashtra v. Madhukar Narayan Mardikar</i> (1991) 1 SCC 57	84
<i>State of Punjab v. Gurmit Singh</i> (1996) 2 SCC 384	88,90

<i>State of U.P. v Raj Narain</i> (1975) 4 SCC 428	169,176
<i>State of West Bengal v. Anwar Ali Sarkar</i> , AIR 1952 SCR 28	79
<i>Suchita Srivastava v. Chandigarh Administration</i> (2009) 9 SCC 1	81
<i>Sudhansu SekharSahoo v. State of Orissa</i> , (2002) 10 SCC 743	87
<i>Sunday Times v.UK</i> A 30 (1979)	180
<i>Sunil Batra v. Delhi Administration</i> (1976) 4 SCC 494	75
<i>Supreme Court Advocates on Record Association v. Union of India</i> .....(2016) 5 SCC 1	
<i>Supreme Court Advocates-on-Record Association v. Union Of India</i> 1993 (4) SCC 441	179
<i>Surya Prakash Khatri v. Madhu Trehan</i> 92 (2001) DLT 665 (FB)	6
<i>Swami Ramdev v. Juggernaut Books Pvt.Ltd</i> , CM(M) 556/2018	203
<b>T</b>	
<i>Talley Family v. National Business Review</i> (1991) 4 HRNZ 72	
<i>Terminiello v. Chicago</i> 337 US I(1949)	138
<i>Terry v. Persons unknown</i> (2010) FCR 659, 24:2010 EWHC 119(QB):2010 EMLR 16	148
<i>Thalappalam Secretary Co-operative Bank Ltd. v. State of Kerala</i> 2013 Indlaw SC 663	178
<i>The Secretary, Ministry Of Information &amp; Broadcasting v. Cricket Association of Bengal</i> (1995) 2 SCC 161	121,169,171, 177,265
<i>Theakson v. MGN</i> [2002] EWHC 137 (QB); [2002] EMLR 398	180
<i>Thorgeirson v. Iceland</i> , 25 <sup>th</sup> June 1992, Application No. 13778/88	126
<i>Time Inc. V. Hill</i> 17 L Ed 2d 456 :385 US 374(1967)	142
<i>Tolstoy Miloslavsky v. United Kingdom</i> , 13 July 1995, Application No. 18139/91	126
<i>Tucker v. News Media Ownership Ltd</i> [1986] 2 NZLR 716	241
<i>TV 3 Network services Ltd v. BSA</i> [1995] 2 NZLR 720	241,247
<b>U</b>	
<i>U.K. v. Heinemann Publishers Australia Pty Ltd.(Spycatcher case )</i> (1987) 8 NSWLR 341	252

<i>Union of India v. Association of Democratic Reforms and another</i> (2002) 5 SCC 294	179,189
<i>United States v. Miller</i> 425 US 435(1976)	70,229
<i>UPSC v. R K Jain</i> (W.P. NO. 1243/2011)	172,174,178
<b>V</b>	
<i>Van Hannover v. Germany</i> , Appn.No.59320/00,24 June 2004	
<i>Venables v. News Group Newspapers</i> (2001) 1All E.R. 908	100,144
<b>W</b>	
<i>Wainwright v. Home Office</i> (2003) 4 All E R 969 (HL)	98
<i>Wallingford v. National Beekeepers Association of New Zealand</i> [2001] NZAR 251	239
<i>Whalen v. Roe</i> 429 U.S.589 (1977)	230
<i>Widener v. Pacific Gas &amp; Elec.Co.</i> 75 Cal App 3d. 415,142: CAL RPTR.304, 313 (1977)	187
<i>Williams v. KCMo Broadcast Division Meredith Corp.</i> , 472 S.W.2d 1 (M.App.W.D )1971	234
<i>Winer v.U.K</i> (1986) 48 D&R 154	220
<i>Wolf v. Colorado</i> 1949)238 US 25	65
<b>X</b>	
<i>X v. Z Hospital</i> AIR 1999 SC 495	174
<b>Y</b>	
<i>Y.G.v. Jewish Hospital of St.Louis</i> 795 S.W.2d 488(Mo.App.E.D.1990)	235

# CHAPTER I

## INTRODUCTION

*Privacy Is Freedom, And Ergo To Kill*

*Privacy Is To Murder Man.*

-Justice V.R.Krishna Iyer, Freedom of Information (1990)

One's house is his castle. The man considers certain information so sacred that he wishes it not to fall in the public domain even though it may be true. The right to prevent others from encroaching into the tangible property has been recognized from times immemorial. Now the legal arena has started to confer recognition on the intangible property under privacy jurisprudence which includes one's feelings, thoughts, personal information etc. The modern technologies pose a threat to the privacy right of people and it is doubtful whether the current legal framework is adequate enough to protect the private life of the individual.

### 1.1. SCOPE OF THE STUDY

Modern privacy law began with Warren & Brandies' landmark article 'Right to Privacy' published in Harvard Law Review in 1890.<sup>1</sup> They argued that privacy right should be protected from unwanted intrusion by media under the law of tort as it injures the feelings and sentiments of a person.

---

<sup>1</sup> Warren & Brandies, *The Right to Privacy*, 4 HARV.L.REV.193 (1890).

Debates are going on regarding the parameters within which the personal life of the individuals should be protected from unwanted attention and disclosure to the public. The privacy right is a precious right which is essential for one's personal development, self-fulfilment and self-realization. The right to exclude others from one's personal sphere should be protected by privacy law. The infringement of privacy right ultimately affects one's dignified life which is guaranteed by the constitution. It may generate many complexes in him and may even lead to psychological problems. Therefore, the right to privacy is an essential component of the right to life. However, the exercise of this right is subject to certain restrictions: it can be used to prevent crime, to ensure order, morality, and health and also for the protection of other rights and the freedom of others.

The earlier protection to the home and property is now extended to ones' sentiments, solitude and feelings. Actually, privacy regime protects many aspects of an individuals' private or personal life. The early cases in many jurisdictions did not recognize the right to privacy in a useful manner and considered the matter under the law of defamation, trespass, nuisance etc., which was not adequate to address the issue in a fruitful manner.

The research topic of the thesis is relevant from both the national and the international perspective. The right to privacy has been recognized globally through several international and regional conventions such as UDHR, ICCPR, ECHR etc. All these conventions guarantee that the private life of a person should be secured and it should not be disturbed unnecessarily. Apart from this

almost all countries of the world have conceived and guaranteed the right to privacy in their constitutions either expressly or impliedly. The countries also have started to enact specific statutes for ensuring the privacy right.

In India though several judicial pronouncements discussed the right to privacy an effective steps was taken in the decision of *Justice K.Puttaswamy v. Union of India*<sup>2</sup> in which it had been given a constitutional status. The bench comprising nine judges gave a new dimension to the right by giving a proposition that the right to privacy is a fundamental right under the fabric of 'life and personal liberty' clause of Article 21 of the Constitution of India. The countries all over the globe are in the stage of formulating good data protection laws on the rationale that data which are of private in nature should be protected. India also should have an adequate privacy and data protection regime.

Today the visual media is intruding into the private life of the individuals and publishing information not of public importance but only to increase their TRP rating. At the same time it is to be noted that the role played by media in a democratic nation should be acknowledged.

Therefore, it is a contemporary issue that demands exploration to formulate proper legal framework for regulating the media from intruding into the privacy right. In this background the topic of the research is highly essential and relevant in the current scenario.

---

<sup>2</sup> (2017) 10 SCC 1.

## 1.2. CONCEPTUAL BACKGROUND

The word 'media' denotes all means of communication such as newspapers, radio and TV that provide the public with news, entertainment, etc., usually along with advertisements.<sup>3</sup> With the invention of television, it became very popular in society because of its attraction and influence. The impact of visual media is very much high when compared to that of print media.

The media plays a crucial role in society in many respects. It keeps the individuals and the society as a whole well informed. It is a potent weapon against the abuse of power and it acts as a check for the prevention of corruption.<sup>4</sup> The media should understand the popular feeling and give expression to it. It should also give attention to the desirable sentiments of the people and should fearlessly expose popular defects.<sup>5</sup>

Media is guaranteed the fundamental right to publish and inform the public about all matters that are of 'public interest' and 'public concern' under Art 19(1) (a) of the Constitution of India. As a corollary of this right, the citizens have the right to know or the right to information under Right to Information Act. All these rights have also been recognized by various international covenants such as Universal Declaration of Human Rights, 1948 (UDHR), International Covenants on Civil and Political Rights, 1966 (ICCPR), European Convention on Human Rights, 1950 (ECHR) etc.

---

<sup>3</sup> *Media*, WEBSTER'S NEW WORLD COLLEGE DICTIONARY (4th ed.2006).

<sup>4</sup> B.R.SHARMA, FREEDOM OF PRESS UNDER INDIAN CONSTITUTION (1993).

<sup>5</sup> *Id.*

Privacy right is the recognition of an individual's right to be let alone and also the right to enjoy his personal space and time without unlawful interference. In other words, it is the rightful claim of the individual to determine the extent to which he wishes to share himself with others and also to control the time, place and circumstances to communicate with others. The crisis comes at the point when freedom of speech and expression of media, right to information and right to privacy come in conflict with each other. In the contemporary world, balancing the privacy right, media freedom and the right to information is a matter of concern. In this context it is relevant to examine the ambit and concept of public interest, newsworthiness etc. because media challenges the legal action for violation of privacy right mainly on these grounds. The current legal framework fails to address all these issues. The present study tries to find out a solution to the problem of balancing all these rights.

This research work confines its study to visual media especially television as it has great impact on the society because of its sound and image, when compared to the print media. Also it analyses the role of regulatory bodies in regulating the visual media.

In the modern world there is a drastic change in the function and attitude of media in the dissemination of information. At present, to increase the TRP rate the journalists forget their duty to the society and pursue any method to gather "news". Moreover, with the invention of technologies, it has become very easy to capture the footages and images and broadcast it through visual media.



Today there are a large numbers of cable T.V. channels without sufficient regulatory frameworks.

In respect of the responsibility of media, the Hutchinson Report in the USA observed that the press should have responsibility to society. It should give an accurate, objective and balanced picture of the world. It should reflect the pluralistic character of the society and has to play a positive role in regulating crime, violence and social conflict. In other words, it should work for the public good.<sup>6</sup> The role of media is aptly highlighted by Delhi High Court in *Surya Prakash Khatri v. Madhu Trehan*,<sup>7</sup>

*The editor of a newspaper or a journal has a greater responsibility to guard against untruthful news and publications for the simple reason that his utterances have a far greater circulation and impact than the utterances of an individual and by reason of their appearing in print, they are likely to be believed by the ignorant.*<sup>8</sup>

Media is a social institution which takes its colour and ambit from the political, social and economic conditions of the society. The social responsibility theory which originated in the U.S. in the 20th century also explains press freedom in the present context. It arose on the background of the failure of free market place of ideas.<sup>9</sup> The theory demands that with the advent of other forms

<sup>6</sup> See generally, Y.K.D'SOUZA, FREEDOM OF PRESS, CONSTITUTION AND MEDIA RESPONSIBILITY (1st ed.1998).

<sup>7</sup> (2001) DLT 665 (FB) (the journal 'Wah India' published an article which questioned the attribute of the judgements in an indirect manner.); See also, *Rajendra Sail v. M.P. High Court Bar Association* (2005) 6 SCC 109 (the newspaper published a report under title 'Sail Terms High Court Decision in Niyogi murder case as Rubbish'. In this case the editor apologized).

<sup>8</sup> *Surya Prakash Khatri*, (2001) DLT 665 (FB) ¶ 23.

<sup>9</sup> See, J. S. MILL, ON LIBERTY(4<sup>TH</sup>ed.1913).

of media such as radio, films etc. the need for control has arisen. It is based on the rationale that since freedom carries with it obligations and enjoys a privileged status, the media is subjected to social responsibility.<sup>10</sup>

The Government drafted a new Privacy Bill, 2011 and subjected to amendments several times. However, the Government failed to introduce proper privacy legislation for India even though Governments in other countries had succeeded in enacting the law. The issue of balancing both the media freedom and the privacy right is not addressed properly. For print media, the Press Council of India is the regulatory authority which addresses the regulatory issues to a certain extent. But for visual media there is no proper and adequate mechanism to regulate the content of the programmes.

This thesis does not focus on the overall control of visual media, instead, it is concentrated on those aspects where the privacy right is in confrontation with visual media freedom and the right to information. The issues arising out of social media and internet are excluded from the purview of the exploration.

### **1.3. INVSION OF PRIVACY RIGHT-MEANING**

The purpose of the law is the administration of justice. It aims to implement the welfare of the people. The man aims happiness in conduct and he has some sort of interest in his action. In a society the interest of one individual may be in conflict with that of another. Therefore, it is impossible to enforce all interests and the law recognizes certain interests only. In other words, a legal right involves approval and enforcement of certain rights by the state. It imposes

---

<sup>10</sup> Y.K.D' SOUZ, *supra* note 6.

on other persons to respect others right. The privacy right involves prevention of others from encroaching into the private affairs of another which are not of public importance. The privacy right as a legal right imposes duty on others including the state not to interfere with the private life of others without any justification.<sup>11</sup>

The word 'invasion' generally connotes the idea that something which is incoming or spread of something which is usually hurtful.<sup>12</sup> It is an offensive and intentional interference with a person's seclusion or private affairs.<sup>13</sup> The invasion of the privacy right involves unjustified exploitation of one's personality and interference with the personal activities of another person.

Some of the instances of invasion of privacy right by the visual media are:-

- a. The use of hidden microphones and cameras for gathering information and is airing through visual media. The conduct of sting operation is an example for this. Here the legality of this practice by the media is questionable.
- b. Airing of live interviews and asking unfair questions infringing on privacy right during the interview.
- c. Persons caught up in emergencies or persons in circumstances of personal suffering or tragedy being interviewed without understanding their suffering or sentiments.
- d. Broadcasting the information about celebrities, without their consent, affecting their personal life.

---

<sup>11</sup> For detailed analysis, *see, infra*, Chapter 2 RIGHT TO PRIVACY-CONCEPT AND PERSPECTIVES

<sup>12</sup> *Invasion*, THE MERRIUM WEBSTERS DICTIONARY (10<sup>th</sup> ed.2009)

- e. Reporting the personal information of the victims of sexual offences which is humiliating and invasive.

Therefore, the invasion of the privacy takes several forms. There may be invasion into the body, the information, the communication among people etc.<sup>14</sup>

#### **1.4. MEDIA REGULATION -CHALLENGES**

So far as 'Control mechanism' is concerned, it faces a twofold task. First, the regulation of visual media should not result in the infringement of free speech principles. Secondly, the exercise of free speech and expression should not be an unbridled horse. In other words, the visual media should not infringe on other competing rights or interests. Today the visual media is not under proper regulation even though we have a multitude of Acts and regulations. The Supreme Court of India in *People's Union for Civil Liberties v. Union of India*<sup>15</sup> highlighted the need for regulation and in this background Indian Broadcasting Foundation (IBF) had formulated 'The Ministry of Information Broadcasting Self-Regulation Guidelines' for Broadcasting Sector, a draft version of 2008. In the draft version there are self regulation Guidelines, content codes and certification rules, principles, guidelines and ethical practices, which shall guide the Broadcasting Service Providers (BSP) in airing their programmes, sticking

---

<sup>14</sup> For detailed analysis *See, infra* Chapter 3, PROTECTION OF RIGHT TO PRIVACY- INDIAN PERSPECTIVE *see also*, RISHIKA TANEJA & SIDHANT KUMAR, PRIVACY LAW- PRINCIPLES, INJUNCTIONS AND COMPENSATION(1<sup>ST</sup> ed.2014).

<sup>15</sup> (1997) 1 SCC 301.

on to the programme code provided by Cable Television Networks (Regulation) Act, 1995.

Recently a Bill called The Communications Convergence Bill, 2001, has been placed before Parliament to regulate all form of communications under a single regulatory authority. Thereby, the Bill also proposes to repeal the now existing enactments such a Indian Telegraph Act, 1885, The Cable T.V. Networks Act, 1995, The Indian Wireless Telegraphy Act, 1933, The Telegraph Wires (Unlawful Possession) Act, 1997 etc. Therefore, the thesis also examines the extent to which the issue of neglecting the privacy right by media has been addressed by the Bill.

Another development in this area is the new Indian Privacy Code 2018 which seeks to protect the fundamental right to privacy of all natural persons and the personal data concerning them. However, it is not a comprehensive code in all respects. It is essential to examine the relevancy of the code in the context of the violation of privacy right. Therefore the regulation of visual media a challenging one as it involve balancing of individual interests and societal interests.

In this scenario the thesis raises the following research questions:-

1. Is it necessary to redefine the term 'visual media' so that common man can be included as a publisher within the purview of the term?
2. What is the permissible area within which the media can intrude into the private life of an individual?

3. Can a public figure claim right to privacy to the same extent as in the case of an ordinary person?
4. What should be the actual mechanism to balance the right to privacy, the right to information and media freedom in the contemporary period?
5. What should be the criteria to decide 'public interest' with special reference to protection of right to privacy?
6. Is the existing self-regulation sufficient to regulate the media?

### **1.5. HYPOTHESIS**

The study is focused on the hypothesis that-

- a. The existing legal framework is not adequate for the regulation of visual media from intruding into the privacy right of the individuals and it needs a good regulatory framework.
- b. The freedom of the media often comes in conflict with the privacy right of persons.

### **1.6. RESEARCH PROBLEM**

The visual media often transgresses its limits of freedom and reports matters relating to privacy. The visual media justifies its action citing the defence of public interest.

However, the Indian legal system has not given adequate attention to protect the privacy right which is now elevated to the status of fundamental right by the Supreme Court of India. Besides, the visual media is devoid of any kind of good and sufficient regulatory measures to prevent it from invading the

privacy right of the individuals. The above issue has been highlighted by the judiciary in its important decisions.<sup>16</sup>

The freedom of the visual media and the privacy right of the individuals are not exceptions to the principle that no right is absolute. For a better working of the democracy there should be a balance between these two rights. The present thesis mainly addresses the above problem and tries to find out a solution.

By having a good legal framework for regulating the visual media from invading the privacy right of the individuals, not only the privacy right but the freedom of visual media also can be protected in a better way. Taking into account the impact of the visual media in the everyday life of the people a study on the above topic is the need of the hour.

## **1.7. METHODOLOGY ADOPTED**

The methodology adopted to develop this thesis is purely doctrinal because the problems and concerns are centered round the legal principles, and the question here is regarding the law and regulations to be adopted to solve the problems. The researcher went through various primary and secondary sources such as International and national statutes, case laws, authoritative text books, journals, articles, electronics data bases in various libraries etc.

## **1.8. CHAPTERIZATION**

The first chapter '**INTRODUCTION**' gives an account of the framework of the thesis. It mainly gives an idea about the topic of research. It presents the

---

<sup>16</sup> See, *Infra*, Chapter 7, REGULATION OF VISUAL MEDIA WITH SPECIAL REFERECNE TO PRIVACY RIGHT.

significance of the regulations for the visual media with special reference to the privacy right of the individuals. It states the research hypothesis, the research problems and questions, and also the methodology used for the study. The relevance of the thesis, both international and national, is highlighted in this chapter. The main content of the chapters can be understood from the first chapter of the thesis itself.

The second chapter '**RIGHT TO PRIVACY-CONCEPTS AND PERSPECTIVES**' explores the importance of the privacy right. It discusses various authoritative definitions and the concept 'right to privacy'. It gives an individual protection from unwanted publicity, power to take autonomous decision, self realization etc. The chapter also tries to identify the various values that have significance in moulding an individual for the betterment of the society.

The third chapter '**PROTECTION OF RIGHT TO PRIVACY – INDIAN PERSPECTIVE**' examines the adequacy of the existing legal framework to prevent intrusion and unauthorized disclosure of personal information to the public. In India there is no specific statute to protect the general right to privacy. However, the personal matters of persons are acknowledged in two different ways to a certain extent. First, under article 21 of the Constitution, it is impliedly guaranteed under the life and personal liberty clause. Secondly, different statutes in different perspectives safeguard the right in mosaic forms. The chapter examines both the above aspects, and following this, the chapter analyses the journey of judiciary to clarify the status of privacy right under the Indian constitution in the light of the recent decision of the



Supreme Court of India in *K.Puttaswamy v. Union of India*.<sup>17</sup> In short, the chapter examines how far the existing legal constitutional and statutory measures are helpful in protecting the privacy right of individuals in India. It also examines whether the existing remedies are adequate to protect the privacy rights of individuals when it comes in conflict with media rights.

The fourth chapter '**MEDIA FREEDOM VIS-A VIS - MEDIA RESTRAINTS –AMBIT AND CONCERNS**' discusses the ambit of media freedom that is guaranteed under international instruments and Constitution of India. It also analyses the justifications of media freedom and the limit within which it can exercise the freedom. The chapter discusses the recent developments in restraining the media freedom for ensuring the privacy right.

The fifth chapter '**RIGHT TO KNOW, PUBLIC FIGURES AND PRIVACY RIGHT -A BALANCING EXERCISE**' is devoted to examine the importance of right to information which is another facet of the right to freedom of speech and expression guaranteed under Article 19 (1)(a) of the Constitution. The freedom of information and the right to privacy often come face to face with each other making it very difficult to decide to which right weightage should be given. The chapter also examines this aspect and gives certain solutions to tackle the situation. The media always justifies its action of disclosure on the ground that it carries the element of public interest. The chapter also discusses critically the privacy protection of public figures which is constantly under attack. With

---

<sup>17</sup> (2017) 10 SCC 1

the advent of new technological devices, journalists are engaged in investigative journalism and sting operation to bring out the truth, but this is also not supported by proper legislations. Therefore, this thesis attempts to study the legality of the investigative journalism and also examines to what extent the media is permitted to intrude into the private matters of the individuals under the guise of investigative journalism.

Both freedom of media and right to privacy have got recognition all over the world. The mechanisms to enforce these rights are different in different countries.

The sixth chapter '**PRIVACY RIGHT–A COMPARATIVE PERSPECTIVE**' helps to understand the nature of protection afforded to private information or private life of an individual in other jurisdictions.

The seventh chapter '**REGULATION OF VISUAL MEDIA WITH SPECIAL REFERENCE TO PRIVACY RIGHT**' critically analyses various mechanisms now existing in India to regulate the visual media, especially television, and to prevent it from unlawful intrusion on privacy right. For reforming the role of the media there were various commissions appointed by the government. The chapter examines the role of these commissions in enriching the functions of the media. It also discusses the defences for the media to justify intrusion and avoid liability. The chapter examines the pros and cons of Privacy Bill, 2011 and its redrafted form, Communications Convergence Bill, 2001, and Privacy Code 2018, which was recently drafted. The chapter also

touches on the different kinds of code of conduct applicable to media, how far they are implemented and whether these are sufficient to tackle the trouble of privacy violation.

The final chapter eight is “**CONCLUSION AND SUGGESTIONS**”.

At the outset, the final chapter addresses and finds solutions to the problems identified above. It suggests the suitable regulatory frameworks that should be adopted for the media with special reference to visual media. It also suggests the extent to which the media can publish the information which is purely personal or private in nature. The thesis suggests the considerations that should be taken into account in order to balance the conflicting rights when privacy right is at stake.



## CHAPTER II

### RIGHT TO PRIVACY-CONCEPT AND PERSPECTIVES

*'They who can give up essential liberty to obtain a little temporary safety deserve neither liberty nor safety.'*

-Benjamin Franklin, Memoirs of the Life.

#### 2.1 INTRODUCTION

Man enjoys freedom in the realm of his privacy. He will be humiliated when there is unwanted attention. He is very conscious of what should be and should not be disclosed to the public. He is always taking care of preventing personal information from being known by other people. The desire of keeping information which one considers so close to him from others or a selected group of people is usually referred by the term 'privacy'. However, it is very difficult and crucial to understanding the contents or elements of privacy rights. A universal definition of privacy rights is impossible since its perspective is changing from time to time, place to place and society to society. The relevancy of privacy right is constantly under attack on diverse grounds. Some argue that there is no need for an independent right of privacy as it can be protected under the right to property or right to life. Another viewpoint is that owing to the modernization of society and the highly developed nature of devices used for surveillance, it is high time to reevaluate the above aspect of privacy. The word privacy incorporates several kinds of interests. It extends from keeping certain

matters confidential to exercise autonomy in the decision-making process.<sup>1</sup> This chapter analyzes various aspects of the term privacy right and identifies what it is. It gives an overview of the recognition of privacy right at the international regime. It goes through various definitions put forwarded by various authorities since different definitions pinpoint and highlight diverse aspects. The chapter also tries to identify various values of privacy, which have a significant role in molding an individual to the betterment of society.

## **2.2 EXPLORING THE MEANING AND CONCEPT OF PRIVACY RIGHT**

The people from a very early period itself were very much conscious of having a private space without any public attention. This is evident from their attitude and the way of their living. The traditional view of privacy has been changed over time because of changes in society and due to technological development. The different perspectives of privacy right can be understood both under the ancient period and under the modern period. The philosophy of privacy can be traced back to our old epic and traditional books. The interest to protect privacy arises from the basic fact that man is not happy when third parties without his consent know his matters.

There were several attempts to explore the concept of privacy right from different perspectives. The following section of the thesis devotes attention to

---

<sup>1</sup> Lillian R. BeVier, *Information About Individuals in the Hands of Government: Some Reflections on Mechanisms for Privacy Protection*, 4 WM. & MARY BILL RTS. J. 455,458 (1995), See also, Daniel J.Solove, *A Taxonomy of Privacy*, 154 UNIV. OF PENN.L.REV. 477(2006).

different definitions from various important dictionaries and from famous jurists who contributed largely to the understanding of privacy right. In simple language, the term 'privacy' means confidentiality; confidentialness; seclusion; solitariness; and solitude'.<sup>2</sup> It is the right to be let alone, the right of a person to be free from unwanted publicity and the right to live without unwanted interference by the public in matters with which the public is not necessarily concerned. It says that the terms "right to privacy" is a generic term encompassing various rights recognized to be inherent in the concept of ordered liberty, and such rights prevent government interference in intimate personal relationship's or activities, freedoms of individual to make fundamental choices involving himself, his family, and his relationship with others. A man has the right to pass through this world, if he wills, without having his picture published, his business enterprises discussed, his successful experiments written for the benefit of others, or his eccentricity commented upon by any means or mode.<sup>3</sup> It can also be described as the absence or avoidance of publicity or display, the state or condition from being withdrawn from the society of others, or public interest.<sup>4</sup> It is the quality or condition of being private; withdrawal from the company or public view; seclusion, secrecy told in strict privacy or one's private life or personal affairs or an invasion of one's privacy.<sup>5</sup>

---

<sup>2</sup> *Privacy*, MITRA'S LEGAL & COMMERCIAL DICTIONARY (6<sup>th</sup> ed.2014).

<sup>3</sup> *Privacy*, BLACK'S LAW DICTIONARY (6<sup>th</sup> ed.1990).

<sup>4</sup> *Privacy*, NEW OXFORD DICTIONARY, 2(1993).

<sup>5</sup> *Privacy*, WEBSTER'S NEW WORLD COLLEGE DICTIONARY, NEW MILLENNIUM (4<sup>th</sup> ed.2006).

These explanations mainly concentrate on the right of a person to be free from unwanted publicity where there is no public interest. It explains the right to privacy as a right to be free from others' unwanted attention. It gives the meaning that the right involves keeping private and personal information from disclosing to others.

### **2.2.1 Concept Developed By Warren and Brandies**

The term privacy right has attained widespread attention when Samuel Warren and Louis Brandies authored an article under the title 'Right to Privacy' in 1890 in Harvard Law Journal<sup>6</sup>. They argued for the remedy for an invasion of privacy mainly under the law of tort. The authors adopted the concept put by Justice Cooley as 'right to be let alone'. They grounded this concept on the principles of human dignity and inviolable personality. The following are the main features of privacy developed by them.

1. The right to privacy does not prohibit any publication of matter, which is of public or general interest.<sup>7</sup>
2. The right to privacy does not prohibit the communication to others.<sup>8</sup>
3. The right to privacy is recognized not based on the right to property or copyright but based on the right to protect the individuals' inviolate personality i.e., an injury to one's 'feelings' or honour.<sup>9</sup>

---

<sup>6</sup> Warren & Brandies, *Right to Privacy*, 4 HAR.L.REV.193(1890).

<sup>7</sup> *Id.* at 197.

<sup>8</sup> *Id.* at 198.

<sup>9</sup> *Id.* at 200.

4. The right is restricted on the ground of public interest and when the information becomes part of the public domain.<sup>10</sup>

In the article, they highlighted so many cases wherein the issue of privacy was involved<sup>11</sup>. The seriousness of the issue is highlighted in the following passage as cited by Warren and Brandies in their article.

*[T]he instantaneous photographs and newspaper enterprise have invaded the sacred precincts of private and domestic life, and numerous mechanical devices threaten to make good the prediction that “what is whispered in the closet shall be proclaimed from the housetops”.<sup>12</sup> For years there has been a feeling that the; law must afford some remedy for the unauthorized circulation of portraits of private persons, and the evil of the invasion of privacy by the newspapers.....The press is overstepping in every direction the obvious bounds of propriety and decency. Gossip is no longer the resource of the idle and the vicious but has become a trade, which is pursued with industry as well as effrontery. To satisfy a prurient taste the details of sexual relations are spread broadcast in the columns of the daily papers. To occupy the indolent, column upon column is filled with gossip, which can only be procured by the intrusion into the domestic circle. The intensity and complexity of life, attendant upon advancing civilization, have rendered necessary some retreat from the world, and man, under the refining influence of culture, has become more sensitive to publicity, so that solitude and privacy have become more essential to the individual; but modern enterprise and invention have, through invasions upon his privacy, subjected him to*

<sup>10</sup> Ken Gomerley, *One Hundred Years of Privacy*, WIS.L.REV. 1335(1992).

<sup>11</sup> *Marion Manola v. Stevens & Myers*, N.Y.S.Ct. June 17(1890). (in this case, the plaintiff demanded injunction to restrain the defendant photographer who surreptitiously took photograph while she was playing the role in 'Broadway Theatre' in tights, without her consent, from publishing her images. The court issued a preliminary injunction); *Pollard v. Photographic Co.* 40 Ch.D.345 (Ch.1888)(there was the sale of Christmas cards wherein the plaintiff's photo was imposed without getting the consent of the plaintiff).

<sup>12</sup> Warren and Brandies, *supra* note 6, at 195.



*mental pain and distress, far greater than could be inflicted by mere bodily injury.*<sup>13</sup>

Warren and Brandies argued for the remedy for the invasion of privacy under tort law by taking into account the nature of instruments by which privacy had been invaded. The new concept propounded by Warren and Brandies was a red signal to the media, which are so eager in the new era of yellow journalism or sensational journalism. Later, various jurisdictions in many countries started to recognize the concept.<sup>14</sup> Therefore, it can be said that the concept developed by Warren and Brandies is closely related to the idea that man should be safe from unauthorized intrusion and publication of personal information.

### **2.2.2 Concept Developed By William Prosser**

Meanwhile, William Prosser in 1960 developed the concept by suggesting four distinct torts of privacy. It is an extension of the concept developed by Warren and Brandies.<sup>15</sup>

- a. Unreasonable intrusion into the solitude or seclusion of another.
- b. Public disclosure of truthful but embarrassing facts
- c. The publicity that places a plaintiff in a false light in the public eye.
- d. Unlawful appropriation of an individual's name or likeness.

---

<sup>13</sup> *Id.* at 196.

<sup>14</sup> German Civil Code, 1900, Art. 823(1); France Civil Code, 1970, Art. 9; Meanwhile in California in 1899, in New York and in 1903, Virginia in 1904 amended its libel statutes to include the right to privacy. *See also*, YOUNGER COMMITTEE REPORT ON PRIVACY (1972), Cmnd.5012, ¶ 94 & 95.

<sup>15</sup> William L. Prosser, *Privacy* 48 CALIF.L.REV.383(1960); *See also*, WILLIAM L. PROSSER & W. PAGE KEETON, LAW OF TORTS (1984 & SUPP.1988).

In intrusion cases, the interest protected is an interest in freedom from mental agony. In public disclosure and false light cases, the interest protected is an interest in reputation. In appropriation cases, the interest protected is the interest in name and likeness.<sup>16</sup>

However, whatever may be the kind of infringement all instances will ultimately result in the mental agony and distress of the victim. It would adversely affect the dignity of persons.

### **2.2.3 Privacy Right- Philosophical Dimension**

Justice Thomas Cooley in 1880 observed that privacy right is synonymous with the right to be let alone.<sup>17</sup> Comparatively, a detailed observation had been made by Adam Carlyle Breckenridge and he said that privacy is the right of individuals to decide the extent to which his information can be shared with third parties. He added that the privacy right enables a person to the time, place and circumstances to communicate with others. It means that it is his right to withdraw from others and places or to participate or associate with something as wishes. In other words, it gives autonomy to a person over the dissemination or sharing of information.<sup>18</sup>

Edward Shills explains privacy right as a zero relationship between individuals. Here there will be no communication at all among people. There

---

<sup>16</sup> Edward J Bloustein, *Privacy as an Aspect of Human Dignity: An Answer to Dean Prosser*, 39 N.Y.U.L.Rev.962, 966(1964).

<sup>17</sup> THOMAS M COOLEY, *A TREATISE ON THE LAW OF TORTS*, 29(2<sup>nd</sup> ed.1888).

<sup>18</sup> ADAM CARLYLE BRECKENRIDGE, *THE RIGHT TO PRIVACY, A MOST COMPREHENSIVE RIGHT* (1970). It is closely similar to the meaning given by Alan F Westin. *Infra* note 20.

will be a complete withdrawal of the individual from society. It denotes the idea that interaction or communication is absent in the family, organization, institution and the whole society. According to him, a single individual or a group of individuals can claim privacy right. It can be seen that he mainly stressed on the point that privacy denotes complete seclusion from others.<sup>19</sup>

Alan Westin defines privacy in terms of informational control. It means that it is the discretion of an individual or group of people or even institution to decide when, how and to the extent to which the information should be disclosed.<sup>20</sup> He says that in a relationship of the individual to the society, the right to privacy is the voluntary and temporary withdrawal of a person from the general society through physical or psychological means. It takes the form of, solitude, intimacy, anonymity, and reserve<sup>21</sup>. Thus he suggests four aspects of individual privacy i.e. Under solitude, the individual is withdrawn from the group and he is free from the observation of other people. This is essential for

<sup>19</sup> Edward Shills, *Privacy: Its Construction and Vicissitudes*, 31 LAW AND CONTEMPORARY PROBLEMS, 281, 282, NO.2 (Spring 1966). He defines privacy as a "zero relationship" between two persons or groups or between a group and a person. It is a zero relationship, in the sense that it is constituted by the absence of interaction or communication or perception within contexts in which such interaction, communication, or perception is practicable –i.e., within a common ecological situation, such as that arising from spatial contiguity or membership in a single embracing collectivity such as a family, working group, and ultimately a whole society. See, e.g., *Phoolan Devi v. Shekhar Kapoor*, (57)154 DLT(1995) (in this case, in an interim application filed by the applicant Phoolan Devi sought a restraint order to restrain the defendant Shekhar Kapoor from exhibiting and publishing the film, 'Bandit Queen'. The court decided in favour of the applicant and the defendant was prevented from exhibiting the film until the final decision. The case discussed various aspects of privacy rights and the privacy rights of public figures).

<sup>20</sup> ALAN F WESTIN, *PRIVACY AND FREEDOM* (1967) (he says that it is the claim of the individuals, groups, or institution to determine for themselves when, how and to what extent information about them is communicated to others. his definition of privacy contributed to the philosophical basis to the right. His analysis is relevant in the modern context especially in the area of data protection laws. He had been influenced by the concept propounded by Brandies).

<sup>21</sup> *Id* at.37.

an individual to organize himself, to integrate his activities in society and thereby to uphold dignity and individuality in society.<sup>22</sup> In intimacy, the individual is in association with a small number of people excluding a large portion of the population. It enables a person to form a close relationship with a certain number of people. In anonymity when an individual is in public places or delivering public performances but he wishes that he should not be under any kind of surveillance and should not be identified. Reserve involves an individual creates a psychological barrier against unwanted intrusion, which is dependent upon the extent of interaction between individuals. The extent to which an individual claims reserve and the same is respected or rejected by others is at the root of recognizing privacy.<sup>23</sup> The same idea is put forward by Julie Innes and says that it is a condition in which one person has control to decide in respect of matters which are too intimate. It may cover matters relating to his body, documents, and relationships.<sup>24</sup> Alan had been criticized by Louis Lusky by saying that Westin's approach would lead us to the notion that the sharing of personal information by one's neighbour to another would amount to a violation of privacy right. Therefore, Lusky says that 'privacy is the condition enjoyed by one who controls the communication of information about himself.'<sup>25</sup>

---

<sup>22</sup> IAN KERR, VALERIE STEEVES, CAROLE LUCOCK (EDS.), LESSONS FROM THE IDENTITY TRAIL-ANONYMITY, PRIVACY, AND IDENTITY IN A NETWORKED SOCIETY(2009).Valerie Steeves, *Reclaiming the Social Value of Privacy*.

<sup>27</sup> WESTIN, *supra* note.20, at 31.

<sup>24</sup> JULIE INNES, PRIVACY, INTIMACY, AND ISOLATION(1992).

<sup>25</sup> Louis Lusky, *Invasion of Privacy: A clarification of Concepts*, LXII COLUM.L.REV.693 (1972).

W.A.Parent explains that to claim privacy, personal information should not be documented. And it should not be within the knowledge of other persons. The personal knowledge or information consists of matters which are widely known by others at a specific period.<sup>26</sup> The explanation given by Parent is not clear concerning the information that was known to people in the past and not known to those in the current period. Parent suggests that the information should be documented to lose privacy. Understanding privacy in this sense is very difficult because an individual can have privacy even though it is documented and vice versa.<sup>27</sup> Therefore, documentation of information is not a rider to determine the loss of privacy.

Another authority Edward Bloustein argues that privacy is an interest, which protects the personality, independence, dignity, and integrity. He argues that Warren and Brandies failed to give a positive description of privacy.<sup>28</sup> He also raised the point that the intrusion into private life results in a blow to the dignity and personality of the individuals. Hyman Gross criticizes Bloustein's definition by pointing out that he failed to explain why privacy is valuable as human dignity.<sup>29</sup> Gross is of the attitude that there was ambiguity about the privacy right. It is due to different uses of the term 'privacy' in law and ordinary language. The law only determines what situations of privacy are protected.

---

<sup>26</sup> W.A.Parent, *Privacy, Morality and the Law*, 12 PHILOSOPHY AND PUBLIC AFFAIRS 269 (1938).

<sup>27</sup> *Infra*, Chapter 3, PROTECTION OF PRIVACY –INDIAN PERSPECTIVE, ¶3.13. Right to be Forgotten.

<sup>28</sup> Edward J Bloustein, *Privacy as an Aspect of Human Dignity: An Answer to Dean Prosser.*, 39 N.Y.U.L.REV. 962 (1964).

<sup>29</sup> Hyman Gross, *The Concept of Privacy* 42 N.Y.U.REV. 34, 35 (1967).

According to him, the concept of privacy right should be clearly explained. It is required that the condition in the life of a person which the law is to protect should be well defined.<sup>30</sup> He explains privacy both as a 'condition of human life' and as a 'form of control'. In the former sense, privacy is a condition of human life in which his relationship with others is limited.<sup>31</sup> In the latter sense, one uses control over the personal information and he finds happiness in that.<sup>32</sup> Charles Fried says that privacy is not simply an absence of information about us in the minds of others. But it is the control of information about ourselves. The person who can control others from knowing personal information can enjoy privacy.<sup>33</sup>

Ruth Gavison says that the concept of privacy is distinct, useful and coherent in different contexts. Interest in privacy involves the extent of knowledge which is known to others. It may include the extent of physical access or that of the attention of others. In other terminology, contexts such as information known, attention given to an individual should be taken into consideration. These are otherwise termed as secrecy, anonymity and solitude respectively. Therefore, privacy right consists of three elements. They are secrecy anonymity and solitude.<sup>34</sup> He identifies the concept of privacy, by giving the character of liberty, as claims of state's non-interference, which can be equated with Warren and Brandies' right to be let alone. However, he says that privacy claim is raised for protection from interferences against other

---

<sup>30</sup> *Id.* See also, KIRAN DESHTA, RIGHT TO PRIVACY UNDER INDIAN LAW at 24(2011).

<sup>31</sup> Hyman Gross, *supra* note.29, at 36.

<sup>32</sup> *Id.*

<sup>33</sup> Charles Fried, *Privacy*, 77 YALE L.J.475 (1968).

<sup>34</sup> Ruth Gavison, *Privacy and Limits of the Law*, 89 YALE L.J.421(1980).

individuals. The second is that conceptualizing privacy as non-interference excludes the claim that has nothing to do with a highly personal decision.<sup>35</sup> He rejects Edward Bloustein's view and says that the rationality of privacy relies on the fact that all kinds of invasions ultimately culminated in the encroachment of human dignity. Because there are instances of violations of human dignity without loss of privacy and the case of prostitutes is an example of that.

Irwin Altman, an environmental psychologist, suggests that privacy is a process in which an individual or a group of individuals regulates the relationship with each other. He continues to say that in case of privacy right a person varies the extent of disclosure of his personal information and creates a boundary that is acceptable for social interaction. In this case, a person uses certain control for interaction with the rest of the community.<sup>36</sup>

Daniel J Solove in his new book 'Understanding Privacy' narrates the drawbacks of existing concepts of privacy and he develops an alternative approach to it.<sup>37</sup> He contends that privacy right should not be viewed as an individual right that conflicts with other social interests. Solove explains privacy in a pluralistic vision by saying that privacy is an umbrella term that refers to a wide range of things.<sup>38</sup> It shares so many values as members of a family share so many traits. He argues that conceptualizing privacy in terms of protecting

---

<sup>35</sup> *id* at.438. See also Mac Cormick, *A Note upon Privacy*, 89 L.Q.REV.23 (1976).

<sup>36</sup> Irwin Altman, *THE ENVIRONMENT AND SOCIAL BEHAVIOUR: PRIVACY, PERSONAL SPACE, TERRITORY AND CROWDING* (1976),6. as cited in Valerie Steeves, *Reclaiming the Social Value of Privacy*.

<sup>37</sup> Danielle Keats Citron, Leslie Meltzer Henry, *Visionary Pragmatism and the Value of Privacy in the 21<sup>st</sup> Century*,108MICH.L.REV.1107(2010).

<sup>38</sup> *Id.* at 1110.

individualistic interests would undervalue the importance of privacy.<sup>39</sup>It is admitted that the privacy interest loses its importance when it conflicts with the interests of society. It does not mean that injured feelings, reputation, or humiliation of an individual are irrelevant to the value of privacy.<sup>40</sup> The concept put forward by Solove highlights the need for having the right to privacy. The privacy right safeguards the individuality of a person. By ensuring the individuality of a person, society is benefitted. Therefore, the recognition of privacy right leads to social harmony and it creates a good social structure in society.<sup>41</sup> He also analyses various actions that amount to a violation of privacy right and he referred to them as architectural problems.

The Indian scholars also followed the definitions given by the above jurists. Tripathi observed that it is the right to exclude others from unwanted interference.<sup>42</sup>Prof. Upendra Baxi raised a doubt whether privacy right was considered as a value in human relations. He cited certain instances to substantiate this such as marriage parties, midnight music, morning and evening devotional songs, involvement in neighbours' activities to show compassion towards them.<sup>43</sup>

---

<sup>39</sup> Solove, *Conceptualizing Privacy*, 90.CAL.L.REV.1087.1130 (2002).

<sup>40</sup> *Id.* at 1133.

<sup>41</sup> *Id.* at 1138.

<sup>42</sup> Tripathi, Speech for symposium organized at Campus Law Centre, Faculty of Law, University of Delhi, 17<sup>th</sup> Feb 1982 as cited in GovindMisra, *Privacy; A Fundamental Right under the Indian Constitution*, DEL. L.REV.8 &9,134-160 (1979-82).

<sup>43</sup> *See*, K.K.Marthew on DEMOCRACY, EQUALITY AND FREEDOM (Upendra Baxi ed.,1978).



### 2.3 PUBLIC AND PRIVATE DICHOTOMY

The right to privacy mainly centered on what is private and public information. It dates back to the period of Greek philosopher Aristotle who made a distinction between public and private spheres. The former involves political affairs and the latter includes a personal sphere of individuals. The term 'public' denotes 'open to all'.<sup>44</sup>It led to the recognition of confidential zone in respect of an individual. The state was not allowed into the private sphere, which was considered as essential for private reflection, familial relations and self-determination.<sup>45</sup>

The distinction between public wrong and private wrong is also based on this distinction. Because it was considered that, the private wrong affects the rights of the individuals and it is a civil wrong. While the public wrong affects society as a whole and it is a crime.<sup>46</sup>Moreover, in respects of matters which concern him and not the public, he should be given an absolute right and the other persons should be prevented from encroachment of that area.<sup>47</sup>

---

<sup>44</sup> JURGEN HABERMAS, THE STRUCTURAL TRANSFORMATION OF THE PUBLIC SPHERE. AN INQUIRY INTO A CATEGORY OF BOURGEOIS SOCIETY (1991).

<sup>45</sup> Michael C James, *A Comparative Analysis of the Right to Privacy in the United States, Canada, and Europe*, CONN. J. OF INTER. LAW 29 (Spring 2014) at 261; *See generally*, HANNAH ARENDT, THE HUMAN CONDITION (1958); JOSTEIN GRIPSURD, INTRODUCTION: DISCOVERING THE PUBLIC SPHERE. IN DISCOVERING THE PUBLIC SPHERE. (Jostein Gripsrud, Halvard Moe, Anders Molander, and Graham Murdock, ed.,2011).

<sup>46</sup> WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND (1765).

<sup>47</sup> JOHN STUART MILL, ON LIBERTY,13(1859). *See also*, AUSTIN, LECTURES ON JURISPRUDENCE (1869) (Austin also supported this viewpoint and said that there should be a distinction between public and private realm but it had its limitations. One could not expect the same degree of privacy right in the public realm and private realm).

### 2. 3.1.Plain View Principle

The individuals in society naturally expect that sharing of information with members of society is undeniable. If one is in a public street, it is unreasonable to expect that others would not see and listen. This is the traditional plain view principle which says that what is knowingly exposed to others is permitted to observe. If we want privacy in this situation we should be in a closed compartment. It means that every society has its norms for gathering information from society and one cannot deny legitimate gathering of information from society. The modified version of the principle of plain view said that information is in plain view if it is readily available through legitimate means of observation.<sup>48</sup> In other words, the modified version says that we cannot have legitimate privacy interests or reasonable expectation of privacy, in the information that can be readily observed by someone through legitimate means of observation. This modified version of the principle is essential to prevent unlawful surveillance by using certain devices. By adopting this principle one can expect privacy in his movement even though he is in public place because it is not easily available.<sup>49</sup>One is entitled to privacy in public places if the disclosure of information results in the infliction of his dignity.

---

<sup>48</sup> JOHN STUART MILL, *supra note 47*, at 67.

<sup>49</sup> MARK TUNICK, *BALANCING PRIVACY AND FREE SPEECH: UNWANTED ATTENTION IN THE AGE OF SOCIAL MEDIA*, 68 (2014).

## 2.4 RIGHT TO PRIVACY-THEORETICAL PERSPECTIVE

Apart from several definitions and contributions propounded by academicians, jurists, etc, the right to privacy had been explained in terms of certain theories. The following theories throw light to a certain extent to understand the concept and perspective of the right to privacy.

### 2.4.1 Personhood Theory

The personhood theory explains the right to privacy in terms of personality. This concept is closely analogous to the concept of dignity. Roscoe Pound and Paul Freund are the main arguers of this theory.<sup>50</sup>The theory gives prime importance to the personality of an individual and says that a person must be given autonomy to make decisions of his own. In respect of certain matters, the state should not have interfered. If not, the state interference would amount to an invasion of personal identity. That is why Justice Blackmun says that it is a right to 'self-definition'.<sup>51</sup>The liberal individualistic followers say that the right to privacy mainly centered on three personal ideals. The first is the idea of personal relations which keeps the relationship between individuals. The second ideal is the Lockean ideal of the politically free man in which he enjoys a certain

---

<sup>50</sup> Roscoe Pound," *Interests in Personality*, HARV.L.REV. 28(1915) 343, Paul.A.Fewuns, *Privacy: One concept or Many?* in PRIVACY NOMOS XIII (J.Ronald Pennock and John.W.Chapman, ed.,1971),182, *Accord, Justice K Puttaswamy v. Union of India*(2017) 10 SCC 1, *R.Rajagopal v. The State of Tamil Nadu*,1995 AIR 264.(the cases which examined the status of privacy right mainly centered around the concept of life and dignity, personal liberty. Therefore, traces of personhood theory can be elicited in all these cases).

<sup>51</sup> Jed Rubenfeld, *Right of Privacy*, 102 HARV.L.REV.737 (1989).

extent of freedom and the third, the Kantian ideal of the morally autonomous man in which a person is free to make his own decisions.<sup>52</sup>

Therefore, the invasion of privacy is an injury to personality. The injury to personality adversely affects one's mental condition and it is more severe when compared to that of a bodily injury. It is acknowledged in the Second Restatement of Torts as one, who intentionally intrudes, physically or otherwise, upon the solitude or seclusion of another or his private affairs or concerns, is subject to liability to the other for invasion of his privacy, if the intrusion would be highly offensive to a reasonable person.<sup>53</sup>

Robert C Post views that intrusion of privacy involves a transgression of social norms, which would amount to injury to personality.<sup>54</sup> A man has to follow certain norms in the society upon which the personality of an individual should be determined.<sup>55</sup> This sociological framework or the social interaction is founded on the rules of 'deference and demeanor'.<sup>56</sup> The former requires the person to respect the other members of the society and the latter require to observe respect to himself.<sup>57</sup> In this way, an individual should not only confirm

<sup>52</sup> Benn, Privacy, *Freedom and Respect for Person* in PRIVACY NOMOS XIII,1,15-16 (J. Ronald Pennock&J.Chapman, eds.,1971).

<sup>53</sup> *Hamberger v. Eastman*, 106 N.H.107, 206 A.2d 239(1964) at.112. (here the installation of a device goes went beyond the limits of decency as it affects reasonable person's moral judgment. Thus the tort of invasion of privacy is at least concerned with policing the limits of decency with redressing the mental distress of particular plaintiffs. See, RESTATEMENT (SECOND) OF TORTS§652(1977).

<sup>54</sup> Robert C Post, *Social Foundations of Privacy: Community and Self in the Common Law Tort*, CAL.L.REV.77(1989).

<sup>55</sup> *Id.*

<sup>56</sup> E.GOFFMAN, THE NATURE OF DEFERENCE AND DEMEANOR, IN INTERACTION RITUAL: ESSAYS ON FACE TO FACE BEHAVIOR, 47(1967) as cited in Robert C Post, *supra* note 54.

<sup>57</sup> *Id.*

the social order of society but also see that his integrity is not affected. The violations of these social rules damage a person's individuality or personality and Robert C Post calls such rules as 'civility rules' and personality as social personality.<sup>58</sup>

The personhood theory is attacked on the ground that it is almost similar to the concept of liberty and autonomy. It is too broad because it cannot be said that all elements of personality are private and all threats to a person's dignity are invasions of privacy. Another criticism is in terms of the role of the state in protecting privacy right. Jed Rubenfeld argues that law cannot protect all forms of individual rights in case if it conflicts with other interests. Jed Rubenfeld criticized the theory of personhood by arguing that the right to privacy acknowledges that the state should not encroach into the private life of an individual. It is often referred to as anti-totalitarianism, which emphasized that privacy is a device for preventing the state from encroachment.<sup>59</sup>

#### **2.4.1. Property Theory of Privacy**

The next theory, which explains the concept of privacy, is property theory. It is based on the perception that one's personal information is his property<sup>60</sup>. On this assumption, the individual has the right to control information, which he considered to be intruded on by anyone. This explanation is closely in line with the definition given by Alan Westin who said that the personal information is the property of his own and he has every right to restrain

---

<sup>58</sup> Robert C Post, *supra* note.54

<sup>59</sup> Jed Rubenfeld, *The Right of Privacy*, 102 HARV.L.REV. 737, 750 (1989).

<sup>60</sup> Richard Murphy, *Property Rights in Personal Information*, 84 GEO.L.REV. 2381 (1996).

both private and public authorities from interference.<sup>61</sup>Somewhat, a similar line of observation has been made by the sociologist Prof. Edward Shills. His observation is that the property claim can be raised by an individual in respect of the space around him, past information, conversation, his body, and image. He is entitled to exercise all rights in respect of information as he can do so in respect of his property. It is grounded on the fact that personal information is considered as a commodity in the market place. Therefore, no other person is entitled to explore the information without his consent and to take advantage of the information by intrusion and disclosure.<sup>62</sup>It is said by James Madison that the protection of the faculties of man was the consequence of inalienable property rights. A man can claim a property right in his tangible property and also intangible property, the latter being his feelings, opinion, thoughts, emotions, etc.<sup>63</sup>The property theory of privacy has some leniency with copyright law wherein the author of copyright has a property right in cases where in his image is used.

Those who oppose the property theory say that the theory deals with transactions or appropriation of commercial value. But the privacy protection is more concerned with safeguarding the emotional and psychological aspects of

---

<sup>61</sup> ALAN F WESTIN, *PRIVACY AND FREEDOM* (1967).

<sup>62</sup> Edward Shills, *Privacy: Its Constitution and Vicissitudes*, 31 *Law and Contemporary Problems*, 281-306 (Spring 1966).

<sup>63</sup> JAMES MADISON, *THE WRITINGS OF JAMES MADISON*, 6 (*Correspondence, 1790-1802*)[1906] *ESSAY ON PROPERTY*, GAILLARD HUNT ed., at 101-103, <https://oll.libertyfund.org/titles/madison-the-writings-vol-6-1790-1802>, (Last accessed 10thAug 2013) *See, also, Justice K.Puttaswamy v. Union of India* (2017) 10 SCC 1: AIR 2017 SC 172.

an individual, due to disclosure of personal or intimate information. Therefore, it is outside the scope of property law.<sup>64</sup>

#### 2.4.2 Theory of Reductionism

There are arguments both in favour and against the recognition of the right to privacy as an independent right. Reductionists such as Ayn Rand<sup>65</sup>, William Prosser<sup>66</sup>, and Judith Jarvis Thomson<sup>67</sup> etc. are of the view that privacy right cannot be considered as an independent right. They suggest that it can be protected under the right to property.

Ayn Rand holds that one cannot demand other people to leave him alone. One could protect his privacy by controlling material objects or access to location since the right to privacy can be reduced from right to property. One cannot have the right to life without having property, which is the means of livelihood to an individual. By having, control over the property one can have control over the access of information, which is analogous to the concept of privacy as put forwarded by Alan Westin.<sup>68</sup> Rand also suggests that any law protecting privacy would not be an objective one and therefore it could not be justified.<sup>69</sup>

---

<sup>64</sup> Warren & Brandies, *Right to Privacy*, 4HAR.L.REV.193 (1890).at 205. See also, *Justice K.Puttaswamy*, (2017) 10 SCC 1: AIR 2017 SC 172.

<sup>65</sup> Ayn Rand said that privacy adorned the position than that of a right. She says that it is a requirement of human cognition and civilization. It had also been remarked that civilization is the progress towards a society of privacy. See, AYN RAND, *THE FOUNTAINHEAD* (1943).

<sup>66</sup> Willaim L. Prosser, *Privacy*,48 COLUM L. REV.383(1960).

<sup>67</sup> Judith Jarvis Thomson, *The Right to Privacy*,4 PHIL & PUB.AFF.295(1975).

<sup>68</sup> WESTIN, *supra* note 61.

<sup>69</sup> Amy L Peikoff, *Beyond Reductionism: Reconsidering Right To Privacy*,3N.Y.U.J LAW &LIBERTY 1(2008).

The analysis of theories is pointing out the fact that the understanding of privacy right on the contemporary perspective is the combination of all theories. The degree of acceptance of elements of theories may be more or less varied. The Indian privacy jurisprudence is much more associated with personhood theory where the right to privacy is placed under life and personal liberty clause of the Constitution of India.

## **2.5 VALUE OF PRIVACY**

Privacy has value in both individualistic and societal aspects. It is a catalyst in the social construction of a democratic society. An alternative view is that privacy is a dynamic process negotiating our relationship with others in day-to-day life. The functions performed by privacy are different. It ensures autonomy, permits emotional release, allows self-evaluation and helps to create boundaries of distance from strange people.<sup>70</sup>

### **2.5.1 Privacy As Control**

The authorities like Alan Westin, Charles Fried, Arthur Miller, etc mainly pointed out that privacy is the right of an individual to control, determine as to when, how and to what extent information about us should be communicated to others. In other words, it is closely connected with our ability to control the transfer of personal information to others.<sup>71</sup>

The right of privacy helps to block the flow of information and to avoid misconceptions or misrepresentation about a person before the public. Because,

---

<sup>70</sup> ALAN F WESTIN, *PRIVACY AND FREEDOM* 32-39 (1967).

<sup>71</sup> James Rachels, *Why Privacy is Important?*, 4 *PHIL & PUB. AFF.* 323(1975).



the matters which are not of public interest will help to create only a wrong impression about the individuals. Therefore, right to privacy protects an individual from being stereotyped, which may be the outcome of disclosure of information that cannot be adequately understood in the absence of special circumstances. This analysis invites two kinds of private functions. Firstly, the function of privacy is to prevent cognitive errors by persons who seek to acquire knowledge about a person and secondly, the function of privacy is to protect persons who are the subject of information from misrepresentation.

The social aspect of privacy becomes evident when we need information for the evaluation of a public figure. When the private information of a public official is not in public interest, it is not necessary for the formation of public image. Here the public should be protected by blocking the flow of information which are not in public interest. Where, the information to the public cannot always be genuine and intimate so that it may sometimes lead to misrepresentation of an individual. It is hurtful and would affect him adversely for his development.

In other words, it can be said that the claim of privacy right act as a shield to prevent others from unwanted gaze or interferences. Such an analysis is apt to justify the non-interference by government, media, and others.<sup>72</sup>The limited access theory propounded by Hyman Gross justifies the above views by

---

<sup>72</sup> As E.L.Godkin observed, nothing is better worthy of legal protection than private life, or, in other words, the right of every man to keep his affairs to himself, and to decide for himself to what extent they shall be the subject of public observation and discussion.E.L.Godkin, *Libel and its Legal Remedy*, 12 J.Soc.Sci.69, 80(1880) as cited in Daniel J. Solove, *Conceptualizing Privacy*, CAL.L.REV.90 (2002) 1087.

holding that privacy right ensures no intrusion into the personal affairs of an individual.<sup>73</sup> Earnest Van Den Hagg suggests an elaborate idea that privacy right enables a person to give access to others in respect to his personal life. Therefore, the right to privacy entitles one to exclude others from watching, utilizing, invading his personal information.<sup>74</sup> O'Brien's observation is that privacy right enables one to provide only limited access to an individual's life events.<sup>75</sup> Conceptualizing privacy as a state of existence is hit by the argument that it neglects to incorporate the content of the private sphere and is devoid of the element of choice concerning disclosure of personal information. The theory of access does not provide any understanding of the extent of access and the degree of control as explained above.

An almost similar view is propounded by Gavison and he observes that the interest in privacy is related to our concern over accessibility to others, the extent to which others have access to us, and the extent to which we are the subject of others' attention.<sup>76</sup>

### **2.5.2 Privacy And Autonomy**

Privacy creates a situation to exercise autonomy in all spheres of life. An individual can make his own decisions when he is not disturbed with any kind of interference. As said earlier, the existence of privacy right is essential to make a

---

<sup>73</sup> Hyman Gross, *The Concept of Privacy*, 42 N.Y.U.L.REV.34 (1967).

<sup>74</sup> Earnest Van Den Hagg also supports a similar view by saying that privacy is the exclusive access of a person or other legal entity to a realm of his own. The right to privacy entitles one to exclude others from watching, utilizing, invading his private ERNEST VAN DEN HAAG, ON PRIVACY, in NOMOS. XIII: PRIVACY 149, (J.Ronald Pennock & J.W.Chapman eds., 1971).

<sup>75</sup> David M.O'Brien, *The Right of Privacy*, 2 COLUM.L.REV.437(1902).

<sup>76</sup> Ruth Gavison, *Privacy and Limits of the Law*, 89 YALE.L.J.421(1980).

person autonomous. Such an observation is supported by Richard Posner and according to him; privacy has three distinct meaning i.e., secrecy, seclusion, and autonomy.<sup>77</sup> David Richard put forwarded two bases on which the right rests. The first of which says that every person can create autonomy in him. The second one says that every person has the right to equal concern and respect in his pursuit of autonomy.<sup>78</sup>

Therefore, it can be said that the right to privacy as a legal principle is drawn from the fundamental value of personal autonomy. Autonomy gives the individuals the capacity of self-determination by which he can choose his own life and it is similar to decisional privacy. By exercising such control, an individual can retrieve others from observation and creates a zone in which the individual can act freely and from being judged by others. Then only he will be capable of thinking and acting independently without the interference of others. The man who is subjected to surveillance or the attention of everyday life would be deprived of his individuality. It, in turn, benefits both individuals and society. It is the autonomy, which makes a person deny or oppose anything, which he thinks as not food for him. Such autonomy can be seen in forced sterilization, compulsory drug trials of non-consenting persons.

---

<sup>77</sup> The term 'auto' means self and 'nomos' means a law which together means law for oneself and it connotes individual as the self-governing source of law or rights. OXFORD ENGLISH DICTIONARY, 807, (2<sup>nd</sup> ed.1969), Richard A. Posner, *The Right of Privacy*, 12 Geo.L. Rev.393 (1977).

<sup>78</sup> David Richards, *The Individual, the family, and the Constitution: A Jurisprudential Perspective*, 55 NY.L.REV.133(1980).

### 2.5.3 Privacy and Intimacy

The right to intimacy is the right to live one's life independently without interference.<sup>79</sup> As an intrinsic value, privacy is capable of developing intimacy with one another. It supports the individual for the formation and maintenance of a relationship with one another in the selection of companions, friends, etc. By holding such a right, one can prevent the state or other individuals from interfering with personal life either sexual or familial. The right to privacy fulfills one's emotional and sexual behaviour. Because, the privacy right enables a person to create an intimate and personal relationship with other people. They can find happiness in their activities.<sup>80</sup> In a society, the individuals have to work in varying degrees of relationships such as friends, familial or religious.<sup>81</sup> Charles Fried observes the relationship between privacy and other values in the following words as,

*Privacy is not just one possible means among others to insure some other value, but it is necessarily related to ends and relation of the most*

<sup>79</sup> Nordic Conference on Right to Privacy, May 22<sup>nd</sup> and 23<sup>rd</sup>, 1967 in Stockholm, <https://www.icj.org/wp-content/uploads/2013/06/Right-to-privacy-seminar-report-conclusions-1967-eng.pdf>, (Last accessed 4<sup>th</sup> June 2012)., See also, G.MISRA, RIGHT TO PRIVACY IN INDIA, 124(1994).

<sup>80</sup> Charles Fried supports the value of privacy in terms of intimacy as he suggests that privacy creates moral capital, which we spend in friendships and love. See, Charles Fried, *Privacy: A Moral Analysis*, 77 YALE.L.J 475 (1968), See also, James Rachels, *Why Privacy is Important*, 4 PHIL & PUB. AFF.323(1975).

<sup>81</sup> CHARLES FRIED, *supra* note 80, See also, *Douglas v. Hello!Ltd.(No.1)*[2001] QB 967 ( the Hello! Ltd magazine surreptitiously took wedding photographs of the celebrities Douglas and Zeta-Jones and the latter claimed an interim injunction not to publish the photos. The court granted an injunction. In *Murray v. Express Newspapers.Plc*, EWCA.CIV.446[2009] Ch.481 the petitioners sought an injunction order for prohibiting further publication of photographs that had been taken by the defendant. In *Dutchess of Argyll v. Duke of Argyll* [1967]1Ch 302,322 Thomas J. observed that confidential nature of the relationship between spouses is of its very essence and so obviously and necessarily implicit in it that there was no need for it to be expressed. In this case, the newspaper was restrained from publishing the information that had been disclosed by Duke. The court preserved the privacy in communication between husband and wife).

*fundamental sort, respect, love, friendship, and trust. Privacy is not merely a good technique for furthering these fundamental relations; rather without privacy, they are simply inconceivable. Privacy is the necessary atmosphere for these attitudes and actions, as oxygen is for combustion.*<sup>82</sup>

Again, as Westin compares the individuals as actors in a drama. It seems that he adopted the observation of famous poet Shakspeare that life is a drama. And individuals are actors. The individuals perform their roles only for a specific period. He can shed feelings and emotions only when he is alone or in companion with persons whom he is interested to be in the companion. There have to be moments 'off-stage' when the individual can be himself.<sup>83</sup>The above analysis shows that privacy right is essential for emotional release when he is alone or when he is in the company of persons whom he considers as intimate.

#### **2.5.4 Privacy and Dignity**

The acknowledgment of privacy amounts to recognition of an individual's dignity and helps him to achieve a decorous life. The unauthorized intrusion into the life of an individual always affects his dignity. Because of this assumption, it is legally accepted that the search and seizure without legal authority are illegal because it will adversely affect the dignity of the individual.<sup>84</sup>

---

<sup>82</sup> CHARLES FRIED, *supra* note 80.

<sup>83</sup> ALAN F WESTIN, *PRIVACY AND FREEDOM* (1967).

<sup>84</sup> *Kharak Singh v. State of Punjab* AIR 1963 SC 1295, *Gobind v. State of M.P* AIR 1975 SC 1378, *Malak Singh v. State of P & HAIR* 1981 SC 760.

The non-recognition of privacy ultimately destroys one's dignity. In respect of personal matters which are not of public importance, his privacy right should be respected.<sup>85</sup> Individual personality suggests that it is the individual's independence, dignity, and integrity; it defines man's essence as a unique and self-determining being.<sup>86</sup> Commercial use of one's image or name without his consent amounts to an assault upon the integrity of one's personality. Dignity as a part of privacy is the integrity of one's identity or personality. A broad interpretation of dignity necessitates the recognition of privacy as a precondition for personhood.<sup>87</sup> The infliction of privacy is an assault on human personality, which demeans individuality. Thus, privacy right connotes the idea that a full realization of one's personhood requires the recognition of the conditions which are necessary for every person to uphold his identity and human dignity.<sup>88</sup> It demands the legal recognition of physical and mental integrity. It is through which one can achieve autonomy and freedom.<sup>89</sup>

### 2.5.5 Privacy and Secrecy

There is a close relationship between privacy and secrecy. The concept of privacy involves secrecy to a certain extent. It enables a person to keep

---

<sup>85</sup> S.K.SHARMA, PRIVACY LAW, A COMPARATIVE STUDY, 211(1994) (Warren and Brandies also explained privacy in their article in terms of human dignity and inviolate personality).

<sup>86</sup> Edward J Bloustein, *Privacy as an Aspect of Human Dignity: An Answer to Dean Prosser*, 39 N.Y.L.REV.(1964).

<sup>87</sup> Warren & Brandies, *Right to Privacy*, 4 HAR.L.REV.193(1890).

<sup>88</sup> Jonathan Kahn, *Privacy as a Legal Principle of Identity maintenance*, 33, SETON HALL L. REV.371 (2003).

<sup>89</sup> LOUIS HENKIN, HUMAN DIGNITY AND CONSTITUTIONAL RIGHTS IN THE CONSTITUTION OF RIGHTS: HUMAN DIGNITY AND AMERICAN VALUES.210 (Michael. Meyer &W.A.Parent eds.,1992).

certain matters secret.<sup>90</sup> But it cannot be said that all secret information will come under the purview of privacy. In other words, if a person keeps certain information in secrecy, it does not mean that he is entitled to protection under the privacy regime. Sidney Jourard defines privacy as an outcome of a person's wish to withhold from others certain knowledge as to his past and present experience and action and his intentions for the future.<sup>91</sup> It is sometimes argued that the concept of privacy, as secrecy, is a corollary of limiting access to the self.

However, the secrecy will be lost once the information fell into the public domain. Critics are of the view that conceptualizing privacy as secrecy would narrow down the concept of privacy as it failed to recognize the privacy of a group of individuals. Another criticism is that it is concerned only with total secrecy rather than selective secrecy since individuals want to keep secrecy sometimes from a group of people only.<sup>92</sup> Such a conceptualization creates another difficulty concerning the kind of private matters, which need secrecy since not all private matters are always secret.<sup>93</sup>

---

<sup>90</sup> RICHARD A POSNER, *THE ECONOMICS OF JUSTICE*, (1981), Richard A Posner, *The Right to Privacy*, *GEO.L.REV.*12, 393(1978).

<sup>91</sup> Sidney.M.Jourard, *Some Psychological Aspects of Privacy*, 31 *LAW AND CONTEMPORARY PROBLEMS*.307 (1966).

<sup>92</sup> Edward J Bloustein, *Privacy as an Aspect of Human Dignity: An Answer to Dean Prosser*, 39 *N.Y.L.REV.*(1964).

<sup>93</sup> JUDITH WAGNER DECEW, *IN PURSUIT OF PRIVACY LAW, ETHICS, AND THE RISE OF TECHNOLOGY*.48 (1997); *See generally*, S.BOK, *SECRETS*(1984) (he is of the view that secrecy is essential for individuals to have a sense of the situation in which we are performing activities. We should have control over secrecy in the respect of time of the release of information).

## 2.6 SOCIAL FUNCTION OF PRIVACY

The right to privacy has certain values both in the individual sphere and in the social sphere. Ferdinand Schoeman strongly argued that respect for privacy would enhance a good relationship of individuals with society. He believed that privacy is not a right but nuanced social norms that exert control over individuals.<sup>94</sup>

The right to privacy can be deduced from a few fundamental principles of liberty. Robert B HallBorg Jr examines two important theories of privacy in this respect.<sup>95</sup> He says that there is a difference between the constitutional right to privacy and a moral right to privacy. The constitutional right to privacy restrains the government from peeping into their private life. The moral right to privacy prevents a person from observing another when he is even in a public place engaging in private activities. According to him, privacy means a certain condition of action, which is a condition of being unobserved when one, is in 'private'.<sup>96</sup> He differentiates his observation from that of Judith. Robert says that the concept of privacy is subject to an essential limitation that one can claim this right only when he is a private place. But according to Judith, the right to privacy is not subject to such a limitation. It is considered as waived when one appears

---

<sup>94</sup> FERDINAND SHOEMAN, 'PRIVACY AND SOCIAL FREEDOM', CAMBRIDGE UNIVERSITY PRESS, 1992. *See also* Robert C Post, *Social Foundations of Privacy: Community and Self in the Common Law Tort*, CAL.L.REV.77(1989).

<sup>95</sup> Contra, H.J.MCCLOSKEY, 'PRIVACY AND THE RIGHT TO PRIVACY' PHILOSOPHY AND PUBLIC AFFAIRS,55,(1980) 17-35(Mc Closkey argues that the interest in privacy is not a species of privacy but of liberty).

<sup>96</sup> Robert B. Hall Borg, Jr, *Principles of Liberty and The Right to Privacy*, Law, and Philosophy, 5, No.2(Aug. 1986)pp.175-218., at 176., *See*, Judith Jarvis Thomson, *The Right to Privacy*,4 PHIL & PUB.AFF.295-314 (1975).



in public. Here it is better to take the position that when a person is in the private realm, unless and until he voluntarily waives that right, he can claim the right to privacy.<sup>97</sup>

## 2.7 PRIVACY AS AN INALIENABLE HUMAN RIGHT

To understand the nature of privacy right it is better to take into account the first principles concerning the nature and evolution of rights. There are rights, which are inalienable as they are inherent in him. The human being would not have a dignified existence if these rights are separated. That is why John Locke said that natural law preserves humanity. He stresses on the need to preserve one's life and also not to disturb others' life.<sup>98</sup> Salmond says that when interests are protected on moral grounds, irrespective of their legal recognition, they are natural rights. Roscoe Pound observes that natural rights are inherent in every human being and it should be secured. Therefore, privacy right is a natural right because it protects two moral qualities such as dignity and autonomy of a person.<sup>99</sup> Warren and Brandies in their article argue for the recognition of privacy right as an inalienable personality right. All international instruments support the right as a human right, which may be considered one of the reasons for the understanding of privacy rights in a human right perspective.

---

<sup>97</sup> See also, *Justice K Puttaswamy v. Union of India* (2017) 10 SCC 1: AIR 2017 SC 172.

<sup>98</sup> JOHN LOCKE, *SECOND TREATISE OF GOVERNMENT* (1690). (he said that 'The idea of liberty is the idea of a power in any agent to do or forbear any action, according to the determination or thought of the mind, whereby either of them is preferred to the other) See also, JOHN LOCKE, *THEORY OF FREEDOM*, E1-4 II.CHAPTER XXI.8:237, *AN ESSAY CONCERNING HUMAN UNDERSTANDING*. (1975).

<sup>99</sup> ROSCOE POUND, *THE SPIRIT OF THE COMMON LAW* (1921).

## 2.8 DEFINITION OF PRIVACY UNDER EARLY LEGISLATIVE BILLS

There were Bills in certain countries that attempted to define privacy. The perusal of the Bill gives some idea of the concept of privacy right which had been understood the then contemporary people.

Alexander Lyon's Bill, 1967 defined it as the right of any person to preserve the seclusion of himself, his family or his property from any other person.<sup>100</sup> The Walden Bill of 1969 defined privacy as the right of any person to be protected from intrusion upon himself, his home, his family, his relationships and communication with others, his property and his business affairs. It was also included (a) the spying, prying, watching or besetting (b) the unauthorized overhearing or recording of spoken words (c) the unauthorized making of visual images (d) unauthorized making of visual images (d) the unauthorized reading or copying of documents (e) the unauthorized use or disclosure of confidential information, or of facts calculated to cause him distress, annoyance or embarrassment, or to place him in a false light. (f) the unauthorized appropriation of his name, identity or likeness for another's gain.<sup>101</sup> Later another Bill called National Council of Civil Liberties defined right to privacy in the following way:-  
Right to privacy is the right of any person to –

- a. Solitude is his right to have his physical senses unmolested in any private place

<sup>100</sup> WALTER F. PRATT, PRIVACY IN BRITAIN (1979).

<sup>101</sup> S.K SHARMA, PRIVACY LAW –A COMPARATIVE STUDY, 10(1994).

- b. Intimacy, being his right to enjoy in any private place the close familiarity of his family, workgroup or social group;
- c. Anonymity, being his right to prevent undue publicity of himself;
- d. Reserve, being his right to prevent psychological investigation of his mind or brain
- e. Privacy of his personal information, being his right to prevent the reading, copying or recording of any information kept by him or by any other person, which expressly or by necessary implication refers to him.

The above Bills tried to preserve different aspects of privacy as explained by various authorities. The Bills reflect the requirements of individuals from the perspective of privacy and has significance in contemporary society.

## **2.9 PRIVACY CONCEPT IN INTERNATIONAL REGIME**

The right to privacy is recognized through international instruments as one of the human rights. Article 12 of the United Nations Declaration of Human Rights, 1948 protects different kinds of interferences. It provides that no one shall be subjected to arbitrary interference with his privacy, family, home, or correspondence, nor to attacks upon his honour and reputation. Everyone has the right to the protection of the law against such interference or attacks<sup>102</sup>. Accordingly, Art 10 and 11 which guarantee that the individual should not be removed from his or her home and private sphere without due process requirements including certain judicial safeguards. Art 17 of the UDHR gives

---

<sup>102</sup> Article 12 :

No one shall be subjected to arbitrary interference with his privacy, family, home or correspondence, nor to attacks upon his honour and reputation. Everyone has the right to the protection of the law against such interference or attacks.

protection against arbitrary deprivation of the actual place of habitation.<sup>103</sup> Art 18<sup>104</sup> and 19<sup>105</sup> try to secure individual freedom such as freedom of thought, conscience, and opinion which can be said to be an integral and important element of the individual's private sphere.

Article 17 of the International Convention on Civil and Political Rights, 1966 also provides that no one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation. It is also added that everyone has the right to the protection of the law against such interference or attacks. Article 8 of the European Convention on Human rights (ECHR), which is one of the regional treaties, also declares that the private and family life of individuals should be respected.<sup>106</sup>

---

<sup>103</sup> Article 17 UDHR

Everyone has the right to own property alone as well as in association with others. No one shall be arbitrarily deprived of his property.

<sup>104</sup> Article 18 UDHR

Everyone has the right to freedom of thought, conscience, and religion; this right includes freedom to change his religion or belief, and freedom, either alone or in community with others and in public or private, to manifest his religion or belief in teaching, practice, worship, and observance.

<sup>105</sup> Article 19 UDHR

Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers.

<sup>106</sup> Article 8 ICCPR

1. Everyone's right to respect for his private and family life, his home and his correspondence shall be recognized.
2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

#### 2.4.2. India under International Obligation to Protect Privacy Right

India cannot ignore her obligation to abide by the international principles embodied in international conventions and treaties. The constitutional provision of India requires the state to endeavor to foster respect for international law and treaty obligation in the dealings of organized people with one another.<sup>107</sup>To give effect to the international rules and principles for the protection of human rights, India has enacted Human Rights Act, 1993 which defines 'human rights' as rights relating to life, liberty, equality and dignity of the individual guaranteed by the Constitution or embodied in the International covenants and enforceable by courts in India.<sup>108</sup>Therefore, it can be said that since the international instruments took several steps to give the privacy right, the status of human rights there is nothing wrong in recognizing privacy right as a human right in India. Besides, India must enforce it as a human right since she is a party to these international instruments. Such an attitude had been taken in the historic case of *Justice K. Puttaswamy v. Union of India*.<sup>109</sup>

It is also relevant to refer to the report of Office of the U.N High Commissioner for Human Rights, 2014 and it says that the right to privacy has been given universal recognition of fundamental importance. Therefore it is high time to give due recognition to this right both in law and practice.<sup>110</sup>

---

<sup>107</sup> INDIAN CONST. art.51.

<sup>108</sup> Human Rights Act, 1993§.2(1)(d).

<sup>109</sup> (2017) 10 SCC 1:AIR 2017 SC 172.

<sup>110</sup> THE RIGHT TO PRIVACY IN THE DIGITAL AGE, REPORT OF THE OFFICE OF THE UN HIGH COMMISSIONER FOR HUMAN RIGHTS (2014), <https://www.ohchr.org/EN/Issues/DigitalAge/Pages/DigitalAgeIndex.aspx> (Last accessed 6th May 2013).

It shows that the right to privacy is recognized in the form of respect for private and family life. In several jurisdictions, which are in line with the provisions of the above convention, the domestic law provides a remedy to the individuals where the right to privacy is violated by the state. Accordingly, State surveillance is possible only according to the principles recognized by law. It should satisfy the test of proportionality in the sense that it should balance both individual needs and social needs.

The judiciary in India had given due respect and regard to various International Conventions which guarantee privacy right of individuals by upholding their integrity and dignity. For example, in *Lillu @ Rajesh v. State of Haryana*<sup>111</sup> the court upheld the privacy right of the rape victims by referring the conventions such as International Covenant on Economic, Social and Cultural Rights, 1966, United Nations Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power 1985. The covenants require that rape victims are entitled to proceedings which do not infringe their integrity and dignity which are the essentials of privacy right. In *PUCL v. Union of India*<sup>112</sup> the court relied on Art 17 of International Covenant on Civil and Political Rights which assures the privacy right and opined that the above Article 17 must be an interpretative tool for construing the provisions of the Constitution. It had also been opined that Art 21 should be interpreted in line with international law and the absence of any substantive rule, the court could frame rules.

---

<sup>111</sup> (2013) 14 SCC 643.

<sup>112</sup> (1997) 1 SCC 30(the petitioner challenged the constitutional validity of S.5 of Indian Telegraph Act,1885 which authorizes interception in telegraphic messages).

The recent landmark case of *Justice K. Puttaswamy v. Union of India*<sup>113</sup> also took into consideration the international covenants which guarantee the privacy right of individuals and held that privacy right is a fundamental right under life and personal liberty limb of Art 21 of Constitution of India. The court stressed the obligation of India to give due regard to these international conventions as the right has been universally recognized as a basic human right. In *Malak Singh v. State of Punjab & Haryana*<sup>114</sup> the court referred ICCPR and said that there was a need for surveillance on habitual offenders but at the same, the state has to follow a certain procedure to prevent intrusion into the privacy right.

The notable point is that in almost all international conventions the right to privacy has been expressly and not impliedly stated under its articles. Therefore we can elucidate that at the international level the right to privacy has been given great importance.

## 2.10 CONCLUSION

The analysis of the development and series of definitions on the right to privacy show that initially, the concept had tried to protect the life and property of an individual in various forms. Later, it started to recognize affording protection to one's spiritual nature, feelings and intellect, which later referred to as 'right to be let alone'. In other words, it is the freedom to live one's life without interference. The above analysis is an acknowledgment of the reality that the

---

<sup>113</sup> *Puttaswamy*, (2017) 10 SCC 1: AIR 2017 SC 172.

<sup>114</sup> (1981) 1 SCC 420, (the petitioner challenged the conviction, close surveillance system by the police and entering the name in the surveillance register).

concept of privacy is so important in a democracy and it has a pivotal role in social construction. Despite the controversy in nature, concept and definitions of privacy, one cannot deny that privacy has some significant role in guiding and molding both individual and society. It helps an individual to have a decisional choice, individuality, dignity, etc. Therefore, we cannot undermine the value of privacy right.

Even though there are some controversies as to whether it is an independent or deducible right or liberty, it has some democratic justification also. It ensures equality to an individual, helps to participate in the governance of the country, etc. It is very difficult to formulate a universal definition for the term privacy. Because the concept of the right to privacy changes over time. It is a form of interest, a condition of life, control of information, etc. Therefore, it can be said that privacy right is the combination of all the above. It should be viewed as an element of social construction and should not be considered in conflict with social needs.

At the international level also the right to privacy attained significance under the Universal Declaration of Human Rights (UDHR), International Convention on Civil and Political Rights (ICCPR); regional treaties like the European Convention on Human Rights (ECHR), etc. These conventions bear specific provisions to respect the private life of individuals. It prohibits an unjustified attack on his personal affairs and bestowed with the status of human right.





## CHAPTER III

### PROTECTION OF RIGHT TO PRIVACY – INDIAN PERSPECTIVE

*‘The Right to be let alone is, indeed, the  
beginning of all Freedoms.’-*

William O Douglas,  
Public Utilities Comm’n v. Polla, 343 US  
451,467(1952)

#### 3.1 INTRODUCTION

India lacks a specific law to protect the right to privacy of citizens. However, the right is impliedly incorporated under life and personal liberty clause of Article 21 of the Constitution of India. The chapter gives an overview of the historical perspective of the development of privacy right in India. It analyses how far the private life of individuals is secured from unwanted attention under the Constitution of India and whether the prime document of the country is trustful to preserve the dignified life of the individuals when privacy matters are concerned. Following this, the chapter analyses the journey of judiciary to clarify the status of privacy right under Constitution of India in the light of the decision of the recent Supreme Court of India in Justice *K.Puttaswamy v. Union of India*.<sup>1</sup>The chapter also examines the protection of private information in different statutes and how far it is worth in ensuring the

---

<sup>1</sup> (2017) 10 SCC 1: AIR 2017 SC 172.

privacy rights. The right to privacy under tort law is also under discussion in this chapter. In this technologically developed era, it is very easy to keep past information and its disclosure would amount fresh intrusion of privacy. A new right called right to be forgotten is also analysed to understand the above aspect from Indian perspective.

### **3.2 PRIVACY RIGHT IN ANCIENT INDIA**

The people in ancient India followed certain practices, which had the support of custom and it aimed to lead a life from unwanted interference from others. The term privacy right had not been used during that time. In those days, under the rules of house construction the houses were constructed to seclude the women from the notice of strangers. Kautilya's Arthasasthra also mentioned the right to privacy.<sup>2</sup> There was traditional practice of Ramanujasampradaya wherein the people in the normal course did not consume food in public. If they have to consume food in public places, they did it by making temporary enclosure to escape from strangers' gaze.<sup>3</sup> The advent of civilization has created in man a notion of 'private', which is something distinct from 'public'. In the Biblical period itself, we can trace the perception of the privacy concept. When Adam and Eve consumed the fruit of tree of knowledge, they became conscious of their nakedness. It can be interpreted that our knowledge of good and bad by divine edict linked with notion of privacy right.<sup>4</sup> In every aspect of life we creates

---

<sup>2</sup> G.MISRA, RIGHT TO PRIVACY IN INDIA, 83 (1994).

<sup>3</sup> *Id.*

<sup>4</sup> G. Misra, *Privacy and the Indian Legal System*, 12 DEL.L.REV.46(1990).

something very close to us by keeping others or class of persons from knowing it or claim it as our own.

### 3.3 PRIVACY RIGHT IN PRE INDEPENDENCE ERA

Pre independence period witnessed the protection of tangible things or body from unlawful intrusion. Preventing other people from intruding into home or belongings was not a new phenomenon to the law. It had often been preserved under the law of trespass. The woman were enjoyed the seclusion from the view of strange men and their style of living were arranged in that way. The building rules were drafted in order to give effect to the above privacy attitude.<sup>5</sup>

In India, the judiciary also sanctioned the enjoyment of privacy right, as a customary right. In *Gokul Prasad v Radho*<sup>6</sup> the plaintiff alleged that the doors of house of the defendants constructed in such a way that it violated the privacy right of the plaintiff. The Allahabad High Court speaking through Chief Justice Edge upheld the decision of the lower court, pronouncing that the plaintiff had the right to privacy by the usage of custom and if there were interferences without his consent there arose cause of action. This case is important in three respects. The Gokul Prasad case elaborately referred several cases and recognized the fact that the privacy right had its existence from time immemorial as a customary right.<sup>7</sup> Secondly, it laid down the proposition that the intrusion into one's privacy

---

<sup>5</sup> Indian Easement Act, 1882, §18(it deals with acquisition of easement right by custom i.e., customary easement under which one cannot open a new window to invade his neighbors' privacy).

<sup>6</sup> ILR 10 All (1888) 358.

<sup>7</sup> See for e.g., *Nuthimull v. Zuka Oollah Beg.* S.D.A., N.W.P.Rep.1855, 92, *Ganga Pershad v. Salik Pershad* S.D.A., N.W.P.Rep.1862, Vol.II.217, *Ram Baksh v. Ram Sookh* N.W.P.H.C.Rep.1868, 253., *Mata Prasad v. Behari Lal*, Unreported S.A.No.8 of 1886.,

results in a feeling of disgrace. The court opined that the privacy right was a dynamic concept and it was closely related to the life style of the people and the concept was different from one place to another and from time to time.<sup>8</sup> It was said that the houses which were not constructed to protect the privacy of the people would not get any adequate market value. Another important observation was that privacy right is closely related to the lifestyle of the people and it is a dynamic concept.

In another case, *Sheonath Rai v. Ali Hussain*<sup>9</sup> the Allahabad High Court observed that the right to privacy was prevalent in India where the people pursue different living conditions. This case also involved the issue of construction of a building which violated the privacy of the neighbours. In an interesting observation in *Bohra Tarachand v. Must.Rayazi Begum*<sup>10</sup> was that the claim of right to privacy did not depend on the caste or creed of the person owning the house or on the fact that it was used by the ladies. All these cases lead to the fact that even from the early days, at the time when English law was reluctant to recognize the right to privacy, India was lenient to adopt the perspectives centered on the concept of privacy. It was so observed in *Nihal Chand v. Mt.Bhagwan Dei*<sup>11</sup> and said that it was the birth right of a human being and should be sacred. In another case of *Brahmanand v. Lala Jagdish Prasad*<sup>12</sup> it

---

*Lachman Prasad v. Jamna Prasad*, Weekly Notes, 1887,295(Cawnpore Case) etc. as in G.MISRA, *supra* note 2, 85-86(1994).

<sup>8</sup> *Id.*

<sup>9</sup> ALJ(1904) 118.

<sup>10</sup> AIR 1923 All.404.

<sup>11</sup> AIR 1935 All.1002.

<sup>12</sup> AIR 1969 AWR (H.C) 111.

was remarked that the right of privacy was attached to a portion of the building where it was shown that women were ordinarily residing. The importance of privacy right is beautifully explained in *Bhagwan Das v. Parmeshwar*<sup>13</sup>as:-

*In all civilized countries of the world and even in so called uncivilized groups some modicum of privacy for domestic purposes is necessary without which the family life would become most inconvenient and difficult.*<sup>14</sup>

The basis of customary right of privacy has different views. One view says that it is based on the social custom of pardah. Another view says that it is based on an innate sense of modesty and human morality.<sup>15</sup>The former one totally related to caste and creed. The latter is related to the birthright of the human being as to live with human dignity. The custom of pardah also protects the social value of keeping women from strangers. Therefore, the custom of pardah is practiced on social value also. It is to regulate the sexual life and institution of the family.

### **3.4 42<sup>nd</sup> LAW COMMISSION REPORT AND PRIVACY RIGHT**

After the 42<sup>nd</sup> report of the Law Commission on the Indian Penal Code in 1971, the legislature proposed to enact law by introducing new section, i.e., S.490, on invasions which would amount to eavesdropping and unauthorized publication of photographs. The Commission expressed the view that in respect of other notions of privacy right, further development and legislations in other

---

<sup>13</sup> AIR 1971 AWR (H.C) 474.

<sup>14</sup> *Id.* at 475.

<sup>15</sup> *Keshao Sahu v. Dasarath Sahu* AIR 1961 Ori. 154.

countries are required. In line with this recommendation, the chapter titled 'Offence against Privacy' was sought to be introduced. But unfortunately, the Bill was lapsed due to the dissolution of Lok Sabha.

Under the proposed S.490 IPC the use of any artificial listening or recording apparatus had been introduced in the vicinity of any premises without the knowledge or consent of the person, listens to any conversation with the aid of such apparatus or record any conversation with the apparatus is an offence and is punishable for six months and fine or with both. The second clause of the section made the publication of recordings or conversation an offence with the punishment of imprisonment of one year.

The proposed S.490 IPC provided that the taking photographs with an intention to cause annoyance, without consent of that person, a punishable offence with imprisonment for six months or with fine or both. Under the next sub clause, the publication of the same would amount to an offence with one year imprisonment or fine. The taking of photographs of a place, building or thing with the knowledge that these are prohibited would amount to unauthorized photographing and is punishable. The publication of the above photographs would also be punishable and amount to the violation of privacy right. The law introduced exceptions under which the above provisions were not applicable to the public servant who is acting in good faith in the course of his duties connected with the security of State, the prevention, detection or investigation of offences, the administration of justice or the maintenance of public order. The persons who were acting under the direction of a public servant were also not punishable

under the section. The third exception provided that the penalty will not be attracted to the use by any person of any artificial listening or recording apparatus for any purpose authorized or permitted under any law.

Unfortunately, the Bill was lapsed due to the dissolution of Lok Sabha. The recommendation of the Law Commission to introduce a Bill with an intention of protection of privacy right should be appreciated. Again in 1981 a private member introduced 'The Right to Privacy Bill, 1981', and it did not come into the limelight.<sup>16</sup>

The Commission opined that it was not advisable to have a general right to privacy. The Commission adopted the view in the U.K that the insertion of general right to privacy would create uncertainty and confusion into the law. Moreover, the concept of privacy had been subjected to changes from time to time and place to place. Besides, as Younger Committee pointed that the definition or explanation of privacy right in the early period could not be relied upon as it is in the process of development.<sup>17</sup>

### **3.5 SECOND PRESS COMMISSION AND PRIVACY RIGHT**

The second Press Commission Report devoted more effort to discuss the position of the right to privacy under the Constitution of India.<sup>18</sup> It elaborately

---

<sup>16</sup> REPORT OF THE SECOND PRESS COMMISSION (1) (1982) Chapter VI, ¶ 5. *See also*, R.Dhawan, *On the Laws of Press in India*,26(3) JILI,288(1984).

<sup>17</sup> *Id.*

<sup>18</sup> The Press Commissions were constituted to make a comprehensive enquiry and to examine various issues associated with journalists and freedom of press to ensure high standard of journalism. The first Press Commission was constituted in 1952 under the Chairmanship of Justice J.S.Rajadhyakhsa with other eleven members. The Commission did not discuss the privacy right. Therefore the author of this thesis didn't discuss the report of first press commission report. At the same time the second press commission discussed the matter.

discussed the cases of surveillance and observed that the Supreme Court had not recognized a general right of privacy as fundamental right even as an emanating from other fundamental rights under the Constitution.<sup>19</sup> Therefore, it decided that it was not proper to include privacy right as an explicit provision under the Constitution.

### **3.6 CONSTITUENT ASSEMBLY DEBATE ON PRIVACY RIGHT**

Even at the time of the drafting of the Constitution, there was debate over the suitability of inclusion of the right to privacy under the category of fundamental rights and freedoms. In 1947, in the ‘Draft articles on Fundamental Rights and Duties of citizens’ submitted by K.M Munshi, it had been proposed to guarantee the right to the inviolability of his home, the right to secrecy of his correspondence, the right to maintain his person to secured by the law of the Union from exploitation in any manner contrary to law or public authority.<sup>20</sup>

Again in the draft articles on fundamental rights by Dr.B.R. Ambedkar in 1947, said that the people had the right to be secured in their persons, houses, papers and effects against unreasonable searches and seizure except when if a warrant had been issued fulfilling the procedural requirements. The draft report

---

The Second Press Commission was constituted in 1978. Under chapter VI of the Report the Commission was required by item 3 of Terms of Reference to ‘examine and make recommendations on the Constitutional and legal safeguards to protect the citizen’s right to privacy. It submitted the report under the chairmanship of Justice K.K.Mathew. Actually the commission was constituted under the chairmanship of Justice P.K.Goswami. But later due to the change of government he and his colleagues resigned and it was reconstituted.

<sup>19</sup> The commission took into account the cases such as *Kharak Singh v. State of U.P.* AIR 1963 SC 1295 : 1964 SCR(1)332, *Gobind v. State of M.P.* (1975) 2 SCC 148, *See also*, REPORT OF THE SECOND PRESS COMMISSION (1)(1982) Chapter VI, ¶ 5.

<sup>20</sup> B. SIVA RAO, THE FRAMING OF INDIA’S CONSTITUTION- SELECT DOCUMENTS 4(2006).



submitted by Dr. B.N.Rau, expressed that if there could be no search without a warrant, it would adversely affect the police investigation. Another objection was raised by Sir Alladi Krishnaswamy Iyer and Jaya Prakash Narayan that protection of secrecy in respect of correspondence is ensured under ordinary law of the land rather than under the constitutional provisions. Therefore, the Constitution of India when it was adopted on 26th January 1950, the term 'privacy right' had not been mentioned in the document.<sup>21</sup>

### **3.7 RIGHT TO PRIVACY- CONSTITUTIONAL PERSPECTIVE**

The Indian legal system was not ready to give the constitutional status to the privacy right. Therefore the right to privacy was not expressly or impliedly recognized in the Constitution of India. This may be due to the lack of overcrowding of new technologies as we are now experiencing. The early decisions of courts in India show that the judiciary was also reluctant to recognize the right to privacy as a constitutional right. The question of privacy arose mostly in cases related to seizure and search by police officials. The relevancy of privacy collaterally discussed for the first time came before the Supreme Court in *M.P.Sharma v. Satish Chandra*.<sup>22</sup> In this case, an investigation into the affairs of the company was ordered by the Government on receiving the report that an organized attempt for misappropriating the fund of the company thereby adversely affected the interests of the creditors and shareholders. The District Magistrate of Delhi issued search warrant for the documents in the custody of

---

<sup>21</sup> *Id.*

<sup>22</sup> AIR 1954 SC 300( wherein the search warrant issued under S.96 (1) CODE.CRI.PROC, and it was questioned on the ground of violation of fundamental rights).

the company in 34 offices. The petitioners challenged the constitutional validity of the search warrant on two grounds namely Art 19(1)(f) and Art 20(3) of the constitution. Regarding the former, the court found no merit and said that a mere search warrant had not taken away their business reputation or had not amounted to a restriction of the possession and enjoyment of the property. In respect of Art 20(3) the petitioners argued that the compulsory production of documents under search warrant amount to compulsorily procuring of incriminatory evidence from the accused himself. They argued that Art 20(3) extended not only to oral evidence by the accused but also to the evidence which was collected compulsorily from a person. It had also been alleged that it violated the privacy rights of the petitioners. The court held that the search warrant under Art 20(3) only amount to testimonial compulsion and it was not unconstitutional.

By rejecting the argument for the recognition of privacy right as a constitutionally protected right the court observed that the makers of the constitution had thought fit not to subject the regulations as raised in this case to constitutional limitations by recognition of a fundamental right to privacy as analogous to the Fourth Amendment of U.S Constitution.<sup>23</sup> Therefore, it was not

---

<sup>23</sup> U.S.CONST.amend.IV :

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by oath or affirmation and particularly describing the place to be searched, and the persons or things to be seized.

The court referred the U.S decision of *Boyd v. United States*, 116 US 616(1886) and observed that the fourth and fifth amendment of U.S Constitution had been clearly violated by the illegal search and seizure. i.e., obtain incriminating evidence by illegal search and seizure. But in India there was no such rationale and therefore, in the present case the search and seizure did not violate the principle against self-incrimination as it was to prevent crime.

justified to import it into a totally different fundamental right by some process of strained construction.<sup>24</sup>

In the next important case, *Kharak Singh v. State of U.P.*<sup>25</sup> the Supreme Court had got another opportunity to examine the ambit of privacy right in the context of surveillance by the police. In this case, the petitioner challenged the validity of chapter XX of U.P.Regulations which allowed the police officials to surveillance which involved secret picketing of the house, domiciliary visiting of the house etc. He challenged the regulations on the ground of violation of Articles 19(1)(d) and 21 of the Constitution. The court elaborately considered the ambit of life and personal liberty clause of Article 21 of the Constitution of India. The court elaborately discussed whether the intrusion into the residence of a citizen and the knocking at his door at night would involve the violation of freedom under article 19(1)(d) or liberty under article 21 of the constitution. The term 'life' under Art 21 is qualified with the term personal to make a distinction between freedom under Art 19 and liberty under art 21. The personal liberty is a compendious term to include the whole rights which are essential to make the concept liberty a meaningful one. For this purpose all those rights which are not covered under different clauses of Art 19(1) should be taken into consideration. The court admitted that the right to privacy was an important aspect of liberty, which was embedded in the concept of ordered liberty. Therefore, the surveillance at night disturbing the persons at night would amount to violation of privacy right. The court also considered the application of important common

---

<sup>24</sup> *M.P.Sharma*, AIR 1954 SC 300.

<sup>25</sup> *Kharak Singh*, AIR 1963 SC 1295:1964 SCR(1)332.

law principle that ‘every man’s house is his castle’. But the court was reluctant to adopt these principles on the ground that the Constitution of India did not confer such right as American Constitution did. The majority held that clause (b) of Regulation 236 is unconstitutional since there was no law to justify the regulation.<sup>26</sup> To claim so, violation of fundamental right must be direct. By putting a suspect under watch would not violate his fundamental right under Art 19(1)(d) of the constitution.

The minority judgment, speaking through Subha Rao.J., said that the case involved an important question of the right of a citizen to lead a secured life according to the societal norms. The life of person does not mean a mere animal existence, but is a wide term to include variety of conduct which the individual was free to pursue.<sup>27</sup> It was also highlighted that

*[T]he right to personal liberty not only include right to be free from physical restrictions but also free from encroachments on his private life. It is true that our constitution does not expressly declare a right to privacy as a fundamental right, but the said right is an essential ingredient of personal liberty. Every democratic country sanctifies domestic life; it is expected to give him rest, physical happiness, peace of mind and security. In the last resort, a person’s house where he lives with his family, is his “castle” it is his rampart against encroachment on his personal liberty. The pregnant words of that famous judge, FrankfurterJ., in Wolfv. Colorado<sup>28</sup> pointing out the importance of the*

<sup>26</sup> *Id.*

<sup>27</sup> *Id.*¶11, *See also, Munn v. Illinois* 94 US 113 (1876) (wherein the U.S Supreme Court upheld the power of the State government to impose regulations on private industries for the protection of public interest).

<sup>30</sup> (1949)238 US 25 (wherein it had been observed that if the State sanctioned the police incursion it would not amount to violation of Fourteenth Amendment which says that all persons born or naturalized in the United States, and subject to the jurisdiction thereof, are

*security of one's privacy against arbitrary intrusion by police...nothing is more deleterious to a man's physical happiness and health than a calculated interference with his privacy. Therefore the right of personal liberty in Article 21 as a right of an individual to be free from restrictions or encroachments on his person, whether those restrictions or encroachments are directly imposed or indirectly brought about by calculated measures.*<sup>29</sup>

In short, the majority took the view that illegal domiciliary visit amounted to the sanctity of home and was a part of ordered liberty. At the same time, minority was of the view that right to privacy was an essential aspect of personal liberty. The minority verdict attained much attention in course of time.

In another landmark case *Gobind v. State of M.P*<sup>30</sup> the petitioner challenged the validity of Regulations 855 and 856 of M.P Police Regulations under Police Act, 1961. It also involved the issue of surveillance, which affected the reputation and privacy of the petitioner. The court analysed the nature of the privacy right and said that the privacy right must protect the personal intimacies of the home, the family, marriage, motherhood, procreation and child rearing. However, the claimed right must be a fundamental right implicit in the concept of ordered liberty.<sup>31</sup> The court rightly said that -

*Rights and freedoms of citizens are set forth in the Constitution in order to guarantee that the individual, his personality, and those things stamped with*

---

citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws).

<sup>29</sup> *Kharak Singh*, AIR 1963 SC 1295.:1964 SCR(1)332.¶

<sup>30</sup> (1975) 2 SCC 148: AIR 1975 SC 1378.

<sup>31</sup> *Id.* at ¶ 24.

*his personality shall be free from official interference except where a reasonable basis for intrusion exists. 'Liberty against government' a phrase coined by Professor Corwin expresses this forcefully. In this sense many of the fundamental rights of citizens can be described as contributing to the right to privacy.*<sup>32</sup>

*Gobind* case also commented that what Warren and Brandies described privacy as an interest by which man should be able enforce his privacy right directly and not indirectly by enforcing other rights. The Supreme Court observed that the law to protect the privacy right had to evolve through case-by-case development. To overcome the right there should be compelling state interest test.<sup>33</sup>The court in *Gobind* case observed that the individuals need a place of shelter where they can be free from the unwanted attention of the public. In this shelter they can shake off their mask which they had projected to the world to get a good image and acceptance from the public. By shaking of this mask, the individuals can keep their relationship with others by keeping ones' nature.<sup>34</sup>The *Gobind* case decided in favour of State saying that the regulations were applicable only to persons who were suspected to be habitual offenders. Therefore the surveillance was limited to certain class of citizens only and it was according to the law provided in the Act.

*R. Rajagopal v. State of Tamil Nadu*<sup>35</sup>made a historic step in recognizing the right to privacy under the rubric of life and personal liberty clause of Article

<sup>32</sup> *Id* at ¶ 25.

<sup>33</sup> *Id*, ¶28.

<sup>34</sup> *Gobind*, (1975)2SCC 148, ¶ 27.

<sup>35</sup> AIR 1995 SC 264, 1994 SCC (6) 632, JT 1994(6) 514, 1994 SCALE (4) 494 (here the petitioners sought relief under Art 32 of the constitution to prevent the respondents from interfering with the publication of autobiography of Auto Shankar, a condemned prisoner as it was alleged that the autobiography reveals the nexus between the prisoner and high

21 of Constitution of India. Here the court observed that the right to privacy is an independent and distinctive concept that had originated in the law of torts. Under this, the aggrieved party can claim damages for the injury caused by an unlawful invasion of privacy right. The court said that the right had two aspects; one was general law of privacy, which afforded a tort action for damages resulting from unlawful invasion of privacy. The other was the protection given to right to privacy under constitutional provisions that protects personal privacy against unlawful invasion by state authorities. The right could be denied only when there is an important countervailing interest which is superior to the privacy right. Since it related to the rights of the individual, the right to privacy is overlapped with the concept of liberty and it must be a fundamental right which is implicit in the concept of liberty. Relying on other foreign decisions as discussed above the court decided that the petitioners were entitled to publish the autobiography of Auto Sankar. The court also took the view that prior restraint could not be imposed as it would cause chilling effect on the free expression. The court clarified the position that it would invade the privacy right if they publish anything beyond that. The court speaking through B.P.Jeevan Reddy and Suhas C Sen, J.J. the summarized the principles as:-

- a. The right to privacy is implicit in the right to life and liberty guaranteed to the citizens under Article 21 of the Constitution of India. It is a “right to be let alone”. A citizen has a right to safeguard the privacy of his own, his family, marriage, procreation, motherhood, child-bearing and education

---

officials in police department. The court also discussed the right of the press to criticize and comment on the acts and conduct of public officials).

among other matters. No one can publish anything above matters without his consent. In case of violation, he would be liable in an action for damages.

- b. In cases where the individual voluntarily becomes the subject matter of controversy, he cannot claim right to privacy.
- c. If the publication is based on the information in public records, the liability will not be attracted.
- d. The public officials cannot claim privacy protection in respect of acts and conduct which become the part of discharge of their official functions. However, in respect of matters other than official matters he enjoys same protection as any other citizen.
- e. But in India there is no law which gives authority to the state to impose prior restraint to prevent the media from publishing the information.<sup>36</sup>

Here it should be noted that the court in this case very elaborately discussed the extent of the privacy protection in different categories of person, especially public officials. But it is a question to decide to what extent the Indian legal system has followed the guidelines propounded by the court.

In another case, *District Registrar and Collector, Hyderabad v. Canara Bank*<sup>37</sup> the court reiterated that the right to privacy was a part of life and personal liberty under Article 21 of the Constitution of India.<sup>38</sup> Chief Justice Lahoti, after

---

<sup>36</sup> *Id.* ¶ 26.

<sup>37</sup> (2005)1 SCC 496 (in this case 25 writ petitions were considered. The grievance of the petitioners was that the documents executed between private parties which were in the custody of Bank were inspected and directed the bank to recover the deficit duty from them. They alleged that their right to privacy was violated).

<sup>38</sup> *Id.*



referring *Griswold v. State of Connecticut*<sup>39</sup>, *Kharak Singh v. State of U.P.*<sup>40</sup>, *Gobind v. State of M.P.*<sup>41</sup> etc. the court held that the right to privacy dealt with persons and not with places. Therefore, even though the documents were in the bank, the individual is entitled to get privacy protection in respect of that document. It is opposite to the property theory of privacy as propounded by *United States v. Miller*<sup>42</sup>. The court took the decision that giving power to the collector to authorize any person to inspect the documents suffers the vice of excessive delegation without proper guidelines had violated the privacy of customers. It reaffirmed that the right to privacy is emanated from life and liberty under Articles 21 and 19 of the Constitution. Also, it found the basis of recognition of privacy right in India in various important International conventions such as UDHR, ICCPR etc. Moreover, it had been said that the privacy attaches to the person rather than to places and therefore if the person is not in possession of documents and he had not been parted with the document voluntarily, the privacy right has not been lost. It is also essential to have and to stick on the procedural safeguards to prevent unauthorized access. It should be

---

<sup>39</sup> 381 US 479 (1965) (U.S Supreme Court speaking through Justice William O Douglas, upheld the privacy rights of married couple by holding that the law which prohibited the use of contraceptive as unconstitutional. It had been observed that there is a zone of privacy within a penumbra created by First, Fourth and Ninth Amendment of U.S Constitution. The case was cited in important judgement, *Roe v. Wade* 410 U.S.113 (1973) which held that regulation on abortion as unconstitutional and uphold the constitutional right to privacy of woman).

<sup>40</sup> AIR SC 1963 1295:1964 SCR (1)332.

<sup>41</sup> (1975) 2 SCC 148: AIR 1975 SC 1378.

<sup>42</sup> 425 US 435(1976) (the court held that in respect of bank records, the U.S.Fourth Amendment protection was not applicable. The court applied the third party doctrine which said that a person had no legitimate expectation of privacy in respect of information which he had voluntarily given).

ensured that the information provided to a third person is used only for the purpose for which it has been given.

### 3.7.1 Justice K. Puttaswamy v. Union of India<sup>43</sup> (Right to Privacy case) ---an Analysis

In this land mark case the nine judges' bench of the Supreme Court of India examined the viability of declaring the right to privacy<sup>44</sup> as a constitutional right. The court re-examined the constitutional foundations of right to life and personal liberty. The court observed that the constitutional liberty is required to be interpreted in the context of challenges to social order and of global information based society.<sup>45</sup> This case can be analysed in following manner.

The petitioners argued that the decisions in *Kharak Singh v. State of U.P.*<sup>46</sup> and *M.P.Sharma v. Satish Chandra*<sup>47</sup>, were based on the ratio of *A.K.Gopalan v. State of Madras*<sup>48</sup>, which was held to be not a good law by eleven judge Bench in *R.C. Cooper v Union of India*.<sup>49</sup> It had also been argued that seven judges bench in *Maneka Gandhi v. Union of India*<sup>50</sup>, the minority judgment of

<sup>43</sup> (2017) 10 SCC 1 (the nine judges' bench consisted of Hon'ble Justices, Dr. D.Y. Chandrachud, Kehar C.J., Agrawal J., Nazeer J., Nariman J., Kaul J., Bobde J., Sapre J., and Chelameswar J. considered the reference case. Actually a three judges' bench of Supreme Court of India referred the matter while considering a writ petition challenging the constitutional validity of Aadhar Card Scheme of Union Government. It had been decided that, Aadhaar (Targeted Delivery of Financial and Other Subsidies, Benefits and Services) Act, 2016, was constitutional as it did not violate fundamental right to privacy except certain provisions. But at the same time the provision relating to requirement of aadhar card for opening of bank account, mobile phone connection, mandate of aadhar card authentication by private entities were held unconstitutional).

<sup>44</sup> *Id.* (Justice Y.V Chandrachud explained the term 'right to privacy' as something which allows a man to be left alone in a core which is inviolable. The relationship of an individual with the rest of the society poses issues of autonomy and free choice).

<sup>45</sup> *Id.*

<sup>46</sup> AIR 1963 SC 1295 : 1964 SCR(1)332. *hereinafter*, Kharak Singh.

<sup>47</sup> AIR 1954 SC 300, *hereinafter*, M.P.Sharma.

<sup>48</sup> AIR 1950 SC 27.

<sup>49</sup> (1970) 1 SCC 248.

<sup>50</sup> (1978) 1 SCC 248, *hereinafter* Maneka Gandhi.

Subha Rao J.in *Kharak Singh* was approved and the decision of majority was overruled.

There are various earlier cases such as *Gobind*, *R.Rajagopal*, *PUCL*, etc. and had been observed that the right to privacy was a constitutionally protected right. The court in *Puttaswamy case* considered the argument that the above cases were decided by the court of smaller benches than that of *M.P. Sharma* and *Kharak Singh*. The *M.P.Sharma* case had been decided by the bench consisted of eight judges and *Kharak Singh* case by the bench of 6 judges. Therefore, the binding nature of the smaller bench decisions created the uncertainty of the constitutionality of the privacy right. Following are the main issues framed for consideration:-

- a. Whether there is a constitutionally protected right to privacy.
- b. If there is a constitutionally protected right to privacy, whether this has the character of an independent fundamental right or whether it arises from within the existing guarantees of protected rights such as life and personal liberty.
- c. The doctrinal foundations of the claim to privacy
- d. The content of privacy and
- e. The nature of the regulatory power of the state.<sup>51</sup>

### **3.7.1.1 Freedom under Article 19 and Article 21-An Interface**

It was argued by the petitioner that the court in *Kharak Singh* was decided on the basis of principle that the freedom embodied in Articles 19 and 21 was

---

<sup>51</sup> *Puttaswamy case*, (2017)10 SCC 1. Part A, ¶ 7.

distinct and separate which is the dicta in *A.K.Gopalan case*.<sup>52</sup> Because of the the restrictions to enjoyment of freedom under Art 19 had to pass the test of reasonableness under Article 19(2) only and therefore, it had been excluded from the purview of Article 21. But the dicta in *A.K.Gopalan* was held to be a bad law in *Cooper case*.<sup>53</sup> Moreover, the minority judgement in *Kharak Singh* was approved in the land mark judgement of *Maneka Gandhi case*.<sup>54</sup> The court in *Maneka Gandhi*, speaking through Justice P.N.Bhagawati held that fundamental rights under part III of the Constitution were independent and overlapping. The elements of the fundamental right to life and personal liberty were disbursed in Articles 19 and 21 of the Constitution. The fundamental rights are emanating from the principle of liberty and dignity. Therefore, it can be said that the deprivation of life under Article 21 should pass the test of reasonableness, fair and just procedure. The validity of the state action should be decided on the basis of impact on guarantees of freedom and not merely upon the object of state action.<sup>55</sup> Therefore, the deprivation of liberty in terms of privacy should be addressed in the present day scenario.<sup>56</sup> It was also remarked that an individual should be left free to attain entitlements of life which in turn essential for the enjoyment of life.<sup>57</sup>

<sup>52</sup> AIR 1950 SC 27 hereinafter, *A.K.Gopalan*. Justice Fazal Ali in his dissenting opinion observed that the fundamental rights were not an isolated one but a common thread of liberty and freedom, at 52-53.

<sup>53</sup> *R.C.Cooper v. Union of India* (1970) 1 SCC 248. (otherwise known as Bank Nationalization Case in which the petitioner challenged the constitutional validity of the law of nationalizing the major banks in India).

<sup>54</sup> *Maneka Gandhi* AIR 1978 SC 597.

<sup>55</sup> *Puttaswamy*, (2017) 10 SCC 1: AIR 2017 SC 172. at ¶ 21-24.

<sup>56</sup> Per,Dr.Y.V.Chadrachud .J. at ¶ 27.

<sup>57</sup> *Id.*

Dr. D.Y. Chandrachud.J. regarding the decision of *M.P.Sharma* observed that the judges in above case considered that the makers of the constitution did not think of subjecting the power of search and seizure to the privacy right. That is why the court in *M.P Sharma* observed that it was not right to import a new fundamental right, ie., privacy right, into the Constitution of India and there was no similar provision to the Fourth and Fifth amendment of the U.S. Constitution. To the same extent, S.A.Bobde J observed that the decision in *M.P.Sharma* was correct because in India there was no corresponding provision to the Fourth Amendment of the U.S Constitution which speaks of privacy right. *Gobind case* also, actually did not specifically discuss the placement of privacy right under the Constitution of India.<sup>58</sup>

So far as *Kharak Singh* decision is concerned, there is, in the words of Dr.D.Y.ChandrachudJ, internal inconsistency. Because, the court invalidated domiciliary visit at night under Regulation 236 (b) of Police Regulations as it constituted an unauthorized intrusion into a person's home and it is against the ordered liberty. At the same time, the majority observed that the right to privacy was not guaranteed under Article 21 of the Constitution of India. Both these observations conflict with each other in the sense that it failed to observe the element of liberty and thereby privacy, under Article 21 of the Constitution. As observed by S.A.Bobde.J. without acknowledging the existence of the right to privacy the court in *Kharak Singh* could not strike down the regulation.<sup>59</sup>

---

<sup>58</sup> *Id.*

<sup>59</sup> *Puttaswamy case, supra note.55.*

The invasion of privacy right must fulfill three-fold requirements :-

- a. Legality which connotes the meaning that a law should be in existence to that effect.
- b. Need which means that there should be legitimate State aim.
- c. Proportionality which means that there should be a rational nexus between the objects and the means adopted to achieve the aim.<sup>60</sup>

While deciding *M.P.Sharma case* there was only *A.K.Gopalan* decision for constitutional interpretation which took the view that there should not be overlapping of fundamental rights and these should be considered in an isolated compartment. But with the decision of *R.C.Cooper* in 1970 and *Maneka Gandhi* in 1978, now it is a settled position that fundamental rights under Part III of the constitution are overlapping in nature and could not be isolated as these are mutually reinforcing. In the course of time, the Supreme Court under the purview of Article 21 impliedly interpreted many rights as fundamental.<sup>61</sup>

<sup>60</sup> Per, Jagdish Sing Khehar J., R.K.Agarwal J., Dr. Y Chandrachud J., S.Abdul Nazeer J., Part T, ¶ H.

<sup>61</sup> Right to go abroad in *Satwant Singh Sawhney v. D Ramarathnam APO* (1969) 3 SCR 525 ; Right against solitary confinement in *Sunil Batra v. Delhi Administration* (1976) 4 SCC 494; Right of Prisoners against bar fetters in *Charles Sobraj v. Supdt. Central Jail* (1978) 4 SCC 104; Right to speedy trial in *Hussainara Khatoon v. State of Bihar* (1980) 1 SCC 81; Right against custodial valance in *Sheela Barse v. State of Maharashtra* (1983) 2 SCC 96; Right to livelihood in *Olga Tellis v. Bombay Muncipal Corporation* (1985)3 SCC 545; Right to medical care in *Paramananda Katara v. Union of India* (1989) 4 SCC 286.

### 3.7.1.2 Ordered Liberty<sup>62</sup> as an Aspect of Privacy

The court in *Puttaswamy case* elaborately discussed the concept of ordered liberty. The provisions of the constitution had been framed to ensure welfare of people. The framers of the constitution were well aware of the importance of man's spiritual nature, feelings and his intellectual skills for the pursuit of the happiness. These are conferred upon the man as against the government in a sphere where he should be left alone.<sup>63</sup> The right to privacy is related to the individual and therefore, it overlaps with liberty. However, it would be very difficult to define privacy and the essence and scope of it should be explained in the context of other rights and values. The right to privacy must encompass and protect the personal intimacies of home, family, marriage, motherhood, procreation and child rearing. Therefore, it had been suggested that the right should be constitutionally fundamental one which should be implicit in the concept of ordered liberty.<sup>64</sup>

The rights are protected under constitutional provisions because of several reasons. It cannot subject to easy amendments on flimsy ground. Once it is understood that privacy right is an intrinsic value of life and personal liberty, it is entitled to get protection under Constitutional provisions.

In the concurrent judgement delivered by Abay Manohar Sapre J. it was stated that the preamble of the constitution mainly emphasis on the unity of

---

<sup>62</sup> Ordered liberty is a concept that freedom may be limited by the need for order in the society. It is a balance between justice, order and freedom. *See*, RUSSEL KIRK, THE ROOTS OF AMERICAN CAUSE (1974).

<sup>63</sup> *Gobind v.State of M.P.*(1975) 2 SCC 148:AIR 1975 SC 1378.at 155, ¶20.

<sup>64</sup> (2017) 10 SCC 1: AIR 2017 SC 172.

nation and the dignity of the individual. It imposed both moral and spiritual obligation on the state to give respect to the personality of every citizens and to create conditions in which he should be allowed to be let alone. The terms 'dignity' and fraternity' were closely intertwined and to achieve integrity of the nation, the dignity of the individual should be assured. If an individual is conscience of others' dignity, it brings unity of the nation.<sup>65</sup> Since liberty, equality and fraternity are interrelated with each other while interpreting the rights of individual under constitution it should strike a balance between changing needs of society and protection of right of citizens. It is possible only through securing liberty, equality and fraternity. It was not possible to include all rights under Part III of the constitution. In the course of time, according to the needs of the society by way of judicial interpretation, the rights would be recognized under constitutional provisions especially under Art 21. Such an exercise can be found in *A.K.Gopalan*<sup>66</sup>, *Kesavanantha Bharati*<sup>67</sup> etc. Therefore, the genesis of privacy right is in the preamble especially under 'liberty of thought, expression, belief, faith and worship and fraternity assuring the dignity of the individual. Secondly, in freedom of speech and expression under Article 19(1) (a) and thirdly from Article 19(1) (d) which guarantees the right to move freely throughout territory of India. It was also said that it had been emanated from the expression 'personal liberty' under Article 21 of the Constitution. To

---

<sup>65</sup> *Id.*

<sup>66</sup> AIR 1950 SC 27.

<sup>67</sup> (1973) 4 SCC 225.



put as a whole, the constitution was drafted for the peaceful living of the people in the nation.<sup>68</sup>

Chelameswar J. viewed the limitation in *M.P.Sharma* decision where it had only said that the rationale and rule of U.S. Fourth Amendment could not be applied to the Constitution of India. The Constitution of every country is amenable to the change in the society. The text and silence of the constitution should be examined to understand the rationale of the Constitution. Moreover, the court did not examine the possibility of putting the right to privacy under any provisions of the Constitution. Therefore, *M.P.Sharma* is not an authority for the proposition that there is no privacy right under the Constitution of India.<sup>69</sup> Chalameswar J. and Nariman J. explained that privacy right involves repose, sanctuary and intimate decision.<sup>70</sup>

Regarding the compatibility of the Constitution to accept privacy right as a fundamental right Justice Kaul gave a beautiful narration in *Puttaswamy* case. He observed that the Constitution was a living document. It was for ensuring justice for all in the form of equality, liberty, dignity, fraternity, fairness etc. This living document had been drafted for the present and for the future for peaceful harmonious and orderly social living. It was drafted in such a way that it can conceive all possible rights within its folder.<sup>71</sup>

---

<sup>68</sup> Per AbhayManohar Sapre J ¶¶ 10-13.

<sup>69</sup> Per Chelameswar J. ¶ 7.

<sup>70</sup> They adopted the view of Gary Bostwick on privacy right. See, Gary L. Bostwick, *A Taxonomy of Privacy: Repose, Sanctuary, and Intimate Decision*, 64 CALIF. L. REV. 1447 (1976).

<sup>71</sup> Per Sanjay Kishn Kaul J. ¶ 23.

The original intention theory also supports this aspect in the sense that the makers of the Constitution were to ensure that it changes with need of the time.<sup>72</sup>The Constitution reflects the hopes and the aspirations of the people and guides the nation to move forward in the course of time. Kaul J reiterated the wordings of Khanna J. in the celebrated case of Kesavanantha Bharati as :-

*It had its roots in the past, its continuity is reflected in the present and it is intended for the unknown future.*<sup>73</sup>

It has also been observed that the core value of the Constitution cannot be very well defined. They cannot be a static one. These values are subjected to changes in accordance with time, society, and situations. Therefore, privacy is nothing but a form of dignity which itself is a subset of liberty.<sup>74</sup>

The conclusions of the Hon'ble Supreme Court are as follows:

- (i) The decision in *M P Sharma* which holds that the right to privacy is not protected by the Constitution stands over-ruled;
- (ii) The decision in *Kharak Singh* to the extent that it holds that the right to privacy is not protected by the Constitution stands over-ruled;
- (iii) The right to privacy is protected as an intrinsic part of the right to life and personal liberty under Article 21 and as a part of the freedoms guaranteed by Part III of the Constitution.

---

<sup>72</sup> See also, *State of West Bengal v. Anwar Ali Sarkar*, AIR 1952 SCR 284.

<sup>73</sup> *Kesavanantha Bharati v. State of Kerala* (1973) 4 SCC 225, at ¶1437, See also, *Puttaswamy*, (2017) 10 SCC 1: AIR 2017 SC 172., Per, Sanjay Kishan Kaul J., at ¶ 35.

<sup>74</sup> *Id*, *Puttaswamy case*, Per Sanjay Kishan Kaul J., at ¶ 40.

(iv) The decisions subsequent to *Kharak Singh* which have enunciated the position in (iii) above lay down the correct position in law.<sup>75</sup>

The proper understanding, practice and application of the privacy right judgment require further development in order to protect privacy right in its full strength. The future of privacy jurisprudence depends on the interpretation that would be given according to the mores of the society.

### 3.8 PRIVACY JUDGEMENT AND MEDIA

With privacy judgment, in future, the individual has a strong claim against media for intruding into the privacy of the individuals. People faces serious invasions from media and it is doubtful whether the invasions from non-state actors had been properly addressed by the existing legal system. The trend of the courts is not to grant prior restraint against media and freedom of speech found to get higher degree of protection. But the future may not be so. The cases following this decision put greater relevancy on right to privacy especially in the case of *Transgenders*<sup>76</sup> and *Aadhar card*.<sup>77</sup>The above cases based the judgments in the light of the decision of privacy judgment of the Supreme Court.

### 3.9 CONTOURS OF RIGHT TO PRIVACY

The right to privacy carries with it not a single interest but of many. The analysis of series of case laws underpins this fact. This leads to the truth that privacy right protects our distinct values and interest and helps a person to lead a dignified life.

<sup>75</sup> (2017) 10 SCC 1, Part T, ¶¶ 1-6.

<sup>76</sup> *Navtej Singh Johar v. Union of India*, W.P.(CrI.) No. 76 of 2016. Decided on 6<sup>th</sup> Sept.2018.

<sup>77</sup> *Justice K.S.Puttaswamy v. Union of India*, W.P.(C) No. 494 of 2012. Decided on 26<sup>th</sup> Sept. 2018.

Autonomy as an element of privacy right had been highlighted in several cases. Sometimes the total prohibition of employment on gender basis would affect the autonomy and would attract the action for violation of privacy right also. It was happened in *Anuj Garg v. Hotel Association of India*<sup>78</sup> in which the Punjab Excise Act, 1914 prohibited ‘a man below the age of 25 and woman’ from employment in premises in which liquor or intoxicating drug is consumed by public. The division bench by holding the provision as invalid observed that the total restraint on woman from employment would amount to violation of privacy rights which gives her autonomy to choose profession. The State must ensure safety to the women in the working place of women so that would be confident in discharge of her official functions. Otherwise it would amount to oppression and violation of privacy rights.<sup>79</sup>

The autonomy of women to take decision in respect of her body was again come for consideration in *Suchita Srivastava v. Chandigarh Administration*<sup>80</sup> in which the wish of the woman to bear the child had not taken into consideration by the High Court. When the matter came before the Supreme Court, Chief Justice Balakrishnan along with other two judges observed that the woman should be given autonomy to take decision in respect of reproductive choice. Because the right to make reproductive choices is another aspect of personal liberty under Art 21 of Constitution of India and also her right to privacy, dignity

---

<sup>78</sup> (2008) 3 SCC 1.

<sup>79</sup> *Id.* at 19 ¶ 51.

<sup>80</sup> (2009) 9 SCC 1. (in this case a woman was alleged to be pregnant out of rape and district administration filed petition to get permission for its termination under Medical Termination of Pregnancy Act, 1971).

and bodily integrity should be respected. The compelling state interest would come when conditions provided in the statute were fulfilled to protect the life of the prospective child and also the mother. In a latest case of Allahabad High Court *Sanjeev Gupta v. Ritu Gupta*<sup>81</sup> the court by upholding the autonomy of women said that compelling the wife to sex was an intrusion of privacy and would amount to cruelty.

The autonomy as an aspect of privacy came again in *Selvi v. State of Karnataka*<sup>82</sup> in which the Supreme Court examined the constitutional validity of narco analysis, polygraph test, brain electrical activation profile were challenged. It had been observed that right against self-incrimination is a component of personal liberty under Art 21 of the constitution. The autonomy of a person to make a decision to submit him to such a test should be respected. The court observed that the results obtained through these techniques involuntarily would hit by Art 20(3) and also personal liberty under Art 21 of the Constitution. Chief Justice Balakrishnan observed that the theory of interrelationship among various fundamental rights would suggest that right against incrimination should be read as a component of personal liberty under Art 21. Therefore, right to privacy find a place in Art 20(3) of the constitution. In this sense, the autonomy of a person to choose to submit to these techniques should be considered. Otherwise, it would amount to clear violation of privacy right. Here the decision is deviation from that of M.P Sharma case wherein it was observed that right under Article 20(3) could not be related to privacy right of an individual. However, if there is

---

<sup>81</sup> First Appeal No. 296 of 2018, *See*, <https://www.livelaw.in>. (Last accessed 3rd Jan 2019).

<sup>82</sup> (2010) 7 SCC 263.

a compelling interest which outweighs the privacy right, the latter would not be taken into consideration. For determining the paternity of a child such scientific methods, especially DNA test, can be used.<sup>83</sup>

The question of autonomy of transgender came for consideration in a latest decision of the apex court in *National Legal Service Authority v. Union of India*.<sup>84</sup> The case again clarified that the right to privacy is a part and parcel of Article 21 of Constitution of India. In this case the Supreme Court of India upheld the dignity of the transgender and added that dignity included right to privacy also. It had been observed that transgender is also entitled to fundamental right guaranteed under constitution of India. Moreover, self-determination of gender is an essential aspect of autonomy and it is conceived under personal liberty limb of Art 21 of the Constitution. The concurring judgment of Dr. Sikri .J. took the view that the gender identity protection under Art 15 is intersected with Art 21. This would make privacy right as an expression of individual autonomy, dignity and identity. The decision suggested the position that privacy right is enriched by other values incorporated under fundamental right guaranteed under constitution of India.<sup>85</sup>

---

<sup>83</sup> See also, *Bhabani Prasad Jena v. Orissa State Commission for Women* (2011) 7 SCC 69. (2014) 5 SCC 438.

<sup>84</sup> *Id.* at 490 -491, *Justice K Puttaswamy v. Union of India* (2017)10 SCC 1 at ¶84, (Per, Justice Y.V.Chandracud., The court referred the observation of *Francis Coralie Mullin v. Union Territory of Delhi*, AIR 1981 SC 746 and observed that the right to dignity is an essential aspect of constitutional culture which make sure the self-fulfillment of individuals and includes “expressing oneself in diverse forms, freely moving about and mixing and mingling with fellow human beings. In Francis case the court was considering the demand of a detainee for an interview with a lawyer and members of family under Conservation of Foreign Exchange and Prevention of Smuggling Activities (COFEPOSA) Act, 1974).

The privacy right cannot be denied to the woman of easy virtues. She also deserve privacy protection. It had been confirmed in *State of Maharashtra v. Madhukar Narayan Mardikar*<sup>86</sup> because right to privacy is implicit in the right to life and liberty guaranteed under the constitution. In *Hinsa Virodhak Sangh v. Mirzapur Moti Kuresh Jamat*<sup>87</sup> also the apex court was of the view that the right to privacy has the status of constitutional right, even though it is not expressly stated under any of the Articles of the Constitution. In this case a resolution was passed by Ahmedabad Municipal Corporation which directed the closure of municipal slaughterhouses for nine days during a festival of Jains. While upholding the restriction as reasonable, the court took the view that the freedom to decide food habits is a part of one's personal affair and it is a part of right to privacy under article 21 of the constitution of India. The people who are non-vegetarians could not be compelled to be vegetarians for a long period.

In *Sheikh Zahir Mukhtar v. State of Maharashtra*<sup>88</sup>, the famous cow slaughter case, the Bombay High court considered almost all case laws which deal with the aspects of privacy and highlighted the point that

*In Kharak Singh case the apex did not consider the issue whether the right to privacy was a fundamental right or not. But the majority was of the view that an invasion on the part of the police of the sanctity of a man's home and an intrusion into his personal security and his right*

<sup>86</sup> (1991) 1 SCC 57 (the Supreme Court examined the validity of the decision of High Court which quashed the punishment of a police officer who was alleged to rape a woman. High Court quashed the punishment questioning the character of the woman).

<sup>87</sup> (2008) 5 SCC 33 ¶27.

<sup>88</sup> 2016SCCOnlineBom 2600 (the petitioners challenged the Maharashtra Animal Preservation (Amendment) Act of 1995, which in addition to existing slaughter of cows, a complete prohibition was imposed on the slaughter of bulls and bullocks in the state).

*to sleep which is the normal comfort and dire necessity for human existence will be an infringement of personal liberty guaranteed under Article 21 of the constitution.*<sup>89</sup>

After considering series of cases, the Bombay High Court in this case expressed the view that right to privacy was a part of personal liberty guaranteed under Article 21 of the Constitution. In the recent, case *Ratan N Tata v. Union of India*<sup>90</sup> the petitioner said that his right to privacy was violated when his conversation with Nira Radia had been tapped. The matter has been left for a larger body to decide the issues of privacy.

Recently, in June 2018, the Patna High Court, in the case of *Based on the News Item Uploaded on the Website of News App v. The State of Bihar*<sup>91</sup> upheld the decision of a woman to meet and marry her lover. At the same time the court warned that the media should not publicize the details of the woman and her parents involved in the case. It is to protect their privacy right and reputation. However, the media had been given freedom to report the proceedings of the case.

### **3.10 PRIVACY CONCERN UNDER STATUTES**

The various aspects of privacy right have been disbursed in several statutes in India. The term privacy right has not been used in these statutes. It is mainly in the nature of prohibition from disclosing the information to third persons.

---

<sup>89</sup> *Id* ¶181.

<sup>90</sup> (2014) 1 SCC 93.

<sup>91</sup> Civil Writ Jurisdiction case No.11689 of 2018.



### 3.10.1 Privacy in Family Relations

A family is created out of love and affection between members of the family. The bond of love between members of family is maintained in the privacy of their relationship. For an ordered society, existence of sound families is demanded.<sup>92</sup> An unwanted surveillance into the four walls of the home definitely creates disturbances in the smooth running of the institution of the family. The people should enjoy his life without interference is accepted in Indian culture. In early period itself, an entry into the premises of another person was allowed only according to the convenience of the owner of the property<sup>93</sup>. The entry was permitted only during daytime and it is even today incorporated in civil and criminal procedural laws.<sup>94</sup>The offence of tress pass under Indian Penal Code is punishable as it amounts to unauthorized intrusion into the inviolability of one's home. The Requisitioning and Acquisition of Immovable Property Act, 1952 protects the bona fide owner of property and his property is exempted from acquisition under the Act. Similarly, after labourer had been released from the jail and their living inside the house was made peaceful under Bonded Labour System (Abolition) Act, 1976.It shows that the sanctity of relationship between members of family had been maintained by privacy right.

Therefore, in cases, especially matrimonial cases which involve the intimate and personal matters are dealt in camera proceedings to the exclusion

---

<sup>92</sup> W. FRIEDMANN, LAW IN A CHANGING SOCIETY, UNIVERSITY OF CALIFORNIA PRESS 72(1959).

<sup>93</sup> The Indian Works of Defence Act, 1903, The Northern Indian Canal and Drainage Act, 1873.

<sup>94</sup> CODE CIV.PROC, 1908, §65 & §.62; The Slum Areas(Improvement and Clearance) Act,1956, § 27; Cantonment Act, 1924, §.42 The Road Transport Corporation Act,1950.

of third parties in courts. It is to protect the privacy of the parties concerned. The magistrate can exclude the general public or individual from watching the trial proceedings.<sup>95</sup>

### 3.10.2 Privacy Concern of Sexually Abused Victims

The privacy right of sexual victims was emphasized in *Lillu @Rajesh v. State of Haryana*.<sup>96</sup> The court took into account the importance of International Covenant on Economic, Social and Cultural Rights 1966 and United Nations Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power 1985 and observed that the rape survivors are entitled to legal proceedings without disturbing their mental integrity and dignity. Even sexual violence against a person will be come under the purview of unlawful intrusion into the right to privacy of an individual. Often the privacy right of children comes into limelight when they unfortunately become the victims of sexual abuses and offences. The apex court has rightly held that the sexual violence is a dehumanizing act and it is an unlawful intrusion of right to privacy and sanctity. It offends his/ her dignity also.<sup>97</sup>

But even though there are provisions to protect privacy the case laws suggest the truth that privacy right is continuously violated. In a recent Calcutta High Court case *Bijoy Das v. State of West Bengal*<sup>98</sup> the single bench comprising

<sup>95</sup> CODE.CRL.PROC.1973§ 327. In cases of Under family law such as Special Marriage Act, 1954, The Hindu Marriage Act, 1955, the privacy right of parties is ensured by conducting trial in camera. The Code of Criminal Procedure, 1973 also tuned in similar line.

<sup>96</sup> (2013) 14 SCC 643.

<sup>97</sup> *State of Karnataka v. Krishanappa* (2000) 10 SCC 743. See also, *Sudhansu Sekhar Sahoo v. State of Orissa*, (2002) 10 SCC 743.

<sup>98</sup> 2017 SCC OnLine Cal 417, See also, *State of Punjab v. Gurmith Singh and others.*, (1996) 2 SCC 384, *Dinesh@Buddha v. State of Rajasthan*, (2006) 3 SCC 771 (wherein it had been held that the identity of rape victims should not be indicated by trial courts). In *Sakshi v.*

Joymalya Bachi.J. expressed utmost displeasure on the identification of victims in sexual offences during trial and investigation.

POCSO Act, 2012 contains provisions touching the privacy aspect of child victim of sexual abuses. Under the Act the media is prohibited from giving any report, any comment or publish any photos leading to disclosure of the identity of the child.<sup>99</sup> It includes name, address, photograph, family details, school, friends, neighbourhood etc. In other words the visual media is prohibited from publishing any information which leads to the identification of the child will come under this category. The police officer should ensure that the identity of the child victim is not published to media during investigation or trial.<sup>100</sup> The special court is also under an obligation to preserve the identity of the child victim.<sup>101</sup>It is also required that the trial should be conducted in camera and media is not permitted to disclose it. In spite of these provisions the court remarked that the privacy right of child victim is continuously violating. However, in the best interest of the child, with permission of Special Court of Investigative Team the details can be disclosed. It is mostly happened where

---

*Union of India & others* (2004) 5 SCC 518 (laid down safeguards to trial court proceedings. “(1) The provisions of sub-section (2) of Section 327 Cr.P.C. shall, in addition to the offences mentioned in the sub-section, also apply in inquiry or trial of offences under Sections 354 and 377 IPC. (2) In holding trial of child sex abuse or rape: (i) a screen or some such arrangements may be made where the victim or witnesses (who may be equally vulnerable like the victim) do not see the body or face of the accused; (ii) the questions put in cross-examination on behalf of the accused, insofar as they relate directly to the incident, should be given in writing to the presiding officer of the court who may put them to the victim or witnesses in a language which is clear and is not embarrassing; (iii) the victim of child abuse or rape, while giving testimony in court, should be allowed sufficient breaks as and when required).*See, State of Karnataka v. Puttaraja* AIR 2004 SC 433(the court observed that it would be improper to mention the name of victims in the judgements).

<sup>99</sup> POCSO Act,2012,§ 23.

<sup>100</sup> *Id.* § 24(5)

<sup>101</sup> *Id.* § 33(7)

the identity of child victim cannot be recognized by the investigating officer. Even then, the case laws show that the privacy concerns of children are neglected by the officials and the media.

In *Nipun Saxena v. Union of India*,<sup>102</sup> the latest case of Supreme Court of India, the court elaborately discussed the measures that should be taken in order not to encroach into their privacy right and thereby subject them to unnecessary harassment.<sup>103</sup> The Supreme Court mainly concentrated on two aspects of such victims. Firstly, the court was concerned with the protection of identity of

<sup>102</sup> 2018 SCC OnLine SC 2772, Per., Justices Madan B. Lokur and Deepak Gupta.

<sup>103</sup> *Id.* The court reiterated the guidelines laid down in the decision of Calcutta High Court in, *Bijoy Das v. State of W.B.*, 2017 SCC OnLine Cal 417. The directions are in the following manner:

- a. Officer-in-Charge of the police station and the investigating officer in the case including the Special Juvenile Police Unit shall ensure that the identity of the victim is not disclosed in the course of investigation, particularly at the time of recording statement of the victim. The investigating agency shall not disclose the identity of the victim in any media and shall ensure that such identity is not disclosed in any manner whatsoever except the express permission of the Special Court in the interest of justice. It was further directed that the identity of the victim particularly his/her name, parentage, address or any other particulars that may reveal such identity shall not be disclosed in the judgment delivered by the Special Court unless, such disclosure of identity is in the interest of the child.
- b. Police Officer or the Special Juvenile Police Unit receiving complaint as to commission or likelihood of commission of offence under the POCSO Act shall register the same and furnish a copy free of cost to the child and/or his/her parents.
- c. If the child is unable to arrange for his/her legal representation, the child shall be referred to the District Legal Services Authority for necessary legal aid/representation under Section 40 of the POCSO Act.
- d. The Police Officer on registration of FIR shall promptly forward the child for immediate emergency medical aid, whenever necessary, and/or for medical examination.
- e. Trial of the case shall be held in camera and evidence of the victim shall be promptly recorded without unnecessary delay. The Special Court shall not permit any repetitive, aggressive or harassing questioning of the child particularly as to his/her character assassination, which may impair the dignity of the child during such examination.
- f. The quantum of the compensation shall be fixed taking into consideration the loss and injury suffered by the victim and other related factors as laid down in Rule 7(3) of the POCSO Rules, 2012 and shall not be restricted to the minimum amounts prescribed in the Victim Compensation Fund.
- g. The Special Courts to ensure that the trials under POCSO Act shall conclude as expeditiously as possible preferably within a year from taking cognizance of the offence and without granting unreasonable adjournment to the parties.

victims of sexual abuse and rape and reiterated that they should not be subjected to any kind of harassment. Secondly, it also considered the issues relating to disclosure of the name and identity of a victim falling within the purview of the POCSO Act 2012. The court took the view that the publication of identity would attract punishment. The court rightly pointed out the actual attitude of the society and observed that the victims were actually treated more badly than the offenders. Moreover, in spite of all guidelines even the courts are not keeping the identity of victims in secrecy.<sup>104</sup> The court reiterated the provisions of IPC and Cr.P.C. which throw light how to handle the case in these matters.<sup>105</sup>

As far as the investigation officers are concerned, it is required that the FIR of rape victims should not be put into the public domain and instead of real name, pseudo name can be used to prevent the identity from being disclosed. Such details are excluded from the purview of Right to Information Act also.<sup>106</sup> Further, the identity of victims was disclosed when NGOs and other welfare organisation took up the matter to the mainstream of media. In this case usually identity would be revealed and privacy right of the victim would be adversely affected. It had been opined by the court that with the consent of the next kin of

---

<sup>104</sup> See, *State of Punjab v. Gurmit Singh*, (1996) 2 SCC 384.

<sup>105</sup> Section 228A IPC gives punishment for disclosure of identity of the victim of certain offences etc., Section 228A(1) states that any person who makes known the name and identity of a person who is an alleged victim of an offence falling under Sections 376, 376A, 376AB, 376B, 376C, 376DA, 376DB or 376E commits a criminal offence. Section 228A (2) states that making known the identity of the victim by printing or publication under certain circumstances described therein. Section 327 Cr.P.C, 1973 says that courts should be open and normally public should have access to the Court, but by vide the Amendment Act of 1983, cases of rape, gang rape etc. were excluded from the category of cases to be tried in open Court. Section 228 A (3) IPC, lays down that nobody can print or publish any matter in relation to any proceedings within the purview of Section 228A IPC and Section 327 Cr.P.C.

<sup>106</sup> Right to Information Act, 2005, §.8 (1)(j).

the victim and with the welfare institution the identity can be revealed. But it is not advisable to do so taking into account the best interest of the victim and also in the absence of clear guidelines in this regard it is better not to reveal the identity of the victim.

Media should not sensitize the issue in order to increase Television Rating Points (TRP). The above principles are applicable in cases where victims are died because the dead persons are also entitled to dignity and privacy. India needs effective and comprehensive law and its implementation to prevent unauthorized disclosure of personal details of sexually abused victims.

### **3.10.3 Arrested Persons and Privacy**

The Code of Criminal Procedure contains provisions to the effect to ensure the privacy rights of arrested persons to a certain extent. However, the recent U.K. case of *Khuja v Times News papers Limited*<sup>107</sup> raises some concerns over the persons who were arrested suspiciously and later found to be an innocent persons. In this highly criticized case, the Supreme Court of U.K. refused the plea of a man who was arrested for the alleged commission of child sex abuse and later released without framing any charges. The majority took the view that there is no reasonable expectation of privacy in relation to proceedings in open court.<sup>108</sup> Through this judgement the Supreme Court reiterated the

---

<sup>107</sup> [2017] UKSC 49.

<sup>108</sup> <https://onlinelibrary.wiley.com/doi/epdf/10.1111/1468-2230.12391>(Last accessed 26th Dec. 2018).

importance of informational privacy whereby the individuals are entitled to keep their personal data from unauthorized usage and disclosure.

### **3.10.4 Privacy violation in internet**

The Information Technology Act, 2000 touches the issue of violation of privacy right by using technological devices especially internet. The law provides that anyone who intentionally publishes the images of the private area of any person without consent will be faced with criminal liability.<sup>109</sup> Under this statute privacy is violated in circumstances where one is having a reasonable expectation of privacy.

### **3.10.5 Privacy in Messages**

A person enjoys privacy in his personal letters, e-mail and messages. Based on this rationale the Indian Post Office Act, 1898 provides that anybody who is employed to carry and deliver postal articles will be punishable if he failed to observe safety in the postal articles without any authority.

The Indian Telegraph Act, 1885 also contains provision preventing unlawful interference and trying to know the contents of the telegraphic messages would invite penal consequences. The disclosure of the information of the telegraph message was also punishable under Telegraph Act. It was also the duty of the officer to bring the message to the desired person. To intercept the

---

<sup>109</sup> The Information Technology Act, 2000, §.66E provides punishment of 3 yrs imprisonment and two lakhs rupees fine).

messages certain prescribed procedures have to be followed as provided in the Act.

### 3.10.6 Privacy in Information Shared

The law protects the privacy of information shared between advocate-client, doctors-patients, chartered accountants-clients, husband-wife etc. The Evidence Act prohibits the married couple from disclosing any communications made between during married relationship<sup>110</sup>

The law protects the information given in confidential relationship. Therefore, the Indian Evidence Act, 1872 provides provisions for the obligation to keep the privileged information as confidential especially between doctor-patient, advocate-client, husband –wife etc. In the case of advocates, under Advocates Act 1961, an advocate is under a duty not to abuse or take advantage of confidence reposed by the client on advocate. On similar line an advocate should not disclose any communication made by the client in course of employment.<sup>111</sup> As a corollary to the above rule, the Evidence Act provides that the clients shall not be compelled to disclose any confidential communication shared between one person and his advocate.<sup>112</sup>

Similar obligation is casted on the medical practitioner. The Medical Council Act 1956 provides a wide range of professional standards and Code of ethics for medical practitioners. Medical Ethics imposes an obligation on doctors

---

<sup>110</sup> Evidence Act, 1872, §122 (however, this protection is not available in cases where one of the couple prosecuted for the commission of crime).

<sup>111</sup> *Id.* § 126.

<sup>112</sup> *Id.* § 129



to respect the secrets of the patients in course of his employment.<sup>113</sup> It is in line with the Geneva Declaration, 1947 which requires the doctors to respect the secrets of patients.<sup>114</sup>The same rules are applicable chartered accountant and his client. A chartered accountant has to keep all information acquired during the course of employment.<sup>115</sup>

### **3.10.7 Privacy and Religion**

The autonomy to choose is an aspect of privacy right. The right to choose one's own religion and practice is protected constitutionally and statutorily. The Indian Penal Code under its various provisions protects religious freedom and practices. If anyone deliberately interfere or insults the religious beliefs or feelings by signs or visible representation is punishable. He can enjoy all the above rights and freedoms only when he is ensured with privacy right.<sup>116</sup>

### **3.10.8 Privacy and Political Right**

A citizen has the right to participate in the good governance of the country by casting vote to the candidate of his own choice. It is possible only when he has freedom to vote without any kind of interferences and disturbances for which privacy is an essential requirement. The Representation of People Act, 1957 and chapter IX of Indian Penal Code, 1860 contain provisions to ensure free and fair

---

<sup>113</sup> Indian Medical Council (Professional Conduct, Etiquette and Ethics) Regulations, 2002, Chapter 2, Rule 2.2.

<sup>114</sup> The Declaration of Geneva has been adopted by the 2<sup>nd</sup> General Assembly in Geneva in 1947.

<sup>115</sup> The Chartered Accountants Act, 1949.

<sup>116</sup> INDIAN PENAL CODE, 1860 §§ 295-298; INDIA CONST. art 25 -29.

election. All above statutes ensure that one is not under an obligation to disclose the person to whom he had casted voted.

Even though there are different statutes, which tries to include various aspects of privacy rights, the protective mechanism provided in the statutes is not sufficient. The privacy aspect of the statute is not clearly established in these statutes.

### **3.11 PRIVACY PROTECTION UNDER DOCTRINE OF BREACH OF CONFIDENCE**

The breach of confidence is considered as an equitable remedy which is usually used to protect business secrets. It requires that there should be confidential relationship between the claimant and the offender. This kind of relationship can be seen between lawyer and client, doctor and patient, teacher and student relationship. In U.K., traditional doctrine of law of confidence, in majority, covered commercial transactions especially employer employee relationship.

A duty of confidence is created between the parties when one party either knows or ought to know that the information is of confidential in nature and the other party believe that the information would not be disclosed.<sup>117</sup> The nature of information will be taken into consideration for the application of the doctrine. Under the doctrine of confidence, sexual relationship of persons, address of individuals, still and visual images, photographs of interior of a home, medical

---

<sup>117</sup> *A v. B(a company)*[2002]2 All.E.R.545 (the claimant was succeeded in getting an injunction for restraining the respondent media from publishing the details of extra marital life).

data, and photographs of children will come under the category of private information.

The historic case of *Prince Albert v. Strange*<sup>118</sup> recognized the modern English of confidence in which the court granted injunction prohibiting the publication of a catalogue of private etching made by Queen Victoria and Prince Albert.

The assumption of such an agreement is possible impliedly on the basis that as a reasonable man the defendant would have assumed an obligation that the information gathered should not be published. For the application of the doctrine, it is not the quality of the information but the confidential nature of information was taken into consideration.<sup>119</sup> Therefore, the requirement is that the information should be private in nature. Megarry J in the classic case of *Coco v. AN Clark (England) Ltd*<sup>120</sup> reiterated three elements of breach of confidence as-

- a. The information must have the necessary quality of confidence
- b. The information must have been imparted in circumstances importing an obligation of confidence
- c. There must be an unauthorized use or disclosure of that information to the detriment of the party communicating it.

---

<sup>118</sup> [1849] EWHC Ch J 20: Mac & G.25(in this case the defendant obtained the catalogue of etching surreptitiously).

<sup>119</sup> GAVISON & PHILIPSON, MEDIA FREEDOM UNDER HUMAN RIGHTS ACT (2010).

<sup>120</sup> [1969]RPC 414.

Lord Goff explained the basis of this principle in the following way. The duty arises where a person receives information in circumstances where he had notice, or is held to have agreed, that it is confidential.<sup>121</sup>

The U.K courts are reluctant to recognize a specific tort of invasion of privacy.<sup>122</sup> In most cases the injured claimant had to satisfy with the remedy under law of libel and malicious falsehood. Sometimes these remedies did not secure justice to the aggrieved person. *Kay v. Robertson*<sup>123</sup> clearly exposed the insufficiency of law under both common law and statute to protect personal information from being falling in public domain. In this case, the famous television star suffered severe head injury and admitted in a hospital. The media, in spite of warnings, got entered into the hospital room, conducted an interview and took photographs. The claimant did not get justice and the court was unable to give relief because the English law did not recognize the privacy right either under common law or under statute law.<sup>124</sup>

In *Douglas v. Hello! Ltd*<sup>125</sup> Sedley LJ, had stated that actually the privacy law focuses on the protection of autonomy, dignity, self respect etc. But the doctrine of confidence protects the confidential information that was shared

<sup>121</sup> *A. G. v. Guardian News Papers Ltd*(no.2) [1990] 1 AC 109 (a retired government employee sought to publish his memoirs through defendant and the government sought to restrain publication. The defendant media sought to publish the proceedings. A.G. sought to restrain publication).

<sup>122</sup> (1991)19IPR 147 (in this case a journalist took photographs, without consent, of a television celebrity who was admitted in a hospital in coma stage).

<sup>123</sup> *Id.*

<sup>124</sup> *Id*, See also, *Douglas v. Hello!*(2001) 2 All.E.R.289 : [2005] EWCA Civ 353(here we can compare the position in U.S.A that definition of privacy gives stress on the nature of information i.e., whether the information is private or not).

<sup>125</sup> *Id.*

between the parties. In U.K. the House of Lords in *Wainwright v. Home Office*<sup>126</sup> held that there was no general tort of invasion of privacy. However, it was necessary to recognize values which help to enforce specific causes of action. The common law provides specific cause of action which includes equitable action for breach of confidence to preserve confidentiality of personal information. In this respect Lord Hoffman in *Campbell v. MGN*<sup>127</sup> explained the development of doctrine of confidence and it shows the development of common law to suit the needs of the individuals. The first development was that that prior relationship is not necessary for applying the doctrine of confidence. Traditional rule says that a duty of confidence arises only when information is confidential in nature when it comes to the knowledge of a person or he had notice of it or he agreed to keep it as confidential, and then he was precluded from disclosing it in all circumstances.<sup>128</sup> The second development was that England started to accept that personal information was something worthy of protection and it is evident from the enactment of Human Rights Act, 1998 which is in line with ECHR. These were the guiding rule while deciding the case *A v.B (a company)*.<sup>129</sup>

### 3.11.1 Remoulding Doctrine of Breach of Confidence

The courts found the solution in the doctrine of breach of confidence by reformulating the doctrine against disclosure of personal information. There are landmark judgments, which shaped the law for guaranteeing private life to be

---

<sup>126</sup> (2003) 4 All E R 969 (HL).

<sup>127</sup> (2004) 2 All E R 995 (HL).

<sup>128</sup> See Lord Goff of Chieviley in *A. G. v. Guardian Newspapers Ltd. (NO.2)*, (1988) 3 All.E.R. 545(HL) See also, *Indu Jain v. Forbes* 2007 SCC OnlineDel.1424: I.A.No. 12993/2006.in C.S.(O.S)No. 2172/2006.

<sup>129</sup> (2002) 2 All.E.R. 545.

secure without any interruption. In England both Human Rights Act and ECHR compelled the state to remoulding the doctrine of breach of confidence.

In *Douglas v. Hello!*<sup>130</sup> OK! Magazine was given, by way of an agreement, the right to publish the wedding photos of Michael Douglas and Catherine Zeta Jones. But Hello! Magazine without any authorization obtained and published the photos of Douglas and Jones. Brook L.J. observed that equity may intervene to prevent the publication of photographs which were taken in breach of the direction not to take photos. The direction would give rise to the requirement of obligation of confidence. For a cause of action under breach of confidence the matter should be confidential in nature. It is also required that the information had been shared in circumstances which carry a duty of confidence or the information shared is private in nature. The test was whether the defendant knew or ought to have known that plaintiff had a reasonable expectation that the information would not be disclosed. Therefore the trend is that in order to give effect to Article 8 of ECHR<sup>131</sup> the English courts started to relax the element of breach of confidence to protect the personal privacy. This led to the situation that even though there is no confidential relationship between the parties, the law started to protect privacy right. Lindsay J in Hello! case rightly said that the line of recent English Judgment is a fusion between the pre-existing doctrine of breach of confidence and the law under present Human Rights Act, 1998.

---

<sup>130</sup> [2000]EWCA Civ 353; [2001]2All.E.R 289.

<sup>131</sup> See *supra*, Chapter 2, RIGHT TO PRIVACY-CONCEPT AND PERSPECTIVES.

Another major development took place in *Venables v. News Papers Ltd*<sup>132</sup> wherein protection was granted for preventing the identity of two boys who were convicted for the offence of murder. It was opined that the duty of confidence might arise in equity independently of a transaction or relationship between parties. Media often becomes duty bound not to disclose information if it is known that the information is confidential. Here the court took into account the consequences of the disclosure of information of convicted children.

In the case, *A v. B (a company)*<sup>133</sup> the Court of Appeal in England adopted the concept of 'reasonable expectation of privacy'. In this case an English footballer obtained an injunction to prevent the newspaper from disclosing the details of his sexual relationship. Speaking through Lord Wolf C.J. the court observed that the action for breach of confidence must be heard in the light of Article 8 and 10 of ECHR. A duty arises where one person knows that or ought to know that other person reasonably expects that his privacy right would be protected. This observation is almost similar to that of *Venables case*.

In *Douglas v. Hello (No.3)*<sup>134</sup> it is doubtful whether the information is purely secret or confidential. Because, the permission to take wedding photographs was given to OK! Magazine. But an intruder took photographs and sold to Hello! Lord Lindsay considered the wedding reception was private in nature even though a group of invited persons attended it. It means that the information was disclosed to certain group of persons. Here question whether

---

<sup>132</sup> [2001]All.E.R.908.

<sup>133</sup> (2002)All.E.R.545.

<sup>134</sup> [2003] EWHC 55 (Ch.).

the information was considered as secret. However, the decision can be justified on the ground of protection of trade secret also. Because the permission to take photos was granted to OK! Magazine and the invitation were confined to a small section of people.

The limitations of the principle of breach of confidence are (a) The doctrine has no application when the information is not confidential in nature. (b) It is not applied to useless or trivial information and (c) the doctrine is not applied where the information is outweighed by public interest.<sup>135</sup>

From the analysis of case laws in England, it seems that two distinct actions were available under law of confidence when there was disclosure of confidential information. One of them is that the defendant is liable for disclosure when there is prior relationship between parties. The other is that, the cause of action arises when the publication of information in which victim has a reasonable expectation of privacy and is highly offensive to a reasonable person.

The analysis of case laws shows that the requirement of having a pre-existing relationship between claimant and defendant is given away to prove the breach of confidence to prevent private information from being public. The development of breach of confidence as a privacy remedy can be analyzed as the position before and after the decision of *Campbell v. MGN Ltd*<sup>136</sup> In this case the newspaper published the photographs of Miss Campbell who was returning from the place of treatment for drug addiction. She claimed that the publication was in breach of confidence and there was invasion of privacy right.

---

<sup>135</sup> *A.G. v. Guardian Newspapers Ltd. (No.2)*[ 1990] 1 AC 109.

<sup>136</sup> [2004]UKHL 22.



The trial court accepted the argument of Naomi. Her argument was that the gathering and publication of information regarding her treatment in the clinic was in breach of confidence. But the Court of Appeal reversed the decision of lower court on the ground that the claimant publicly denied the consumption of drug and it is the duty of the newspaper to reveal the truth since she was a public figure. Therefore, the publication of information was in public interest. Reversing the decision of Court of Appeal, the House of Lords in majority pronounced that the information that she was under the treatment at narcotics centre was purely private in nature and it did not involve any element of public interest. She had a right to respect her private life and her right to privacy under Article 8 of ECHR, which outweighed the freedom of expression under Article 10 of ECHR. The decision of House of Lords was subjected to criticism because she already claimed that she was not addicted to drug consumption. She, being a public figure, owed duty towards the public to be a role model and the matter squarely fell within the ambit of 'public interest'.

### **3.11.2 Transformation from Confidential Information to Private Information**

The Campbell case made some clarification of issues arose out of the modification of the doctrine of breach of confidence. In *Campbell v. MGN Ltd*<sup>137</sup>, the claimant got relief on the ground of breach of confidence in the publication of photographs, which had been taken surreptitiously. Naomi Campbell was returning from Narcotics treatment centre. Here question was

---

<sup>137</sup> [2004]UKHL 22.

whether there were circumstances which imposed an obligation of confidentiality on publishers. In this case, there is was no preexisting relationship between the claimant and defendant. There was no express or implied promise or communication between parties. That is, there were no warning signals, which prohibit the photographer to take photos.

Here the English courts found liability solely on the ground that the information was private in nature, in the absence of any circumstances which impose obligation of confidence. The minority judgment found that there was no obligation of confidence because the photographs contained no information worthy of protection.<sup>138</sup>

### 3.11.3 Personal Information under Doctrine of Confidence

A broad scope to the terms 'private information' has been given by stressing on the impact of the disclosure of personal information. In *Douglas case* Keene L.J. clearly reiterated the impact of visuals when compared to that of printed matters. As Keene L.J. put it, a picture paints a thousand words. There are different modes of expression for communicating the same information. This was confirmed in *Theakson v.MGN*<sup>139</sup>, which observed that the publication of photograph could not be justified by saying that one would be entitled to publish the same information in another medium as an adaptation of the former.

This observation had developed into a new approach and the photographs were treated not merely as a fact but as an emotional impact. Such an approach

---

<sup>138</sup> *Id.*

<sup>139</sup> [2002] EWHC 137 (QB); [2002] EMLR 398, *See, Douglas v. Hello! (No.3)* [2003] EWHC 55 (Ch.), ¶ 72.

was adopted in Campbell case also. Before the House of Lords decision in Campbell case it is already accepted view that information was protected if its disclosure 'would be highly offensive to a reasonable person of ordinary sensibilities.'<sup>140</sup> If the court gives enforceability to Art 8 of ECHR it is rather meaningless to adopt different principles of different jurisdiction. Art 8 says about information of private life or personal information. It is the test adopted in tort of American jurisprudence and not the gist of Art 8. The test of unconscionability is the test of breach of confidence and not that of privacy.<sup>141</sup>

In *Campbell v. MGN Ltd*<sup>142</sup> the court took the view that if information is related to private life, the person had a reasonable expectation of privacy. The question of 'confidential' is irrelevant, and the question is whether information is private or public. If the private information is misused, the cause of action will arise.

The new approach is to focus on the protection of human autonomy and dignity instead of giving importance to the relationship between the parties and the nature of information. It speaks of the right to control the publication of information and the right to respect the private life of others. After the decision of *Campbell Case*<sup>143</sup>, the law of confidence, which had previously been used to develop remedies for violation of privacy right, had been transformed. Instead of using the term 'misuse of confidential information' now it is started to speak

---

<sup>140</sup> See also, *Douglas II* [2005]3 WCR 881. (it was adopted from the Australian decision in the case, *Australian Broadcasting Corporation v. Lenah Game Meats* [2001]HCA 63).

<sup>141</sup> HELEN FENWICK AND PHILIPS GAVISON, MEDIA FREEDOM UNDER HUMAN RIGHTS ACT, (2010).

<sup>142</sup> [2004] UKHL 22.

<sup>143</sup> [2004] 2AC 457.

of 'misuse of private information' of 'infringement of privacy'.<sup>144</sup> Lord Hoffman described it as a 'shift in the centre of gravity'.<sup>145</sup>

Nichols J.(minority) in Campbell case observed that the law of breach of confidence and that of misuse of confidential information protect two different interests. The former protects secrecy and the latter protects privacy. However, there are information which come under the purview of both. If the information is already in public domain, it is not qualified for protection under the term 'confidential'. But it may be qualified for protection as privacy right. Because, further publication would amount to infringement of privacy right, if the publication relates to personal information.<sup>146</sup>

Action for breach of confidence and action for misuse of personal information stand on different footing. The domain of privacy doctrine mainly focuses on the keeping the dignity and personality of an individual, while the doctrine of confidentiality centers on the duty of keeping good faith between two parties in respect of confidential information.

### **3.12 TORT OF BREACH OF PRIVACY IN INDIA**

India has only a limited number of cases to discuss the tort privacy. The cases of *Kharak Singh*, *M.P.Sharma*, *Gobind* etc. much more concentrated on the discussion on constitutional perspective. The recent case of *Justice K. Puttaswamy* also did not contribute to the development of privacy right from the point of law of tort. The breach of privacy as a tort is relevant where the invaders

---

<sup>144</sup> Gavin Philipson, *Transforming Breach of Confidence? Towards a Common Law Right of Privacy under the Human Rights Act*, 66 MOD.L.REV.726-758 (2003).

<sup>145</sup> Per, Lord Hoffman in *Campbell case*, [2004] UKHL 22..¶51.

<sup>146</sup> See, *infra*, Right to be forgotten, at 110.

are private persons. The invasion of privacy right by other persons has been addressed by the Supreme Court in *Ram Jethmalani v. Union of India*.<sup>147</sup> It had been observed that breach of privacy right by fellow citizens ultimately lead to destruction of social order. The court also commented that the private persons should not invade the privacy right of individuals. The state should also see that the other individuals are not unlawfully interfere with the private life of others even in the context of exercise of fundamental rights by those others.<sup>148</sup>

*Indu Jain v. Forbes*<sup>149</sup> by propounding the principles observed in *R. Rajagopal v. State of Tamil Nadu (Autoshankar Case)*<sup>150</sup>, said that the right to privacy as an independent and distinctive concept under tort law has been recognized. An unlawful invasion of privacy gives rise to cause of action for damages.<sup>151</sup> In United States the Second Restatement of Torts adopted four categories of torts developed by Dean William Prosser. The Restatement also said that in order to constitute invasion of privacy the alleged act should cause mental distress and injury to the plaintiff.<sup>152</sup>

It can be said that the remedy in the case of privacy violation by private persons it is better to provide it under law of tort. But law of tort is stagnant in this respect and is in rudimentary stage.

<sup>147</sup> (2001) 8 SCC 1 (in this public interest litigation case, the disclosure of bank details of individuals without establishing any prima facie case was in question. There was unaccounted money and a Special Investigating Team was appointed to enquire into the matter).

<sup>148</sup> *Id* at 35-36 ¶¶ 83-84.

<sup>149</sup> 2007 SCC Online Del.1424.

<sup>150</sup> AIR 1995 SC 264

<sup>151</sup> *Indu Jain*, 2007 SCC Online Del 1424., ¶¶ 67; *Id. Autosankar case*, ¶ 9 *Contra, Manisha Koirala v. Shashilal N* (2003) 2 Bom. CR 136, (the court observed that in India there is no tort of privacy by statute at present).

<sup>152</sup> *See, supra* Chapter II RIGHT TOPRIVACY – CONCET AND PERSPECTIVES.

### 3.13 RIGHT TO BE FORGOTTEN (RIGHT TO BE ERASED)

It is commonly accepted that once the information had been published, it is considered that the matter is in public domain. However, the repeated publication of the matter would amount to fresh intrusion of privacy when every viewer sees the programme again and again.<sup>153</sup> Recently, the Allahabad High Court observed that the past criminal prosecution of a minor need not be considered for his employment. The right to privacy include right to deny information with respect to any criminal prosecution faced by him while he was a minor under Juvenile Justice Act.<sup>154</sup> The person has the right to be erased from the records certain past events.

The concept of right to be forgotten is of recent origin and it has not yet fully established in Indian legal system. Actually, it means deletion of personal data from public records to protect privacy rights. It involves the conflict between personal privacy and right to information.

It has got recognition primarily in France in 2010 and it is a right which requires recognition in other countries including India. One of the reasons for the acceptance of this right is due to the increase in the use of electronic devices which keep the data for a long time even after the purpose has been accomplished. In ordinary language it means, the right of erasure of personal data from public records. It is also provide people a greater control over their personal information. In early period, the information was merely confined to

---

<sup>153</sup> *Gilbert v. Star Newspaper Co. Ltd.* (1894) 51 TLR, *Creation Records Ltd. v. News Group Newspapers Ltd.* 1997 EMLR 444.

<sup>154</sup> <https://www.livelaw.in>. (Last accessed 9th Aug 2017).

print media and for the re-publication of information, effort had to be taken again. But, now it is very easy to reproduce and disseminate information again without much effort.

In the first Indian case of right to be forgotten, the Karnataka High court through Justice Anand Byrareddy in *Sri Vasunathan v. The Registrar*<sup>155</sup> approved the right to be forgotten in internet in the Indian context. In this case the petitioner demanded to mask the name of his daughter from the order of the complaint filed by her husband so that she could not be identified by the public to protect her image in the society. The High Court observed that the name should be appeared in the official records of High Court and not in the public domain of the internet. Unfortunately the court did not discuss the principle in detail. It only said that there is similar law in Western countries in the context of sensitive cases involving women in general and highly sensitive cases involving rape or affecting the modesty and reputation of the individuals. The decision is in line with The European Union Data Protection Directives<sup>156</sup>

Man may forget, but machines do not. The right 'right to be forgotten' is supposed to have been originated from this truth. The concept of right to be forgotten had found its place in the French law and the Italian law of right to oblivion'. The right of oblivion gives the offender the right to remove the details of his commission of crime and that of conviction. It gives him a chance to

---

<sup>155</sup> General Writ Petition No. 62038 of 2016.

<sup>156</sup> European Union, Directive 95/46/EC of the European Parliament and of the Council on the Protection of Individuals with Regard to the Processing of Personal Data and on the Free Movement of Such Data, (24 October 1995), available at <http://www.dataprotection.ie/docs/EU-Directive-95-46-EC/89.htm>.

reform his life.<sup>157</sup> Recently the Allahabad High Court in *Rajiv Kumar v. State of U.P.*<sup>158</sup> held that the right to privacy includes right to deny information in respect of information on criminal prosecution faced when he was a child under Juvenile Justice Act, 1986.<sup>159</sup> The Court observed,

*A child who has been prosecuted for criminal offence is entitled to a fresh chance in life. The child has to begin life as an adult on a clean slate, as if no such criminal prosecution is purged from public discourse and is not a consideration for appointment to an office. The denial of public space and legitimacy to the fact of such criminal prosecution is the sheet anchor of the right to privacy and right to reputation of a child.*<sup>160</sup>

It is also on the rationale that the person who had been punished or accused but not convicted should not be subjected to non-legal punishment.<sup>161</sup> The concept has some sort of similarity to reformatory theory of punishment. To address this issue there should be a balance between free flow of information and privacy right.

### 3.14 PAGE 3 CULTURES

It is a recent phenomenon developed in media industry which is associated with tabloid coverage of activities and parties of highly profiled

<sup>157</sup> Jeffrey Rosen, *The Right to be Forgotten*, STAN. L. REV. (2012).

<sup>158</sup> Writ Appeal No. 53425 of 2007.

<sup>159</sup> <http://barandbench.com>, (Last accessed 24<sup>th</sup> May 2019) (the court while dealing with the issue of suitability of employment of a person, held that the existence of a past criminal prosecution of a person was not a criteria for deciding his suitability for his employment. In the present case the appointment of the petitioner was cancelled on the ground that he had not disclosed the past history of criminal prosecution under Ss. 323, 504, 506 IPC and S.3(1) of Scheduled Castes and Tribes (Prevention of Atrocities) Act when he was minor. Moreover, he had been acquitted in the case and it should be considered that an acquittal wipes a conviction out as if it never happened).

<sup>160</sup> *Id.*

<sup>161</sup> *R v. Philip Oliver* [2011] EWCA Crim 3114, *See also*, MARCK TUNICK, *BALANCING PRIVACY AND FREE SPEECH* (2015).



persons.<sup>162</sup>It is doubtful whether it contributes anything to the society rather than sensational and gossip journalism. Through this media is developing its own glamorous world to enhance its publicity. The paparazzi culture has swallowed the Indian media industry nowadays.<sup>163</sup>Even though the term page 3culture is associated with print media it is equally applicable to visual media also. It is seemed that right to privacy is often violated in these programmes and unwanted peeping into the private life of these persons should regulated by law.

### 3.15 CONCLUSION

It can be stated that in ancient India, the private life of persons were secured as a customary right. It has also been considered as a basis for keeping relationship in the family and society. The courts in those days had considered and recognized the privacy aspects of individuals, even though the word ‘privacy right’ had not been used. The later period witnessed the approach of the legislature to preserve the concept in the form of Commissions and legislative Bills. Unfortunately due to the lack of clarity and the inability of giving proper definition for privacy right, the attempts were failed. However, the judiciary in India tried to shape the concept of privacy right through a series of cases such as Kharak Singh, Gobind, M.P.Sharma, R.Rajagopal etc. by adding the flavor of dignity that is enshrined under Article 21 of the Constitution of India. At the same time, the journey through the statutes revealed the fact that statutory

---

<sup>162</sup> The term ‘page three’ originated from entertainment news in supplement to newspapers. It covers colourful photos, celebrity news, party details, gossip, private life of celebrities etc. <http://www.presscouncil.nic.in>. (Last accessed 10<sup>th</sup> Oct 2016).

<sup>163</sup> <http://www.ndtv.in>. (Last accessed 14<sup>th</sup> Nov 2016).

framework in India is trying to ensure different aspects of privacy right in relation to his life, body, property and documents. Recently, India has blessed with the landmark judgement of the Hon'ble Supreme Court in *Justice K. Puttaswamy v. Union of India* that elevated the right to privacy to the status of fundamental right. The court placed the right on the corner stone of life and personal liberty limb of Article 21 of the Constitution of India. It is also summed up that with respect to the application of the doctrine of breach of confidence to protect the right to privacy is not as such applied in India. It is also stated that the tort of privacy law is not applied well in India for protecting the private life of the individuals.

The right to be forgotten is a recent developing concept. It is can be considered as an exception to the rule that once the information fell in the public domain, it has lost its privacy claim. It is to protect the dignity of the person whose personal information had been fallen in public domain in the past. He has a right to claim that the personal information which is not of public importance should be erased from the machines.

.....❁\*❁.....

## CHAPTER IV

### MEDIA FREEDOM VIS-A VIS - MEDIA RESTRAINTS –AMBIT AND CONCERNS

*‘Give me the liberty to know, to utter, and to argue freely  
according to conscience, above all liberties.’*

-John Milton, Areopagitica(A Speech for the Liberty of  
Unlicensed Printing), 1644

#### 4.1 INTRODUCTION

Media is considered as the fourth pillar of democracy. It is the watchdog and is the ‘eyes and ears’ of the general public as it informs the society on every aspect of governmental functions, exposes its malpractices and corruption of the government.<sup>1</sup> It has to impart those rationales which are set out in the preamble and other provisions of the Constitution of India. The freedom of media is intertwined with other freedoms such as freedom of speech, freedom of assembly, religious freedom, and political freedom, freedom of intellectual growth and communication of ideas. The freedom of media is recognized in various national and international instruments such as UDHR, ICCPR, and ECHR etc.

---

<sup>1</sup> D.R. MANEKAR, MEDIA AND THE THIRD WORLD (1979); *Romesh Thapper v. State of Madras* [1950] SCR 59, *Ramlila Maidan Incident, re* (2012) 5 SCC 1; *See also, A-G. v. Guardian Newspapers Ltd. (No.2)*[1990] 1 AC 109,183 CA(a retired government employee sought to publish his memoirs through defendant and the government sought to restrain the publication. The defendant media also sought to publish the proceedings).

The primary function of the media is to disseminate ideas and information and to educate and mobilize the society in that direction.<sup>2</sup>This chapter analyses the ambit of freedom of speech and expression with special reference to media. The freedom that is enjoyed by the visual media is similar to that of other media. Besides the historical development of media freedom can be understood only through the historical perspective of press freedom. Therefore to understand the perspective of freedom of visual media, freedom of the press is discussed wherever it is essential.

An understanding of the international perspective of media freedom in the era of the electronic revolution will be helpful to formulate the law and policy to tackle the issue of privacy violation. The chapter looks into that aspect along with the fairness of its restrictions. The chapter also discusses how far media perform its functions without hindering the other rights of individuals.

## **4.2 CONCEPT OF MEDIA-BLURRING THE LINE BETWEEN ORDINARY MAN AND JOURNALISTS**

The literal meaning of media is a form of communication or method of expression. It maintains social relations in society.<sup>3</sup>The popular classification of media is print media and electronic media. The former covers newspapers, pamphlets, books, magazines etc. The latter covers radio, television, cinema etc. The innovations and changes in science and technology gradually result in the

---

<sup>2</sup> REPORT OF THE SECOND PRESS COMMISSION 19 (1982).

<sup>3</sup> JURGEN HABERMAS, THE STRUCTURAL TRANSFORMATION OF THE PUBLIC SPHERE. AN INQUIRY INTO A CATEGORY OF BOURGEOIS SOCIETY(1991); E.LLOYD SOMMERLAD, THE PRESS IN DEVELOPING COUNTRIES (1969)

change in the definition and concept of media also. Such change can be noticed in the post- independence period.

The term 'media' has been derived from the Latin word 'medium' which means 'middle sheath' or in other words, 'middle ground or intermediate'. The object of every media is to communicate people about social, political and other aspects related to society. Another classification of media is print media and visual media. The former confines its use to newspapers, pamphlets, books etc. The latter is related to television, motion pictures, video etc.<sup>4</sup>The revolution in science and technology leads to the invention of televisions, internet etc. In the present scenario, every man can become a medium through which dissemination of information is possible very easily.

The meaning of the term 'press' may be extended to any person who is communicating with the public. It is a personal right which is not limited to newspapers but extended to lectures, political pollsters, novelists, academic researchers and dramatists etc.<sup>5</sup>

It is an era of artificial intelligence. Now any person can shed attention on others by using technology. Previously what traditional media performed is taken over by ordinary individual. Thousands of photos and videos are uploaded every minute. The boundary line between traditional journalists and ordinary individual is gradually minimizing, the latter becomes the role of

---

<sup>4</sup> BASTINADE G HENRICO, MEDIA HISTORY AND THE STUDY OF MEDIA SYSTEMS, MEDIA HISTORY(2008).

<sup>5</sup> *First National Bank of Boston v. Bellotti* 435 U.S. 801-02 (Justice Burger opined that the press clause was included in the First Amendment to protect the press from the threat that it had posed to the government to absolve from censorship. Here the word press can be used synonymously with media).

‘citizen journalist’.<sup>6</sup> This ‘democratization of media’ poses a great threat to the privacy of individuals. Before the technological era, the hurdles that had to be overcome by the media for the dissemination of information were served as a check for unethical activities.<sup>7</sup> But today, with a single ‘clip and click’ the information is reaching all over the world within seconds. The law is lagging behind such kind of social transformation. Therefore it is high time to redefine the term ‘media’.

### 4.3 MEDIA FREEDOM IN INDIA

History of media freedom in India dates back to 18<sup>th</sup> century British India especially during the period of the nationalist movement. The people in those days formulated political willingness through the press. To contravene this, British rulers introduced certain legislations to make a set back to the press freedom of Indians. The Regulations introduced in 1799 by Lord Wellesley contained rules for regulating the press. But during the period of Lord William Bentick, the press enjoyed comparatively more freedom when compared to the period before. The Sepoy Mutiny was supported by the press freedom and to overcome this they enacted the Gagging Act, 1857 under which license as essential for press freedom. Moreover, no criticism could be leveled against the government. However, it had been repealed in 1858.<sup>8</sup>

---

<sup>6</sup> See, ANDERSON, THE MYTHICAL RIGHT TO OBSCURITY (2012) as cited in MARK TUNICK, BALANCING PRIVACY AND FREE SPEECH(2015). See also, *Citizens United v. Federal Election Commission* 558 U.S.310,352(2010).

<sup>7</sup> MARK TUNICK, *supra* note 6, at 110.

<sup>8</sup> BARNES H, THE INDIAN PRESS (1940).

Later in 1867, under the ruling of Sir John Lawrence, the Press and Registration Book Act, 1867 was introduced to put the Government control over the press freedom. By this enactment, the Government regulated the press under which the press should be registered and should preserve books and printed matters. Later Vernacular Press Act 1878 under the Lordship of Lord Lytton which introduced a stringent provision to restrict press freedom. Under this, the government could seize the press on the ground that it had published objectionable materials. Also, the press had to deposit security if they violated laws of Government and the Act had been repealed in 1880. After the formation of the Indian National Congress, Lord Curzon introduced Official Secrets Act, 1899 which prohibited the press freedom by prohibiting the press from publishing matters related to army and administration which were categorized as a non-bailable offence. In 1908 Lord Minto Morley passed Newspapers (Incitement to Offences) Act 1908 which provided for punishing the editors who incited people to rebellion. Again laws such as Indian Press (Emergency Power) Act, 1931, Foreign Relations Act, 1932 etc. were enacted to prevent the press from writing anything against British administration.<sup>9</sup>

The English East India Company issued Amherst circular in 1826 which prohibited the servants of the company from keeping in touch with the press. Later Lord Macaulay enacted the Gagging Act, 1835 to prevent the writing of criticism in print media. Lord Canning put regulations in the form of Press regulations in the whole of India in 1857. The Vernacular Press Act, 1878 came

---

<sup>9</sup> *Id.*

into force which put stringent regulations on media freedom. Under the Official Secrets Act, 1923 the State had been given more power by making a provision to keep certain matters as secret.

#### **4.4 FREEDOM OF VISUAL MEDIA- AN OVERVIEW**

The visual media enjoys the same kind of freedom as that of print media. The early era of communication witnessed only print media rather than visual media. The invention of visual media is of a recent one. Therefore, the historical aspect of the freedom of visual media is more or less same as that of print media.

The general meaning of freedom is to have the use of one's powers of action (i) without restraint or control from outside and (ii) with whatever means or equipment the action requires. The term 'freedom' connotes in the negative sense, the absence of external interference whether to suppress or to constrain. Positively, freedom lies in the ability to do something and to achieve the end.<sup>10</sup>The concept of press freedom has its origin in libertarianism in England in 1688.<sup>11</sup>In England, the press freedom is protected and restricted on the principle that what is not prohibited is permitted.<sup>12</sup>The libertarian principle put forward that man need not be treated as a dependent person. They say that the man is a

<sup>10</sup> WILLIAM ERNEST HOCKING, FREEDOM OF THE PRESS: A FRAME WORK OF PRINCIPLE (1947) at 119-120. *See also, Express Newspapers (P) Ltd v. Union of India*[1959] S.C.R.12: AIR 1958 SC 578(the petitioners challenged the levy of import duty on newspapers)

<sup>11</sup> I.Bayo Oloyede, *Press Freedom: A Conceptual Analysis*, J.SOC.SCI. 11(2):101-109(2005). Earlier it had been believed that publication of newspaper is illegal since it is an act to commit a breach of peace. Therefore, many people met with punishment for publishing pamphlets. For example, one Daniel Defoe, on 24<sup>th</sup> Feb 1703 was imprisoned for writing a pamphlet. DANIEL DEFOE, *SHORTEST WAY WITH THE DISSENTERS* (1702). *See generally*, D.D.BASU, *LAW OF THE PRESS IN INDIA* (2003).

<sup>12</sup> WADE AND GODFREY PHILIPS, *CONSTITUTIONAL LAW AND ADMINISTRATIVE LAW*, 465-66 (9<sup>th</sup> ed. 1977); REPORT OF COMMITTEE ON PRIVACY, CMND,5012 at 10(1972)



rational human being so that he can distinguish between good and bad. He can distinguish between good and bad. Under libertarianism, the right to search for truth was considered as one of the inalienable rights of man and the press was considered as a partner in the search for truth. The people began to employ and consider the press as an instrument through which they can check the activities of the rulers.<sup>13</sup>The libertarian theory mainly centered on the idea that the state should not put any kind of control over the media and there should not be any kind of prior restraint over it. All persons had enjoyed freedom in publishing whatever he had intended to be published. It was believed that the libertarian concept laid the foundation of free press as is enjoyed today all over the world. But under the British monarchy, the authoritarian theory gained importance under which the rulers used the media to inform the people about the functioning of the rulers. Therefore, the monarch controlled the press to a greater extent so far as the control, content and ownership were concerned. In turn, the press enjoyed little freedom during that period. With the advent of libertarianism, the authoritarianism suffered set back in 1688.<sup>14</sup>

One of the political thinkers, John Milton argued for the liberty of freedom of the press and he was against any kind of interference with the freedom of the press. His classic *Areopagitica*<sup>15</sup> had come to limelight just after the printing machine was invented. He had struggled for the liberty to

---

<sup>13</sup> I.Bayo Oloyede, *supra* note 11 at 102. *See also*, LIEVE GIES, *MEDIATING HUMAN RIGHTS* (2015) (for discussion on liberty, rights and freedom).

<sup>14</sup> *See generally*, KUNDRA.S, *MEDIA LAWS AND INDIAN CONSTITUTION* (2005).

<sup>15</sup> JOHN MILTON, *AREOPGITICA: A SPEECH FOR THE LIBERTY OF UNLICENSED PRINTING, TO THE PARLIAMENT OF ENGLAND* (1644).

know, to utter, and argue freely according to conscience. He considered freedom to express as above all other liberties. During his period government imposed unfair restrictions on the publication right and people had to get approval from the government under the Licensing Order Act, 1643. The people were arrested if they published anything which contained criticism against the government. Milton was against the censorship of the press because it ultimately resulted in the control of freedom of thought.<sup>16</sup>

He justified the need for the freedom of expression in two ways by linking it with God. In his first argument, he linked censorship with the Catholic Church and said that it was not suitable in a protestant country. In his second argument, he highlighted that it was the duty of every individual to search truth which could only be attained through freedom of press.<sup>17</sup> At the same time, he was not against fair restrictions upon the press and said that the press should not be given absolute freedom. He argued that the press should be accountable in the sense that it should take responsibility concerning the content of the publication. According to him, the restriction should be acted as a safeguard against libel. It can be said that Milton's perspective on press freedom had highly influenced the development of media freedom all over the world. The First Amendment of the U.S Constitution and development of media freedom in the U.K. and India were in line with the view put forwarded by Milton among others.

---

<sup>16</sup> <https://warburg.sas.ac.uk/pdf/emh290b2451517.pdf>. (Last accessed 24th October 2014)

<sup>17</sup> MILTON, *supra* note 15.

As stated earlier visual media is a generic term that includes television, video, films etc. The law of broadcasts is applied to television, radio etc. From the historical perspective of broadcast law, In India, The Indian Telegraph Act, 1885 was the major legislation that controls the above audiovisual communications. The term 'telegraph' is defined as any appliance, instrument, material or apparatus used or capable of use for transmission or reception of signs, signals, writing, images and sounds for intelligence of any nature by wire, visual or other electromagnetic emissions, radio waves or Hertzian waves, galvanic electric or magnetic means.

The possession of wireless apparatus and radio receivers, which were not covered under the Telegraph Act, was dealt with The Indian Wireless Telegraphy Act 1933. Television became very popular in major cities only after 1972. Before the entry of private channels, there was only one channel owned by the Government. It was mainly used to disseminate information relating to the activities of Government on social and political issues. The emergency period witnessed the misuse of television by the Government which resulted in the demand of an autonomous body to control the working of television. After the emergency period, a white paper called 'White Paper On The Misuse Of The Mass Media During Emergency'. Based on this a working group was constituted to see the issues of Akashvani and Doordarshan. A Bill was introduced and the Indira Gandhi Government rejected it on the ground that an organization to regulate the mass media would not serve the purpose.<sup>18</sup> A new

---

<sup>18</sup> ANNUAL REPORT OF THE MINISTRY OF INFORMATION AND BROADCASTING 1979-80(1980).

policy for broadcast media was formulated by the Ministry of Information and Broadcasting in 1982 in which various recommendations to reform various media organizations. Later in 1989, the Prasar Bharati Bill was introduced with an object of giving autonomy to the Prasar Bharati Corporation. Unfortunately, the clauses relating to the right to freedom of speech and expression and those relating to autonomy, the integrity of corporation were dropped. Therefore, when the Prasar Bharati (Broadcasting Corporation of India) Act, 1997 was enacted it failed to achieve the autonomy of the Corporation.<sup>19</sup>

The right to free expression also includes the right to communicate without any geographical barrier. Today visual media especially television, radio, social networks etc. are considered as the most effective means of communication. Most of the people depend upon above visual media for accessing information in matters of contemporaneous issues. Speaking on its relevancy Jeevan Reddy J in *Cricket Association of Bengal case*<sup>20</sup> observed-

*[T]he television is unique in the way in which it intrudes into our homes. The contribution of picture and voice makes it an irresistibly attractive medium of presentation. It has a tremendous appeal and influence over millions of people. Television is shaping the food habits, cultural values, social mores and what not of the society in a manner no other medium has done so far. The younger generation is particularly addicted to it. It is a powerful instrument, which can be used for greater good as also for doing immune harm to the society. It depends upon how it is used. With the advance of technology, the number of channels available has grown enormously. National borders have become meaningless. The reach of*

---

<sup>19</sup> MADHAVI GORADIA DIVAN, FACETS OF MEDIA LAW (2010).

<sup>20</sup> *The Secretary, Ministry Of Information & Broadcasting v. Cricket Association Of West Bengal* (1995) 2 SCC 161.

*some of the major networks is international. It is no longer possible for any government to control or manipulate the news, views and information available to its people.*<sup>21</sup>

The right to broadcast as a facet of freedom of expression of visual media has been determined in *Indira Jaising v. Union of India*.<sup>22</sup> In this important case, the Bombay High Court preserved the right of the petitioner to have her interview to be telecasted without any censorship. The case also decided that Doordarshan was not an exception for the application of the right of freedom of speech and expression. *Odyssey Communications Pvt. Ltd. v. The Lokvidyan Sanghathan*<sup>23</sup> preserved the rule that the citizen had the right to exhibit his films on Doordarshan subject to the rules of Doordarshan. It is similar to the right available in any other media.<sup>24</sup>

#### **4.5 MEDIA FREEDOM-INTERNATIONAL PERSPECTIVES**

The right to freedom of expression has been given the status of a fundamental human right. It is a key for the protection of all human rights and the basis of human dignity. In the international scenario, the freedom of expression is guaranteed under the Universal Declaration of Human Rights

---

<sup>21</sup> *Id.* ¶ 197.

<sup>22</sup> 1988 Mah.L.J.745 (in this case the petitioner was invited for an interview to speak on the law relating to women. She criticized the Muslim Women's (Protection of Rights on Divorce) Bill, 1986 which was pending before the Parliament. Doordarshan later censored this part and therest of the part was telecasted. Doordarshan justified that the criticism was against the ruling party and argued that the right to freedom of speech and expression did not apply to Doordarshan).

<sup>23</sup> AIR 1986 SC 1642 (the Supreme Court allowed special leave to appeal to the appellant to challenge the order of Bombay High Court which prevented the telecast of Episode nos.12 and 13 of the Serial 'HoniAnhoni' in a writ petition filed by the Respondent).

<sup>24</sup> But, the court in *Odyssey case* was reluctant to decide on the point whether a citizen had the right to establish a private broadcasting station or not.

(UDHR).<sup>25</sup>The International Convention on Civil and Political Rights (ICCPR) also guarantees the free expression of every one subject to the limitations provided therein.<sup>26</sup>The European Convention on Human Rights (ECHR)<sup>27</sup>, American Convention on Human Rights (ACHR)<sup>28</sup>, African Charter on Human

<sup>25</sup> Article 19, UDHR :-

Everyone shall have the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers.

<sup>26</sup> Article 19, ICCPR:-

1. Everyone shall have the right to hold opinions without interference.
2. Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his own choice.
3. The exercise of the rights carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:
  - a. For respect of the rights or reputations of others;
  - b. For the protection of national security or public order or public health or morals.

<sup>27</sup> Article 10, ECHR:- Freedom of Expression:-

1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.
2. The exercise of these freedoms, since it carries with its duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.(available at [https://www.echr.coe.int/Documents/Convention\\_ENG.pdf%23page=9](https://www.echr.coe.int/Documents/Convention_ENG.pdf%23page=9). (Last accessed 10<sup>th</sup> June 2010 at 9.30 p.m.)

<sup>28</sup> Article 13, ACHR-- Freedom of Thought and Expression

1. Everyone has the right to freedom of thought and expression. This right includes freedom to seek, receive, and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing, in print, in the form of art, or through any other medium of one's choice.
2. The exercise of the right provided for in the foregoing paragraph shall not be subject to prior censorship but shall be subject to subsequent imposition of liability, which shall be expressly established by law to the extent necessary to ensure:
  - a. respect for the rights or reputations of others; or
  - b. the protection of national security, public order, or public health or morals.
3. The right of expression may not be restricted by indirect methods or means, such as the abuse of government or private controls over newsprint, radio broadcasting frequencies, or equipment used in the dissemination of information, or by any other means tending to impede the communication and circulation of ideas and opinions.

and People's Rights (ACHPR)<sup>29</sup> are other regional treaties, which also similarly guarantee the freedom of expression. The importance of freedom of expression as a human right had been recognized in the 1<sup>st</sup> session of the General Assembly. It declared that freedom of expression is the touchstone of all the freedoms. The American court of Human Rights observed that a democratic society can properly function only when there exists a free expression. In the same line of argument, the European Court of Human Rights acknowledged for the development of the society and that of individual the importance of free expression could not be denied.<sup>30</sup> Again, African Commission on Human and People's Rights observed that freedom of expression is a human right, vital to an individual's personal development, his political consciousness and participation in the conduct of the public affairs of his country.<sup>31</sup>

The key features of the freedom of speech and expression can be explained in the following way. The opinions are protected and can be claimed

- 
4. Notwithstanding the provisions of paragraph 2 above, public entertainments may be subject by law to prior censorship for the sole purpose of regulating access to them for the moral protection of childhood and adolescence.
  5. Any propaganda for war and any advocacy of national, racial, or religious hatred that constitute incitements to lawless violence or to any other similar action against any person or group of persons on any grounds including those of race, color, religion, language, or national origin shall be considered as offenses punishable by law.

<sup>29</sup> Article 9, ACHPR

1. Every individual shall have the right to receive information.
2. Every individual shall have the right to express and disseminate his opinions within the law.

<sup>30</sup> *Handyside v. United Kingdom*, Dec 1976, Application No. 5493/72, 1 EHRR 737, ¶ 49 (Handyside, who was the owner of 'Stage I' publishers published the book authored by Soren and Jesper. A complaint was filed against the book on the ground that it contained obscene matters. It was the first case which considered by ECHR court which laid down the principle that freedom of expression is applicable not only to information or ideas that are favourably received or regarded as inoffensive or as a matter of indifference but also to those that offend, shock or disturb the State or any sector of the population).

<sup>31</sup> *See, e.g Media Rights Agenda vs. Nigeria*, 31 October 1998, Communication Nos. 105/93, 130/94, 128/94 and 152/96, ¶ 52.

by everyone without any kind of discrimination. The right consists of every kind of idea and opinions which are capable of transmission to others.<sup>32</sup> It is deeply rooted in every country rather than that any other right. The democratic functioning of the state is impossible when people are not guaranteed freedom of speech and expression.<sup>33</sup>

#### 4.5.1 Restriction of the Right in International instruments

The right to freedom of expression carries with it certain duties and responsibilities. Therefore, the right can be restricted for giving due respect to the rights and reputation of others, for the protection of national security, public order, public health and morals.<sup>34</sup> The restrictions provided in international instruments are in line with the above objectives.

The restrictions have to satisfy the tripartite test.<sup>35</sup> Firstly, there should be clear provision of law to impose a restriction. Secondly, the restriction must be for the protection of a legitimate and overriding interest. Here both and purpose and its effect should be taken into account.<sup>36</sup> . If the restriction was imposed under the grounds which are not mentioned in the law it should be held as

<sup>32</sup> See, e.g., *Ballantyne and Davidson v. Canada*, Communication No.385/1989.31 March 1993 ¶ 11.3 (the petitioners challenged the amendments to Charter of French Language, which banned on using English, on the ground that it violated their freedom of expression).

<sup>33</sup> RAYMOND WACKS, *PRIVACY AND PRESS FREEDOM* (1995).

<sup>34</sup> HELEN FENWICK & GAVIN PHILIPSON, *MEDIA FREEDOM UNDER HUMAN RIGHTS ACT* (2000).

<sup>35</sup> *Mukong v. Cameroon*, 21 July 1994, Communication.No.458/1991, ¶9.7 (UN Human Rights Committee)(the complainant was a journalist and he was arrested for his criticism against Cameroon's government in an interview. He had been subjected to inhumane treatment. It was claimed that Art19 of ICCPR had been violated. The case was decided in favour of Mukong on the ground that in the case the freedom of expression could not be curtailed).

<sup>36</sup> *R v. Big M Drug Mart Ltd*, [1985] 1 SCR 295, at 337.



unconstitutional.<sup>37</sup> The restrictions must be ‘necessary’ to protect the interests that are identified under the second part of the test.<sup>38</sup>

Regarding the interpretation of restrictions on freedom of speech and expression, the European Court under ECHR observed that the freedom of expression, as enshrined in Art 10 of ECHR, is subject to some exceptions. It is also required that the necessity for putting the restriction should be clearly stated.<sup>39</sup>

Thirdly, the term ‘necessary’ consists of several elements. The court will enquire whether or not there is a ‘pressing ‘or ‘substantial’ need for putting the expression under restriction. Again, there should be nexus between the restriction and the object which is sought to be achieved.

The application of the right is subject to some other practical limitations. One of them is the margin of appreciation under which the state has to take into account the notions, values and culture of its society while implementing the provisions of international conventions.<sup>40</sup> The test of proportionality is also used to test the legality of the restrictions. The benefits that should be protected must be greater than the harm caused to freedom of expression.<sup>41</sup>

---

<sup>37</sup> See also, *Romesh Thapper v. State of Madras* [1950] SCR 594, at 603.

<sup>38</sup> *Mukong v. Cameroon*, 21 July 1994, Communication.No.458/1991

<sup>39</sup> *Thorgerson v. Iceland*, 25<sup>th</sup> June 1992, Application No. 13778/88, ¶ 63.

<sup>40</sup> See, e.g., *Ahmed and others v. United Kingdom*, 2 September 1998, Application no. 22954/93, ¶ 59. See generally, Eyal Benvenisti, *Margin of Appreciation, Consensus, and Universal Standards*, INTERNATIONAL LAW AND POLITICS 31(1999)843.

<sup>41</sup> *Tolstoy Miloslavsky vs. United Kingdom*, 13 July 1995, Application No. 18139/91, See also, *S.Rangarajan v. S.J.Ram*[1989](2)SCR 204 at 226. See, *infra*, at ,proportionality test.

#### **4.6 FREEDOM OF SPEECH AND EXPRESSION - THEORETICAL PERSPECTIVE**

The right to free speech and expression is considered by all countries of the world as so valuable, important and basic human right. It is the mother of all liberties because no freedoms can have an existence without the freedom of speech and expression. It is considered to be an indispensable facet of liberty.<sup>42</sup> There is also an argument that free speech doctrine should get protection by taking into account the important functions that are performed in a democratic society. Freedom of speech and expression serves broad social purposes. The realization of self-fulfillment or self-development of the individual depends on the exercise of the right to free expression by him. It is also argued that the search for truth is possible in society by the free expression of ideas and opinion. Another justification for the free expression is that it leads to the discovery of truth. Further, it enables an individual to participate in the democratic functions of the state. A reasonable balance between stability and social change can be maintained in society by recognizing freedom of speech and expression.<sup>43</sup> Such an approach is supported by certain theories, which try to justify the freedom of speech and expression. These theories have been recognized in almost all countries of the world.<sup>44</sup> The main theories can be explained as:-

---

<sup>42</sup> *Maneka Gandhi v. Union of India* AIR 1978 SC 597.

<sup>43</sup> *Indian Express Newspapers & others v. Union of India* AIR 1986 SC 515: (1985)1 SCC 641: (1985) 2 SCR 287.

<sup>44</sup> ERIC BARENDT, FREEDOM OF SPEECH(2<sup>nd</sup> ed.2007).

#### 4.6.1 Theory of Self-Development

The argument from the perspective of self-development suggests that freedom of speech and expression is essential for the self-development of an individual.<sup>45</sup> The freedom of expression has wide acceptance in a society on the assumption that it helps an individual for his personal development. It gives every person an opportunity for the exchange of ideas, opinions, views, ideology etc. It opens a new path way for the formulation of public opinion. The role of free expression for attaining education, growth and development in all fields of life cannot be denied.<sup>46</sup> It enables an individual to express his feelings and sentiments as he pleases before the public.

If there is any restriction, philosophers argue that there will be a diminution in his personality and self-development. The freedom of speech and expression makes individual an autonomous person who is capable of deciding on his own. A healthy individual and nation with an intellectual knowledge is the promise of freedom of speech and expression.<sup>47</sup> A man should be free to express his ideas, beliefs, thoughts and opinion in society. If an idea is born in a man, he has a desire to share it with others. Suppression of these would be painful for him and in turn, it results in the 'mental sterilization' of the community.<sup>48</sup>

---

<sup>45</sup> C.Emerson,*Towards a General Theory of the First Amendment* 72(1963) YALE.L.J.877. Privacy also serves the same purpose. *See, Supra* Chapter 2 Right to Privacy- Concepts and Perspectives.

<sup>46</sup> P.B. GAJENDRAGADKAR, *LAW, LIBERTY AND SOCIAL JUSTICE*, 89-90 (1965).

<sup>47</sup> JOHN MILTON, *AREOPGITICA: A SPEECH FOR THE LIBERTY OF UNLICENSED PRINTING, TO THE PARLIAMENT OF ENGLAND*, 27 (1644). *See also*, ERIC BARENDT, *FREEDOM OF SPEECH* (2<sup>nd</sup> ed. 2007).

<sup>48</sup> ERNEST WILLIAM HOCKING, *FREEDOM OF PRESS, A FRAMEWORK OF PRINCIPLE* ( A REPORT FROM THE COMMISSION ON FREEDOM OF PRESS) at 88-89 (1947) as cited in

#### 4.6.2. Theory of Discovery of Truth

This theory is inconsonant with the argument of J.S.Mill in his 'On Liberty'<sup>49</sup> and says that truth is most likely to have emerged from the free discussion.<sup>50</sup> Traditionally it is argued that freedom of speech and expression provides the individuals a platform for discussion.<sup>51</sup> It has a strong influence on justifying media freedom in all countries as free speech provides a platform for sharing opinions and observation, which helps him to know the reality.<sup>52</sup> The concept of the free market place of ideas closely associated with this argument. It presupposes that every idea will get into the market and that is accessible to all sections of the people. It enables the free flow of ideas without any hindrance or obstacles. The ultimate good that is desired would be better attained by free trade in ideas. When there is conflict in idea in a platform a full and free discussion will lead to the truth. The discussion in a democracy keeps the society Full and free discussion keeps a society always active, and not a stagnant one.<sup>53</sup> It is based on the assumption that dissemination of information is necessary for discussion. It is through media that people gather knowledge, information, news etc. For the good and successful working of democracy, more than one opinion

---

MADABHUSHI SRIDHAR, THE LAW OF EXPRESSION-AN ANALYTICAL COMMENTARY ON LAW FOR MEDIA, 19 (1<sup>st</sup> ed.2012).

<sup>49</sup> J. S. MILL, ON LIBERTY(4<sup>TH</sup>ed.1913).

<sup>50</sup> *Contra*, Alvin I Goldman & James C Cox, *Speech, Truth and the Free market for Ideas*, Legal Theory,2, 1-32 (1996).

<sup>51</sup> SIEBERT.F, T.PETERSON AND W.SCHRAMM, FOUR THEORIES OF THE PRESS (1956) (the argument is in line with the principle of laissez-faire wherein state has no control. It was believed that every man should have a platform to raise their voice on public issues and it is also believed that truth will always prevail over falsehood).

<sup>52</sup> HELEN FENWICK & GAVIN PHILIPSON, MEDIA FREEDOM UNDER HUMAN RIGHTS ACT (2000); *See also*, K.Greenwatt, *Free Speech Justifications*, 89 COLUM. L.REV.119 (1989).

<sup>53</sup> *Dennis v. United States* 341,U S 494. Justice Douglas dissenting, *See also*, MADABHUSHI SRIDHAR, *supra* note 48.

is essential because public opinion can be arrived at only out of different views. This provides a platform for the discussion to find out the truth which helps an individual to decide on matters of public importance.<sup>54</sup>

Benjamin Franklin is one of the authorities who support this view. If such a right is not is guaranteed there will not be any innovation of ideas and policies which are indispensable for democracy.<sup>55</sup> Any unreasonable and unjustifiable restriction on the freedom of speech and expression will act as a hurdle in the discovery of truth.<sup>56</sup>

#### **4.6.3. Theory of Democratic Governance**

The democratic justification of freedom of expression says that it cannot be denied to any individual because all are entitled to participate in the democratic process by expressing his views and opinion. It says that people cannot actively participate in the governance of the country if they are ignorant of political issues. It gives a foundation stone for self-government. The political decisions are guided by the principle of majority opinion.<sup>57</sup> The followers of this theory also argue that the people would not engage in those activities which are widely accepted as wrong. It acts as a deterrent effect on those who become part of wrongful activities.<sup>58</sup>

---

<sup>54</sup> See generally, P.S.CHAUDHARI, SELECT ESSAYS ON THE INDIAN CONSTITUTION (1989).

<sup>55</sup> JUSTICE E.S.VENKATARAMIAH, FREEDOM OF PRESS-SOME RECENT TRENDS (1987).

<sup>56</sup> J.S.MILL, ON LIBERTY (1913).

<sup>57</sup> A.MEIKLEJOHN, POLITICAL FREEDOM: THE CONSTITUTIONAL POWERS OF THE PEOPLE (1965) at 27; See also, A.Meiklejohn, *The First Amendment is an Absolute* SUP.CT.REV.245(1961).

<sup>58</sup> Greenwalt, *Free Speech Justifications* (1989) 89 COLUM. L.REV.; See generally, LARRY ALEXANDER, IS THERE A RIGHT OF FREEDOM OF EXPRESSION ? (2005).

#### 4.7 MEDIA FREEDOM AND FREE SPEECH CLAIMS

Often it is doubtful whether the free speech justification as explained above is suitable to explain the media freedom. It is doubtful whether the self-fulfillment theory is suitable to explain media freedom because it is exercised by large media concerns. The justifications from the perspective of democracy and truth theory are appropriate to explain media freedom.

There are three perspectives on the freedom of the press when analyzing the relationship between freedom of press and freedom of speech. The first perspective stresses on the traditional approach as put by Dicey, that both terms are synonymous.<sup>59</sup> This is similar to the equivalence model under which the free speech claims of media are equivalent to that of speakers generally. Here media can claim all those advantages and rights, which can be claimed by the individual speaker.<sup>60</sup>

This traditional approach suffers from the drawback that it does not add anything special to the press freedom. If media is given, a similar degree of freedom it will adversely affect the audience's interests because common people depend on media to get information and if media is not given special consideration the dissemination of information is not possible. Another drawback of this approach is that it fails to explain the privilege enjoyed by the

---

<sup>59</sup> A.N.DICEY, INTRODUCTION TO THE STUDY OF THE LAW OF THE CONSTITUTION (10<sup>th</sup>ed. 1959) *A.G. vs. Guardian Newspapers Ltd.*(No.2)[1990]1 AC 109,183 (Court of appeal decided that the media does not enjoy specific right apart from that at general public);D.Lange, *The Speech and Press Clauses*,23 UCLA L. REV.(1975); WW.Van Alstyne, *The Hazards to the Press of Claiming a Preferred Positio*,28 HAST.L.J..761 (1977).

<sup>60</sup> HELEN FENWICK & GAVIN PHILIPSON, MEDIA FREEDOM UNDER HUMAN RIGHTS ACT 21(2000).

media.<sup>61</sup> The media is powerful in accessing the information when compared to that of an individual. The second perspective is that the media enjoys distinct freedom of speech when compared to that of an individual. Because press freedom is defined as freedom from restraint and it is considered as a requisite to promote the public interest by publishing the facts and opinions.<sup>62</sup> This is equivalent to the special privilege model, which proposed that media could be given special privileges apart from an individual.<sup>63</sup> Critiques of this approach argue that if media is given such privileges and a broad constitutional guarantee, it will be prejudicial to free speech interests and values. Because they argued that the owner of a newspaper has the sole right to determine its contents.<sup>64</sup>

The third perspective is that the press freedom should be protected only to the extent to which it promotes certain values or interests in freedom of expression.<sup>65</sup> This is similar to the 'differentiated privilege model' which says that media can be afforded with special privileges only when it is justified by the free speech claims.<sup>66</sup> Because primarily media play an important role while disseminating information and ideas to society. William Blackstone in 1769 stated that liberty of the press is essential to the free society. It is also said that press freedom should not be subjected to any kind of previous restraints and

---

<sup>61</sup> *Id.*, (press is given immunity from taxation to make them function effectively. Similarly the media has the right to acquire information to attend public events i.e., access right).

<sup>62</sup> ROYAL COMMISSION ON THE PRESS, Cmnd 6810 (1977) ¶ 2.3.

<sup>63</sup> HELEN FENWICK & GAVIN PHILIPSON, *supra* note 60.

<sup>64</sup> *Id.*

<sup>65</sup> ERIC BARENDT, FREEDOM OF SPEECH (2<sup>nd</sup> ed. 2007).

<sup>66</sup> HELEN FENWICK & GAVIN PHILIPSON, *supra* note 60 (the authors observed that often courts do not always assess the media speech regarding free speech values especially in the case of intrusion of privacy right. But Eric Barendt is against this model).

ensorship. Every man has the right to express his sentiments and feelings that he pleases.<sup>67</sup>

#### **4.8 MEDIA FREEDOM – CONSTITUTIONAL PERCEPTION**

The freedom of speech and expression is said to be the mother of all liberties. It is a basic human right and also a natural right.<sup>68</sup>In India, the media derives its rights from ‘freedom of speech and expression clause’ under Article 19(1)(a) of the Constitution.<sup>69</sup> It is also part of the basic structure of the Constitution.<sup>70</sup>Freedom of expression is wide to include all possible forms of expression, thoughts, feelings and conviction. Therefore, it can cover writing, printing, drawing etc. Under the preview of freedom of the press, the freedom of publication, freedom of circulation and freedom of access to all sources of information are also included.<sup>71</sup> It is often said that the rationale of free expression under Art 19(1)(a) is the first amendment to the US Constitution.<sup>72</sup>But the American constitution provides a separate provision to media for guaranteeing press freedom.

<sup>67</sup> *Rex v. Cobbet* (1804)29 How.St.Tr.1, *See also*, BLACKSTONE, COMMENTARIES, 4,151-152(1854).

<sup>68</sup> *Ramlila Maidan Incident, re* (2012) 5 SCC 1.

<sup>69</sup> INDIA CONST.art19(1)(a), *See, Indian Express Newspapers (Bombay) Pvt. Ltd. v. Union of India* AIR 1986 SC 515: (1985) 1 SCC 641: (1985) 2 SCR 287.

<sup>70</sup> *I.R.Coelho v. State of Tamil Nadu*, (2007) 2 SCC 1.

<sup>71</sup> R.C.S.SARKAR, THE PRESS IN INDIA, 33-35 (1<sup>st</sup> ed. 1984).

<sup>72</sup> US CONST amend. I, art.1:-

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble and to petition the government for a redress of grievances.



#### 4.8.1 Specific Provision For media – a Debate

During the drafting of the constitution of India, there was an argument for the separate provision for the freedom of the press. In this respect, the chairman of the Constituent Assembly's Drafting Committee observed that the press had the same status as that of an individual. It is also argued that the press did not enjoy any special rights that were not to be given or exercised by a person in his capacity. Therefore, the press does not require any specific provision of freedom of speech and expression.<sup>73</sup> However, it has been reiterated in several decisions that the phrase 'freedom of speech and expression' include, inter alia, the freedom of the press.<sup>74</sup> On the ground of the same reasoning, it had been argued that the liberty of the press did not stand on a higher footing than that of an individual. In short, the press freedom and individual's free expression are the same and no privileges are attached to the freedom of press.<sup>75</sup> But political philosophers argue that free speech should be given a greater degree of protection since media plays a crucial role in the process of democracy by assimilation and dissemination of information, opinion etc. when compared to that of an individual.<sup>76</sup>

#### 4.8.2 Media Freedom-As Cluster of Rights

As discussed earlier, freedom of expression encompasses within it the right to express one's convictions and opinions. It is extended to the freedom

---

<sup>73</sup> 7 Constituent Assembly Debates, 780 (1948); See, *Channing Arnold v. Emperor* AIR 1914 PC 116( the freedom of journalist is an ordinary part of freedom of speech and expression available under Article 19 (1)(a). He is not entitled to any kind of privileges).

<sup>74</sup> *Romesh Tahpper v. State of Madras* AIR 1950 SC 124.

<sup>75</sup> *M.S.N Sharma v. Sri Krishan Sharma* AIR 1950 SC 395 at 402, See also, *Arnold v. King* (1914) 41 I.A.149. at 169.

<sup>76</sup> BARENDT, FREEDOM OF SPEECH(2<sup>nd</sup> ed.2007).

to seek, receive and impart information and ideas through a different medium. Since the ideas require propagation, it had been held to include their publication and circulation.<sup>77</sup>

The right to circulate is essential for dissemination of information and ideas and therefore it is essential to acknowledge the right to circulate as the derivative right of media freedom had been decided In *Romesh Thapper v. The State of Madras*.<sup>78</sup> The constitutional validity of Madras Maintenance of Public Order Act, 1949 was challenged on the ground of violation of Art 19(1) (a). The Act imposed a ban on the weekly journal in English called Cross Roads, in the State of Madras for securing the public safety and the maintenance of public order. The court speaking through majority judgment viewed that the impugned Act is void since it violated the fundamental right of freedom of speech and expression. Freedom of speech and expression includes freedom of propagation of ideas and circulation.

The above observation was reiterated in *Brij Bhushan v. State of Delhi*<sup>79</sup> where S.7 (1) (c) of East Punjab Public Safety Act, 1949 was challenged. The provision authorized the imposition of pre-censorship of a journal. The court held that it was unconstitutional as it would amount to a restriction on the liberty of the press, which is considered as part and parcel right to free expression. It

---

<sup>77</sup> D.D.BASU, LAW OF THE PRESS at 27- 36 (1<sup>st</sup> ed,1980); *See also, S.Rangarajan v. P.Jagjivan Ram* (1989) 2 SCC 574.

<sup>78</sup> AIR 1950 SC 124 : 1950 SCR 594.

<sup>79</sup> AIR 1950 SC 129.

had been observed that freedom of the press means the absence of previous restraint upon publication.<sup>80</sup>

*Sakal Papers(P) Ltd v. Union of India*<sup>81</sup> examined the constitutionality of Newspaper (Price and Page) Act, 1956 and Daily Newspaper (Price and Page) Order, 1960 which regulated the newspapers according to price charged on the ground of violation of freedom of expression under Art 19(1)(a) of the Constitution. Regarding the freedom of speech and expression, it was observed that the freedom under Art 19(1) (a) included freedom of the press. For propagating the idea, a citizen should be provided with the right to publish, disseminate and circulate either by word of mouth or by writing. The right includes the right to decide the content of the publication and also the volume of circulation. It was held that the impugned law put a restriction on circulation and therefore freedom of free expression was curtailed. The court continued that the freedom of speech could not be restricted for regulating the commercial activities of newspapers. The State could not restrict one freedom by imposing another permissible restriction on the press. In the instant case, the state could not restrict Article 19 (1) (g) of the Constitution of India for restricting freedom of expression under Article 19 (1) (g). Freedom of the press is essential for carrying out the freedom to carry on business. Diminution in the circulation directly narrows down the dissemination of information. For attaining the goals set out in the preamble of the impugned law it could not make inroads on the right guaranteed under Art 19(1)(a) of the constitution. All these observations

---

<sup>80</sup> See also, *Express Newspaper (P) Ltd v. Union of India* AIR 1958 SC 578.

<sup>81</sup> AIR 1962 SC 305: 1962 SCR(3)842.

culminated in the ruling that the Act and order were void and violative of the Art 19(1) (a) because the state could not make a law which directly restricted one guaranteed freedom for securing the better enjoyment of another freedom.<sup>82</sup>

The Supreme Court in *Express Newspapers (P) Ltd. v. Union of India*<sup>83</sup> examined the validity of the provision of Working Journalist and other Newspaper Employees (Conditions of Service) and Miscellaneous Provisions Act, 1955. The court observed that the consequences of the impugned Act on press freedom were too remote and did not require any kind of interference. In *Bennett Coleman & Co. v. Union of India*.<sup>84</sup> Newspaper (Price and Page) Act, 1956 empowered the government to determine the space for advertisement. It had also been opined that the press should be given the right to determine the matters relating to pages and circulation. Otherwise, it would have a direct impact on the freedom of media.

In *Indian Express Newspapers & Others v. Union of India*<sup>85</sup> the Supreme Court speaking through Venkitaramaiah J. explained the freedom of the press as an absence of interference by authorities with the content and circulation of newspapers. The public interest can be promoted only when the information is reached to the people in the country. It is only through this freedom that people

---

<sup>82</sup> *Id.*

<sup>83</sup> AIR 1950 SC 129.

<sup>84</sup> (1972) 2 SCC 788.

<sup>85</sup> AIR 1986 SC 515: (1985) 1 SCC 641 : (1985) 2 SCR 287 (the petitioners challenged the validity of the imposition of import duty on newsprint imported from abroad under s.12 of Customs Act, 1962 (Act 52 of 1962) r/w s.2 and Heading No. 48.01/21 subheading No.(2) in the 1<sup>st</sup> schedule to the Custom Tariff Act, 1975 (Act 51 of 1975) and the levy of auxiliary duty under Finance Act, 1981 on newsprint as modified by notifications issued under § 25 of the Customs Act, 1962, with effect from March 1, 1981).

can make a reasonable judgement in all fields of life. If media is not publishing information a democratic electorate cannot make reasonable judgments.

The right to criticize which is essential for a healthy democracy is another facet of media freedom. It acts as a weapon against corrupt practices of the public authorities. The American case of *Terminiello v. Chicago*<sup>86</sup> clearly explained that one of the functions of free speech is to invite dispute. It serves its best purpose when there is unrest, dissatisfaction etc. which leads to criticism. The media acts as a proper forum of discussion and criticism. The same line of dicta can be seen in *Kedar Nath Singh v. State of Bihar*<sup>87</sup> in which the court clarified that the criticism of the functioning of public authorities within the reasonable limits was an aspect of media freedom. The criticism against the government cannot be said to be misconduct.<sup>88</sup>

The right to report on judicial and legislative proceedings is another facet of media that is enjoyed by the media. In the case of reporting judicial proceedings, it should not encroach upon other rights and freedoms. This right is also on the rationale that media is bestowed with the duty to inform the public on matters of public importance and it is a weapon against errors and injustice.

---

<sup>86</sup> 337 US I(1949).

<sup>87</sup> AIR 1950 SC 124.

<sup>88</sup> *Baldev Singh Gandhi v. State of Punjab*(2002) 3SCC 667 (the court quoted the words of Sir Alfred Denning LJ from Hamlyn Lecture on 'Freedom of Mind and Conscience', Freedom under the Law, 'Everyone in the land Should be free to think his own thoughts, to have his own opinion and to give voice to them in public or in private, so long as he does not speak ill of his neighbour and free also to criticize the Government o any party or group of people, so long as he does not incite anyone to violence.'¶ 11).

#### 4.9 MEDIA TRIAL AND PRIVACY

The media enjoys the privilege of reporting proceedings of the court, which is not available to ordinary citizens. It is to ensure fairness in the administration of justice. It enables the people to know the matters which are of public importance and also to safeguard against judicial error and misconduct.<sup>89</sup>Bentham in *Scott v. Scott*<sup>90</sup> quoted,

*In the darkness of secrecy sinister interest, all evil in every shape, have full swing. Only in proportion as publicity has place can any of the checks applicable to judicial injustice operate. Where there is no publicity, there is no justice. Publicity is the very soul of justice. It is the keenest spur to exertion and the surest of all guards against improbity. It keeps the judge himself while trying, under trial.*<sup>91</sup>

On the other side, the recent trend of media on the discussion of crime and judicial proceedings invited controversy on the ground that it interferes with the administration of justice. Such discussion is conducted by the media only to enhance their circulation and rating. It is an age old principle that the decision of judge should not be biased and should be impartial. The trial in the media adversely affects the administration of justice. The Supreme Court of India in *Saibal Kumar v. B.K.Sen*<sup>92</sup> that the conduct of investigation in parallel with the court proceedings would undoubtedly affect the justice delivery system.

---

<sup>89</sup> MADHAVI GORDIA DIVAN, FACETS OF MEDIA LAW 231 (2010).

<sup>90</sup> (1911) All ER 1.

<sup>91</sup> *Id.* at 30.

<sup>92</sup> AIR 1961 SC 633, *See also, Bridges v. Californis* (1911) 86 L.Ed 192; *Attorney General v. Times* (1973) 3 All E. R. 54.

The 'trial by media' is a term of 20<sup>th</sup> century invention to describe the media coverage discussing the trial of accused before the decision by the court. It will adversely affect the administration of justice. It is against the basic principles of criminal jurisprudence that an accused person is presumed to be innocent until his guilt is proved. The media trial is violating the privacy right of people and sometimes it becomes 'aggressive journalism' which prevents the end of justice itself.

If media is left with unrestricted freedom or the right to publish and gather the information it would prejudice the mind of the public. The media declared him as an offender. If after the trial the court found him an innocent, it would be very difficult for him to acquire his lost privacy right, fame and reputation.<sup>93</sup>

#### **4.10 MEDIA FREEDOM V. MEDIA RESTRAINTS**

In India, the freedom of media is restricted by prior restraint and subsequent punishment. The prior restraint takes the form of licensing, censorship to protect an individual from any damage to his reputation, privacy, property etc.<sup>94</sup> Media freedom is not an unrestricted hunting license to prey on ordinary citizens. An irresponsible media is a powerful instrument of injustice.<sup>95</sup>

---

<sup>93</sup> 200<sup>TH</sup> LAW COMMISSION REPORT ON TRIAL BY MEDIA, FREE SPEECH AND FAIR TRIAL UNDER Cr.P.C. 1973, <http://lawcommissionofindia.nic.in/reports/rep200.pdf> (Last accessed 29<sup>th</sup> November 2016).

<sup>94</sup> D.D.BASU, LAW OF PRESS (5<sup>th</sup> ed.2010).

<sup>95</sup> Per Frankfurter J. in *Pennekamp v. Florida* (1946)328 U.S. 331 (365).

#### 4.10.1 Prior Restraints –As a Limitation

The term ‘prior restraint’ has been derived from the US First Amendment which prevents the state from interfering with the media freedom.<sup>96</sup>In the 18<sup>th</sup> century, the liberty of the press was meant to be the freedom from prior restraints.<sup>97</sup>However, limitations on freedom are necessary to prevent abuses of freedom and to prevent harm to individual interests.<sup>98</sup>The constitution does not permit any abridgment of the freedom of speech unless it falls within any of the categories of restrictions mentioned in Art 19(2). The constitutional limitations on freedom of expression are the security of the state, friendly relations with a foreign state, public order, decency and morality, contempt of court, defamation and incitement to an offence. Here right to privacy is not a ground for limiting the free expression.

At the time when restrictions were incorporated under Article 19 (2) of the constitution on the freedom of media, special attention had been taken by the framers of the Constitution to preserve freedom of speech. They were also of the opinion that unnecessary burdens should not be imposed on the media.<sup>99</sup>

The restrictions which can be imposed on fundamental right of freedom of expression were considered in *State of Madras v. V.G.Row*<sup>100</sup>. While putting

<sup>96</sup> *Nebraska Press Association v. Stuart*, 427 U.S.539 (1976).

<sup>97</sup> REPORT OF THE SECOND PRESS COMMISSION 19 (1982) at 34.

<sup>98</sup> VINCENZO ZENO-ZENCOVICH, FREEDOM OF EXPRESSION, 6-7(2008)(in the book the author analyses the problems of freedom of speech and expression in realistic way. He narrates the conceptual difference between freedom of expression and freedom of press. It is beautifully explained through an illustration. X (wine) is protected for distribution and it requires a bottle(Y). Therefore, Y is protected. Here safeguard has been transferred from the substance to the container).

<sup>99</sup> R.C.S.SARKAR, THE PRESS IN INDIA, 33-35 (1<sup>st</sup> ed. 1984).

<sup>100</sup> 597, (1952) S.C.R.at 607.



the media under restrictions, the nature of the right alleged to have been infringed, the purpose of the restrictions imposed, the extent and scope of the evil sought to be remedied, the inconsistency in the imposition, if any, and the prevailing conditions at that time of restriction etc should be considered.<sup>101</sup> The universal rule applicable to all situations cannot be laid down and each case should be considered individually. The limitation should not be arbitrary. The reasonableness implies intelligent care and deliberation. The legality of restrictions should be decided from the view of a reasonable man and not from that of the personal considerations of judges.<sup>102</sup> For construing the provisions of the constitution the substance and the result of the act of the State should be given importance. The loss or injury caused to the citizen by imposing restrictions on the fundamental right should be given importance.<sup>103</sup>

As in all injunction cases before granting injunctions, the court has seen a prima facie case, the balance of inconvenience and irreparable loss<sup>104</sup> But as a precautionary measure, before granting prior injunction the consequences of prohibition and what is being prohibited should be taken into consideration. Therefore Brennan J. in *Time Inc. v. Hill*<sup>105</sup> observed that for a healthy government, political expression or comment or criticism upon the government is required. In a civilized community, it is not possible to live without interacting

---

<sup>101</sup> *Id See, Express News papers (Pvt.)Ltd v. Union of India* AIR 1950 SC 129; 1 SEERVAI, CONSTITUTIONAL LAW OF INDIA(4<sup>th</sup> ed. 1991) at 704 ¶10.18.

<sup>102</sup> Per Mahajan J.*Chintaman Rao v. State of M.P.*759 S.C.R (1950) at 763.

<sup>103</sup> *Dwarakadas Srinivas v. The Sholapur Spinning & weaving Co.Ltd*[1954]S.C.R.674.

<sup>104</sup> *Gurudas v. Rasaranjan* AIR 2006 SC 3275.

<sup>105</sup> 17 L Ed 2d 456 :385 US 374(1967).

or exposure to society. In turn, the private life of the individual to society is natural. To support this, James Madison said:-

*Some degree of abuse was inseparable from the proper use of everything; and in no instance is this truer than in that of the press.*<sup>106</sup>

In other words, the press should not be burdened with the impossible task of verifying the correctness of news articles published. The courts usually follow the above principles in testing the balance of convenience in granting an injunction. In the U.K also, the view is that government action should be subjected to public criticism. In this country *Derbyshire County Council v Times Newspapers Ltd*<sup>107</sup> opined that the threat of civil action would affect the public interest involved in freedom of expression and also it would result in a 'chilling effect'.

The freedom of media is curtailed when it is subjected to prior restraint and subsequent punishment. The consequences of both are different. The former has a freezing effect and the latter has chilling effect. Most of the authorities are of the view that prior restraint is more serious than the subsequent punishment.<sup>108</sup>The public debate and dissemination of information would be affected by prior restraint. Therefore, it is a commonly accepted view that prior

<sup>106</sup> 4 ELLIOT'S DEBATES ON THE FEDERAL CONSTITUTION 507(1876) ed.,available at <https://oll.libertyfund.org/titles/elliott-the-debates-in-the-several-state-conventions-vol-1>; (Last accessed 20<sup>th</sup> December 2014);Referred in *Indu Jain v.Forbes*I.A. No.12993/2006 in CS (OS) No. 2172/2006,¶72.

<sup>107</sup> [1993] AC 534 : (1993) 1 All E.R.(the Times Newspapers published articles relating to the share dealings involving the superannuation fund of Derbyshire County Council. It was alleged that the publication was of defamatory one).

<sup>108</sup> JOJNE.NOWAH& RONALD D.ROTUNDA, CONSTITUTIONAL LAW(4<sup>th</sup> ed.1991).

restraint upon media freedom can be imposed when there is an interest that should be protected at a greater level.<sup>109</sup>

The concept of ‘new methodology’ was developed in the U.K. in *Campbell v MGN Ltd*<sup>110</sup> to balance competing interests like privacy and freedom of expression. Under ‘new methodology’ no right is absolute over the other.<sup>111</sup> In *Venables v. News Group Newspapers*<sup>112</sup> the court granted an injunction against News of the World Newspaper to prevent the media from publishing the identity of juvenile offenders. *Carr v. News Group Newspapers Ltd.*<sup>113</sup> the court granted injunction to protect the identity of the woman convicted.

In India also, for example, in *Reliance Petrochemicals Ltd. v. Indian Express Newspapers Bombay (P)Ltd.*<sup>114</sup> in which the court granted an injunction against the media from publishing the matters relating to the issue of debentures by the petitioner and it was a matter of sub judice. It had been observed that the respondents might be served with prior notice before publishing the information that the publication might violate his/her privacy right. But such notice should not amount to an unreasonable restriction on the freedom of media.<sup>115</sup>

<sup>109</sup> Law Commission of India, 200th Report on Trial by Media: Free Speech v. Fair Trial under Criminal Procedure (Amendments to the Contempt of Court Act, 1971), 2006, ¶ 200.64.

<sup>110</sup> (2004) 2 All 995 (HL).

<sup>111</sup> This is the position in U.K. to balance Convention rights and to effect the Human Rights Act, 1998. But in USA the freedom of expression is given preference to privacy right See *Bonnard v. Periman* (1891) 2 Ch 269 (CA).

<sup>112</sup> (2001) 1 All E.R. 908.

<sup>113</sup> [2005] EWHC 971 (QB), *See also, Porco v. Lifetime Entertainment Services, LLC*, 1 984 N.Y.S.2d 457 (App. Div. 3d Dep’t 2014) (the main issue was whether a temporary restraining order against a television network seeking to produce a movie about a citizen’s murder prosecution constituted a prior restraint on the freedom of speech).

<sup>114</sup> (1988) 4 SCC 592.

<sup>115</sup> In U.K. Parliamentary Joint Committee on Privacy and Injunctions rejected the idea of pre-notification. But it recommended that ‘the reformed media regulator’s code of practice must include a requirement that journalists should notify the subject of articles that may constitute

The principle of prior restraint which is applicable to print media would be equally applicable to visual media as well. It is an accepted principle that free press implies the absence of prior restraint.<sup>116</sup> Blackstone says that the prior restraint is a fetter on the free will of the people and it is the control of liberty of expression by administrative authorities. He favoured subsequent punishment on the ground that it would maintain liberty of the press.<sup>117</sup>

In *Akshaya Creations v. Muthulakshmi*<sup>118</sup> prior restraint was not granted on the ground that the wife and daughters had not to claim over the privacy right of deceased Veerappan. He had not objected to the publication of his criminal prosecutions during his lifetime and it had also been agreed with the publishers that the latter would delete the private details from the film.

However, there are views that the prior restraint is not enough to keep the standard of free media. Since the media enjoys freedom similar to that of an individual's, restrictions are also the same as that of an individual. But taking into account the higher degree of responsibility, the rights of both cannot be considered on the same footing. Moreover, the nature of media had been subjected to a thorough transformation in the modern era.<sup>119</sup>

---

an intrusion into privacy prior to publication, unless there are compelling reasons not to do so. See Privacy and Injunctions, Session 2010-12, HL Paper 273, (HC 1443, 27-3-2012.)

<sup>116</sup> *R v. Dean of Asaph* (1784) 3 TR 428, See also *Brij Bhushan v. State of Delhi* AIR 1950 SC 129., *Express News Paper (P) Ltd. V. Union of India* AIR 1958 SC 578,

<sup>117</sup> SEBASTIAN PAUL, LAW, ETHICS AND THE MEDIA (3<sup>rd</sup> ed. 2015).

<sup>118</sup> C.R.P(PD) Nos. 3943 and 3944 of 2012 <https://indiankanoon.org/doc/5439094/> (Last accessed 3<sup>rd</sup> Jan 2019) (The revision petitioners challenged the order of Additional judge, Chennai and sought injunction for restraining the defendants from in any manner, exhibiting, releasing or exploiting the film named "VanaUdham" in Tamil and "Attakasa" in Kannada or any other name, in any other language, portraying the life of the plaintiff, viz., the first respondent herein and her husband, late Veerappan, in any form, whatsoever).

<sup>119</sup> Recently, Delhi High Court, August 2017, again reiterated the same. In this case, the petitioner who was the share broker and managing director of the housing society questioned

Lord Denning in *Schering Chemicals v. Falkman*<sup>120</sup> stressed the need for restrictions because the media had no right to ruin the reputation of a person. It is not supposed to blow on the confidence and to interfere with the administration of justice.<sup>121</sup> The issue of granting an injunction was considered in *Rajagopal v. J Jayalalitha*<sup>122</sup> and the court relied on various U.K. and USA judgments. The court very beautifully stated the protection of privacy right of public persons in the following way.

*[I]n a democratic set up, a close and microscopic examination of private lives of public men is the natural consequences of holding public offices. What is good for a private citizen who does not come within the public gaze may not be true of a person holding a public office. What a person holding public office does within the four walls of his house does not totally remain a private matter. However, the scrutiny of public figures by media should not also reach a stage where it amounts to harassment to the public figures and their family members and they must be permitted to live and lead their life in peace. But the public gaze cannot be avoided which is a necessary corollary of their holding public offices.*<sup>123</sup>

After the *Puttaswamy judgment*<sup>124</sup> it seems that there is gradual dilution in the strictness in granting prior restraint. It is exemplified in *Kanimozhi Karunanidhi v. Thiru.P.Varadarajan*<sup>125</sup> the Madras High Court allowed an

---

the publication of an article in the magazine which he alleged that the publication was defamatory.

<sup>120</sup> (1981)2 All ER 32 (330,347) CA.

<sup>121</sup> *Id.*, at 347.

<sup>122</sup> (2006) 2 MLJ 689.

<sup>123</sup> *See, Indu Jain v. Forbes.*, 2007 SCCOnline Del 1424., I.A.No. 12993/2006 in CS(OS)No.2172 of 2006(Del) ¶160.

<sup>124</sup> *See, supra*, Chapter III. PROTECTION OF RIGHT PRIVACY-INDIAN PERSPECTIVE

<sup>125</sup> Original Application No.871 of 2014 and Application No.6297 of 2015 in CS No.705 of 2014, order pronounced on:16.05.2018, <https://indiankanoon.org/doc/8405764/> ( Last

interim injunction restraining the newspaper not to publish any material that was related to the private life of the applicant without his consent. The private law action is maintainable for violation of privacy right and the same had been recognised in *R. Rajagopal v. State of Tamil Nadu*<sup>126</sup>. There are also cases in which the court reiterated that the relief of injunction can be granted in appropriate privacy cases.<sup>127</sup>

#### 4.11 SUPER INJUNCTIONS

It is a long rooted principle that the judgment should be given in open court and it is the underlying rationale of the principle of open justice. The public is allowed to enter into the courtroom and watch the court proceedings based on this principle. It is also on the rationale that justice should not only be done but also seems to have been done. It is achieved through media that report court proceedings to make people aware of the justice that is being done through a court of law.

However, the principle of open justice is not an absolute right. The ultimate aim of the court is to secure justice and if it is defeated by publicity, the principle of open justice cannot be pursued.<sup>128</sup> In such situations, the details of

---

accessed 13th September 2019)(in this case the strained relation of the applicant and her brother was the subject matter of publication).

<sup>126</sup> 1995 AIR 264; 1994 SCC (6) 632; JT 1994(6) 514; 1994 SCALE (4) 494.

<sup>127</sup> *Shashank Shekhar Mishra v. Ajay Gupta* [2011] 184 DLT 675; *Indu Jain v. Forbes.*, 2007 SCCOnline Del 1424., I.A.No. 12993/2006 in CS(OS)No.2172 of 2006(Del); *Khushwant Singh v. Maneka Gandhi*, AIR 2002 Del 58.

<sup>128</sup> *Scott v. Scott*, (1911) All.E.R.1; *A.G v. Leveller Magazine Ltd* [1979] A.C.440 (the name of the witness of trial proceedings were published by the appellant magazine and faced contempt of court. By allowing the appeal, the court observed that in this case the witness himself gave information and that led to the identity).

cases cannot be published and at this point the doctrine of super injunction has relevancy. Under this principle, the details of the cases should not be published.

It is a new doctrine which has been evolved in the United Kingdom to protect the private life of individuals from being published.<sup>129</sup> It is a type of injunction wherein the parties to the case are anonymous, the proceedings or substantive order of the case should not be disclosed, the records of the case from the file is not accessible are the notable features of this injunction. It is a kind of temporary injunction which is granted against media during the course of proceedings, pending trial and final judgments. It imposes restrictions on media in the following two situations.

- a. The Media is directed to keep the information relating to the applicant as confidential.
- b. The Media is prevented from disclosing the existence of the injunction order itself and the proceedings of the case.<sup>130</sup>

The super injunctions differ from ordinary injunctions in the following respect:-

1. The news media organizations are served with super injunctions (as on 3<sup>rd</sup> party) even though the fact that they are not impeded as a party to the

---

<sup>129</sup> *Terry v. Persons unknown* (2010) FCR 659, 24:2010 EWHC 119(QB):2010 EMLR 16(the court dealt with the issue of dealing with the rights protected under Articles 6,8 and 10 of ECHR. The application was for restraining the publication of certain matters which were alleged to be the misuse of personal information. The court did not order the restraint but ordered not to publish the details of the unknown parties).

<sup>130</sup> RISHIKATANEJA, SIDHANT KUMAR, *PRIVACY LAW- PRINCIPLES, INJUNCTIONS AND COMPENSATION* 168 (1<sup>st</sup> ed.2010). *See also*, Report of the Committee on Super-Injunctions: Super-Injunctions, Anonymised Injunctions and Open Justice (The Committee on Super-Injunctions was set up in April 2010 to examine well publicised issues of concern to Parliament, the judiciary, the media, and the wider public) <https://www.judiciary.uk/wp-content/uploads/JCO/Documents/Reports/super-injunction-report-20052011.pdf> (Last accessed 10th June 2016).

proceedings. And they are prohibited from publishing disclosure of information pending the decision of trial proceedings.

2. The proceedings are anonymous and private hearing will be conducted instead of a public hearing.
3. The case files are not accessible to anyone and it prevents the public and media from knowing the details of the case or proceeding of the case.

In the latest case in the UK, in *PJS v. News Group Newspapers Ltd.*<sup>131</sup> the media published the sexual relationship between claimant and two others. He anticipated further publication of the matter. He had been granted the anonymous privacy injunction on the ground that the award of damages is not adequate. In India, in *Amar Singh v. Union of India*<sup>132</sup> the court granted an injunction to prevent the publication of the tape recorded conversation to protect the privacy of the petitioner.

In *Sahara India Real Estate Corpn. Ltd. v. SEBI*<sup>133</sup> also the court issued a similar injunction even though the term 'super injunction' has not been used. Unfortunately, the courts in the above cases had not taken into account seriously and the court loses the opportunity to give any clear guidelines for the regulation of media. We have to wait for further cases to come before the court to set the matter properly.

---

<sup>131</sup> [2016]UK SC 26.

<sup>132</sup> (2011)7 SCC 69.

<sup>133</sup> (2012) 10 SCC 603.



## 4.12 RIGHT TO REPLY

The right to reply denotes that if any person has been attacked and his reputation had been adversely affected he should be allowed to answer it in the same medium in which he had been affected. The justification for this right is that it enables the weaker persons who have no control over the powerful persons, to protect their reputation. Such a mechanism would also maintain a healthy debate in the society.

The right to reply was first incorporated under French law in 1822. In the United States, the Commission on Freedom of the Press recommended for the law on the right of reply mainly to free the media from proceedings of the court of law.<sup>134</sup> It had been accepted at international conventions such as the American Convention on Human Rights<sup>135</sup> and the European Convention on Human Rights.<sup>136</sup>

The United Nations General Assembly had taken significant step by adopting the Convention on the International Transmission of News and the

---

<sup>134</sup> THE COMM'N ON FREEDOM OF THE PRESS, A FREE AND RESPONSIBLE PRESS 86 (1947) or otherwise known as Hutchins Commission which was constituted during world war II to enquire into the functioning of print and broadcast media. It concluded that freedom of press was in danger and also commented that the press failed to provide service adequate to the need of the society. Also, the press engaged in practices that were unethical

<sup>135</sup> The American Convention on Human Rights, Article 14 states:

1. Anyone injured by inaccurate or offensive statements or ideas disseminated to the public in general by a legally regulated medium of communication has the right to reply or to make a correction using the same communications outlet, under such conditions as the law may establish.
2. The correction or reply shall not in any case remit other legal liabilities that may have been incurred. <http://www.oas.org/juridico/english/treaties/b-32.html>. (Last accessed 3rd Oct 2017).

<sup>136</sup> Ronan Ó Fathaigh, *Eker v. Turkey: The Right of Reply under the European Convention*, EUROPEAN HUMAN RIGHTS CASES, 2018, Issue 1, <https://www.ssrn.com/abstract=3104627> (Last accessed 2<sup>nd</sup> May 2019).

Right of Correction<sup>137</sup>. It focused on the prevention of the dissemination of false or distorted news. It was also intended to ensure media responsibility and wide dissemination of information. But the convention failed to provide effective enforcement mechanisms.

In United States, the Supreme Court considered it in *Red Lion Broadcasting v.FCC*.<sup>138</sup>The court upheld the constitutional validity of Federal Communication's fairness doctrine. But later in *Miami Herald Publishing v. Tornillo*<sup>139</sup> a Florida law of the right of reply was struck down. In England also there is no general right of reply but there are certain self-regulatory mechanisms relating to the right of reply.<sup>140</sup>The regulation obliges the journalist to rectify promptly any harmful inaccuracies.<sup>141</sup>For Broadcast media, there is Of com Broadcasting under Communications Act 2003 and Broadcasting Act, 1996. Under these statutes, the persons concerned would be allowed to make a response.<sup>142</sup>The BBC also gives this opportunity under its Code of Conduct, the Producer's Guidelines.<sup>143</sup>

<sup>137</sup> <http://hrlibrary.umn.edu/instree/u1circ.html>. (Last accessed 24th October 2016); See generally, John B. Whitton, Editorial Comment, An International Right of Reply, 44 *Am.J.Int'l.L.*141 (1950).

<sup>133</sup> 395 U.S.367 (1969) (the court examined the constitutional validity of Federal Communication's fairness doctrine. Among other matters, right of reply was also included).  
<sup>139</sup> 418 U.S.241 (1974).

<sup>140</sup> There were certain initiatives to introduce right of reply in the form of Right of Reply and Press Standards Bill in 2005. But it was in vain.

<sup>141</sup> National Union of Journalists' Code of Conduct, <https://www.nuj.org.uk/about/nuj-code/> (Last accessed 14<sup>th</sup> Nov. 2016).

<sup>142</sup> Ofcom Broadcasting Code, [https://www.ofcom.org.uk/\\_\\_data/assets/pdf\\_file/0005/100103/broadcast-code-april-2017.pdf](https://www.ofcom.org.uk/__data/assets/pdf_file/0005/100103/broadcast-code-april-2017.pdf) (Last accessed 18th Aug. 2018).

<sup>143</sup> [http://downloads.bbc.co.uk/commissioning/site/code\\_of\\_practice.pdf](http://downloads.bbc.co.uk/commissioning/site/code_of_practice.pdf) (Last accessed 7th April 2019)

In Europe, Television without Frontiers Directive of European Council requires that the persons whose reputation had been affected by incorrect facts should be given remedies which include the right of reply. It has been incorporated in European Convention on Transfrontier Television.<sup>144</sup>

In India, in *Life Insurance Corporation of India v. Manubhai D Shah*<sup>145</sup> the Supreme Court directed LIC to publish the reply given by Prof. Shah. In the case of print media, the right to reply is statutorily recognised under the Press Council of India Act, 1978. Under this provision, if a relevant matter is not published it will be considered a professional misconduct.<sup>146</sup> Under Press Council (Procedure for Enquiry) Regulations, a complaint can be lodged if the matter is not published. However, the formulation of right to reply as a general right is not welcomed on the belief that it would encroach into the freedom of editors.<sup>147</sup> It should be noted that the above regulation applies where incorrect information has been aired. But in case of privacy right, the affected person is affected not with incorrect information, but with disclosure of personal

---

<sup>144</sup> Article 8 provides:

Each transmitting Party shall ensure that every natural or legal person, regardless of nationality or place of residence, shall have the opportunity to exercise a right of reply relating to programmes transmitted by a broadcaster within its jurisdiction. In particular, it shall ensure that timing and other arrangements for the exercise of the right of reply are such that this right can be effectively exercised. European Convention on Transfrontier Television art.8, May 5, 1989, Europe. T.S. No.132 (amended Mar.1, 2002), [http://www.ebu.ch/CMSimages/en/leg\\_ref\\_coe\\_convention\\_transfrontiertv\\_consolidated\\_1989\\_1998\\_tcm6-4463.pdf](http://www.ebu.ch/CMSimages/en/leg_ref_coe_convention_transfrontiertv_consolidated_1989_1998_tcm6-4463.pdf) (Last accessed 25th Dec 2018).

<sup>145</sup> AIR 1993 SC 171 (The case was dealing with the situation where LIC refused to publish a rejoinder sent by Prof. Shah which exposed the discriminatory practices of LIC)

<sup>146</sup> Press Council of India Act, 1978, §.14.

<sup>147</sup> See, *Miami Herald Publishing v. Tornillo*, 418 U.S.241 (1974), See, Sebastian Paul, LAW, ETHICS AND THE MEDIA, 127-132 (3<sup>rd</sup> ed.2015).

information. However, the Indian law lags behind the need for having the right to reply in visual media very effectively.

### **4.13 INVASION-JUSTIFICATION**

The media is allowed to raise defences to justify the intrusion of privacy right. The early legislation called Alexander Lyon's Bill of 1967 provided certain defences such as ignorance of violation, fair comment on public interest, consent, legal authority etc. Unfortunately, the Bill was not passed.

The Walden Bill of 1969 incorporated defences such as no knowledge of the violation of privacy right and reasonable care had been taken, consent, reasonable grounds for believing that the information was published in public interest, legal authority and reasonable necessity. Today the accepted general defences are:-

#### **4.13.1 Consent**

Where the plaintiff gives consent, for the publication of information in question, the defendants' action is justified. In the law of tort, consent is a general defence to escape from liability. However, a piece of strong evidence is necessary to achieve the claim in media cases. It is generally available in law of confidence, libel, copyright, trespass etc. Consent may be express or implied. The well-established principle of consent is that it is good sense and justice that one who has assented to an act being done towards him cannot when he suffers from it, complain of it as a wrong.<sup>148</sup> Sometimes the consent has been given to a

---

<sup>148</sup> *Smith v. Baker* [1891] AC 325.

certain extent of information as in *A v. B(a company)*<sup>149</sup> wherein publication of the extramarital relationship of a footballer was in question. The court prevented the publication of details of the extramarital relationship even though they exposed their relationship in public.<sup>150</sup> There is a difference between information spread in a small section of people and the disclosure of details of that relationship in a newspaper. It is also important that the information that was given for one purpose should not be used for another purpose.<sup>151</sup> Today there is no proper guideline to check the misuse of the above issues.

#### **4.13.2 Waiver**

It is a narrow doctrine in which the claimant cannot claim privacy protection since he had waived the right. It is invoked by the defendants mostly in the case of public figures where the media would argue that that by acquiring publicity the claimant waived the privacy right.<sup>152</sup> In this respect, there is grey area which invites clarity to decide the invading area of public figure into which media can enter.

#### **4.13.3 Public interest<sup>153</sup>**

The element of public interest is a common ground of justification for the intrusion of the private life of individuals. It is for the benefit of the society and the individual interest is curtailed. There is no proper definition for this term.

---

<sup>149</sup> (2002) All.E.R.545

<sup>150</sup> *See also, Lord Browne v. Associated Newspapers Ltd.*[2007] EWCA Civ.295.

<sup>151</sup> *Cook v. Word* (1830)6 Bing 409, 130 ER 1338. At p. 1341

<sup>152</sup> *See, infra* Chapter 5, RIGHT TO KNOW, PUBLIC FIGURE AND PRIVACY RIGHT-A BALANCING EXERCISE

<sup>153</sup> It is also, a ground of limitation on the claim on privacy right. *See, Infra* Chapter V. RIGHT TO KNOW, PUBLIC FIGURES AND PRIVACY RIGHT-A BALANCING EXERCISE

However, there are certain attempts to explain this concept. The term 'public interest' is explained by UK Editor's Code, 2016 as

- a. Detecting or exposing crime or a serious impropriety
- b. Protecting public health and safety
- c. Preventing the public from being misled by some statements or actions of an individual or organization.
- d. Disclosing a person or organization's failure or likely to fail to comply with any obligation to which they are subject
- e. Disclosing a miscarriage of justice
- f. Raising or contributing to a matter of public debate, including serious cases of impropriety, unethical conduct or incompetence concerning the public
- g. Disclosing concealment or likely concealment, of any of the above.<sup>154</sup>

While enforcing the ground of public interest, the editors should prove that they had good reason to believe that by publishing the public interest should be served and show how that decision was established at the time <sup>155</sup>

BBC's Editorial Guidelines provide that public interest include exposing or detecting crime, exposing significantly antisocial behavior, exposing corruption or injustice, disclosing significant incompetence or negligence, protecting people's health and safety, preventing people being misled by some statement or action of an individual or organization and disclosing information

---

<sup>154</sup> UK Editor's Code, 2016, *see also*, N.A.MOREHAM, SIR MARK WARBY THE LAW OF PRIVACY AND THE MEDIA, eds.Tugendhat and Christie, 719 (3<sup>rd</sup> ed.,2016) ¶14.77.

<sup>155</sup> *Id.*

that allows people to make a significantly more informed decision, about matters of public importance.<sup>156</sup>

## CONCLUSION

The preamble of the Constitution of India guarantees the liberty of thought, expression, belief, faith and worship. It is a basic human right and has also been ensured under international instruments like UDHR, ICCPR, ECHR etc. An idea generated in the mind of a man is crystallized in a tangible form when it is getting printed. It is the best possible form through which information or idea is disseminated or circulated. After the popularity of the printing press, the place has been taken over by television, radio, internet, other social media etc. The accountability of media is as great as it shapes the democratic ambience of a country. Distinct from the American press freedom, in India the media enjoys the same degree of freedom that is enjoyed by a citizen of the country.

While analyzing the historical perspective of media freedom and its restrictions, it is understood that the freedom of media is closely intertwined with movement of the nationalist struggle for freedom. During the British period in India, the Britishers enacted several laws that mainly aimed to restrict the freedom of media. Because they firmly believed that if the press were given sufficient freedom it would adversely affect their rule in India and Indians would get more power to fight against them.

---

<sup>156</sup> *Id.*

There is no distinction between the freedom enjoyed by the print media and visual media. Therefore the underlying principles of concept and perspective of print media are equally applicable to visual media also. The visual media exercise the freedom in the form of right to telecast or broadcast programmes as audio and visual images. The development of technology paves the way for the formulation of new laws for assuring freedom of media. The Indian judiciary interpreted the freedom of media in tune with the social transformation of the society.

It is acknowledged that the freedom of expression is a core value for both for self development and thereby the society. At the same time imposition of restriction on the media is always and challenging one. Because, it is deep rooted belief that the freedom of media is the liberty from prior restraints. But when it crosses the limits and unjustifiably interferes with administration of justice it should be restrained. For example, the visual media is conducting a parallel trial of cases to attract the audience and the same is subjected to severe criticisms. Besides, the media is disclosing the identities of victims who were involved in cases. It ultimately affects the privacy right even though it is prohibited in statutory provisions. In cases involving victims of sexual offences the area of super injunctions is a new development. However, media can justify the invasion on the ground of public interest, waiver, consent etc. But it should be noted that the above said grounds are misused by the media. The right of reply is a tool to minimize the friction between media and the individuals whose privacy right had been violated. Indian law has not put adequate concern over this mechanism even



though journalists or media have included it in their code of ethics. Therefore it can be summed up that media freedom is not an unbridled freedom. When it crosses every limit it should be regulated by upholding the rationale of right to freedom of expression.



## CHAPTER V

### RIGHT TO KNOW, PUBLIC FIGURES AND PRIVACY

#### RIGHT -A BALANCING EXERCISE

*‘Every freeman has an undoubted right to lay what sentiments he pleases before the public: to forbid this, is to destroy the freedom of the press: but if he publishes what is improper, mischievous, or illegal, he must take the consequences of his own temerity’*

-William Blackstone, Commentaries on the Laws of England  
4(1765)

### 5.1 INTRODUCTION

The people of India are guaranteed with two competing rights such as the right to information and right to privacy. The preamble of the Constitution of India declares that the people of India are sovereign, socialist, secular and democratic republic. It envisages justice, liberty, equality and fraternity and to secure this the people should be able to participate in the decision making process of the country. It is the knowledge and information that makes the people powerful and sovereign. Being a human, acquiring, using and storing the information is essential for his survival.<sup>1</sup> Freedom of speech and expression is worthless unless the people are properly informed. Knowledge enhances the quality of life, makes democracy more meaningful, efficient and participatory

---

<sup>1</sup> PATRICK BIRKINSAW, FREEDOM OF INFORMATION-THE LAW, THE PRACTICE AND THE IDEAL18 (4<sup>th</sup> Ed.2010).

and brings about greater advancement of society by promoting excellence in every field.<sup>2</sup> An individual without information is not capable of making decision and rational choices.<sup>3</sup>The right to information enables an individual to participate in the democratic process by knowing those matters which are of public interest. It will make the government more responsive to the people with respect to their conduct dealing with public affairs.<sup>4</sup>

The media justifies the invasion into the privacy right of individual on the ground that the matter involves public interest which is required to be exposed to the public. With the emergence of new media techniques, it is very easy to intrude into the private life of an individual. Maintaining the balance between free expression, right to information and right to privacy is a challenging strategy. In this background, this chapter examines how far the media can intrude into the privacy right of an individual on the ground of the right to information and public interest. The public figures are mainly confronted with the issue of the violation of privacy right by the media. The chapter also discusses privacy rights of public figures and examines the extent of privacy protection of these persons in the backdrop of constant intrusion of personal life by the visual media.

---

<sup>2</sup> S.P.SATHE, THE RIGHT TO KNOW(1991),*See also*, J.HEBERMAS, COMMUNICATION AND THE EVOLUTION OF SOCIETY (1979).

<sup>3</sup> AMARTYA SEN, DEVELOPMENT AS FREEDOM (1999).

<sup>4</sup> *Near v. Minnesota*, 283 U.S.697 (1913)(in this case the court struck down a Minnesota law which put a permanent injunction on newspapers on the ground that it contained the malicious, scandalous, and defamatory material. It was held that the law violated the First amendment of U.S.Constitution. The decision became a precedent that was applied in *New York Times co. v. United States* 403 U.S.713(it is the famous 'Pentagon Papers Case which is a land mark case on the First Amendment on the U.S.Constitution which laid down the proposition that to impose prior restraint it should be shown that the publication would cause grave and irreparable danger. In this case President Nixon tried to prevent the New York Times from publishing certain documents relating to defence department and the case was decided in favour of the New York Times).

The sting operation is usually adopted by media to gather information. The chapter also discusses various aspects within the spectrum of protection of privacy right while conducting sting journalism.

## 5.2 RIGHT TO INFORMATION-AN OVERVIEW

From a theoretical perspective, the information keeps a human relationship and creates a better informed society.<sup>5</sup> Sweden is the first country which guaranteed the freedom of information in 1766. Later many other countries followed the same path and enacted statutes guaranteeing right to information.

In almost all countries secrecy was the rule and the disclosure was the exception. For example, in the UK, the Official Secrets Act, 1911 served the above purpose. Later, the Fulton Committee on the Civil Service recommended some modifications in secrecy laws. Accordingly, the Labour party published a white paper called Information and Public Interest.<sup>6</sup> Later the departmental committee which had been appointed under Lord Franks made some inroads into the Official Secrets Act which took the form of Official Information Act. The Committee observed that secrecy in all aspects of governance would adversely affect the interest of the country. It had been opined that matters other than defense or security of the nation, foreign matters should also be disclosed.

---

<sup>5</sup> PATRICK BIRKINSAW, FREEDOM OF INFORMATION-THE LAW, THE PRACTICE AND THE IDEAL 19 (4<sup>th</sup> ed.2010) .

<sup>6</sup> *See generally*, FULTON COMMITTEE REPORT, cmdnd. 3638 at 277(1968) (The Fulton Committee had been appointed by the then Prime Minister Harold Wilson in 1966 in U.K. to examine the structure, recruitment and management, including training, of the Home Civil Service, and to make recommendations).

Therefore, the information regarding public records, local government, public bodies were granted green signal to disclose.<sup>7</sup>

Later, in the United Kingdom, a new legislation called the Official Secrets Act, 1989 was enacted. The Code of Practice, 1999 also allows the disclosure of information if it is a matter of public importance. Another piece of legislation which allows the disclosure is ECHR of which Article 10 guarantees freedom of information along with freedom of speech and expression.<sup>8</sup> In tune with this law, the legislature in UK enacted the Human rights Act 1998 which guarantees right to information among other rights.

In the U.S. also, the Freedom of Information Act 1966 (FOIA) gives access to federal agency records of information subject to nine exceptions. The exceptions include the information covering national defense or foreign policy, internal personal rules and practices, trade secrets, inter- agency or intra agency memoranda or letters that are protected by legal privileges, personal and medical files, law enforcement records, information concerning bank supervision and finally the geological and geophysical information. Therefore, it can be seen that in the course of time the principle of secrecy gave way to the freedom of information.<sup>9</sup>

---

<sup>7</sup> See e.g., Public Records Act, 1958, The Local Government Act, 1939, The Public Bodies (Admission and Meetings) Act, 1960, The Local Government (Access To Information) Act, 1985.

<sup>8</sup> Article 10 under European Convention on Human Rights guarantees freedom of expression. The article also guarantees freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. The provision also says that the article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprise.

<sup>9</sup> PATRICK BIRKINSAW, *supra* note, 5.

### 5.3 RIGHT TO INFORMATION AND INTERNATIONAL TREATIES

The international relevance of the right to information dates back to the Declaration of the Rights of Man and of the Citizen in 1789.<sup>10</sup> The charter contained the provision which gives the right to know the citizens the necessity of public contribution, assessment and collection of taxes. All the citizens have a right to decide, either personally or by their representatives, as to the necessity of the public contribution, to grant this freely, to know to what use it is put, and to fix the proportion, the mode of assessment and of collection and duration of the taxes.<sup>11</sup>

Freedom of information is a fundamental human right as it emanates from the right to freedom of speech and expression.<sup>12</sup> UN Commission on Human Rights says that right to seek or have access to information is one of the most essential elements of freedom of speech and expression.<sup>13</sup> Universal Declaration of Human Rights (UDHR) 1948 says:-

Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers.<sup>14</sup>

Similar recognition can be seen in ICCPR which declares:-

<sup>10</sup> Declaration of the Rights of Man and of the Citizen, 1789 art XIV :-  
Each citizen has the right to ascertain, by himself or through his representatives, the need for a public tax, to consent to it freely, to know the uses to which it is put, and of determining the proportion, basis, collection, and duration.

<sup>11</sup> *Id.* See also, Article XII and XIII.

<sup>12</sup> G. A. Res. 59(I) (65<sup>th</sup> Plenary Meeting, Dec. 14, 1946).

<sup>13</sup> Special Rapporteur, *Promotion and Protection of the Right to Freedom of Opinion and expression: Rep. of the Special Rapporteur*, ¶35, U.N. Doc. E/CN4/1995/31 (December 14, 1995).

<sup>14</sup> UDHR art. 19, ¶ 1.

- a. Everyone shall have the right to hold opinions without interference.
- b. Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or print, in the form of art or through any other media of his choice.<sup>15</sup>

At the international level the various instruments guarantee the right of the individuals to know the information relating to public functionaries. It shows that, globally, the right of people to access information or documents which are required to participate in democracy and also for self-development has been recognized. It cast an obligation on the member countries to mould their law accordingly.

#### **5.4 REGIONAL CONVENTIONS**

The freedom of information has also been recognized in various regional conventions. The Commonwealth meeting held at Barbados stated that people should be given sufficient access to the public information so that their participation in the democratic process can be ensured.<sup>16</sup> It is stated that- the right to freedom of thought and expression shall include freedom to work, receive and impart information and ideas, of all kinds, regardless of frontiers, either orally, in writing, in print, in the form of art, or through any other medium of one's choice.<sup>17</sup> The provision also expressly states that the exercise of the right shall

---

<sup>15</sup> ICCPR art 19 ¶ 2, *See also*, Law Commission of India Report No. 179 on The Public Interest Disclosure and Protection of Informers, December 2001. <http://lawcommissionofindia.nic.in/reports/179rptp1.pdf>, 38-45 (Last accessed 27th June 2014).

<sup>16</sup> [www.article19.org.in](http://www.article19.org.in). (Last accessed 16th August, 2011).

<sup>17</sup> American Convention on Human Rights, 1969, art 13.

not be subjected to prior censorship, but shall be subjected to subsequent imposition of liability, which shall be expressly established by the law to the extent necessary to ensure respect for the rights and reputations of others; or the protection of national security, public order or public health or morals.<sup>18</sup>

Therefore it can be interpreted that Art 13 guarantees the right to express one's own thoughts and feelings. It also assures the right and freedom to seek, receive and impart information and ideas of all kinds. Freedom of expression imparts that no one shall be arbitrarily limited or impeded in expressing his thoughts. In this respect, it is an individual right. Collectively, it is the right of a group of people to receive any information whatsoever and to have access to the thoughts expressed by others.<sup>19</sup>

European Convention on Human Rights (ECHR) declares that everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and irrespective of frontiers. Further it says that the exercise of these freedoms, since it carries with its duties and responsibilities, may be subject to such formalities, conditions, restrictions or such penalties as are prescribed by law, and are necessary in a democratic society, in the interest of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing disclosure of information received in confidence, or for maintaining the authority and impartiality of the

---

<sup>18</sup> Adopted by Organisation of American States(OAS) in 1969.

<sup>19</sup> S.P.SATHE, THE RIGHT TO KNOW(1991).



judiciary.<sup>20</sup>The African Charter on Human and Peoples' Rights 1981, the Inter-American Declaration of Principles of Freedom of Expression 2000 and Declaration of the Principle of Freedom of Expression in Africa 2002 etc are also in tune with Article 19 of UDHR.<sup>21</sup>

Therefore it can be said that the legislative instruments of various nations accepted and incorporated the right to freedom of information. It is a step by the states. India took positive steps for to put the rationale of right to information by enacting the Right to Information Act, 2005.

## **5.5 RIGHT TO INFORMATION -INDIAN PERSPECTIVE**

In colonial period secrecy was the rule and disclosure was an exception. The government used the rule of secrecy to keep the people under control. It was believed that good and effective governance of the country is possible only if the information is kept secret. To get a frank, open, honest and professional advice to ministers, secrecy was believed to be essential. Otherwise, the officers were reluctant to give an opinion if it had been discussed with third parties. Another justification is that the government machinery would get spoiled if the advice given by bureaucracy was subjected to public scrutiny. Also, the system and machinery in the country worked on the rule of confidentiality rather than on the rule of openness. The issues relating to privacy were another ground on which

---

<sup>20</sup> ECHR art 10.

<sup>21</sup> THE PUBLIC'S RIGHT TO KNOW: PRINCIPLES ON FREEDOM OF INFORMATION LEGISLATION (LONDON:JUNE 1999),Preface. Available at <http://www.article19.org/pdfs/standards/foi-the-right-to-know-russian.pdf>.(Last accessed 23<sup>rd</sup> April 2016).

the non-disclosure of information was justified. But the concept of welfare state envisages that the rule of disclosure should be the guiding principle.<sup>22</sup>

In India, the right to information is protected in two ways. Primarily, it is the creative interpretation of Article 19 (1) (a) of the Constitution of India. Also, it forms a part of the right to life and liberty under Article 21 of the constitution.<sup>23</sup> Apart from being an implied constitutional right, secondarily, it became a statutory right when the Right to Information Act, 2005 has been enacted. The statute was enacted to ensure access to information by the citizen to secure access to information under the control of public authorities to promote transparency and accountability in the functioning of public authorities.<sup>24</sup>

The main function of media is to inform the public on various aspects of public importance. The media can effectively discharge its duty of dissemination of information only when it can gather information from various sources.<sup>25</sup> Therefore, media should have access to all means to gather news, so

<sup>22</sup> See, S.P.SATHE, *supra* note 19., See generally, FAIZAN MUSTAFA, CONSTITUTIONAL ISSUES IN FREEDOM OF INFORMATION-INTERNATIONAL AND NATIONAL PERSPECTIVES (1st ed.2003).

<sup>23</sup> *Reliance Petrochemicals Ltd v. Proprietors of Indian Express News Papers Bombay Pvt.Ltd* (1988) 4 SCC 592.

<sup>24</sup> The Right to Information Act, 2005, Preamble. Before the enactment of the Right to Information act, 2005, another enactment called Freedom of Information Act, 2002 was in existence. It had been recommended that it is better to use the term 'right' rather than 'freedom'. Because freedom is what I can do for myself. However, right connotes what others do for me. If a person said to have the freedom to obtain information, it only means that he can by his efforts secure information that he wants without there being a duty on the public authorities to provide or reveal information. On the other hand, if the law confers on a person the 'right to information', a corresponding duty is cast on the public authorities to provide information to him and a breach of duty would be attendant with some penalty. Therefore right to information is a better terminology instead of freedom of information.; See, V.Nageswara Rao & KVSS. Janardhanacharyulu, *Legal Foundations of Right to Information-An Overview*, as in RIGHT TO INFORMATION-INDIAN AND INTERNATIONAL PERSPECTIVES (ed.N.SUDARSHAN, 2010).

<sup>25</sup> D.D.BASU, LAW OF THE PRESS, at 244 (5<sup>th</sup> ed. 2010); *British Steel Corporation v. Granada Television Ltd.* 1981 1All.E.R.417(CA)(the majority took the view that the

that they can easily and effectively propagate the news and information to society.<sup>26</sup>

The role of the judiciary in recognizing the right to information as a facet of the right to free expression is remarkable. It had been observed in the historical case, *Bennet Colemann & Co. v. Union of India*<sup>27</sup> that freedom of press meant the right of all citizens to speak, publish and express their views and freedom of speech and expression includes the right to read and be informed. It had also been observed that freedom of speech protects two interests such as individual interests and social interest. The former denotes the need of a man to express his opinion on matters which affect them. The latter denotes finding of the truth by which the state can adopt a proper method properly.

The rationale behind the freedom of information is-

- a. The right of access to information which ensures accountability of government to its people in respect of its working.
- b. The shared information will help the people to contribute effectively in debates.
- c. It will ensure fairness and transparency in the governance of the country.

---

journalist should not keep the source of information as secret. But minority said that they should not be put under obligation to disclose it).

<sup>26</sup> *Attorney General v. Guardian Newspapers* (1987), 1W.L.R.776 (also known as Spycatcher case, in which an order of injunction was sought against the newspaper from publishing the memoirs of a former officer of British security service. It was alleged that such disclosures would affect security matters. The case was decided in favour of the newspaper by reasoning that it would impede if the public is prevented from having such information which would otherwise available elsewhere).

<sup>27</sup> (1972) 2 SCC 788; AIR 1973 SC 783 (the govt. put restrictions on acquisition, sale and consumption of news print).

On the other hand, privacy rationale connotes that information collected for one purpose should not be used for another purpose without the consent of the individual.<sup>28</sup>

In *The Secretary, Ministry of Information & Broadcasting v. Cricket Association of Bengal*<sup>29</sup> the court recognized that the right to freedom of speech and expression connotes the right to receive and impart information also. The citizens should have a variety of views and opinion on public issues so that they can exercise freedom of speech and expression in real sense. Different variety of views, opinions, ideologies and ideas enable a person to arrive at informed judgments. In *State of U.P. v Raj Narain*<sup>30</sup> the court was dealing with the question of whether privilege could be claimed by the government of Uttar Pradesh under section 123 of Evidence Act in respect of Blue Book. The court upheld the right to know of citizens regarding those things that were done in a public way by the public functionaries.

In *S.P.Gupta v. Union of India*<sup>31</sup> the seven judge constitution bench of the Supreme Court gave a new and liberal dimension to the principle of

<sup>28</sup> *Secretary General, Supreme Court of India v. Subhash Chandra Agarwal*, LPA No.501/2009 <https://indiankanoon.org/doc/1342199/> (Last accessed 8<sup>th</sup> Oct 2015).

<sup>29</sup> (1995) 2 SCC 161; AIR 1995 SC 1236 (this case involved the issue of granting the exclusive telecasting right to a private agency rather than to Doordarshan. The court held that the airwaves are the public property and opined that government should implement certain regulatory measures to control the use of airwaves).

<sup>30</sup> (1975) 4 SCC 428.

<sup>31</sup> (1981) Supp SCC 87; AIR 1982 SC 149 (the Supreme Court considered various cases which involved cases of great constitutional importance affecting the independence of judiciary concerning the appointment of judges. It involved the disclosure of correspondence between law Minister, Chief Justice of Delhi High Court and Chief Justice of India. The petitioners demanded the disclosure of these documents). See generally, Report of Law Commission No. 214 (2008), Proposal for Reconsideration of Judges cases I, II and III - S. P. Gupta v. UOI reported in AIR 1982 SC 149, Supreme Court Advocates-on-Record Association v. UOI reported in 1993 (4) SCC 441 and Special Reference 1 of 1998 reported in 1998 (7) SCC 739.

disclosure and observed that disclosure should be the rule in matters of public affairs for the democratic functioning of the government. However, the information need not be disclosed if it injured the public interest. The democratic principles will be survived only in a country where the principle of openness is followed. At the same time, the above concept should not be misused and if every decision taken by the authorities is subjected to enquiry to catch the popularity because it will adversely affect the independence of the authority.<sup>32</sup>

## **5.6 RIGHT TO INFORMATION AND RIGHT TO PRIVACY- A CHALLENGE TO MEDIA**

Like all other rights, the right to freedom of information is not an absolute one. In other words, the law relating to the right to information does not enable a person or media to gather information by infringing on other rights. Sometimes the disclosure of information will be confronted with the rights or interests of other persons. Since the right to information is part of the right to freedom of speech and expression the former is subject to the same restrictions which are applied to the freedom of speech and expression as provided under Art 19 (2) of the constitution. Therefore, the right to information can be restrained on the ground of security of the state, health, morality, decency etc. In *Prabha Dutt v. Union of India*<sup>33</sup> the Supreme Court was of the view that the

---

<sup>32</sup> *Id.* ¶19.

<sup>33</sup> (1982) 1 SCC 1: AIR 1982 SC 6 (in the instant case the petitioner who was a journalist filed a writ petition to get permission to interview the prisoners who were convicted a death sentence).

right of a journalist to get information did not mean she had unrestricted access to information. Here the journalist claimed that she had the right to interview the prisoners. The court objected it and said that even though it was a right the journalist could not do it against his will. Because the freedom of the press did not convey the meaning that it is unrestricted access to the information.

In *The Secretary, Information and Broadcasting v. Cricket Association of Bengal*<sup>34</sup> gave a good interpretation to the exceptions and said that free speech could be restricted in the interest of the nation or in the interest of the society even though the expression 'national interest' or 'public interest' has not been mentioned under any of the exceptions provided under Art 19(2) of the constitution. In the instant case, the court decided that broadcasting is a means of communication and a medium of free expression under Article 19(1)(a) of the constitution of India. It had also been observed that right to entertain and to be entertained through broadcast media is are vital components of freedom of speech and expression. It had been added that the restriction was justified on the ground that the airwaves were public property and as a result the right of the telecaster was a limited one. No one could claim monopoly right over the broadcasting or on electronic media.

There are laws which determine the parameters within which the public or media can access information. Under the Right to Information Act, 2005 the public authorities are under the obligation to provide information to any person

---

<sup>34</sup> (1995)2 SCC 161:AIR 1995 SC 1236 (in this case the main question was whether the cricket association and the right to grant telecast rights to an agency of its own choice whether national or foreign).

subject to the formalities provided under the law. The word 'information' is defined as any material in any form, including records, documents, memos, e-mails, opinions, advice, press releases, circulars, orders, logbooks, contracts, reports, papers, samples, models, data material held in any electronic form and information relating to any private body which can be accessed by a public authority under any other law for the time being in force.<sup>35</sup>

The word "personal" means appertaining to the person; belonging to an individual; limited to the person; having nature or partaking of the qualities of human beings, or of movable property.<sup>36</sup> Therefore, "personal information" under the Act, means the information that is related to a person. The information need not be related to any public activity or public interest.

Section 8 of the Act lays down exceptions under which the information cannot be disclosed. Section 8 (1) (j) of the Act restricts the disclosure of information on the ground of protection of privacy right. It prevents the information officer to furnish information if the disclosure would affect the privacy right of the individual. However, the disclosure is justified if the information officer is satisfied that the larger public interest would outweigh the other interest.

<sup>35</sup> Right to Information Act 2005 § 2(f), *Cf.* The word 'information' applies to data that are gathered in any way, as by reading, observation, hearsay, etc. and does not necessarily connote validity/inaccurate information. WEBSTER'S NEW WORLD COLLEGE DICTIONARY, NEW MILLENNIUM, 733(4<sup>th</sup> ed.2006). *See also, Indian & Eastern Newspapers Society, New Delhi v. Commissioner of Income Tax, New Delhi* AIR 1979 SC 1960: (1979)4 SCC 248 (the court examined whether the view expressed by the internal audit party of the Income tax department was 'information' under §147(b) of Income Tax Act, 1961. The court answered it negatively).

<sup>36</sup> *Personal*, BLACK'S LAW DICTIONARY (6th ed.1994) *see also, UPSC v. R K Jain* (W.P. NO. 1243/2011) ¶16.

In *CPIO, Supreme Court of India v. Subhash Chandra Agarwal*<sup>37</sup> the court analysed the relationship between privacy and the right to information. The main issue involved was in respect of the disclosure of assets of judges of High Court and Supreme Court. The court examined the question of whether the disclosure would violate privacy right. The court clarified that both a private citizen and a public official enjoy the right of the same nature and character. But the degree of enjoyment of privacy is greater in the case of a private individual than that of a public official. Because the public persons always accountable to the public due to the nature of duty that they were performing or discharging in the public. Also, the degree of protection depends upon the circumstances of the case and the public interest involved. To decide whether the information should be disclosed or not the test applied is-

- a. Whether the disclosure of personal information is to provide information for the proper discharge of official duties.
- b. Whether the information is solely related to personal affairs which are unconnected with the official duty.
- c. Whether the disclosure is required to establish accountability and transparency in respect of the public fund.

The Central Information Commission defined 'invasion of privacy' as one who intentionally physically or otherwise intrudes, upon the solitude or seclusion of another or his private affairs or concerns, is subject to liability to

---

<sup>37</sup> (1993) 4 SCC 441(The case is also known as *Judges Asset case*. The case was centered around the main issue whether the judges were under an obligation to disclose the asset details and it would be violative of privacy right.)



the other for invasion of privacy, if the intrusion would be highly offensive to a reasonable person.<sup>38</sup>In *Girish Ramachandra Deshpanday v. Central Information Commissioner*<sup>39</sup> it has been observed that if the information sought is strictly personal information and the disclosure of which result in the serious invasion of privacy, it need not be disclosed. In this case the information sought was about the service career of an employee and his assets. The court was of the view that the information sought was not related to any public activity and could not be said that the matter was a public spirited one.

While recognizing the right to privacy of patients with respect to medical records, the Supreme Court in *X v. Z Hospital*<sup>40</sup> observed that in exceptional situations non-disclosure of medical records could not be objected on the ground that it would violate privacy right. The court decided that where there is a clash between two fundamental rights, the right which would advance the public morality or public interest should be allowed to prevail.

In *A.D. Sharma v. Municipal Corporation Delhi*,<sup>41</sup>the appellant's application for the joint inspection of suit property was rejected on the ground that it would attract S.8(1)(j) of RTI Act, 2005. Such an inspection would result in a violation of privacy right and the Central Information Commissioner had no authority to order an inspection. And it did not involve any degree of element of public interest. To decide, whether, the information ought to be disclosed or not,

---

<sup>38</sup> RISHIKA TANEJA, SIDHANT KUMAR, *PRIVACY LAW, PRINCIPLES, INJUNCTIONS AND COMPENSATION*, 101.(1st ed.2014).

<sup>39</sup> (2013) 1 SCC 212.

<sup>40</sup> AIR 1999 SC 495(in this case an HIV patient questioned the disclosure of medical reports by hospital authorities to her proposed bride groom).

<sup>41</sup> 2013 Indlaw CIC 1725.

the Delhi High Court laid down certain guidelines in *UPSC v. R.K.Jain*<sup>42</sup> which had been reiterated in *A.D. Sharma* in the following way for S.8(1)(j).

- (i) The information sought must relate to "personal information". If the information sought does not qualify as personal information, the exemption would not apply;
- (ii) Such personal information should relate to a third person, i.e., a person other than the information seeker or the public authority;
- (iii) (a) The information sought should not have a relation to any public activity or public interest. If the information sought relates to public activity of the third party, i.e. to his activities falling within the public domain, the exemption would not apply. Similarly, if the disclosure of the personal information is found justified in public interest, the exemption would be lifted.
- (b) The disclosure of the information would cause unwarranted invasion of the privacy of the individual, and that there is no larger public interest involved in such disclosure.’<sup>43</sup>

The media should take into consideration the aspect of public interest while airing programmes. The visualization of the events will have a great impact and if any programme unfortunately invade the privacy of an individual, the humiliation and harassment that is created would be great. The visual media

---

<sup>42</sup> W.P.NO 1243/2011 (13 July 2012)(in this case, respondent sought all documentation relating to the proposed disciplinary action against a Central Excise and Customs Service Officer. It had been observed that the appellant failed to prove any larger public interest).

<sup>43</sup> *Id* ¶36.

should be guided by the above analysis concerning public interest while programmes are disseminated.

### **5.7 PUBLIC INTEREST AS LIMITATION ON PRIVACY**

A person cannot claim privacy right if the public interest demands that the information should be published. The limitation on the protection of privacy right takes the form of limitation which may be limitation to the extent and limitation to the content. The limitation as to the content involves the question of what can be published by the media. The limitation as to extent involves the question of legitimacy or necessity of disclosure of information. In other words, where one person waives his privacy right, it is an issue to see whether it is legitimately necessary or appropriate for the public to know the information. Therefore, the public interest is one of the limitations for the protection of privacy right.

The due consideration of public interest over the privacy right is the mechanism which helps us to decide what can be published by denying privacy right. The term 'public interest' cannot have a static definition because of the notion of public interest changes according to the changes in time, society etc. Generally the public interest refers to those matters which are good to the public. In other words, the concept covers the interest of the general public which includes public order, public health, public security, morals, economic welfare of the community and the objects mentioned in Part IV of the constitution.<sup>44</sup>It denotes something in which the community at large has some pecuniary interest

---

<sup>44</sup> *State of U.P. v. Raj Narain* AIR 1975 SC 865.

by which their legal rights or liabilities are affected. It does not mean mere curiosity, the interest of a particular group of people or localities.<sup>45</sup> It can also be said that public interest include in exposing or detecting crime, exposing significantly antisocial behavior, exposing significantly antisocial behavior, exposing corruption or injustice, disclosing significant incompetence or negligence, protecting people's health and safety, preventing people being misled by some statement or action of an individual or organization and disclosing information that allows people to make a significantly more informed decision, about matters of public importance.<sup>46</sup> Public interest is something which is redressing public inquiry, enforcing public duty, protecting social, collective, diffused rights and interests or vindicating public interest.<sup>47</sup>

The concept of public interest has also been explained in terms of restrictions under Article 19(2). It is the security of the state, public order, contempt of court, defamation etc. and are ultimately referable to be societal interest, which is another name for public interest.<sup>48</sup> These restrictions are imposed in the interest of ensuring and maintaining conditions in which the said

<sup>45</sup> *public interest*, BLACK'S LAW DICTIONARY (6<sup>th</sup> ed.1993).

<sup>46</sup> BBC's Editorial Guidelines, *See*, TUGENDHAT AND CHRISTIE, THE LAW OF PRIVACY AND THE MEDIA(eds.N.A.Moreham, Sir Mark Warby,3rd ed. 2016)

<sup>47</sup> *S.P.Gupta v. Union of India*, (1981) Supp SCC 87: AIR 1982 SC149 Per Justice Bhagavati; In defamation cases the Second Press Commission suggested following factors that should be taken into account as public interest.

- a. Conduct of public servant in the discharge of his public functions
- b. Conduct of any person touching any public question
- c. Any performance which its author has submitted to the judgment of the public
- d. Matters arising out of any authority conferred by law or contract on one person to pass, in good faith, any censure on the conduct of another person, in matters to which such lawful authority relates.
- e. Matters concerning any accusation made against any person to a person which has lawful authority over the person, with respect to the subject matter of the accusation.

<sup>44</sup> *The Secretary, Information and Broadcasting v. Cricket Association of Bengal* (1981)Supp SCC 87: AIR 1982 SC149.

right can meaningfully be exercised by the citizens of the country. *Supreme Court Advocates on Record Association v. Union of India*<sup>49</sup> was rightly observed that disclosure of personal information for the appointment of the candidate as judge of Supreme Court of or High Court was a valid one. Because it was necessary for the interest of the general public and the right to privacy could not be a hurdle in disclosing these matters.

The public interest can be something which is demanded by a large section of the public. It means information related to the state of the economy, the moral values in the society, the environment, national safety etc.<sup>50</sup>

The judiciary discussed the importance of maintaining the balance between the right to information and privacy in certain cases. In *Thalappalam Secretary Co-operative Bank Ltd. v. State of Kerala*<sup>51</sup> speaking on the conflict between right to information and right to privacy the Supreme Court observed that the right to information had been recognized in Resolution 59(1) of UN General Assembly 1946 as a fundamental human right. The same is the position of the right to information under ICCPR and UDHR. If information is not under the control of public authorities, it is assumed the character is of private information and is not accessible to the public. In this sense the right to privacy of citizens should be respected.<sup>52</sup>

<sup>49</sup> (2016) 5 SCC 1.

<sup>50</sup> *UPSC v. R.K.Jain*, W.P.NO. 1243/2011(13 July 2012) ¶27.

<sup>51</sup> 2013 Indlaw SC 663 (the applicant under RTI Act sought information relating to the account of another society in the bank. The application was refused by the society. The High Court upheld the observation that the society is a public authority and liable to provide information. The Supreme Court reversed the decision and observed that society is not a public authority and would not come under the purview of the Right to Information Act).

<sup>52</sup> *Id.* ¶¶ 46-50.

A crucial decision can be seen in *Union of India v. Association of Democratic Reforms and another*<sup>53</sup> as it had been held that the citizen had a right to know the antecedent of candidates contesting the election. Such information should be disclosed to ensure a proper and vice selection of the candidate and it would not attract S.8 (1)(j) of the Information Act. In such cases, the candidate cannot raise the defence that the disclosure of antecedent will hit the right to privacy of the individuals.

The American jurisprudence also recognizes the disclosure of information on the ground of public interest. The right to information would be given more importance than that of privacy right. Warren and Brandies in their article clearly stated, as the first limitation on privacy right, which the right to privacy did not prohibit any publication of information which was of public and general interest. Therefore, an individual's right to privacy must in some cases give away to the paramount rights and interests of society. A proper delimitation on privacy right invites the balancing of other rights when there is a conflict of interest.<sup>54</sup>

## **5.8 'PUBLIC DOMAIN' – AS LIMITATION**

It is an accepted principle of privacy law that once the information fell in the public domain or it is published one cannot claim the protection of privacy right. Once it is published, it lost the character of private and become public. In

---

<sup>53</sup> (2002) 5 SCC 294.

<sup>54</sup> 62 Am. Jur.2d at 700 ¶16, as cited in *Indu Jain v. Forbes Inc.* 2007 SCC Online Del 1424 ¶ 82 (The plaintiff sought injunction to restrain the defendants from publishing certain information about her in the website. The court did not find any merit in the case), Cited in *Swami Ramdev v. Juggernaut Books Pvt.Ltd*, decided by Delhi High Court, 29<sup>th</sup> September, 2018.

the case of media, the place of private activity where it is done, the nature of the activity and the extent of publication etc. will decide the fact whether the information is already in public domain or not.

In *Theakson v. MGN*<sup>55</sup> a tabloid newspaper published news relating to an encounter happened in a restaurant between a prostitute and a television personality. The action was failed on the ground that the information fell in the public domain and lost the character of private information. Because the information of encounter in a brothel was known to persons who were present there.<sup>56</sup> But somewhat an opposite approach can be seen in Douglas case where the claimant succeeded in House of Lords in getting relief against the magazine which published the wedding photos of Michael Douglas and Catherine Zeta Jones. In this case, only invited people and guests attended the function. Therefore, the information about the wedding was not completely confidential. Even then the claimant succeeded in action. Here the court was of the opinion that knowledge by a small number of persons did not lose its character of privacy.<sup>57</sup> This observation remembers us of the definition of privacy by Alan Westin, who stresses the point that privacy involves control over personal information.<sup>58</sup>

---

<sup>55</sup> [2002] EWHC 137 (QB); [2002] EMLR 398.

<sup>56</sup> Helen Fenwick and Gavison show doubts about this decision. They argued that it was against the well-established principle that knowledge by a small number of people of information does not prevent it from being confidential, especially when only a few number of people were present in that place and time. Moreover, the author argues that the brothel was supposed to be a place where private and intimate activities were taken place. This decision is against the principles of Art8 ECHR), *See generally*, HELEN FENWICK AND GAVISON, MEDIA FREEDOM UNDER HUMAN RIGHTS ACT (2010).

<sup>57</sup> *See also*, *Sunday Times v. UK* A 30 (1979) ¶52.

<sup>58</sup> ALAN WESTIN, PRIVACY AND FREEDOM (1967).

In this regard, there should be clarity in respect to a number of person or the extent of the reach of information to the public, which would make the audience public or private. Professor Wacks says that any definition of personal information must refer both to the quality of the information and the reasonable expectation of the individual concerning its use.<sup>59</sup>

In *Peck v. U.K*<sup>60</sup>, the CCTV footage of the claimant who was wandering in the street with a knife, was captured immediately after he had attempted to commit suicide by cutting his wrists. Later it was broadcasted in a television programme called 'Crime Beat' in which the audience identified the claimant. The UK government argued that in Strasburg court the footage which was broadcasted did not form part of private life. Because the incident took place in a public place and it amounted to the loss of privacy. However, the court observed that the information broadcasted would amount to the breach of Article 8 of ECHR. Even though one is in public places, he does not lose privacy protection. One can engage in private actions in public place and the taking of photographs without consent will amount to a violation of privacy right. It does not require that the information should satisfy the test of humiliation or severe embarrassment.

## **5.9 TESTS TO BALANCE TWO CONFLICTING INTERESTS**

The conflict between two rights of equal value requires certain tests to balance it and in the case of privacy right and media freedom, the courts usually adopt tests like clear and present danger test and proportionality test.

---

<sup>59</sup> RAYMOND WACKS , PERSONAL INFORMATION: PRIVACY AND THE LAW 24(1980).

<sup>60</sup> (2003) 36 EHRR 41; [2003] EMLR 287.



### 5.9.1 Clear and Present Danger Test

This test was first stated by Justice Oliver Wendell Holmes in *Schenck v. United States*<sup>61</sup> and he stated that when the nature of expression poses a great threat and cause evil, it should be punished and prevented.<sup>62</sup> Because such manifestation of expressions would pose a clear danger to contemporary society. If there are two conflicting rights of equal value, it will put us in a difficult situation. In *Sahara India Real Estate Corpn. Ltd v. SEBI*<sup>63</sup> the court said that values enshrined in the Constitution was to ensure liberties which sometimes may conflict with each other. Since no values are absolute, they should be qualified and balanced against other important competing values. The Sahara case involved the issue of reporting of court proceedings and observed that prior restraint in the form of postponement orders may be issued to protect the interests of justice. The court took into account clear and present danger test to determine the balance of inconvenience. While doing so, the real and substantial risk to the proper administration of justice, necessity and proportionality should be taken into consideration.<sup>64</sup> If the media freedom has to be restricted over right to privacy, under this doctrine, there should be a clear danger if media is allowed to publish the information.

<sup>61</sup> 249 U.S.47(1919)( two socialists were convicted for conspiring to violate Espionage Act, 1917. They tried to distribute one page circulars against the draft of the above law).

<sup>62</sup> See also, KENTR.MIDDLETON & BILL F. CHAMBERLIN, THE LAW OF PUBLIC COMMUNICATION (2<sup>nd</sup> ed.1991).

<sup>63</sup> (2012) 10 SCC 603(Sahara India filed the appeal against the decision of SAT which ordered the refund of the money that the two companies had collected without complying with formalities. SEBI initiated investigation against Sahara).

<sup>64</sup> See also, RISHIKATANEJA, SIDHANT KUMAR, PRIVACY LAW-PRINCIPLES, INJUNCTIONS AND COMPENSATION (1<sup>st</sup> ed. 2014).

### 5.9.2 Proportionality Test

There are cases which used proportionality test<sup>65</sup> when two competing rights are conflict with each other. As to the term proportionality Lord Diplock in *R v. Goldstein*<sup>66</sup> observed that the proportionality test is concerned with the prioritizing of rights when there is a conflict of interest. For doing so, the relative importance of the factors should be considered. The test says that if a right is overridden without any sufficient objective justification it is not proportionate to the object which sought to be achieved by the restriction. Therefore the level of infringement of privacy should be decided on an objective basis.<sup>67</sup>

It consists of two tests namely a balancing test and a necessity test. The balancing test looks into the level or degree of intrusion. It also sees a clear imbalance of relevant considerations of public interest or any other competing right. The necessity test considers the extent to which the publication was a matter of public interest.

The proportionality test had been applied in *Campbell v. MGN Ltd.*<sup>68</sup> in which the media published articles about the celebrity (the claimant) revealing that she was used to visiting a deaddiction centre for treatment. She claimed compensation for breach of confidence and breach of Data Protection Act, 1998. Allowing the appeal filed by the claimant against the decision of Court of Appeal, the House of Lords observed that the publication amounted to breach of confidence. Because the disclosure would adversely affect the reputation of the

---

<sup>65</sup> *Id.*

<sup>66</sup> (1983) 1 WLR 151.

<sup>67</sup> RISHIKA TANEJA & SIDHANT KUMAR, *supra* note 64..

<sup>68</sup> (2004) 2 All.E.R.995 (HL).

deaddiction centre. It was a breach of assurance that had been given by the centre that their visit would be kept in secret. The proportionality rule was applied by the court to conflicting interests of the appellant's privacy right against the right of media to disseminate information to the public. In turn, the right of media should be balanced with the individual's right to respect private and family life. The court had to see whether the publication by the media would involve a legitimate aim and whether the benefits that would be accrued by disclosure were proportionate to the harm that might be caused to the appellant by interfering with her privacy right. By doing so the court found no pressing social need or any democratic value at stake and found the decision in favour of the celebrity.<sup>69</sup>

In addition to the above considerations to balance the conflicting interest two principles also can be taken into account. Primarily, the principle of social utility which says that we ought to choose that action or resolve on that policy that promotes more social utility than alternative actions or policies.<sup>70</sup> Secondly, harm principle advocated by John Stuart Mill which says that society should not interfere with an individual's liberty except to prevent harm to others.<sup>71</sup> Therefore, if the disclosure would cause great harm or injury to the individual the media should not be allowed to invade the privacy right.

---

<sup>69</sup> See also, *Douglas v. Hello! Ltd* (2001) 2 All E R 298 (CA) (the court also highlighted the requirement that while reporting information it was for the journalist to decide the manner and matter of publication. The court was of the view that the media should decide whether the information should be accompanied with photograph, the language of publication, the matter of presentation etc.).

<sup>70</sup> MARK TUNICK, *BALANCING PRIVACY AND FREE SPEECH- UNWANTED ATTENTION IN THE AGE OF SOCIAL MEDIA* 12 (2015).

<sup>71</sup> *Id.*

In *Justice K Puttaswamy v. Union of India*<sup>72</sup> Kaul J reiterated the test of principle of the proportionality and legitimacy in case of violation of privacy right by state entities. The test involves:-

- a. the action must be sanctioned by law
- b. The proposed action must be necessary in a democratic society for a legitimate aim;
- c. The extent of such interference must be proportionate to the need for such interference;
- d. There must be procedural guarantees against abuse of such interference.<sup>73</sup>

## 5.10 PUBLIC FIGURES AND PRIVACY

The visual media air programmes involving private activities and private information about the public figures in order to increase their circulation. In these circumstances it is a question whether the private matters related to the family life, daily routine matters etc. should be informed to the public. The public figures include political figures, celebrities, victims, offenders etc.

Literally the term 'public figure' means the person who obtained publicity either voluntarily or involuntarily. A person who by his accomplishments, fame or mode of living, or by adopting a profession or calling which gives the public a legitimate interest in his doing, his affairs, and his character, will become a public personage. It includes anyone who has attained public attention out of any reason.<sup>74</sup>

---

<sup>72</sup> (2017) 1 SCC 10.

<sup>73</sup> Per, Kaushal.J.¶ 71.

<sup>74</sup> PROSSER & KEETON, THE LAW OF TORTS, 859-60 (5<sup>th</sup> ed.1984).

*It can also be said that any person who engages in a pursuit or occupation which calls for the approval or patronage of the public submits his private life to examination to whom he addresses his call, to the extent that may be necessary to determine whether it is wise and proper to accord him the approval or patronage which he seeks.<sup>75</sup>*

There is a limit to the extent to which the public figure can waive his right. The invasion of privacy right can be justified only to the extent which is necessary and proper. It means that waiver of right to privacy is not extended to those things in personal life which do not expose anything on the question of competency for the office.

The persons fall under this category are those who hold public office or using public resources. The category of public figures cover those persons who play a role in public life, whether in politics, economy, arts, social sphere or in any other domain.<sup>76</sup> Somewhat a narrow definition can be found in Japan. Here public figures include only those individuals who have attained a very prominent position and are able to influence the society to a great extent. Therefore the category of public figure would cover only a very small group of people such as top corporate executives and leading politicians. Therefore, it is understood that public figures are persons holding public office and /or using public resources and more broadly speaking , all those who play a role in public life, whether in politics, the economy, the arts, the social sphere, sport or in any other domain.<sup>77</sup>

---

<sup>75</sup> *Pavesich v. New England Insurance Co.*, 122 Ga.190 (Ga. 1904).

<sup>76</sup> Parliamentary Assembly of Council of Europe on Right to Privacy, Resolutions 1165 (June 26, 1998).

<sup>77</sup> *Id.* ¶ 7.

The conduct of public officials is subject to public discussion if their conduct is related to the discharge of official duties for e.g., the allegation of corruption, inefficiency, obstruction of public duties etc.<sup>78</sup> In such cases, the defendant cannot raise the defense that the reporting of such activities violated the privacy right.

An interesting discussion had taken place in *Phoolan Devi v. Shekhar Kapoor*<sup>79</sup> with respect to the question that a public figure was. To decide this question the Delhi High Court observed that the term 'public figure' for purposes of determining standard to be applied in defamation cases, includes artists, athletes, business people, dilettantes and anyone who is famous or infamous because of his position in society and the nature of the act done by him.<sup>80</sup> The court also observed that for the purpose of libel actions, the category of public figures will cover those persons who have assumed roles of special prominence in society. The persons who made controversies for the public purpose also come under this category.<sup>81</sup>

For the right of privacy action purposes, public figure includes anyone who has arrived at position where public attention is focused upon him as a person.<sup>82</sup> In the above case, after referring these definitions the court rejected the

---

<sup>78</sup> *Garrison v. Louisiana* 13 L Ed 2d 125: 379 US 64(1964)

<sup>79</sup> (1995) DLT (57) 154.

<sup>80</sup> *Id, see also, Rosanova v. Playboy Enterprises.*, D.C.Ga., 411 F. Supp.440, 444.(the case involved the issue of publication of an article titled 'Playboy's History of Organized Crime' which the plaintiff was objected).

<sup>81</sup> *Mills v. Kingsport Times-News*, D.C.W.Va., 475 F. Supp.1005,1009, *Widener v. Pacific Gas &Elec.Co.* 75 Cal App 3d. 415,142: CAL RPTR.304, 313 (1977).

<sup>82</sup> *Dietman v. Time, Inc*,284 F Supp 925, 930 (1968).(the defendants used hidden camera and recorded pictures and conversations and published it as an article under the title 'Crackdown on Quackery'. Plaintiff claimed damages for violation privacy right and court allowed the claim).

argument that Phoolan Devi was not a public figure. Because her acts and deed invited public attention in the society and it would come under the purview of definition.

While balancing the competing interests such as privacy right, freedom of expression, freedom of information in *S.Rangarajan v. P.Jagjivan Ram*<sup>83</sup> the court observed that balancing two rights as of equal value is not welcomed. It is an age old principle that the freedom of expression cannot be put under stress unless there is a compelling public interest. There should be a proximate connection between the damage caused thereby and the free expression. In *Life Insurance Corporation of India v. Manubhai D Shah*<sup>84</sup> the court was of the view that the public has the right to know whether the LIC had satisfied the internal requirements to protect the interest of stakeholders. In this case an article had been published in the newspaper disclosing certain unfair practices adopted by LIC against policy holders. A counter article was published by an LIC member in the same newspaper. The LIC did not allow the respondent to publish his rejoinder in the magazine of LIC, while LIC allowed publishing the member of LIC in the same magazine. The Supreme Court by upholding the decision of Gujarat High Court adopted the fairness doctrine and directed the LIC to publish the counter. Again in *R. Rajagopal v. State of Tamil Nadu*<sup>85</sup> an attempt to disclose the misconduct and corruption of police officers had been made by the author of autobiography. The court observed that if the publication is based on

---

<sup>83</sup> (1989) 2 SCC 574.(the appellant was director of the film 'Ore Oregramathile' for which the certificate was not granted and it was objected by the appellant).

<sup>84</sup> (1992) 3 SCC 641.

<sup>85</sup> *R.Rajagopal v. State of Tamil Nadu* AIR 1995 SC 264, 1994 SCC(6) 632

the public record it could not be restrained. It is enough that he had published the autobiography after reasonable verification of facts. Such a discourse would be very much helpful to bring the corrupt officials into the limelight. The court said that in India the public officials enjoy the same level of privacy protection as any other citizen has.<sup>86</sup> Therefore, there is nothing wrong in knowing the information of public officials in the information falls under public interest. In the same background the citizen has the right to know the antecedent and criminal actions of candidate so that the voter can decide to elect him or not. It is not against privacy principles.<sup>87</sup>

In United Kingdom the privacy right of public figures is protected more efficiently after the enactment of Human Rights Act, 1988 which is in line with the provisions of ECHR.<sup>88</sup> In *A v. B (a company)*<sup>89</sup> the Court of Appeal laid down certain guidelines to prevent disclosure of private life of public figures. It had been said that a public figure was entitled to get the protection in respect of his personal life matters. But he should understand that due to his public position he had to expect that his actions would be more closely scrutinized than that of an ordinary person. Even trivial might be subjected to discussion in the case of public figures. Comparatively a high standard of conduct is expected by the

---

<sup>86</sup> *Dinesh Trivedi v. Union of India* (1997) 4 SCC 306 (the disclosure of Vohra Committee Report which was dealt with investigation of crime syndicates had been questioned).

<sup>87</sup> *Union of India v. Association of Democratic Reform* (2002) 5 SCC 294.

<sup>88</sup> See generally, *Campbell v. MGN Ltd.* (2004) 2 All.E.R.995(HL) ; *Douglas v. Hello! Ltd.*, (2007) 4 All.E.R.545; *A v. B(a company) Plc.* (2002) 2 All.E.R.545(CA).

<sup>89</sup> *A v. B plc.* (2002) 2 All E.R) 545, Guideline no.(xii).



public from these persons. If the public figure had explored public attention he had less ground to object the intrusion.<sup>90</sup>

### 5.10.1 Public Figures And Paparazzi

It is not disputed that media should publish that information which contains the element of public interest. If it is so, the intrusion into the private life of an individual by the media is justified. The disclosed matter should have the character of news, current affairs, information or a documentary and also the commentary of the above.<sup>91</sup> But the media often publish private facts of individuals, celebrities or politicians in order to increase its rating. They make use of the publicity of public figures to boost their rating.

The Indian media now started the paparazzi culture by peeping into the private affairs of cine artists, politicians and other famous or infamous people. United Kingdom witnessed the sad demise of the Princess Diana due to an accident caused by paparazzi.<sup>92</sup> Indian media is not guided by any proper rules or principles to curb the menace that is caused by the unjustified activities of paparazis. There is no adequate regulatory measure to tackle the issues at present.

<sup>90</sup> *Id.*

<sup>91</sup> Anthony Bendall, Helen Versey, *Privacy and the media - how to balance rights and interests*, (2010), Analysis and Policy Observatory Website: <https://apo.org.au/node/234789> (Last accessed 10th Oct 2018).

<sup>92</sup> The term 'paparazzi' is originated from the name of a freelance photographer which was the character of a film "La Dolce Vita" in 1959. The Ram House Webster's College dictionary 978(1991) defines paparazzi as a freelance photographer especially one who takes candid picture of celebrities for publication. See, Jamie E. Nordhaus, *Celebrities Rights to Privacy: How far should the paparazzi be allowed to go?* 18 THE REV. OF LIT. 285 (1999).

### 5.10.2 Public Figures and Galella Doctrine

In the United States the land mark case of *Galella v. Onassis*<sup>93</sup> discussed the activities of papparazi which utterly disturb personal life of the celebrities. Here it was held that the interference by the media in the privacy of the individual can be greater than that is necessary to protect the overriding public interest.

In this case, Galella, a photographer was arrested when he was trying to photograph Jacqueline Kennedy Onassis and their children. The court was of the view that the photographer was guilty of the harassment, intentional infliction of emotional distress, assault and battery, commercial exploitation of Onassis's personality and invasion of privacy. The claimant had been granted injunction to restraint the defendant from publishing the picture of Onassis and her children. He had been restrained from using their images in the advertisements. It was concluded that even though the photographer was acted in the course of his duty, they had a duty to act within the bounds of law. Therefore it was a case in which the court used the balancing test for granting injunction against the media on the ground of public interest. It can be said that both general public and celebrities entitled to enjoy the privacy right. The court commented that

*[O]f course legitimate countervailing social needs may warrant some intrusion despite an individual's reasonable expectation of privacy and freedom from harassment. However the interference allowed may be no greater than that necessary to protect the overriding public interest. Mrs. Onassis was properly found to be public figure and this subject to*

<sup>93</sup> 353.F.Supp.196 (S.D.N.Y.1972): 487 F.2d 986(2d Cir. 1973) See also, *Galella v. Onassis (Galella II)*, 533 F. Supp. 1076 (S.D.N.Y.1982).

*news coverage. Nonetheless, Galella's action went far beyond the reasonable bounds of newsgathering. When weighed against the de minimis public importance of the daily activities of the defendant Galella's constant surveillance, his obstructive and intruding presence, was unwarranted and unreasonable.*<sup>94</sup>

The term public interest is closely connected with the term 'newsworthiness'. In order to determine whether the information is newsworthiness or not, the test laid down by the U.S.Court in *Galella v. Onassis*<sup>95</sup> is used. It involves three factors.

- a. The social value of item published
- b. The depth of the intrusion into exclusively private affairs and
- c. The extent to which the party voluntarily assumed a position of public notoriety.<sup>96</sup>

The public curiosity is not the same thing as the public interest. If the matter published is related to private information of a person, media should justify that the publication was necessary in order to protect the interest of the public. If a person who is promoting morality and good conduct in the society is expected to lead such life. The exposition of his immoral private life, that is his real life, can be justified and the public figure cannot claim that the disclosure had violated his privacy right.

---

<sup>94</sup> *Galella II*, 533 F. Supp. 1076 (S.D.N.Y.1982). 89,533 F.Supp. at 1105(quoting *Galella I*, at 487 F.2d at 995-96).

<sup>95</sup> *Galella I*, 353.F.Supp.196 (S.D.N.Y.1972): 487 F.2d 986 (2d Cir. 1973)

<sup>96</sup> *Id.* at 224 See also, Jamie E.Nordhaus, *supra* note 92.

### 5.10.3 Voluntary Public Figures

The celebrities, performers, sports personnel, corporate executives, politicians etc. come under the first category of voluntary public figures. Here the issue is whether anything reported about public figures can be considered under the term 'public interest'. The persons who are not famous also attract the attention of media when they become involved in a public controversy.

The person who voluntarily places himself in the public eye and he is engaging in public activities cannot escape from public attention. The people who assume an important role in institutions or engaging in activities having general economic, cultural, social or similar public interest should also face the same position. The person, who subjects himself for the judgement of the public, cannot complain that the media had published his private life and invaded his privacy right. Sometimes the legitimate interest of the public may extend beyond those matters which themselves made public.<sup>97</sup>

### 5.10.4 Involuntary Public Figures

The persons who come under the category of involuntary public figures cover those people who do not seek publicity but became persons of public interest. For example, the murderers, persons in grief, sexually abused persons, relatives of convicted persons etc. Where the crime is reported, the persons who were involved in such cases would become a centre of attraction. Their loss of privacy is sometimes justified on the basis of theory of public accountability. It says that the dissemination of information is necessary to assess the significance

---

<sup>97</sup> RESTATEMENT (SECOND) OF TORTS § 652D (1977).

of the incidents in which such persons have become involved. However, the intrusion is not justified if there is no distinct relationship to the public events that require explanation.<sup>98</sup>

The individuals who are in grief and shock often become the centre of attraction of media to increase their publicity. The people caught up in emergencies, victims of accidents or those suffering from the personal tragedies should not be caught in the camera even if they are in public places. Even though these principles are accepted by the media, it is not strictly followed. The words, images or actions filmed or recorded in or broadcast from a public place which are so private in nature and do not carry any element of public interest should not be published.<sup>99</sup>

### **5.11 PRIVACY IN PUBLIC PLACES**

Here the question posed is that whether one can claim the privacy protection in public places. The traditional view is that one loses his privacy right when he leaves his home and appears in the public places. In these cases, it will be very difficult to demarcate the private and the public life, especially in the case of public figures. In India, the law is insufficient to protect privacy right of individual in public places. It will be helpful to look foreign cases to understand the way in which the right is protected in public places.

---

<sup>98</sup> *Howard v. Des Moines Register & Tribute Co.*, 283 N.W.2d 289, 302 (Iowa 1979) (the newspaper published that the claimant had undergone involuntary sterilization).

<sup>99</sup> *See generally*, *Fragile Merchandise: A Comparative Analysis of the Privacy Rights for Public Figures*, AM. BUS.L. J.2012).

In *Von Hannover v. Germany*<sup>100</sup> the battle was to prevent the publication of photos that were taken without consent. The German Federal Constitutional Court found that since the claimant was a public figure she can claim privacy in the public places only if she was not in the public eye and in a secluded place with an intention of being alone. Even the entertainment stories will get protection in Germany under German Copyright (Arts Domain) Act, if it contributes to the formation of a public opinion. Such publication need not require the consent of the plaintiff.<sup>101</sup> In the U.K., the Press Complaints Commission Code of Practice prohibits taking of photographs of individuals in private places. The Code says that the private places are public or private property where there is reasonable expectation of privacy.<sup>102</sup>

But when it reached the Court of ECHR, it was observed that the state breached the positive obligation to protect the privacy of individual under Art 8 of ECHR<sup>103</sup>. The court took the view that the photograph did not contribute to the formation of any public opinion of great importance. The court opined that a fundamental distinction should be made between the reporting of facts which are capable of contributing to a debate in a democratic society and the reporting of details of the private life of an individual. While in the former case, the media

---

<sup>100</sup> Appn.No.59320/00,24 June 2004.

<sup>101</sup> N.A.Moreham, *Privacy in Public Places*, CAMBRIDGE. L. J. 65(3) 606-635 (2006).

<sup>102</sup> DUNCANBLOY AND SARA HADWIN, *LAW AND THE MEDIA-FOR PRINT, BROADCAST AND ONLINE JOURNALISM* (2nd ed. 2013).

<sup>103</sup> Article 8 of European Convention on Human Rights (ECHR) guarantees the private life of individuals. *See supra* Chapter II, RIGHT TO PRIVACY-CONCEPT AND PERSPECTIVES.

exercises the vital role of watchdog in a democracy when compared to the latter case.<sup>104</sup>

The responsibility of the media to act as a watch dog arises only when the matters in question are of public importance. The court also observed that even in a public place there is a zone of interaction by one person to others which may fall within the scope of 'private life'.<sup>105</sup> The privacy right as a human right is extended to and enjoyed by all. Only because of the fact that the person is a public figure, there is no justification to put oneself under the fear that he or she may be photographed at any time in the public place. This case is an example for the proposition that one can claim the privacy protection even though he or she is in the public places. The case of Von Hannover acknowledged that "there will be a legitimate expectation of privacy" in respect of private life in public places.<sup>106</sup> William Prosser in his famous article 'Privacy'<sup>107</sup> analyses various factors by which one can claim privacy in public places.

### 5.11.1 Nature of Place

It is accepted that one cannot expect or claim the right to privacy if he is in the public places. But if there is only few numbers of persons, one can expect reasonable expectation of privacy. He can claim the right to privacy if he is with close relatives and friends even though he is a public place. The examples are yoga centers, hospitals, health clubs etc. In India, when compared to other

---

<sup>104</sup> Application No.59320/00(2005) 40 ECHR 1¶ 63.

<sup>105</sup> *Id.*¶50.

<sup>106</sup> *See also, McKennitt v. Ash* [2005]EWHC 3003(Q.B) ¶50.

<sup>107</sup> W.Prosser, *Privacy*48 CAL.L.REV.383 (1960).

countries the people are hesitating to lodge complaint even though they are humiliated so much due to public disclosure of private matters.

### **5.11.2 Nature of Activity**

The right to claim privacy also depends on the nature of activity that is carrying on in the public place. It was discussed in the English case of *Peck v. U.K.*<sup>108</sup> wherein the claimant was captured in CCTV cameras when he was in a distress condition holding knife in his hands in a public street very late at night. Later, the photos taken from the footage was telecasted in television. Upholding the right of privacy of the claimant, it was held that the widespread publication of photograph of someone, who is in a state of severe pain, grief etc would amount to the invasion of privacy right even if it was taken in a public place. The court based its finding on the proposition that the disclosure through CCTV was not proportionate.<sup>109</sup>

The public is very eager to know the intimate, embarrassing and traumatic incidents for example, persons who happened to be the victims of accidents, persons who participated in sports events etc. But if one becomes a part of an incident in public, he cannot claim that there is reasonable expectation of privacy where the activity does not invite public discussion.

### **5.11.3 Mode of Obtaining Information**

With the development of modern technologies, it is very easy to dissipate information within a span of one minute. Without the consent of individual, the

---

<sup>108</sup> (2003) 36 EHRR 41; [2003] EMLR 287.

<sup>109</sup> See also, *Campbell v. MGN Ltd.* [2004]UKHL 22.



media often use the technological devices to intrude into his private life. In India, the use of devices to capture intimate moments of individuals and reporting of commission of crime are not regulated by any law. In *Murray v. Big Pictures (UK) Ltd*<sup>110</sup> the court considered the following questions to deal this issue.

- a. The attribute of the claimant
- b. The nature of activity in which the claimant was engaged.
- c. The place at which it was happening
- d. The nature and purpose of intrusion
- e. The absent of consent and whether it was known or could be inferred
- f. The effect on the claimant and the circumstances in which and the purpose for which the information came into the hands of the publisher.<sup>111</sup>

Even though the matter is said to be in public domain, the extent of spread of information in public should also be taken into account. Therefore, in *Brown v. Associated Newspapers*<sup>112</sup> the court took the view that there should be distinction between the information which is made available to a person's

---

<sup>110</sup> (2008)EWCA Civ.446.

<sup>111</sup> Per Sir Antony Clarke M.R. in *Murray v. Big Pictures (UK) Ltd* [2008] EWCA Civ 446 ¶ 36, (the photo of son of J.K.Rowling was taken and published by Sunday magazine while he was in the street along with parents. The photos was taken surreptitiously and appellate court found the case for the claimant. The case is important because the court put much emphasis on the privacy right of children). See generally, BLOY AND SARA HADWIN, LAW AND THE MEDIA, FOR PRINT, BROADCAST AND ONLINE JOURNALISM (2<sup>nd</sup> ed.2013).

<sup>112</sup> (2007)EWCA Civ.295 per Sir Antony Clark E M.R.¶61 (the defendant was restrained from publishing the personal matters of relationship and business practices between the claimant and another person. The court decided that the conversation in domestic place relating to business practices would be protected).

circle of friends or work colleagues and that which was widely published in a newspaper.

The question whether an individual concerned is already in public eye is a factor to be considered when assessing whether he has a legitimate expectation of the right to privacy. The people in the public eye may in some circumstances have a lower expectation of privacy. In USA, the public figures are considered as public property. It is believed that they should have a moral duty to lead the people. Therefore, their moral character is of the public concerns to ensure the public accountability.<sup>113</sup>

Where the public figure is a voluntary public figure, he can claim privacy right to the extent to which the information relating to personal life does not contribute a debate of public importance. In the case of involuntary public figures the media should not air any form of information if the matter does not carry an element of public interest.

## **5.12 NEWSWORTHINESS, PUBLIC INTEREST & ‘IN THE INTEREST OF PUBLIC’**

The ‘news’ is something, which falls within the scope of legitimate public concern and often it is interpreted by publishers and broadcasters as acting in accordance with the ethnicity of the community.<sup>114</sup> News is the chief source of the opinion by which government proceeds.

<sup>113</sup> *Beauharnsais v. Illinois*, 343 US 250 (1952) (the case upheld the Illinois law which prohibited the publication of any matter which create hate each other); *Mayrant v. Richardson*, 10 S.C.L(1Nott &McC) 347,350(S.C.1818).

<sup>114</sup> RESTATEMENT (SECOND) OF TORTS §625 D(AM.LAW.INST,1976)

The term 'news' denotes '1. new information about anything, information previously unknown 2.a) reports, collectively, of recent happenings ,esp. those broadcast over radio, or TV, printed in a newspaper, etc. b) any person or thing thought to merit special attention in such reports, 3) short for newscast-make news to do something that is apt to be reported as news<sup>115</sup>. It also means new tidings, new information of recent events, and new occurrences as a subject of report or talk.<sup>116</sup>As already pointed out, news is a commodity. News media nowadays consider it as a means of enlarging the production and circulation of newspapers, broadcasting etc. The optimistic theorists consider that the news should be given prime importance for the maintenance of a democratic country. The pessimist theorists consider news as a means which support the existing political system in a country. It plays a functional role in the society. The news has a role to play in balancing the society by interacting with other social institutions and make people aware of the events of public importance.<sup>117</sup> News is a social construct which is a thing, or commodity, and newsworthiness is a cognitive construct, a mental judgment. The newsworthiness decides the nature and the content of the news. It is only one of a vast collection of factors that influence what becomes the news and how significantly events are covered.<sup>118</sup>

A line should be drawn between the news carries information to which the public is entitled and those carry merely sensational private life of others

---

<sup>115</sup> *News*, WEBSTER'S NEW WORLD COLLEGE DICTIONARY, 971(4<sup>th</sup> ed.,2006).

<sup>116</sup> *News*, MITRA'S LEGAL & COMMERCIAL DICTIONARY, 607 (6<sup>th</sup> ed.2014).

<sup>117</sup> Pamela J Shoemaker, *News and Newsworthiness-A Commentary*, COMMUNICATIONS 31,105-111 (2006).

<sup>118</sup> *Id.* at 105.

which does not carry any kind of public importance. The media should give due regard to the feelings of the people who were exposed to the society without any justification.<sup>119</sup> They should verify whether the news aired carries anything affecting the rights, health, or finances of the public at large. The public interest is a common concern among citizens in the management and affairs of the local, state, and national government.

The newsworthiness is considered as a test to decide the legality of invasion of privacy right by the media. The test of newsworthiness had been subjected to criticism as it had no proper meaning.<sup>120</sup> Recently, the Madras H.C made an observation in *Kalanidhi Maran v. Aditya Sinha*<sup>121</sup> in connection with the issue of balancing media freedom and privacy right of public figures. In this case the plaintiff/applicant who was carrying on the business of television network and chairman of Solution group of companies. The plaintiff /applicant sought an injunction and damages restraining the defendant for publishing defamatory article in 'Dinamalar' under the heading 'Escape'. The plaintiff contended that the article was defamatory and it referred the private life of him and his family. Also, the article was published without ascertaining the truth. The court referred the leading cases of Supreme Court of India such as *R.Rajagopal case*<sup>122</sup>, *Sakal Papers case*<sup>123</sup>, *Kharak Singh cases*<sup>124</sup> etc. The view

<sup>119</sup> Robert C Post, *Social Foundations of Privacy: Community and Self in the Common Law Tort*, CAL.L.REV. 77,957 (1989).

<sup>120</sup> THOMAS J EMERSON: THE SYSTEM OF FREEDOM OF EXPRESSION (1970), *See also*, REPORT OF THE SECOND PRESS COMMISSION (1) (1982) at 73.

<sup>121</sup> 2013 Indlaw MAD 1422.

<sup>122</sup> *R. Rajagopal v. State of Tamil Nadu* AIR 1995 SC 264, 1994 SCC(6) 632.

<sup>123</sup> *Sakal Papers v. Union of India* [1962] 3 SCR 842.

<sup>124</sup> *Kharak Singh v. The State of U. P* 1964 SCR (1) 332.

was that the persons holding the public offices should not be thin skinned to the comments made on them. Even though they know that the observations are undeserved and unjust they must bear with them and submit to be misunderstood for a time. They must restrain themselves from giving importance to the same by prosecuting the person responsible for it.

In *Autoshankar* case, speaking on the restriction, the court said that the citizen has the fundamental right to safeguard the privacy of his own, his family, marriage, procreation, motherhood, childbearing and education among other matters and none can publish anything in reference to the above matters without his or her consent whether laudatory or critical. If the article contains personal life of a public official, the publication should be after a reasonable verification of facts. The situation will be different if the plaintiff voluntarily invites himself into a controversy.<sup>125</sup>

An extended version of privacy right enables highly reputed public figures to prohibit the public from knowing the public appearance. The persons who are engaged in public activities naturally draw the public attention and it is deemed that they have consented to the disclosure. The scrutiny of private life of public figures who has fame in society is incidental and there is no privacy claim in the publication which involve public interest in his existence,

---

<sup>125</sup> *R.Rajagopal* AIR 1995 SC 264, 1994 SCC(6) 632,at 649-650 (As Mathew J pointed out these principles are broad and not exhaustive and comprehensive. He added that the right has to go through a case by case development).

experiences, words, or acts. Because, the use of the name or the picture of a person is deemed privileged.<sup>126</sup>

However, the people would expect that the public figures should be a role model and they are supposed to be not involved in activities which are against the ethics and the morals of the society.<sup>127</sup>

### 5.13 PRIVACY RIGHT AND PUBLICITY RIGHT

Publicity means the matters made public by communicating it to the public at large or to so many persons that the matter must be regarded as substantially certain to become one of public knowledge<sup>128</sup>. It is the right to control the use of one's own name, picture or likeness and to prevent another from using it for commercial benefit without one's consent.<sup>129</sup> It is the inherent right of every human being to control the commercial use of his or her identity.<sup>130</sup> It is the right of an individual to have absolute command over his name, image, likeness and other unequivocal aspects of his distinctiveness. Thus serving as the philosophical cousin of the right to privacy, the right of publicity refers to the right to control and profit the commercial use of one's personality to prevent

<sup>126</sup> American jurisprudence, at 709, ¶22, *See also, Indu Jain v. Forbes.*, 2007 SCC Online Del 1424 ¶ 86. The decision in *Indu Jain* has been cited in *Swami Ramdev v. Juggernaut Books Pvt. Ltd.* CM(M) 556/2018 (Ramdev sought a prior restraint against the author and publisher of the book 'Godman to Tycoon-The Untold Story of Baba Ramdev' among other grounds, on the ground of violation of privacy right. But the appellate court did not grant injunction but laid down certain guidelines to prevent violation of privacy right). *See, supra* Chapter 3, Protection of Right to Privacy-Indian Perspective).

<sup>127</sup> For example, the famous Indian cricket players, Hardik Pandya and K.L. Rahul were served with show cause notice by BCCI (Board of Control for Cricket in India) for disclosing their personal relationship with certain women. It invited severe criticism and displeasure among the public, Vijay Lokappally, *Hardik, Rahul in Trouble over TV Show Remarks*, *The Hindu*, Jan 10, 2019, at 15.

<sup>128</sup> THE RESTATEMENT (SECOND) OF TORTS §652D (1977).

<sup>129</sup> *Publicity Right*, BLACK'S LAW DICTIONARY (9<sup>th</sup> ed. 2009).

<sup>130</sup> J. THOMAS MCCARTHY, THE RIGHTS OF PUBLICITY AND PRIVACY (2<sup>nd</sup> ed. 2008).

unauthorized misappropriation of the same for commercial purposes. The recognition of the inherent commercial value of identity is central to the right of publicity.<sup>131</sup>

Both privacy right and publicity right are recognized on the ground that it gives individuality. The publicity right has been developed along with privacy right. In India, we have no specific statute governing right to publicity.

### **5.13.1 The Philosophical Basis of Publicity Right**

The philosophical justification of publicity right is that by giving publicity a person creates a commercial image in the society or market by exploiting his skill and effort. Therefore he has the right to extract benefit out of that image or personality. As a corollary to that he has right to prevent others from exploiting the image created or from unjust enrichment by using others' publicity.<sup>132</sup>

The development of publicity right can be traced to European countries. Further it had been developed along with that of privacy right. Earlier, the individuals' identity had been protected and now the economic right of individuals' had been protected.

### **5.13.2 The Healan Doctrine-A Landmark Step**

The United states case of *Haelan Laboratories v. Topps Chewing Gum (Haelan)*<sup>133</sup> had recognized the right to publicity on the assumption that one's personal sanctity and autonomy should be addressed properly. In this case there

---

<sup>131</sup> TUGENDHAT AND CHRISTIE: THE LAW OF PRIVACY AND THE MEDIA (Nicole Moreham and Sir Mark Warby, eds., 3<sup>rd</sup>ed.2016)

<sup>132</sup> *Id.*

<sup>133</sup> 346 US 816 (1953).

was a contractual agreement between the plaintiff and the baseball players to use the images of the player in the advertisement for chewing gum. The defendant who was aware of the agreement induced the players to use their images in his advertisement for chewing gum. The appellate court of circuit recognized that the players had the property right in their photographs. The court observed that apart from the privacy right a person had a right in the publicity value in his images which gives an exclusive right of publishing his picture. Here the term 'property' is often used to denote that the publicity right has pecuniary value. If the publicity right has not been recognized the other person would make use of the image and made profit. The public figure and celebrity have economic interest in the publicity value of their images which is an independent right.

### 5.13.3 Publicity Right under English Law

Under English Law the unauthorized use of image, likeness etc were continued to be protected under law of passing off, breach of confidence, defamation etc. The case of *Douglas v. Hello Ltd*<sup>134</sup> the court upheld the claim of damages by recognizing their privacy right and publicity right. Again in *Murray v. Express Newspapers plc*<sup>135</sup> the photograph of the child of JK Rowling was published. The Court of Appeal held that the privacy right of the child also to be protected. In *Irvine v. Talksport Ltd*<sup>136</sup> the photos of the claimant was used for an advertisement in a radio station. The court observed that the claimant had property right in his own image. To claim damages the claimant had to prove

---

<sup>134</sup> (2001) 2 All E R 289 (CA).

<sup>135</sup> 2007 EMLR 583.

<sup>136</sup> (2003) 2 All ER 881 (CA.)



that he had got a goodwill or reputation at that time. Moreover such publication would create a false understanding of him in the society that he had been recommending the product. The claimant was awarded damages. The above cases show that often the privacy right and the publicity right overlap with each other. When an image of a public figure was published without his consent and make profit out of that it would amount to violation of publicity right. Since it discloses the private information it would amount to the violation of the privacy right also.<sup>137</sup>

#### **5.13.4 Publicity Right in India**

In India, as in the case of privacy right, the development of publicity right is an ongoing phenomenon. In the absence of specific statute the common law principles are applied in India. In the leading case of *ICC Development (International) Ltd v. Arvee Enterprises*<sup>138</sup> the High Court of Delhi examined the ambit of the publicity right. An individual may acquire the right of publicity by his association with an event, sport, movie etc. No other person other than that individual can make use of his own individuality, image, if doing so violative of Art 19 and 21 of the constitution of India. No person can be monopolized and the right of publicity vests in an individual and he alone exploit it and earn profit out of the publicity right. In the instant case the court considered the publicity right as an individual right rather than as a property right. It was opined that

---

<sup>137</sup> see, J.THOMAS MCCARTHY, *supra* note, 130.

<sup>138</sup> (2003) 26 PTC 245(temporary injunction was sought by the plaintiff in a suit in Delhi High Court to restrain the defendant from publishing any advertisement which show some kind of association with plaintiff and the cricket world cup. The court did not grant injunction).

legislature should take steps for the recognition of commercial aspects of publicity right.

Publicity right is something near to copyright in the sense that the celebrities can claim copyright in the films which depict the story of their life.<sup>139</sup> The Indian Copyright Act, 1957 protects the right of a person in his image. In *Phoolan Devi v. Shekhar Kapoor*<sup>140</sup> the petitioner Phoolan Devi succeeded in restraining the defendant from showing the film depicting the life story of her past life. It was alleged that the defendant had exhibited the distorted story, tainted with incidents appearing in the media. It had been decided that where any person enlarges the terrible facts, publishes graphic details of rape, nudity and sexual intercourse, portrays the living person which brings shame, humiliation and memories of events which haunts and will go on haunting, it can be definitely said that it is infringement of privacy right and encroachment into the private life of the claimant.<sup>141</sup>

The right to publicity has been evolved from right to privacy. It is evident from the statement of Warren and Brandies with respect to privacy that it is a part of more general right to the immunity of the person and the right to one's

<sup>139</sup> *Amar Nath Sehgal v. Union of India* (2002) 2 Raj (Del) 248 (The plaintiff who was the sculptor of international reputation completed a mural as requested by the Govt. of India. The government placed it on the walls of Vigyan Bhavan. Later it had been pulled down and kept in a store room. The plaintiff claimed compensation for insult, loss of reputation, humiliation etc. He also claimed his special rights under s. 57 of the Copyright Act, 1957. The court decided positively in favour of plaintiff recognizing the moral rights of the author).

<sup>140</sup> (1995) 57 DLT 154.

<sup>141</sup> The personality right was discussed in the case when veteran film actor Rajnikant by issuing notice to prevent duplication of his screen persona or using the character of Baba in his new film 'Baba' or any kind of advertisement, broadcasts promulgation etc. *See*, RISHIKATANEJA&SIDHANT KUMAR, PRIVACY LAW- PRINCIPLES, INJUNCTIONS AND COMPENSATION, 149-154 (1<sup>st</sup> ed.2014).

personality. One of the specific torts of privacy right out of four as developed by Prosser considers that the appropriation of one's name or likeness is an offence. The interest protected in this case is his identity.<sup>142</sup>

From the above analysis it is understood that there is overlap between intellectual property right, privacy right, publicity rights etc. The exploitation in this area is required for the protection of privacy right in India.

#### **5.14 STING JOURNALISM AND PRIVACY–NEED FOR LEGAL FRAMEWORK**

The term 'sting journalism' is of American origin from the movie "The Sting", the theme of which was luring a person to commit a crime.<sup>143</sup> The sting journalism is otherwise known as investigative journalism or undercover journalism. In India, there is no specific law which deals with sting journalism. Usually it is used by police department and media. The sting operation is good in cases where it is helpful to expose corruption and crimes. But, sometimes it put society and persons in trouble when it results in violation of the privacy right. In sting operation media uses surveillance devices. They try to lure the criminals into trap often known as 'honey trap' and sting them by arrest and publication. Also the suspected individuals are encouraged to commit the crime, otherwise they would not have committed

---

<sup>142</sup> See also, *Hoffman v. Capital Cities/ABC Inc.*, 255 F. 3d 1180 (CA, 2001)( in this case the magazine published an altered photo of famous actor for commercial purposes. The appellate court held that the publication was covered under first amendment protection).

<sup>143</sup> The film was released in 1973 and Robert and Paul Newman played the lead role. USHAM. RODRIGUES & MAYA RANGANATHAN, INDIAN NEWS MEDIA-FROM OBSERVER TO PARTICIPANT 72 (2015).

the crime. The 200<sup>th</sup> Report of Law Commission<sup>144</sup> also expressed that there is no a proper legislation to regulate media in the case of sting operation.

Here there is a clash between law and ethics and it is a question whether such method can be justified even though the aim is to expose the criminals and to meet public interest. Meanwhile, sometimes, the aim of journalists is to make profit and to increase the circulation or publicity.

#### **5.14.1. Sting Operation-Cases and Analysis**

The sting journalism became popular after the incident of Tehalka sting operation. In the operation conducted by the news portal Tehalka.com, the former political party leader was caught on camera accepting money.<sup>145</sup> Following several cases were reported which disclosed the corruption of political figures in the country.<sup>146</sup>

In *Court on Its Own Motion V. State*<sup>147</sup> laid down certain guidelines relating to sting operation. In this case, a teacher in a Delhi School named Uma Khurana was dismissed from service on account of a programme under sting operation done by Live law India news channel showing that the teacher purportedly forcing a girl for prostitution. Later it was found that what was aired was not true, but only a sting operation conducted by a journalist to become famous. In this background the court after made an account of the

---

<sup>144</sup> Law Commission of India, 200<sup>th</sup> Report On Trial By Media Free Speech And Fair Trial Under Criminal Procedure Code, 1973 August 2006.

<sup>145</sup> *Jayalakshmi Jaitly v. Union of India* 99 (2002) DLT 448.

<sup>146</sup> See generally, USHAM. RODRIGUES & MAYA RANGANATHAN, *Supra* note 137.

<sup>147</sup> 2008(151) DLT 695.

responsibilities of electronic media, it urged for certain guidelines for conducting sting operation.

The Cable T.V. Networks (Regulation) Act, 1995 provides for the regulation of the airing of the programmes and stipulates for complying of programme code in corresponding Rules.<sup>148</sup> Even though the sting operation is carrying on in public interest, the same should not trap a person and encourage him to commit the offence.

The U.S. Supreme Court in *Keith Jacobson vs. United States*<sup>149</sup> observed that it is not fair to encourage a person to commit a crime and later prosecute him under sting journalism. A tripartite test has been recognized to test the justification of sting journalism.

- i. The information must be sufficiently vital to the public interest to justify the deception.
- ii. Journalists should not engage in masquerade unless there is no other way to get the story.
- iii. Journalists should reveal to their audience whenever they mislead sources to get information, and explain their reasons for doing so, including why the story justifies the deception and why this was the only way to get the facts.

In *Aniruddha Bahal v. State*<sup>150</sup> the Delhi High Court upheld the sting operation by journalists to expose corruption in Parliament. In this case the

---

<sup>148</sup> See, *infra*, Chapter 7, REGULATION OF MEDIA WITH SPECIAL REFERENCE TO PRIVACY RIGHT.

<sup>149</sup> 503 US 540. See also, Editorial, *Media Sting*, ECONOMIC AND POLITICAL WEEKLY, Vol.42, 52 (Dec. 29,2007- Jan. 4,2008).

<sup>150</sup> 172(2010) DLT 269.

court took into consideration the intention of the journalists that led to expose corruption.

Before publication, the media should give a certificate to the effect that what had been captured is original, authentic and public spirited one. Before engaging in sting journalism the channel should get the permission from appropriate authority, especially from Ministry of Information and Broadcasting before telecasting. In *R.K.Anand v. Registrar, Delhi High Court*<sup>151</sup> the Supreme Court convicted the lawyer Anand for influencing the prosecution witness in the BMW hit run case. It was recorded by the staff of NDTV with a secret camera as a part of the sting operation. The decision of the Supreme Court pointing to the position that, the sting operation is acceptable if it has been done as a matter of the public interest. It was also observed that the NDTV through sting operation, helped the administration of justice and rejected the argument that the act should be considered as trial by media. The court laid down guidelines in the following form:-

1. A sting operation by a private person or agency is, by and large, unpalatable or unacceptable in a civilized society. A sting operation by a State actor is also unacceptable if the State actor commits an offence so that an offence by another person is detected.
2. A State actor or a law enforcement agency may resort to hidden camera or sting operations only to collect further or conclusive evidence as regards the criminality of a person who is already suspected of a crime.

---

<sup>151</sup> (2009) 8 SCC 106.

3. The law enforcement agency must maintain the original version of the actual sting operation. Tampering with the original video or audio clips of a sting operation may lead to a presumption of the spuriousness of the entire operation.
4. A sting operation cannot be initiated to induce or tempt an otherwise innocent person to commit a crime or entrap him to commit a crime.
5. Normally, if a private person or agency unilaterally conducts a sting operation, it would be violating the privacy of another person and would make itself liable for action at law.
6. A sting operation must have the sanction of an appropriate authority. Since no such authority exists in India, and until it is set up, a sting operation by a private person or agency, ought to have the sanction of a court of competent jurisdiction which may be in a position to ensure that the legal limits are not transgressed, including trespass, the right to privacy of an individual or inducement to commit an offence etc.<sup>152</sup>

However in India, there is no specific law which expressly legalizes the sting operation. If there is no legal framework, it would encroach upon the privacy and administration of justice. In the United States, it is permitted to do it to a certain extent as proper method of law enforcement. It is evident from *Sherman v. United States*<sup>153</sup> the court found differences between ‘the trap for unwary innocent and the trap for unwary criminal’. In the former case of the trap

---

<sup>152</sup> *Id.* ¶ 86.

<sup>153</sup> 356 US 359(1958) (the petitioner on accusation argued that he had been trapped in a doctors’ clinic when he came for treatment).

for unwary innocent the case of *Sorrell v. United States*<sup>154</sup> observed that the defence of entrapment is a valid one. But in U.K, the defence of entrapment is not so much accepted. In *R v. Sang*<sup>155</sup> and in *R v. Loosely*<sup>156</sup> the court was of the view that a person could not be prosecuted after he had been trapped. It would amount to an abuse of the proceedings of the court. It is an encroachment into the private life of the person and is infringement of privacy right. In U.K. the Federal Bureau of Investigation is authorized to adopt the sting operation.

Recently, Justice Sadasivam in *Rajad Prasasd Jain v. CBI*<sup>157</sup> observed that the sting operator would be prosecuted under section 12 of Prevention of Corruption Act for abetment of to commit an offence. The court went on to say that privacy right of individual should be protected. The cardinal question in such cases are whether the victim had been lured for the commission of crime. Otherwise he would not commit the offence. The situation should be differentiated from those where the person would be compelled to commit the crime. Sometimes he may be given assurance that the information would be kept in absolute secrecy and confidentiality. Another issue is whether the means employed to establish the commission of the crime itself involves a crime or not.<sup>158</sup>

<sup>154</sup> 287 US 435(1932).

<sup>155</sup> (1980) AC 402.

<sup>156</sup> [2001]UKHL 53 (here the police officers conducted undercover operations and the question was therefore their act crossed the limits).

<sup>157</sup> (2014)6SCC 495 (In this case the appellants-accused were charged u/s.120B IPC and S.12 of Prevention of Corruption Act, 1988. In 2003 the Indian Express Delhi Edition published news that the Union Minister is accepting illegal gratification by saying that money is no less than God and visuals were shown also).

<sup>158</sup> *Id.* ¶14. The Society of Professional Journalists at the Excellence in Journalism 2014 convention in Nashville, Tennessee sanctioned approval to the new code of ethics and it



One of the prime duties of media is to tell the truth. Here the question arises is whether media can use surreptitious methods to gather truth by violating privacy right. The media should balance the obligation of the dissemination of truthful information and the method of gathering information. The sting operation without a proper legal backing would result in violation of privacy right and it adversely affects the justice delivery system.

### **5.15 CONCLUSION**

The role of media in a democratic set up involves collection and dissemination of information. It is nationally and internationally acknowledged that the right to information is a facet of right to freedom of speech and expression. The democracy will fail if the people are ignorant about the issues of the society. They cannot participate in the governance of the country. In a democratic country people has the right to know the activities of the representatives of the people and it should be publicly known. Because the wide attention of the activities of the government is powerful disinfectant and it is a powerful tool against corruption. The free flow of information and ideas promote the political debate. It facilitates the exposure of errors in the governance and administration of justice.

Here the question involve is that what kind of information should be collected and disseminated. It is commonly accepted that the information which involve public interest should be dispersed by the media. But now a days, it is

---

objected the use of surreptitious method of news gathering. *See*, SEBASTIAN PAUL, LAW, ETHICS AND JOURNALISM 123-125 (3<sup>rd</sup> ed. 2015).

alleged that the media is involved in publishing the information which satisfy the curiosity of the public rather than that of public interest for the sake of increasing the circulation and rating. It is also stated that in the public place also the individual enjoy the privacy right when he is engaged in the activities in which the public need not be worried. The issue of balancing the privacy right with the right to information of media is always a challenging one.

For balancing both these rights the courts usually employs clear and present danger test and proportionality tests. Here also, the media can very well absolve from the liability under the wide ambit of privacy right. The public figures faces the infringement of privacy right when the visual media is airing the programmes without giving due regard to their privacy right. It is a debatable question to what extent the public figure can enjoy privacy right that is enjoyed by the private individuals. He enjoys privacy right as a facet of publicity right. In this case, the nature of place, nature of activity and mode of obtaining information can be taken into account. It can also be taken into account where voluntary and involuntary public figures are involved. In this context what amount to public interest is a grey area which requires further clarification. As a corollary to this the media is now engaging in sting journalism without taking into account the injury caused to the person when his privacy right ought to be violated. In other words, it is an encroachment into the administration of justice and a blow to the dignity of the individual.

.....\*\*\*.....

## CHAPTER VI

### RIGHT TO PRIVACY-A COMPARATIVE PERSPECTIVE

*‘A free and democratic society requires respect for the autonomy of individuals, and limits on the power of both state and private organizations to intrude on that autonomy.’*

-The Australian Privacy Charter (1994).

#### 6.1 INTRODUCTION

The right to privacy is a universally recognized human right. Many countries conceived the importance of the privacy right and they included it within their legislative framework. There are countries, which acknowledged and guaranteed right to privacy in their constitutional provisions either expressly or impliedly. Some other jurisdictions formulated the legal principles under law of tort to keep the private life of individuals in safe and protect them from unwanted invasion. Certain jurisdiction well acknowledged the privacy concepts in a much better position than other countries. A comparative study will help to evolve a good framework for ensuring the private life of individuals from unwanted attention by the visual media. This chapter focuses on privacy protection in different jurisdictions especially in United Kingdom, U.S., Australia, and New Zealand.

## 6.2 PRIVACY PROTECTION IN UNITED KINGDOM

In the United Kingdom, there is no general right of privacy. Even then, the old English common law case, *Peter Semayne v. Richard Gresham*<sup>1</sup> upheld the right of a house owner to prevent unauthorized entry into his property.<sup>2</sup> The court observed that when King was a party, Sheriff could enter into the premises in order to execute King's process. However, the notice had to be served by explaining the reason accompanied by a request. The case is famous for the quotation of Edward Coke, the then Attorney of England, that the house of everyone is to him as his castle and fortress, as well as for his defence against any injury and violence, as for his repose. However, realizing the importance of the privacy right the Parliament tried to take steps to safe guard the right. In an earliest case, *Prince Albert v. Strange*<sup>3</sup> an employee of the printer made an unauthorized copying of catalogue of etching made by Queen Victoria and her husband. The claimant succeeded in getting an injunction preventing its exhibition on the ground that the claimant had the property rights over the catalogue of etching and the employee had committed a breach of confidence.

As a first step, in 1969 a Bill was introduced arguing for a general right of privacy.<sup>4</sup> The Bill was rejected on the ground that the right to privacy had not been well defined. It was feared that it would lead to a flood of litigation of the people by claiming unwanted invasion of the right to privacy. Later, the Younger

---

<sup>1</sup> 77 ER 194, popularly known as *Semayne's case*; See also, Gavin Philpson, *The Right of Privacy in England and Strasburg Compared*, NEW DIMENSIONS IN PRIVACY LAW (ANDREW T KENYON & MEGAN RICHARDSON, eds .2007).

<sup>2</sup> In U.S the rule laid down in this case is known as Knock And Announce Rule.

<sup>3</sup> (1849) 1MaN& G 25.

<sup>4</sup> See, RAYMOND WACKS, PERSONAL INFORMATION: PRIVACY AND THE LAW 40 (1989).

Committee under the directorship of Kenneth Younger was entrusted to study and to report on the matter of privacy. The committee rejected the concept of a general right to privacy on the ground that the equitable remedy of breach of confidence under the law of tort would adequately protect the right to privacy. Moreover, they argued that there should be an effective penal framework to well-defined activities, which unreasonably intrude into the private life of the individuals.<sup>5</sup> Another committee called the Calcutt Committee<sup>6</sup> was appointed to look into the matter of the press intrusion on individuals. The Committee found that the rights of the individuals should be protected from intrusion into his personal life or affairs, or those of his family, by direct physical means or by publication of information.<sup>7</sup>

The report did not find any merit recommended for a statutory protection of privacy. The committee recommended for the criminal liability of the media if-

- a. The media obtained information by entering the private property without consent.
- b. The media located surveillance device on private property without consent.
- c. The media took photograph or recorded the voice of someone without his consent when that person was on a private property.<sup>8</sup>

<sup>5</sup> COMMITTEE ON PRIVACY, REPORT OF THE COMMITTEE ON PRIVACY 1972, Cmnd.5012.

<sup>6</sup> COMMITTEE ON PRIVACY, REPORT OF THE COMMITTEE ON PRIVACY AND RELATED MATTERS, 1990, Cmnd1102; *See also*, Laura Lee Mall, *The Right To Privacy In Great Britain: Will Renewed Anti Mediasentiment Compel great Britain To Create A Right To Be Let Alone?*, 4 ILSA J. OF INT'L & COMPARATIVE LAW, 785 (1998).

<sup>7</sup> *Id* ¶3.7.

<sup>8</sup> *Id* ¶12.5.

### 6.2.1 Privacy and European Convention on Human Rights

The European Convention on Human Rights (ECHR) influenced the courts in this country to take appropriate steps for protecting the individuals from unwanted intrusion into the private life and publication of personal information. Article 8(1) of ECHR<sup>9</sup> protects the right to respect for one's private and family life, his home and his correspondence. Article 10(2) of ECHR<sup>10</sup> as an exception to freedom of expression, protects rights of other individuals and prevents the disclosure of information received in confidence. Therefore, as a signatory to the Convention, the country was under positive obligation to implement the appropriate laws in their jurisdiction. It is in the sense that the State should not interfere with the private life of individuals and should take adequate measures to secure respect for private life not only by public authorities but also by private individuals.<sup>11</sup>

---

<sup>9</sup> Article 8 – Right to respect for private and family life:-

1. Everyone has the right to respect for his private and family life, his home and his correspondence.
2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

<sup>10</sup> Article 10 of ECHR says:-

1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprise.
2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interest of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.

<sup>11</sup> ANDREW NICOL QC, GAVIN MILLOR QC, ANDREW SHARLAND, MEDIA LAW AND HUMAN RIGHTS, SERIES, (JohnWadham, ed. 2001).

The analysis of development of privacy law in U.K shows that it was doubtful whether the obligation enshrined under Article 8 could be applied to invoke the requirement of having a privacy law in U.K. There were cases, in which the applicants alleged that the lacuna in not having a privacy law was violative of State's positive obligation under Article 8 of ECHR to ensure privacy right against the state. The following cases clearly illustrate the above observation.

In *Kaye v. Robertson*<sup>12</sup> the plaintiff failed in the action against the media against whom he based the claim on law of libel, trespass, passing off, and malicious falsehood. It took the view that under law of trespass, the plaintiff could not win the case to get damages because he was not the owner of the hospital room. In addition, the law of England, did not provide any law for the protection of privacy right. Nevertheless, the publication of the interview had been restrained on the ground that the plaintiff had not given the consent. The court expressed the concern in respect of the need of privacy protection in England.

In *Winer v.U.K*<sup>13</sup> the applicant sought relief against the publication of a book which contained the personal information of his family. The Government denied the view of the complainant that that the English law was not protecting privacy right. It was also argued that a balance should be sought between the

---

<sup>12</sup> [1990] EWCA Civ. 21 (a journalist surreptitiously took photographs of the plaintiff who was admitted in a hospital).

<sup>13</sup> (1986) 48 D&R 154(the case was concerned with the publication of a book 'Inside BOSS' which disclosed the intimate details of his private life and his relationship with his former wife).

Article 8 and the Article 10 of ECHR. The Commission held that he had not failed to exhaust the domestic remedy by failing to bring an action for breach of confidence. But held that his application was ill founded and inadmissible. The commission found that the absence of privacy remedy did not show a lack of respect for the applicant's private life. However, he obtained the favourable decision under law of defamation. The rationale of this decision was followed in several cases. In *Brady v. U.K.*<sup>14</sup> the claimant alleges violation of privacy right when the newspaper published that he had a sexual relationship during a hospital visit. The applicant succeeded his claim not under privacy law but under defamation law.

A slight variation in the approach of the Commission can be seen in subsequent cases. The courts started to accept the horizontal effect of Art 8 by which state had a duty to prevent unauthorized publication where the private parties were involved. In *Earl Spencer v. United Kingdom*,<sup>15</sup> Privacy Complaint Commission (PCC) upheld their privacy right and held that the newspaper invaded their privacy right. However, they did not file any domestic proceedings against the newspapers but threatened proceedings against their friends who were believed to be involved in the publication of photos and articles in the newspaper. The applicants filed complaints before the Commission that UK had

---

<sup>14</sup> (1997) 90 D & R 45: (1997) 24 EHRR CD 38(the applicant filed the case under malicious falsehood because he failed to prove financial loss when newspaper published about him).

<sup>15</sup> (1998) 25 EHRR CD 105(the photo of one of applicants showing that she had been receiving treatment for alcoholism was published in the newspaper, News of the World' under the article titled "Di's Sister in Law in Booze and Bulimia clinic'. The main issue was whether the applicants had exhausted domestic remedies applicants. Spencer case reversed the decision of the Winer case).



failed to comply with Article 8 of ECHR. The commission highlighted the duties and responsibilities of the State under Article 8. The Commission found that the applicants had chance of success under national law and they did not exhaust remedy under domestic law. The case is important because the English court started to recognize that the absence of remedy in confidence could have amounted to a breach of Article 8 of ECHR.<sup>16</sup>

The above earlier case laws shows that during this period the English law was devoid of any law for securing private life from intrusion and publication of private information in the public domain. However, at the same time, the judiciary started to express the need for having a proper privacy law framework. The later cases show that the State and the courts in United Kingdom, in due course, respected the private life of individuals that is guaranteed under Article 8 of ECHR.

### **6.2.2 Protection under Human Rights Act 1998**

In the United Kingdom, the development of privacy law is closely linked with the enactment of Human Rights Act, 1998, which incorporated the provisions of European Convention for the protection of Human Rights and Fundamental Freedoms 1950.<sup>17</sup> Article 8 of the Human Rights Act<sup>18</sup> incorporates

---

<sup>16</sup> See generally, Jemima Stratford, *Striking the Balance: Privacy v. Freedom of Expression under the European Convention on Human Rights*, in DEVELOPING KEY PRIVACY RIGHTS 13 (Madeleine Colvin ed., 2002); see also, RICHARD CLAYTON & HUGH TOMLINSON, PRIVACY AND FREEDOM OF EXPRESSION (2001)

<sup>17</sup> Sections 3 and 6 of Human Rights Act states that the courts must act in a way that is in compatible with rights contained in the ECHR convention.

<sup>18</sup> Article 8, Human Rights Act, 1988:-

1. Everyone has the right to respect for his private and family life, his home and his correspondence.
2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the

the underlying principle of Art 8 of ECHR convention, which protects the private life of individuals. After being the signatory to the ECHR Convention, the courts in United Kingdom had faced with the problem of implementing the provisions relating to the protection of private life against unjustified intrusion or disclosure of private information. At the same time, the private life under Article 8 of the Human Rights Act has to balance with freedom of expression under Article 10<sup>19</sup> of the same Act.

The later cases in the United Kingdom, after the enactment of Human Rights Act, 1998, show that the individuals enjoyed more protection under this statute. For example, in *Campbell v. MGN*<sup>20</sup> the Mirror group of newspapers published the information along with the photos that Naomi Campbell, a famous model who was receiving a treatment for the drug addiction. She filed the case claiming damages for the breach of privacy right and confidence. The House of Lords decided the case in favour of Naomi and held that the information relating

---

interests of national security, public safety or the economic well-being of the country, for the prevention of the disorder or crime, for the protection of health or morals, or for the protection of the rights and freedom of others.

<sup>19</sup> Article 10, Human Rights Act, 1988:-

1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprise.
2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interest of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.

<sup>20</sup> (2003) 1 All ER 224 (CA): (2004) 2 All ER 995 (HL). The trial court decided in favour of claimant on the ground that her privacy right had been violated. But the Court of Appeal, by following the decision of *Australian Broadcasting v. Lena Game Meats Pty Ltd.* (2001) 185 ALR 1, reversed the decision by reasoning that the information provided in the newspaper had given credibility to the claim of the newspaper that the model had been deceiving the public that she was of a decent character.

to her treatment was purely private in character, which attracted a duty of confidence. The breach of confidence would also affect the reputation of rehabilitation centre also as it failed to keep the personal details of their clients secret. The obligation under Article 10, which guarantees the freedom of expression, was not absolute and could be restricted in the interests of other rights, like right to privacy as guaranteed under Article 8 of ECHR. In an another case *Murray v. Big Pictures(UK)Ltd.*<sup>21</sup> the photos of son of a well known writer had been published and the court examined whether there was a misuse of private information by taking images in public place. The majority of the House of Lords held that there was a breach of confidence and the court awarded damages. In this case, the court upheld the privacy rights of child also.<sup>22</sup>

### **6.2.3 Dawn of Golden Age of Privacy in United Kingdom**

In 2015, the Court of appeal pronounced a landmark judgment in *Google Inc. v. Judith Vidal Hall*<sup>23</sup>, which is a booster or a turning point in future for the protection of the privacy right in the United Kingdom. Among other issues, the court examined whether the cause of action for misuse of private information is a tort (for the purposes of the rules providing for service of proceedings out of the jurisdiction). In this case, the claimants alleged that the defendant collected their browser details (private information) of the claimants' internet usage via

<sup>21</sup> [2008] 3 WLR 1360(the photograph was published in the Sunday Express Newspaper under the caption 'My Secret' that was the quotation from Murray's writings. The proceedings were initiated against the newspapers and Big Pictures Ltd, the latter being the photographic agency).

<sup>22</sup> See also, *supra* Chapter III. PROTECTION OF RIGHT TO PRIVACY-INDIAN PERSPECTIVE

<sup>23</sup> [2015]EWCA.Civ.311. It is an appeal case from the High Court of Justice, Queen's Bench Division, Case No.A2/2014/04(2004) 203.

Apple Safari without the consent of the claimants. They alleged that there was misuse of personal information which amount to a breach of confidence, infliction of personal dignity, autonomy and integrity. One of the main issues was whether misuse of private information is a tort for the purposes of service out of the jurisdiction. The court elaborately discussed earlier cases, ECHR and Human Rights Act, 1988 and decided the case in favour of the claimants and observed that the misuse of private information should be considered as tort.<sup>24</sup>

### **6.3 PRIVACY PROTECTION IN UNITED STATES**

There is no express right to privacy in U.S Constitution. The American privacy law was influenced by the Hippocratic Oath in 400 B.C, which deals with duty of medical confidentiality. Later, the England's Justices of Peace Act, 1361, which criminalized eaves dropping, had influenced the privacy law development here. The *Peter Semayne v. Richard Gresham (Semayne's case)*<sup>25</sup> in the United Kingdom in 1604 also contributed the development of privacy jurisprudence in the United States.

#### **6.3.1 Privacy Right and Constitutional Amendments**

In the United States, the people enjoyed the private life without interference to certain extent under different Constitutional Amendments. Besides, several states protected different aspects of the privacy right in their statutes. For example, the states like Alaska, Arizona, California, Washington,

---

<sup>24</sup> *Id.*, at ¶¶ 17-23, *See also*, Jemima Stratford, *supra* note, 16 ¶51.

<sup>25</sup> (1603) 5 Coke's Rep 91a: 77 ER194 (KB).

Florida, Illinois, and Scotland had several statutes, which aim to ensure the private life of the individuals.<sup>26</sup>

Even though the privacy right came into the lime light after the publication of Warren and Brandies article in USA, the right to privacy had to fight with the right to free expression due to strong acceptance of freedom of media under First Constitutional Amendments. In most cases, the court found the merit of the case in favour of the media.<sup>27</sup>

Under the First Amendment,<sup>28</sup> the Congress shall make no laws, which respect an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances. Therefore, The U.S First amendment guaranteed the freedom of communication by pronouncing that the public disclosure of private expression would cause chilling effect on freedom of expression.

<sup>26</sup> See for e.g., Fair Credit Reporting Act of 1970, Bank Secrecy Act of 1970, Privacy Act of 1974, Family Educational Rights and Privacy Act of 1974, Right to Financial Privacy Act of 1978, Foreign Intelligence Surveillance Act of 1978, Privacy Protection Act of 1980, Cable Communications Policy Act of 1984, Electronic Communications Privacy Act of 1986, Computer Matching and Privacy Protection Act of 1988, Employee Polygraph Protection Act of 1988, Video Privacy Protection Act of 1988, Telephone Consumer Protection Act of 1991, Driver's Privacy Protection Act of 1994, Communications Assistance for Law Enforcement Act of 1994, Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Health Insurance Portability and Accountability Act of 1996, Identity Theft and Assumption Deterrence Act of 1998, Children's Online Privacy Protection Act of 1998, Gramm-Leach-Bliley Act of 1999, Video Voyeurism Prevention Act of 2004 etc.

<sup>27</sup> *Cox Board. Corp.v. Cohn* 420 U.S. 469(1975) (in this case the court did not give damages for publication of identity of rape victim, which was obtained from the court records). See also, *Florida Star v.B. J.F.*, 491 U.S. 524 (1989).

<sup>28</sup> U.S CONST.amnd I :-

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

The Third Amendment of the Constitution<sup>29</sup> guarantees the privacy of home against the intrusion by soldiers. The fourth Amendment<sup>30</sup> guarantees the right of the people against unreasonable searches. It secures their right in their persons, houses, papers, and effects. No warrant can be issued without a warrant, oath or affirmation describing the details of search and seizure.<sup>31</sup> The fifth amendment<sup>32</sup> guarantees the right of self-incrimination which can be termed as protection of personal information. Another facet of privacy right is respected under due process clause of fourteenth amendment of the U.S. Constitution. It guarantees protection in respect of family, marriage, motherhood, procreation and child bearing.<sup>33</sup>

The early period of privacy law witnessed the extension of the privacy protection to marriage, marriage, abortion, use of contraceptive etc. It was based on the assumption that the state interference should not be allowed in respect of

---

<sup>29</sup> U.S CONST.amnd III:-

No soldier shall, in time of peace be quartered in any house, without the consent of the Owner, nor in time of war, but in a manner to be prescribed by law.

<sup>30</sup> U.S CONST.amnd IV:-

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seize

<sup>31</sup> *Ex Parte Jackson*, 96 U.S. 727 (1877) (decided that the sealed letters could not be opened unlawfully the breach of which amount to violation of privacy right).

<sup>32</sup> U.S CONST.amnd. V:-

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall he be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

<sup>33</sup> U.S, Fourteenth Amendment:-

No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

matters relating to the private life.<sup>34</sup> In an important case, *Boyd v. United States*<sup>35</sup> the court inclined in favour of the claimant to protect privacy by deciding that the statute, which compelled the production of private documents as unconstitutional.

In the United States, the right to privacy was first recognized in *Griswold v. Connecticut*<sup>36</sup> wherein the constitutional validity of a state statute which prohibited the use and distribution of contraceptive devices was in question. The U.S. court invalidated the statute by saying that the right to privacy could be derived from the penumbras of constitutional amendments. This right included the freedom of married couple to decide for them what to do in the privacy of their bedrooms.<sup>37</sup>

In 1967, in *Katz v. United States*<sup>38</sup> the issue was whether the tapping of telephone calls in a public booth involved the violation of the Fourth amendment rights. The decision reversed the observation in *Olmstead v. United States*<sup>39</sup> and held that the electronic communications were protected under fourteenth amendment. The court through Justice Harlan clarified that the fourth amendment did not allow the search and seizure where the suspect had a reasonable expectation of privacy. *Roe v. Wade*<sup>40</sup> is an important landmark case wherein the United States Supreme Court upheld the decisional autonomy of the

---

<sup>34</sup> Jed Rubenfeld, *The Right of Privacy*, 102 HAR.L.REV. 737 (1989).

<sup>35</sup> 116 U.S.616 (1886).

<sup>36</sup> 381 U.S.479(1965).

<sup>37</sup> 381 U.S.479 (1965) at 485-486 (the court protected and recognized the decisional autonomy aspects of privacy right).

<sup>38</sup> 389 U.S.347 (1967).Justice John Marshall Harlan used 'the test of reasonable expectation of privacy' under Fourth amendment of the U.S.Constitution.

<sup>39</sup> 277 U.S. 438 (1928).

<sup>40</sup> 410U.S. 113 (1973).

woman under the fabric of right to privacy. In the instant case, the constitutional validity of several state statutes, which imposed restrictions on the abortion laws, was challenged. Here the court viewed that the woman should be given discretion to decide as to whether to undergo abortion or not. Any law, which imposes this kind of restriction would amount to encroachment of the autonomy of woman, which is a facet of the privacy right.

In 1986 in *Bowers v. Hardwick*<sup>41</sup> the issue was whether the homosexuals had the fundamental right to sodomy. Justice White was of the view that privacy protection could be claimed only in three areas; marriage, procreation and family relationship. Therefore, the privacy doctrine could not be applied in the present case. The decision invited severe criticism since it did not lay down any principle and in addition, the court could not limit the enjoyment of privacy right to a certain areas only. Later, the rule laid down in *Bowers* case was overruled in *Lawrence v. Texas*<sup>42</sup> in which the court by protecting the privacy right of homosexuals observed that they had the same right as heterosexuals. In another development, in the case of *United States v. Miller*<sup>43</sup>, the Supreme Court introduced 'third party doctrine' under which the information in possession of third party was not protected under the Fourth Amendment of the US Constitution. Because, the claimant would not have a reasonable expectation of privacy right when the information had been conveyed to a third party.

---

<sup>41</sup> 478 U.S.186(1986).

<sup>42</sup> 539 U.S. 558 (2003).

<sup>43</sup> 425 U.S. 435 (1976) (the United Supreme Court observed that the records in bank were not protected under Fourth Amendment of U.S Constitution and reiterated the principle of third party doctrine. The doctrine says that in respect of matters that are voluntarily given one cannot claim protection).



*Whalen v. Roe*<sup>44</sup> and *Nixon v. Administrator of General Service*<sup>45</sup> are the two landmark judgements, which recognized the constitutional right to informational privacy. In the latest case *NASA v. Nelson*<sup>46</sup>, by Supreme Court of America relied on above two cases. The case deals with the issue of collection of personal data collected by NASA of its employees to ensure their capability to do their work. The respondents alleged that the collection of information violated their privacy right.<sup>47</sup> The court decided in favour of state acknowledging the legitimate mode of collecting personal data and the public or national interest, which made the alleged act of the state as constitution alone.

### **6.3.2 Tort of Invasion of Privacy**

The tort of invasion of privacy is the development of common law principle.<sup>48</sup> The development of the privacy tort law is greatly indebted to the classic article written by two Boston young lawyers Samuel D Warren and Louis D Brandies, in Harvard Law Review in 1893.<sup>49</sup> They argued for a proper legal framework against the media intrusion. They were annoyed by the unauthorized

<sup>44</sup> 429 U.S.589 (1977) (in this case, the statute, which provided for the collection of information of patients who received a specific class of drug prescription, was challenged on the ground of violation of constitutional right to informational right to privacy. The Supreme Court unanimously decided that the statute was constitutional since it followed the rational formalities, which squarely fell under due process clause of the U.S.Constitution).

<sup>45</sup> 433 U.S. 425 (1977) (in this case the former President Nixon challenged the constitutional validity of Presidential Recordings and Materials Preservation Act (the Act) under which all presidential papers and tape recordings had to be handed over to the officers for screening for classifying those which were personal and those which were intended for historical preservation. The court took the view that the manner in which it had been collected and the screening was lawful and it did not violate the fourth amendment right of Nixon. The court stressed on fourth amendment protection rather than the claim of right of informational right to privacy of Nixon).

<sup>46</sup> 562 U. S. 134 (2011).

<sup>47</sup> Russel T Gorkin, *The Constitutional Right To Informational Privacy*, 6 DUKE .J. OF CONS. L. & PUB. POL. SIDEBAR, 1 (2010).

<sup>48</sup> RAYMOND WACKS, *PRIVACY AND PRESS FREEDOM* (1995).

<sup>49</sup> Warren & Brandies, *The Right to Privacy*, 4 HARV.L.REV.193 (1890).

publication of wedding details of daughter of Warren by press intrusion. In their article, they exposed their fear that with the advent of new technology and inventions the media could assimilate and disseminate information very easily. It would make no distinctions between family life and public life.

They argued that the publication of personal life of one person would disturb his sentiments, personality and self-image. According to them, privacy right should include the right to be secured from unjustified disclosure and publication of one's thoughts and feelings, private information, images etc.<sup>50</sup> They argued that the underlying rationale behind the protection of right under law of property, libel, defamation, assault, copyright, trust, contracts etc are centered on the right to privacy itself. In all these cases, the intrusion into the home, personal information, body etc. are secured. However, these were not adequate to protect one's private life from intrusion by media. They claimed for the protection of privacy right under the common law principles to protect the 'inviolable personality' of individuals. The article also cited several exceptions such as information under public interest, public domain etc, where the right to privacy could not be claimed.<sup>51</sup>

The intrusion into the private life and unauthorized use of private information are prevented in America under four distinct torts. This is the contribution made by Sir William Prosser,<sup>52</sup> which is considered as the second

---

<sup>50</sup> *Id* at 198.

<sup>51</sup> *See supra*, CHAPTER 2, RIGHT TO PRIVACY-CONCEPTS AND PERSPECTIVES.

<sup>52</sup> W.PROSSER, THE LAW OF TORT, 804(4<sup>th</sup> ed.1974).

stage of the development of the privacy protection after the Warren and Brandies episode. The four privacy torts developed by William Prosser are –

- a. Intrusion upon seclusion or solitude or into the private affairs of plaintiff
- b. Public disclosure of embarrassing private facts of plaintiff
- c. Publicity which places the plaintiff in a false light in the public eye
- d. Appropriation of the plaintiff's name or likeness for the advantages of defendant

#### **6.3.2.1 Intrusion upon seclusion:-**

The mere intrusion upon the solitude and seclusion upon an individual without any lawful justification will also amount to the tort of invasion of privacy right under this heading. Here there is no physical invasion. The position has been incorporated in the Restatement (Second) of Torts. It is the manner of gathering information and the publication of the same will make the act an offensive one.<sup>53</sup> It is also stated that one who intentionally intrudes, physically or otherwise, upon the solitude or seclusion of another or his private affairs or concerns, is subject to liability to other for invasion of his privacy, if the intrusion would be highly offensive to a reasonable person.<sup>54</sup>

It is also known as intrusion theory. According to this theory, there will not be liability for observing one person or even taking his photograph while he is walking in the public street. During that time, he is not in seclusion. In order to win the privacy claim the plaintiff should prove that the intrusion was highly offensive to a person of reasonable sensibilities. This tort requires that the matter

---

<sup>53</sup> RESTATEMENT (SECOND) OF TORTS §652B (AM.LAWINST., Tentative Draft No. 17, 1977).

<sup>54</sup> *Id.*

should be private in nature. Secondly, the plaintiff is entitled to keep the information secret. Finally, it requires that the manner of collecting information is highly offensive to a reasonable person. Therefore, mere receipt of information surreptitiously obtained will attract liability if it is highly offensive to person of ordinary sensibilities. Under this tort, the entry into the private room without permission would attract action against the defendant.<sup>55</sup>

As an exception to the above rule in *Barbrick v. Vopper*<sup>56</sup> the court observed that the media can publish information even though it had been obtained through illegal interception and it contained an element of public interest. In *Barber v. Time Inc*<sup>57</sup> the reporters entered the hospital room with permission but took photographs without permission. The court gave verdict in favour of the claimant for the violation of privacy right. The surveillance by media by using innovative and technical devices will come under this category.<sup>58</sup>

### **6.3.2.2 Appropriation of Name or Likeness**

One who appropriates to his own use or benefit the name or likeness of another is subject to the other for invasion of his privacy.<sup>59</sup> It prevents commercial exploitation of one's publicity by interfering with the private life of individuals. In this case, the interest of the individual to the exclusive use of his identity is preserved. However, there is no appropriation where the plaintiff's

---

<sup>55</sup> *Engman v. Southwestern Bell Telephone Co.* 591 S.W.2d 78 (Moapp.W.D.1979) (the offender had access to the private room to install cable wire while plaintiff was sleeping).

<sup>56</sup> 149 L.Ed.2d.787 (2000).

<sup>57</sup> 348 Mo.1199.159S.W.2d 291(1942).

<sup>58</sup> *Holman v. Central Arkansas Broadcasting*, 610 F 2d 542(8<sup>th</sup> Cir.1979), *Cassidy v. American Broadcasting Co.* 377N.E.2d 126 (III App.1978).

<sup>59</sup> RESTATEMENT(SECOND)OF TORTS § 652 C (AM.LAWINST., Tentative Draft No. 17,1977).

name or likeness is published, as a matter of newsworthy concern.<sup>60</sup> No one has the right to claim the privacy right merely because his name or his appearance is brought before the public, if it is used for his purposes. If the publicity is given for appropriating the commercial or other values associated with the name or the likeness of the plaintiff by the defendant then the right of privacy is invaded. The facts that, the defendant is engaged in the business of publication is not enough to make the incidental publication a commercial use of the name or likeness.<sup>61</sup>

The cases of invasion of privacy right of the celebrities and the public figures come under this category. One has a property right over his images and where one publishes it without consent, the photographer is committing two offences. One is invasion of the privacy right and the other is the infringement of right to publicity. This is mostly happening in the case of celebrities. The media is exploiting the celebrities' rights and it adversely affecting the economic interests of celebrities.

### **6.3.2.3 Publication of Private Embarrassing Facts**

It deals with the publication of truthful information, which is private embarrassing fact. The media usually invade the privacy of individuals by publishing the truthful private facts in order to attract the audience or readers and thereby increase the publicity. Following are the elements of this tort-

- a. Disclosure of private information to the public.
- b. The public has no legitimate public interest in the information.

---

<sup>60</sup> *Williams v. KCMo Broadcast Division Meredith Corp.*, 472 S.W.2d 1 (M.App.W.D 1971)(the television broadcasted that plaintiff was arrested, handcuffed and produced before the court).

<sup>61</sup> RESTATEMENT(SECOND)OF TORTS, § 652 C (AM.LAWINST., Tentative Draft No. 17,1977).

c. It resulted in the humiliation to a person of ordinary sensibilities.

The publication of private information will amount to the privacy violation as stated in the Restatement (Second) of Torts. It states that one who gives publicity to a matter concerning the private life of another is subject to the liability for invasion of his privacy, if the matter publicized is of a kind that-

- i. would be highly offensive to a reasonable person and
- ii. is not of legitimate concern to the public.<sup>62</sup>

While the intrusion upon seclusion concerns collection of information, this tort gives importance to the disclosure of information. If the publication is of private facts is legitimate public concern or it involves the element of public interest there will not be violation of the privacy right. The Restatement also states that if the matter ceases to be the giving of information to which the public is entitled, and becoming a morbid and sensational prying into private lives for its own sake, with which a reasonable member of the public, with decent standards would say that he had no concern.<sup>63</sup>The disclosure must be of private facts, which were not in the public domain. Therefore, the defendant is not liable for the publication of private information if it is already in the public domain.

In *Y.G. v. Jewish Hospital of St.Louis*<sup>64</sup> the plaintiffs who attended a vitreo fertilization programme, and the media broadcasted the programme. In the court, the plaintiffs argued that they already said to the defendant that they were not interested in giving the publicity to the details of the programme and they

---

<sup>62</sup> *Id.* § 652 D, *See also, Cox Broadcasting Co.v.Cohn*, 420 U.S.469.

<sup>63</sup> RESTATEMENT (SECOND) OF TORTS § 652 C (AM.LAW INST.,Tentative Draft No. 17,1977).

<sup>64</sup> 795 S.W.2d 488(Mo.App.E.D.1990).

attended it. A noteworthy observation made by the court by saying that the programme involved a matter of public interest in the sense that the society could know the success and possibility of new technology in medical field only Through Such Programmes And In This Case, Others Did Not Identify The Plaintiffs.

#### **6.3.2.4 Publicity Placing One In A False Light**

Under this category, if one who gives publicity to a matter concerning another and places the other person before the public in a false light, is subject to liability for invasion of privacy if-

- i. The false light in which the other was placed would be highly offensive to a reasonable person , and
- ii. The actor had knowledge of or acted in reckless disregard as to the falsity the publicized matter and the false light in which the other would be placed. <sup>65</sup>

Based on the above discussion, it seems that the private life of individuals is protected under constitutional amendments and the law of tort to some extent. In addition to the above, there are specific statutes like The Privacy Act of 1974<sup>66</sup>, The Financial Monetization Act of 1999 <sup>67</sup>, The Fair Credit Reporting Act<sup>68</sup> etc. through which private related matters are specified.

<sup>65</sup> RESTATEMENT(SECOND)OF TORTS § 652 E (AM.LAW INST., Tentative Draft No. 17,1977).

<sup>66</sup> It prevents unauthorized disclosure of personal information, which is held by Federal Government.

<sup>67</sup> The statute gives the right to the customers to require the financial institutions to adhere to the privacy policy. Under this statute, the financial institutions are required to safeguard the personal information that they had collected from the customers.

<sup>68</sup> It protects the personal financial information that is collected by credit information agencies.

## 6.4 PRIVACY PROTECTION IN NEW ZEALAND

There is no general right to privacy in New Zealand. The first legislative attempt to protect privacy was the Preservation of Privacy Bill, 1972, but it had not been enacted. The successful attempt was Privacy Act, 1993 under which the personal information was protected by incorporating privacy principles.

### 6.4.1 Media Freedom and Privacy Right

The New Zealand Bill of Rights Act, 1990 guarantees the freedom of expression. Everyone has the right to freedom of expression including the freedom to seek, receive and impart information and opinion of any kind in any form.<sup>69</sup>

However, the Privacy Commissioner has no jurisdiction to entertain the complaint in cases where the news media invade the privacy right. The broadcast media are guided by the principles developed by the Broadcasting Standards Authority (BSA).<sup>70</sup> The Privacy Act, 1993<sup>71</sup> was enacted for preventing intrusion and to give protection of individual privacy. The Act allows industries and institutions to develop its privacy principles. The privacy principles are related to the collection, storage, use and disclosure of personal information by agencies and recognize the right of access and correction of personal information by the individual concerned.

---

<sup>69</sup> New Zealand Bil of Rights Act, 1990, § 14; *See also*, A Geddis, *The Horizontal Effect of New Zealand Bill of Rights Act, as applied in Hosking v. Runting* [2004] New Zealand Law Review 681.

<sup>70</sup> The Press Council is the platform, which hears complaints related to privacy issues. It is a self regulatory body which had been constituted by Publishers and Journalists in 1972. It entertains complaints against press. But it has no teeth in the sense that it has no power to punish. The complainant has to undertake that he would not proceed or commence action against the newspaper of the journalist.

<sup>71</sup> *See generally*, LONGWORTH & McBRIDE, *THE PRIVACY ACT: A GUIDE* (1994).



Under Privacy Act, all agencies are under an obligation to follow privacy principles except news media in relation to news activities.<sup>72</sup>The 'news activity' means

- (a) The gathering of news, or the preparation of the compiling of articles or programmes of or concerning news, observations on news, or current affairs, for the purpose of dissemination to the public or any section of the public.
- (b) The dissemination to the public or any section of the public, of any article or programme of or concerning (i) News (ii) Observations on news and (iii) Current affairs

News medium means any agency whose business, or part of whose business, consists of a news activity. Under privacy principle, six and seven, the access to information can be denied if it relates to the revealing of the confidential source of information to a Radio New Zealand or Television New Zealand journalist.<sup>73</sup>The exemption given to the media from the provision is to ensure the functioning of media very effectively.<sup>74</sup>In *Talley Family v. National Business Review*,<sup>75</sup> the newspaper published the financial details of the complainant. The issue was whether the contents of the publication would amount to the 'news' or 'the current affairs'. The Privacy Commissioner was of

<sup>72</sup> Privacy Act, 1993, § 2 (1).

<sup>73</sup> The Privacy Act has twelve privacy principles. Principle 6 gives individuals the right to access information about themselves. Principle 7 gives the individuals the right to correct information about them. Necessary and Desirable :Privacy Act 1993 Review (1998) paras 1.4.49 and 1.4.52 See also, Rosemary Tobin, *Privacy and Freedom of Expression in New Zealand*, as in DEVELOPING KEY PRIVACY RIGHTS 127 (Madeleine Colvin ed., 2002)

<sup>74</sup> Rosemary Tobin, *Privacy and Freedom of Expression in New Zealand*, in DEVELOPING KEY PRIVACY RIGHTS 127 (Madeleine Colvin ed., 2002).

<sup>75</sup> (1991) 4 HRNZ 72.

the opinion that the complaint was not within the jurisdiction on the ground that it was ‘news agency’ and the publication would amount to the news activity by the news medium. Therefore, it was exempted from the purview of operation of the section. In appeal, the Tribunal concluded that the activity of the agency clearly fell within the definition of the news activity and the contents were amount to the news or the current affairs. Therefore, it was outside the purview of Privacy Act. It had been also added that ‘the news’ or ‘the current affairs’ should be literally construed, otherwise, it would amount to the curtailment of the freedom of expression.

In *Wallingford v. National Beekeepers Association of New Zealand*,<sup>76</sup> the ambit of exemption was analysed. The plaintiff argued that the defendant was not a news medium because, the activities in the collection of material for a journal was not a journalists’ work in its full sense. It was argued for the respondent that the term ‘news medium’ means an agency, a substantial part of whose business consisted of a news activity and whose activities were such that they deserved the special protection available to ensure the freedom of the news media in a democratic society.

The Tribunal decided that the ‘news activity’ involves the publication of articles, columns and other writing. The element of news activity could be elicited in a single piece of publication also.<sup>77</sup> In the case of clear privacy violation, the claimant is provided with the damages for humiliation, loss of

---

<sup>76</sup> [2001] NZAR 251(the information about the identity of the author of a series of letters published by the defendant in their publication was not allowed to be published.

<sup>77</sup> *Id.* at 255.

dignity and injury to the feelings. It had been observed the defendant was carrying on news activity. The tribunal took into account the fact that the matter had been distributed to public libraries throughout the state.

#### **6.4.2 Tort of Invasion of Privacy Under Common Law**

The common law tort of invasion of privacy is based on the principle that one's autonomy should be respected. The cases wherein the privacy right had been violated, the court decided the matter by granting injunction as requested by the parties and without having much discussion on the subject matter. In New Zealand, also the rationale of common law tort of invasion of privacy is that the ordinary private life of an individual should not be disturbed and should not be subjected to undesired publicity or public disclosure.

In New Zealand also the common law tort of privacy and BSA privacy principles are in tune with the privacy principles in the United States. The tort of developed by Prosser also influenced the privacy jurisprudence in New Zealand. In the case of intentional intrusion into the plaintiff's seclusion or solitude, the plaintiff has to prove that the defendant intruded into the private matter and the intrusion itself had to be highly offensive and objectionable to a reasonable person. In addition, the means used to intrude; the purpose of intrusion etc. should also be taken into account to decide the matter. In the case of the public disclosure of private facts, the requirements adopted by Prosser have to be followed. It requires, firstly that the disclosure of private facts must be a public disclosure and not a private one. Secondly, the disclosed facts must be private in

nature. Finally, the matter published must be highly offensive and objectionable to reasonable person of ordinary sensibilities.<sup>78</sup>

In *Tucker v. News Media Ownership Ltd.*,<sup>79</sup> the claimant, a heart patient, obtained an injunction to restrain the defendant from publishing news regarding to the previous conviction. The court gave decision for claimant on the ground of invasion of privacy. It was found that the matter in issue was an adaptation or extension of the tort of intentional infliction of emotional distress. The court said that a public fact in course of time would become a private matter. But the court did not discuss the legal aspect in a fruitful way how this happened, how long it took, and whether all public facts could consider as private facts in the course of time.

In *TV 3 Network Services Ltd. v. Fahey*<sup>80</sup> a hidden camera was used to record the activities of a doctor during a surgery who was a public figure. The matter was aired and the content of the programme was about the allegation of sexual impropriety against the doctor. His conversation was tapped and was included in the programme. He argued airing of the programme amounted to unlawful invasion of his privacy right. The court observed that the programme contained the public interest in the fact that the doctor often denied in the media that he was not an accused in criminal cases and he tried to be a good person. Therefore, it was legitimate for the media to expose the real fact of his misconduct.

---

<sup>78</sup> See, W. Prosser, *Privacy*, 48(1960) CAL.L.REV. 383.

<sup>79</sup> [1986] 2 NZLR 716.

<sup>80</sup> [1999] 2 NZLR 129.

In *P v. D & Independent News Ltd*,<sup>81</sup> the extent of the privacy protection was in question. The plaintiff, a public figure filed an injunction suit against a journalist for preventing the publication that the plaintiff had suffered from psychological problems. The plaintiff argued for the remedy for breach of confidence and the violation of privacy right. The journalist justified their action and argued that the media had the right to freedom of expression under New Zealand Bill of Rights Act and the right to make enquiry in respect of matters, which are interested to the readers. The court mainly relied on *Kaye V. Robertson*<sup>82</sup> in England, which held that in the absence of clear evidence the court could not impose prior restraint on the media. The Court concluded that there was a tort of privacy in the New Zealand and it encompassed the public disclosure of private facts. By taken into account all the above factors, the court decided that the information that a person had been undergone psychiatric treatment was a private information. Then the question was whether the disclosure would be highly offensive and objectionable to a reasonable person of ordinary sensibilities. The attitude of the public towards mental illness was not a consideration in the present context. However, it would depend upon one's own feelings and perspective when the matter had been disclosed in the public. Here the emotional distress and feelings of the plaintiff should be given importance. If the matter had been disclosed, it would affect his privacy right and the job. Finally, the court held that the publication would be a breach of tort

---

<sup>81</sup> [200] 2 NZLR 591

<sup>82</sup> [1990] EWCA Civ 21.(A journalist surreptitiously took photographs of the plaintiff who was admitted in a hospital)

of privacy and the injunction was granted to prevent the disclosure of identity of the plaintiff, the journalist, and the contents of court file.

One of the demerits of the judgement is that the judge could have decide the extent to which the right to privacy acts as a reasonable limitation on the right to freedom of expression. In addition, the court failed to discuss the privacy right of public figures.

*L v G*<sup>83</sup> is a recent case in which the court observed that proper consideration should be given to right to freedom of expression and the right of the media to publish information. The court reiterated the requirements that –

- a. The facts disclosed must be of private one.
- b. Therefore should be public disclosure of private facts.
- c. The disclosed facts must be highly offensive and objectionable to a reasonable person of ordinary sensibilities.
- d. Any legitimate public interest in the disclosure of facts would be insufficient to override the right to privacy in respect of them.

In this case, one Mr. G published the sexually explicit photographs of one Ms. L. The photos were taken with her consent during their sexual relationship. The main issue was whether the publication would result in the identification of the complainant. The court approved the intrusion free space of the individual and said that the right to privacy is a value, which was peculiarly personal. It requires the psychological need of the person to preserve personality, family, etc. Otherwise, it would result in the loss of the personal shield of privacy. The

---

<sup>83</sup> [2002] DCR 234.

argument that the publication of information of plaintiff would not be capable of identifying would not prevent the court from protecting the privacy of the plaintiff. In this country, a further clarification and elucidation of the concept of public disclosure and the private facts are required through case law development.

The common law tort of invasion of privacy should be interpreted in the light of Bill of Rights Act.<sup>84</sup> *Moonen v. Film and Literature Board of Review*<sup>85</sup> discussed the legal impact where there is inconsistency between freedom of expression and censorship of objectionable publications under the Films, Videos, Publications Classifications Act, 1993. The Court of Appeal decided that an interpretation, which would give more effect to the freedom of expression should be adopted. While dealing with such inconsistency it is better to identify different interpretations, and then select the one which least infringers the right. Then analyze the extent to which that interpretation or meaning which would limit the freedom of expression. It should be capable of giving a democratic justification. The Bill requires that any limit on a guaranteed right or freedom must be reasonable prescribed by the law and justified in a free and democratic society. The limit must be identifiable, adequately accessible and sufficient. The extent of limit would depend upon the facts and circumstances of each case. In order to decide whether the limit is reasonable or democratically justifiable, certain factors are to be taken into consideration. The factors such as, the relevance of

---

<sup>84</sup> J. Norton, *Hosking v. Runting and the Role of Freedom of Expression*, [2004] AUCK.U. L. REV.245.

<sup>85</sup> [2000]2NZLR 9.

particular case under Bill of Rights Act, importance in the public interest thereby protected, the limits sought to be placed on the application of the common law, and the effectiveness of the intrusion in protecting the interests should be taken into consideration.<sup>86</sup>

The court in *Duff v. Communicado Ltd.*<sup>87</sup> opined that somewhat a modified approach should be adopted if there is a conflict between the common law and the Bill of Rights. A reasonable limitation on the freedom expression should be adopted in such cases. *R v. Mahanga*<sup>88</sup> is another case, which explained the balancing process of freedom of speech and privacy. In this case, the television company had denied access to the video tape containing the trial on the ground that it would affect the privacy right of the convicted person and the interviewer. The Court of Appeal reiterated the duty of media to report the court proceedings in public interest. At the same time, the competing interests should be balanced. The court observed that the media had enough opportunity to view the trial in open court. There is an ample difference between effectiveness of an interview, which is in an open space and in a television. In another famous case *Hosking v. Runting*<sup>89</sup> the Court of Appeal did not allow the appeal of the claimant on the ground that when the twins of claimants appellants, who were celebrities, were photographed, they were in the public place.

---

<sup>86</sup> *Ministry of Transport v. Noort* [1992]3 NZLR 260.

<sup>87</sup> [1990]2 NZLR 89 (HR)

<sup>88</sup> [2001] 1 NZLR 641 (CA)

<sup>89</sup> [2005] 1 NZLR 1(CA)( the photo of appellant's ( Hosking) twins was taken when they were in a street. The appellants sought to prevent the publication); see also, Ursula Cheer, *The Future of Privacy: The Recent Legal Developments in New Zealand* [2007] 3;7;(2007)13 CANT. L. REV. 169.



Therefore, they could not claim it as a private information. They failed to prove that there was reasonable expectation of privacy and publicity given to the facts that would be highly offensive to an objective reasonable person.

### **6.4.3 Privacy Right in Broadcast Media**

The Broadcasting Act, 1989 is intended to protect privacy of individuals by incorporating certain privacy principles. The privacy principles involve following aspects while dealing with private information while broadcasting programmes.

- a. The protection of privacy includes protection against the public disclosure of private facts where the facts disclosed are highly offensive and objectionable to a reasonable person of ordinary sensibilities.
- b. It also protects against the public disclosure of some kinds of public facts. It includes the public facts, which had acquired the character private through the passage of time.
- c. The intentional interference with the solitude or seclusion of an individual amounts to a separate ground of complaint.
- d. The protection of privacy also available against the disclosure of private facts to abuse, defame the identifiable person. The prior relationship between broadcaster and named individual is not essential here.
- e. The protection of privacy includes the protection against the disclosure by the broadcaster of the name, address, phone number of an identifiable person without consent. It is subject to the exception of public interest where these are essential for serving public interest.

- f. Public interest is a defence to the claim for privacy of an individual.
- g. If an individual, consent to the invasion of privacy cannot later raise for the breach of privacy. Where child is involved, the broadcaster should act in the best interest of the child.

These privacy principles are based on those developed by Prosser. The Broadcasting Act, 1989 constitutes Broadcasting Complaints Authority (BCA) to deal with complaints relating to broadcasting programme. *Re McAllister*<sup>90</sup> is the first case, which came before BSA. The BSA based its decision on American privacy principles.

The rule formulated by BSA was approved by the High Court in *TV 3 Network services Ltd v BSA*.<sup>91</sup> In this case, BSA took the stand that the privacy right of the complainant had violated while filming an interview of the complainant. It was observed that the publication of the private facts amounted to highly offensive one to an ordinary person. The TV 3 channel appealed to High Court but the High Court also upheld the decision of BSA. It was commented that the disclosure of past events would amount to the violation of the privacy right. Ordinarily, the complainant would not agree to have such an interview and the same was within the knowledge of TV 3. Therefore, the interviewer would be a trespasser if he or she entered the property of the complainant. The use of hidden camera can be justified only in extreme cases. It requires that the public interest must clearly outweigh the competing individual rights and there should be other reasonable way to get the information.

---

<sup>90</sup> [1990]NZAR 324.

<sup>91</sup> [1995] 2 NZLR 720.

In this country, several cases recognized that there is tort of invasion of privacy in New Zealand. The New Zealand Bill of Rights Act 1990 has great impact in New Zealand. However, the media exemption from privacy principles under Privacy Act 1993 when carrying on news activity is a drawback in the legal system.

## **6.5 PRIVACY PROTECTION IN AUSTRALIA**

In Australia, the process of balancing the free speech and the privacy is debatable one. There is no Bill of Rights as in USA. The law relating to the freedom of expression and privacy are contained in constitutional principles, statutory principles and the common law principles.

### **6.5.1 Freedom of Expression in Australia**

The freedom of expression has been protected in three distinct ways.

- a. The freedom of expression is impliedly protected in the form of implied constitutional freedom of political communication under the Australian Constitution.
- b. The freedom of expression is presumed under common law principle under which it can be restricted only by clear and unambiguous grounds.
- c. Being a signatory to many of the international conventions including ICCPR, Australia has an obligation to protect the freedom of expression, since the rule of statutory construction requires to interpret the legislation in consistent with international conventions.<sup>92</sup>

---

<sup>92</sup> David Lindsay, *Freedom of Expression, Privacy and Media in Australia*, in DEVELOPING KEY PRIVACY RIGHTS 160 (Madeleine Colvin ed., 2002).

### 6.5.2 Implied freedom of Political Communication

The people of Australia enjoy the freedom of speech and expression as implied freedom of political communications. Because the freedom exists on the rationale that it is not prohibited.<sup>93</sup> It protects the people against the legislative and the executive action. *Lampe v. Australian Broadcasting Corporation*<sup>94</sup> confirmed the existence of implied freedom. It operates not as a source of personal right but as a limitation or restriction on laws. It had been observed that it is necessary for effective operation of responsible government. It was said that Australian common law must confirm with the Federal Constitution. The freedom of expression is protected under the legal assumption that the legislature would not enact a law, which impairs the freedom of speech and expression.<sup>95</sup>

### 6.5.3 Privacy Law in Australia

The Australian privacy law does not provide a general common law right to privacy. Several attempts to have been made in this respect but were in vain. For the purpose of data protection Australia has introduced Privacy Act 1988 with recent Privacy Amendment (Private sector) Act 2000. In *Church of Scientology v. Woodward*<sup>96</sup> the court made the hint that a privacy tort may be introduced and identified in cases of 'unjustified invasion of privacy right'.<sup>97</sup> In the cases of media intrusion, the individuals have to pursue other remedies such

---

<sup>93</sup> *Australian Council Television Property Ltd v. The Commonwealth*(1992) 177 CLR 106, *Nationwide News Property Ltd. v. Wills* (1992) 177 CLR 1( the former Prime Minister of New Zealand filed defamation case against Australian Broadcasting Corporation).

<sup>94</sup> (1997) 189 CLR 520

<sup>95</sup> *Coco v. R.* (1994)179 CLR 427.

<sup>96</sup> (1982) 154 CLR 25(the issue was whether ASIO could be prevented from conducting investigation into the church of scientology)

<sup>97</sup> *Id.*at ¶ 54

as the tort of trespass and the defamation or an action for the breach of confidence. The right to privacy as such has not been legally recognized and it is presumed that the legislature will not enact the law, which infringes the right and freedom of others. In *Coco v. R*<sup>98</sup> the court had to examine the request of the police to use a listening device. The High Court opined that in the absence of clear and unambiguous legislation, the unlawful entry into the premises could not be permitted. Australian privacy law extends protection against arbitrary and unlawful interference into the private life of a person which is in line with Art 17 of ICCPR.

#### **6.5.4 Intrusions and its Prevention**

The intrusion into the privacy of a person can be either territorial or electronic intrusions.

##### **6.5.4.1 Territorial Intrusion**

The law of tress pass prevents the intrusion into the premises of another person. The damages are awarded in the case of violation of the privacy right. An injunction will be a more appropriate remedy to prevent the publication of the intruded material.<sup>99</sup> The two serious nature of allegation, the limited opportunity given to reply to all the allegations and the potential effect of the publication on the business of the plaintiff should be taken into consideration while granting the injunction.<sup>100</sup>

---

<sup>98</sup> (1994)179 CLR 427

<sup>99</sup> *Lincolnhunt Australia Pty Ltd. v. Willesee* (1980) 4 NSWLR 457

<sup>100</sup> *Emcorp Property Ltd v. Australian Broadcasting Corpn* [1988] 2 Qd R169.

#### **6.5.4.2 Electronic intrusion**

It is regulated under Federal Telecommunication (Interception) Act 1979. The law authorizes interception only for the purpose of national security and law and order. The surveillance Devices law prohibits the communication or publication of private conservation that have been unlawfully recorded. The Surveillance Devices Act in Victoria and Western Australia prohibits the unlawful use of optical surveillance devices. However, the media is exempted to a certain extent from using such devices for news gathering. The publication of private facts is prohibited subject to the exception that if public interest demands, it can be published.<sup>101</sup>

#### **6.5.5 Remedy for Disclosure of Private facts in Australia**

The unlawful disclosure of private facts invites two actions in Australia.

##### **6.5.5.1 Action for Breach of Confidence**

Usually the action for breach of confidence arises where there is a contract that the information would be kept in confidence. It is usually applied to protect trade secrets. But it has been found its application in keeping health information as secrets.<sup>102</sup> The requirements for invoking the remedy for breach of confidence are same in other jurisdiction as explained above.

##### **6.5.6 The Tort of Defamation**

It protects the individual reputation and the media is restricted from communicating information, which are defamatory in character. The defamation

---

<sup>101</sup> David Lindsay, *Freedom of Expression, Privacy and Media in Australia*, as in DEVELOPING KEY PRIVACY RIGHTS 160 (Madeleine Colvin ed., 2002) at 177.

<sup>102</sup> *Folconer v. Australian Broadcasting Corpn* (1991) 22 IPR 2015

law in Australia incidentally protects certain aspects of personal privacy also. In the absence of proper law for the privacy protection, the extent to which defamation law has been used to protect the privacy contributed the development of defamation law.

The defence of the justification and the public interest have been accepted as exceptions for action for disclosure of information. Under Australian Privacy jurisprudence, the courts are trying to keep the defence within limits. It is usually applied to protect the community from destruction, damage or harm to protect national security, breach of law against society etc.<sup>103</sup> The case of *Castroll Australia Property Ltd. v. Emtech Associates Property Ltd*<sup>104</sup> decided that to justify the disclosure of confidential matters something more weighty than a 'public interest' should be established and its boundary of exception.<sup>105</sup>

## 6.6 Media Content Regulation in Australia

The content of media is regulated by the Code of Conduct developed by the media under co-regulatory or self-regulatory regimes. Broadcasting Services Act, 1992, regulates broadcasting services. It establishes co-regulatory schemes for broadcasting content with the main rules set by the codes of practice developed in consultation with the Australian Broadcasting Authority (ABA). With respect to the breach of Code of Conduct, the complaints can be

<sup>103</sup> *Intial Services Ltd v. Puttorill* [1968] 1 QB 396.

<sup>104</sup> (1980) 33 ALR 31.

<sup>105</sup> *U.K. v. Heinemann Publishers Australia Pty Ltd. (Spycatcher case)* (1987) 8 NSWLR 341 (the respondent was restrained from publishing the book 'Spycatcher'), See generally, Mathew Howard, *Spycatcher Downunder: Attorney General for the united kingdom v. Heinemann Publishers Australia*, WEST. AUST.L. REV. 19 (1989) p. 158. See also, *Esso Australia Resources Ltd. v. Plowman* (1995) 128 ALR 391.

filed to the broadcaster. If dissatisfied with the decision, the complaint can be filed to ABA. However, ABA has limited power to impose punishment.

There are commercial broadcasters, community broadcasters and subscription broadcasters. The Code developed by commercial and national broadcasters include the provisions dealing with privacy intrusions by news and current affairs programmes which generally attempt to balance personal privacy and the public interest in disclosure. The code says that in broadcasting news and current affairs the personal affairs of individuals should not be disturbed. The code also requires that care should be taken while broadcasting images or interviews with the bereaved and survivors or witnesses of traumatic events.

#### **6.7 Balancing Freedom of Expression, Privacy and Media in Australia**

As already stated the freedom of expression is partially protected by the Constitution, which is applied to political speech also. There is uncertainty in the area of nature and scope of protection. The privacy right in Australia is protected mainly by the laws consists of common law principles. This form of law is not adequate to protect the privacy right in Australia. To balance the freedom of expression and privacy right, Lange test is commonly used. It laid down a two stages test to examine whether there is violation of freedom of speech and expression. The 1<sup>st</sup> stage of the test requires that a law to be “effectively burden freedom of communication about government or political matters either in terms, operation or effect. The second stage requires that the law should be appropriate and compatible with the constitutional system of government.”<sup>106</sup>

---

<sup>106</sup> *Lange v. Australian Broadcasting Corp.* (1997) 189 CLR 520.



In Lange case, the High Court remodeled the defamation law by introducing a new form of qualified privilege to apply to the political communications. It can be raised that by disclosing the private facts, one's reputation would be damaged and therefore defamation law can be a defence in case of disclosure of personal information. The ground of public interest justification for disclosure of private information requires further development in this country.

## **6.8 CONCLUSION**

The private life of individuals in U.K can be analysed in the back ground of before and after the period of Human Rights Act, 1988. Before the enactment of this statute, the courts extended the doctrine of breach of confidence for protecting the private from public disclosure. The doctrine involved the distortion of the doctrine of breach of confidence, which had been deeply rooted in the legal system. The cause of action under breach of confidence refers to the information disclosed by one person to another under situation imposing an obligation of confidence, whether there may be express or implied agreement. Later, in order to protect the private life of individuals the cardinal elements of the doctrine is shaken off because of the absence of specific remedy. The requirement of confidential relationship was not required to initiate legal action against disclosure of private information without any justification. There are decisions, which raised doubts as to the suitability of using the remedy of breach of confidence in order to protect the private aspects of one's life. The latest case

of *Google Inc. v. Judith Vidal Hall*<sup>107</sup> in U.K. in 2015 is beginning of a new horizon for the protection of privacy right, which recognized the tort of disclosure private information. The U.S. courts are more concerned with duty based protection of privacy right while U.K. courts are with rights based approach for protecting the private information from unlawful disclosure. Now the Human Rights Act 1988, in tune with the provisions of ECHR, enacted the provisions to protect the private life of the individuals.

The U.S privacy jurisprudence protects the private information under the Fourth, Fifth and Fourteenth Amendments of the Constitution. The early period of privacy law witnessed the extension of privacy protection to marriage, abortion, use of contraceptives etc. It was based on the assumption that the state interference would not be allowed in the matters of private life. Later, there was a gradual change in the application of doctrine. The protection of privacy under the law of tort can be considered as a good guidance for the development of the tort of privacy in Indian privacy regime.

The Australian courts are more conservative than English courts. Here, the right to freedom of expression and the right to privacy are not expressly protected. However, it is impliedly protected under common law and other legal principles. To regulate the media there are self -regulatory and co-regulatory codes. The greater weightage is placed on the public interest in the case of disclosure of government information than that is placed on the disclosure of personal information. Under the common law, personal privacy prevails over the

---

<sup>107</sup> [2015]EWCA.Civ.311

interest in freedom of expression. If government information is in question then free speech has greater importance than competing interest and the common law principles are inadequate to balance the competing rights.

Even though the Constitution of India and other statutes prevents disclosure of personal information, it is not adequately protected. The extension of breach of confidence doctrine to shield the disclosure of personal matter is not a proper means because it is destruction of long time-honored principle. Therefore, it is concluded that when comparing the privacy regime in different jurisdictions, Indian legal system can adopt various good measures to tackle the problem of privacy invasion. Moreover, the law and policies adopted in the above jurisdictions for privacy invasion by visual media is commendable even though there are draw backs in the legal system.

.....❖.....

## **CHAPTER-VII**

### **REGULATION OF VISUAL MEDIA WITH SPECIAL REFERECNE TO PRIVACY RIGHT**

*‘A free and democratic society requires respect for the autonomy of individuals, and limits on the power of both state and private organizations to intrude on that autonomy.’*  
-The Australian Privacy Charter (1994).

#### **7.1 INTRODUCTION**

The media has undergone tremendous change due to contemporary period of technological development. The globalization and liberalization led to tremendous increase in number of audio visual media, which demands regulation. India lacks an effective regulatory mechanism to control the visual media from invading the private life of individuals whether private or public figures. The existing system of legal framework is not satisfactory and efficient to address the issues arising out of the emergence of modern technologies in the digital era. Even with a mobile phone, one can catch photos and videos of any person and publish it in public domain. Today the media has been subjected to and they prefer to have been subjected to self-regulation only and they defend any other kind of regulation on the ground that it is utterly against the basic principles of media freedom guaranteed under Constitution of India and other

International Conventions.<sup>1</sup> This chapter mainly focuses on different aspects of regulation of media with special reference to privacy right. The regulation of broadcast media among other things aims to maintain a balance between citizen's right to free expression, right to information and freedom media. It also implies that under the purview of regulation, freedom of media should not be unnecessarily curtailed and also media should not intrude into the private life of individuals. Media has to follow certain ethics such as accuracy, honesty, truth, objectivity, fairness, balanced reporting, respect or autonomy of ordinary people. But the pursuit of successful career, promotion, compulsion from the management to meet the target etc., put the journalists under severe pressure which compels them to deviate from democratic path. Media publish stories which are curious to public rather than 'what is in public interest'.<sup>2</sup>

The Chapter critically analyses various mechanisms now exist in India, to regulate the visual media, especially television, to prevent it from unlawful intrusion of privacy right. For reforming the role of media there were various commissions appointed by the government. The chapter also examines the pros and cons of Privacy Bills which were recently drafted by the Ministry of Information and Broadcasting. The chapter also touches different kind of code

---

<sup>1</sup> See, *Supra* Chapter 4 MEDIA FREEDOM VIS- A VIS - MEDIA RESTRAINTS –AMBIT AND CONCERNS.

<sup>2</sup> Andrew Belsey, *Journalism and Ethics, Can they co-exist*, as in MEDIA ETHICS: A PHILOSOPHICAL APPROACH (ed. Mathew Kieran). See also, *Mother Diary & Food Processing Ltd. v. Zee Telefilms* (IA 8185/2003 in Suit No. 1543/2003, dated 24-01-2005. See also, 200<sup>th</sup> Report of Law commission, Trial by Media: Free Speech v. Fair Trial Under Criminal Procedure (Amendments to the Contempt of Court Act, 1971)(2006) ¶ 200.5.

of conduct applicable to media and how far it is implemented to tackle the problem of privacy violation.

## 7.2 VISUAL MEDIA-NEED FOR ETHICS

It is true that today media is in the hands of powerful persons and they are competing for power and money. Absence of regulation is advisable when the competition is natural and healthy. On the contrary, when the competition is for power and economic monopoly, the public interest will be crusaded. Here comes the need of regulation and definitely, media is not an exception to this.

The term 'ethics' denotes principles or rules which can regulate the behavior of man.<sup>3</sup>The regulation of any practice that is socially beneficial involves the shaping and guiding of the institution or entity to achieve the goals that are desirable.<sup>4</sup>The attitude of the audience may be a powerful influence on journalists to make ethical choices. Now media becomes a profit oriented business enterprise. This is evident from the fact that day by day the number of channels are increasing without having proper control mechanisms.<sup>5</sup>Further the impact of visual media is high than that of print media because of its expressive dimension.<sup>6</sup>Therefore, it is not unjustified for regulating the media to ensure fair standards in its conduct. Media ethics regulate the conduct of media persons for ensuring responsible journalism by compelling to observe code of conduct and

---

<sup>3</sup> Andrew Belsey, *supra* note 2.

<sup>4</sup> THOMAS GIBBONS, *REGULATING THE MEDIA* 4 (2<sup>nd</sup> ed. 1998).

<sup>5</sup> Today India has around 908 channels. *See*, <https://mib.gov.in/satellite-tv-channel?nid=292391> (Last accessed 11<sup>th</sup> June 2019).

<sup>6</sup> Joshua Meyrowitz, *The Blurring of Public and Private Behaviours*, in *THE PUBLIC SPHERE* 214,225-229 (JOSTEIN GRIPSURD, HALLVARD MOE, ANDERS MOLANDER & GRAHAM MURDOCK., 2011); Shakuntala Rao, *Global Media Ethics, Justice and Indian Journalism*, as in 235 *GLOBAL MEDIA ETHICS: PROBLEMS AND PERSPECTIVES* (Stephen.J.A.Ward ed.,2013).

ethics. The freedom of speech and expression does not entail that it is free from any kind of regulation. Every right can be restricted according to established principles of law. The freedom of speech does not convey the idea that one can express himself as he pleases. It is not an absolute or unbridled right. Also, the need for regulation arises when it encroaches other right and freedoms of others.<sup>7</sup> Need for regulation of media from intruding privacy right was highlighted in the recent case of *Sanjoy Narayan v. High Court of Allahabad*<sup>8</sup> in which the newspaper published incorrect report which tarnished the image of the Chief Justice of a High Court. While delivering the judgment the division bench made following observation.

*“The role of the media is to provide the readers and the public in general with information and vires tested and found as true and correct. This power must be carefully regulated and must reconcile with a person’s fundamental right to privacy.”*<sup>9</sup>

It is also revealed through cases that the media owners, even though it is owned by government (All India Radio and Doordarshan) use the media to propagate their own ideas. It is seemed that they are propagating programmes in the interest of party in power disregarding the public interest.<sup>10</sup> It had been opined that if the kind of bias is continued, they would take over the control of thought process of the people. This will culminate in the situation that only those media who favour the ruling party or corporate giants can only survive.

<sup>7</sup> INDIA CONST. art 19(2); *See also*, STEVEN KNOWLTON & BILL READER, MORAL REASONING FOR JOURNALISTS (2009).

<sup>8</sup> (2011) 13 SCC 155.

<sup>9</sup> *Id.* at 156, ¶6.

<sup>10</sup> *See e.g., Odyssey Communications Pvt.Ltd. v. The Lokvidyan Sangathan* AIR 1988 SC 1642; *Indira Jaising v. Union of India*, 1988 Mah.L.J. 745.

Therefore regulation of visual media is very much essential. It should not be forgotten that the mass communication media are business enterprise and thus run according to commercial dictates, above all the pursuit of profit.<sup>11</sup>

The regulation of media involves both external control and internal control. The external control consists of control on the working mechanism whereas the internal control connotes content control. The protection of privacy rights against the freedom of expression of media is most akin to the control of content of the programme and therefore thesis specifically confined to content regulation of the programmes only.

### **7.3 COMMITTEES IN INDIA FOR REGULATION OF MEIDA**

With a view to reform the law relating to media, from time to time the Government of India appointed various commissions. The important among them are analysed below.

#### **7.3.1 Verghese Committee (1978-79)<sup>12</sup>**

This committee was appointed in 1977 under the chairmanship of B.G. Verghese with a view to give autonomy to Doordarshan and radio. The submitted its report in February 1978. The committee recommended for the establishment of a trust called 'AkashBharati', The National Broadcast Trust'. However, it did not propose an autonomous body to control the media. Instead, it recommended

---

<sup>11</sup> VINCENZO ZENO-ZENCOVICH, FREEDOM OF EXPRESSION- A CRITICAL AND COMPARATIVE ANALYSIS, 18(2008), *See also*, Phil Jacklin, *Access to Media: A New Fairness Doctrine*, as in DANIEL L. BRENNER & WILLIAM L. RIVERS, FREE BUT REGULATED-CONFLICTING TRADITIONS IN MEDIA LAW (Collected Essays with Commentary) (1989).

<sup>12</sup> Verghese B.G. AkashBharti, NATIONAL BROADCAST TRUST:REPORT OF THE WORKING GROUP ON AUTONOMY FOR AKASHVANI AND DOORDARSHAN, Ministry of Information and Broadcasting (1978).



for the establishment of decentralized body to control the functions of media. The power should be delegated to it so that it can function at regional level in tune with the custom, attitude of that locality. It can take quick decision taking into account local sensitivity and attitude. It recommended that the media should work for public purpose. It proposed for an independent working of corporation without any control from the government. After the establishment of National Broadcast Trust, it took the view, the Ministry of Information and Broadcasting, should be renamed 'Ministry of Information'. Because, the duty of broadcasting would be vested upon National Broadcast Trust'. The Committee was of the view that the trustee should be given the status of judges of Supreme Court. It also took the view that there should be Broadcast Review Commission for every seven years to review the functioning of the broadcast media.

In line with these recommendations, in 1978, Sri.L.K.Advani, the then Union Minister of Broadcasting, introduced the Bill in Lok Sabha, with an object to establish an autonomous body called 'Prasar Bharati'. Unfortunately, the Bill was lapsed with the change in the government.

### **7.3.2 Chanda Committee (1964-66)<sup>13</sup>**

This committee was constituted under the chairmanship of Mr. Ashok Kumar Chanda in 1964. Unlike Verghese Committee, it recommended for the establishment of an autonomous body, to regulate both radio and television. The Report said that there should be separate regulatory authorities for radio and television. But the government rejected the recommendation of conversion of

---

<sup>13</sup> <http://www.devcomprojects.co.in>. (Last accessed 5th Oct 2016).

All India Radio into an autonomous corporation. It recommended for the establishment of National Council for Mass Communication. But the then Government did not take any steps for its implementation.

### **7.3.3 P.C.Joshi Committee (1984-85)<sup>14</sup>**

The Committee was constituted in 1983 under the chairmanship of Dr.P.C.Joshi who was the director of Indian Institute of Economic Growth, New Delhi. For ensuring the standard of Doordarshan programmes, it recommended the establishment of a National Doordarshan Council and also to provide autonomy. It was of the view that the programmes from outside India should be subjected to certain checking mechanism to uphold the standard of programmes.

### **7.3.4 Bachhawat Committee (1988)<sup>15</sup>**

This committee was constituted in 1988 with Mr.Justice Bachhawat as its chairman to report on various problems of journalists with special reference to wages. It recommended for equitable national wage policy.

At the time of appointment of these committees the print media was the major source of propagation and dissemination of information. Moreover, the legislature was more conscious of giving other amenities like wages, working conditions etc rather than protecting privacy right.

### **7.3.5 First Press Commission(1952-54)<sup>16</sup>**

It was appointed in 1952 with Hon'ble Mr. Justice J.S.Rajadhyakshya as chairman, Ministry of Information and Broadcasting. The main objective of the

---

<sup>14</sup> *Id.*

<sup>15</sup> *See*, AHUJA.B.N., THEORY AND PRACTICE OF JOURNALISM (1988).

<sup>16</sup> REPORT OF THE FIRST PRESS COMMISSION (1954).

commission was to ensure freedom of press and to maintain high standards of journalism. For this purpose it recommended the establishment of a Press Council. Accordingly, Press Council was established on 4<sup>th</sup> July of 1966 and Council was functioned from 16<sup>th</sup> November 1966. National Press Council day is celebrating on the day of 16<sup>th</sup> November every year. The Working Journalists and other Newspaper Employees(Conditions of Services) and Miscellaneous Provisions Act was enacted under its recommendations. However, the commission contributed nothing new for the protection of privacy right.

### **7.3.6 F.S.Nariman Committee Report<sup>17</sup>**

The committee suggested certain modalities in connection with role of media to keep standard of journalism.

- a. The trusteeship Principle:- Under this principle the professional journalists are trustees of public and their aim is to seek and disseminate the truth with integrity and independence.
- b. The Self-Regulation Principle:- A model of self regulation is on the principle of impartiality and objectivity in reporting ; ensuring neutrality; responsible reporting of sensitive issues, especially crime, violence, agitations and protests; sensitivity in reporting women and children and matters relating to national security; and respect for privacy.

---

<sup>17</sup> *Destruction of Public & Private Properties v. State of A.P.*(2009) 5 SCC 212 while dealing with the issue of destruction of properties by political parties, the court referred the report of Mr. Nariman Committee to show the responsibility of media. *See also, Reliance Petrochemicals Ltd. v. Proprietors of Indian Express Newspapers Bombay (P) Ltd.*, (1998) 4 SCC 592:AIR 1989 SC 190.

- c. Content regulation:- Content regulation is not advisable except to the extent permitted by statutes and code of self restraint because it goes to the root of the censorship. It is better to evolve code and complaint system by the media itself.
- d. Complaints principle:- So far as media is concerned, it is recommended to establish a proper and effective redressal mechanism to treat the complaints in a fair and just manner.
- e. Balance principle:- A balance has to be maintained on the basis of the principle of proportionality and least invasiveness. It should effectively ensure democratic governance and self-restraint from news publications that the other point of view is properly accepted and accommodated.

It seems that the earlier commissions did not extend sufficient attention for the protection of privacy right. It may be because of the fact that the right to privacy was in a rudimentary stage which required case by case development.

#### **7.4 JUDICIARY AND MEDIA REGULATION**

The judiciary in its various judgments highlighted the need for the proper legal framework to regulate the visual media especially television. The unbridled condition of broadcasting media can be seen in *The Secretary, Ministry of Information and Broadcasting v. Cricket Association of Bengal*<sup>18</sup>. In *Indraprastha People v. Union of India*<sup>19</sup>, the High Court again reiterated that

<sup>18</sup> (1995) 2 SCC 161; AIR 1996 SC 1236 (the case involved the dispute between the parties was that on the issue whether the respondent had the exclusive right to telecast a six nation international Cricket tournament. It was held that the airwaves are public property and had to be controlled by a public authority in the interest of the public).

<sup>19</sup> WP (C) No.1200/2011 (Del. HC), 91(2001)DLT 110, <http://indiankanoon.org/> (Last accessed 4<sup>th</sup> June 2016)

there should be a regulatory body for broadcast media under the Cable Television Networks (Regulation) Act, consisting of eminent and expert persons whose tenure should be fixed so that they can work independently without any kind of interference. The court on the danger of conceiving certain unethical means by the television channels in order to attract viewership to earn high rate of revenue.

The Supreme Court of India, in *Media watch India (A Regd. Society) v. Union of India*<sup>20</sup> stressed the need for guidelines to regulate the content of television channels and for a proper redressal mechanism. The court observed that the Central Government having framed Cable Television Network Rules, 1994 would be well advised to frame similar rules to formalize the complaint redressal mechanism.<sup>21</sup>

The court in *In re Destruction of Public & Private Properties case*<sup>22</sup> supported the formulation of norms of self-regulation in an effective way rather than external regulation for broadcasters and industry. The proposed norms says that NBA believes that media should act as a medium to highlight the drawbacks of the Government. It is not proper to a governmental control over the media to ensure credibility and independence. Therefore, the media itself formulate checks and safeguards for visual media.

---

<sup>20</sup> Writ Petition (Civil) No. 1024/2013. in the instant case the rape victim and her husband were interviewed by a woman organization on behalf of Doordarshan. The programme was telecasted and the complaint was filed for not concealing the face of the victim. It was alleged that the right to privacy and the right to live with human dignity of the victim had been violated. ).

<sup>21</sup> See also, *Common cause(A Regd. Society) v. Union of India*, Writ Petition (Civil) No. 963/2013.

<sup>22</sup> (2009) 5 SCC 212.

However in the above case, the court declined to give any direction to the media for its regulation. Rather the court appreciated the reports of Justice K.T.Thomas and Justice F.S.Nariman for their work in formulating reports and its recommendations. The Nariman Committee wholly endorsed the need for the formulation of:-

- a. Principles of responsible broadcasting and
- b. Institutional arrangements of self-regulation.

However, the committee declined to recommend statutory regulation which has the effect of oppressing the media freedom which is not suitable for a democracy.

Again the Supreme Court in *Mohamed Ajmal Mohammad Amir Kasab v. State of Maharashtra*<sup>23</sup> rejected the argument that the media should not be subjected to any kind of regulation. It highlighted the negative aspect of press freedom and irresponsible journalism. The court observed that the telecasting, in live, the terrorist attack had not served any national interest or social cause. On the other hand it was acted only for their commercial interest. Therefore, it could not be said that regulatory mechanism for the electronic media should come from within.<sup>24</sup>The courts can issue preventive injunction, directing the media, print as well as electronic, directing not to publish any defamatory matter which has the effect of violating the privacy or any other human right of a person

---

<sup>23</sup> AIR 2012 SC 3565(the case was dealing with Mumbai terror attack in 2008, in which the court discussed the negative aspects of media reporting also).

<sup>24</sup> See, S.N.Singh, *Constitutional Law-I, Annual Survey of Indian Law*, IND. L. INST., XLVIII :((2012) at 191.

or which tends to adversely affect the business or trading activities of any person or which tends to interfere with, or obstruct the administration of justice.<sup>25</sup>

## 7.5 KINDS OF REGULATIONS

There are different kinds of regulations of media. Each kind of regulation has its own pros and cons. This section of chapter analysis various kinds of regulation which are applicable to media. Finally, here it is examined the suitability of regulatory mechanism which is specially applicable to protection of privacy rights of individuals in India.

### 7.5.1 Self-Regulation

For media freedom a free enterprise is necessary and it should be a commercially profitable also. At this juncture, in the case of media, interests of society and that of enterprise should be balanced without any government interference.<sup>26</sup>

Self-regulation is the combination of standards setting out the appropriate codes of behaviour for the media that are necessary to support freedom of expression, and process how those behaviors will be monitored or held to account.<sup>27</sup> It is also commonly accepted that the regulation within the media would help to keep a proper balance between society and the media. It is to uphold the media freedom without any interference. Even though the media is

---

<sup>25</sup> *Reliance Petrochemicals Ltd. v. Proprietors of Indian Express Newspapers Bombay (P) Ltd.*, AIR 1989 SC 190, *Amar Singh v. Union of India* (2011) 7 SCC 69,90.

<sup>26</sup> H. Philip Levy, *THE PRESS COUNCIL HISTORY, PROCEDURE AND CASES*, 8(1967) as cited in Sebastian Paul, *LAW, ETHICS AND MEDIA*, 20(3<sup>rd</sup> ed.2015).

<sup>27</sup> Andrew Puddephatt, *The Importance of Self-Regulation of the Media in upholding Freedom of expression--communication and Information*, UNESCO, CI Debate series (2011); *See also*, M. NEELAMALAR *MEDIA LAW AND ETHICS* (2009).

subjected to self-regulation it is always complained that the media is not observing the parameters formulated in self-regulatory principles. One of the criticisms raised against self-regulation is that it cannot impose punishment in an effective manner.

### 7.5.2 Co-Regulation

There is also demand for another kind of regulation called co-regulation. It consists of both rules of self-regulation and statutory regulation. In Australia this kind of regulatory authority, News Media Council, was recommended by committee appointed by the government. In this kind of regulation the financial support is extended by the government. This support gives rise to issues of credibility of independent functioning of the media.

### 7.5.3 Statutory Regulation

The demerits of self-regulation often led to the recommendation of statutory regulation of media. Statutory regulation is defined as the imposition of rules by government backed by the use of penalties and the authority of state that are meant to change the behavior of individual or groups or broadly as any technique or approach designed to control, alter or influence behavior.<sup>28</sup>The arguers under this category are of the opinion that there should be the state led regulation for broadcast media because they believe that the state led regulation would monitor and put the media under an effective control. It recommended for

---

<sup>28</sup> Nielsen, E. (2004, May 17). *ISO.*, International Organization for Standardization : Available at [http://www.google.co.uk/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&ved=0CCwQFjAA&url=http%3A%2F%2Fwww.iso.org%2Fiso%2FfilelinkgetFile%3FfileNodeid%3D21969%26fileVolId%3D-2000&ei=iUNuTfEBIfx8QP9h5XADQ&usq=AFQjCNGepRpb6PIWphmpN\\_r-CzHz8VRLEQ&sig2=29AkFIyNdB7rr-Fk](http://www.google.co.uk/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&ved=0CCwQFjAA&url=http%3A%2F%2Fwww.iso.org%2Fiso%2FfilelinkgetFile%3FfileNodeid%3D21969%26fileVolId%3D-2000&ei=iUNuTfEBIfx8QP9h5XADQ&usq=AFQjCNGepRpb6PIWphmpN_r-CzHz8VRLEQ&sig2=29AkFIyNdB7rr-Fk). (Last accessed 23<sup>rd</sup> December 2017)



the constitution of another body of regulation such as Ofcom in U.K. and replace NBA (News Broadcasting Authority). The body should consist of persons with special knowledge and experience from various fields.

The critics of this regulation say that it would undermine the freedom of expression. Bringing the media under the law framed by the state would lead to influence by the state. It would hesitate to report those matters which are against the government and the political bodies.

Taking into account the pros and cons of various above regulations, the self-regulation is more suitable because it ensures independence of media. The public will repose confidence on media because of noninterference of government and political parties. Moreover the self-regulatory rules can be easily modified according to the changes in the society. After the infamous phone scandal in UK, there is a demand for the setting up of an ombudsman or internal auditor to ensure that the media adheres to various codes of journalism. Another merit of this regulation is that the redressal mechanism is cheap and effective.

## **7.6 LEGAL FRAMEWORK FOR REGULATING THE MEDIA WITH SPECIAL REFERENCE TO PRIVACY RIGHT**

Today media are the biggest invaders of privacy.<sup>29</sup> The regulation of media is a contemporary issue which has always been subjected to debate. Even, there is no privacy statute for preventing violation of privacy right. The case of Nira Radia awakened the Government to draft a Privacy Bill in 2011 but unfortunately, the bill failed to come to limelight. The Nira Radia episode clearly

---

<sup>29</sup> Alan F. Westin in a Conference at Connecticut, 1995 as cited in Pankaj Sethi, *Media Power-Politics and Public Interest* 198 (1<sup>st</sup> ed. 2011).

shows the unethical influence of corporate sector over the media.<sup>30</sup>Mainly at present Cable Television Networks (Regulation) Act, 1995 contains certain provisions to regulate the visual media.

### **7.6.1 Cable Television Networks (Regulation) Act, 1995**

The Act was enacted to regulate the cable television networks in the country. The Act requires that the cable television network shall not air any programme which is against the programme code concerned.<sup>31</sup>The programme code is specified under Rule.6 of Cable T.V. Network Rules, 1994. It requires that the programme should not -

- a. Offend against good taste or decency.
- b. Contain criticism of any friendly countries
- c. Contains attack on religions or communities or visuals or words contemptuous of religious groups or which promote communal attitudes
- d. Contains anything obscene, defamatory, false and suggestive innuendos and half truth
- e. Is likely to encourage or incite violence or contains anything against maintenance of law and order or which promote antisocial attitude
- f. Contains anything amount to contempt of court
- g. Contains aspersions against integrity of the president and judiciary
- h. Contains anything affecting integrity of nation

---

<sup>30</sup> See also, Editorial, Journalists on Call, Economic & Political Weekly 7-8 (Dec 4, 2010).

<sup>31</sup> Cable T.V. Network Act, 1995, §.5, Programme code-  
No person shall transmit or re-transmit through a cable service any programme unless such programme is in conformity with the prescribed programme code.

- i. Criticizes, maligns or slanders any individual in person or certain groups, segments of social, public or moral life of the country
- j. Encourages superstitions or blind belief
- k. Denigrates women through depiction in any manner of the figure of a woman, her form, or body or any part thereof in such a way as to have the effect of being indecent or derogatory to woman, or is likely to deprive, corrupt or injure the public morality or morals
  - l. Denigrates children
    - m. Contains visuals or words which reflect a slandering, ironical and snobbish attitude in the portrayal of certain ethnic, linguistic or regional groups.
    - n. Contravene provisions of Cinematograph Act, 1952

The authority to punish the offenders is vested on District Magistrate, sub-divisional magistrate or Commissioner of Police. The Act specifically provides no effective provisions to prevent intrusion by the visual media. Therefore the provisions of this Act are not sufficient to regulate the content regulation of media programme.<sup>32</sup>

#### **7.6.2 Prasar Bharati (Broadcasting Corporation of India) Act, 1990**

This statute was enacted for the establishment of a Broadcasting Corporation in India and should be named as Prasar Bharati. It is empowered to organize and conduct public broadcasting services to inform, educate and entertain the public and to ensure a balanced development of broadcasting on

---

<sup>32</sup> VENKAT IYER, MASS MEDIA LAWS AND REGULATIONS IN INDIA (2000).

radio and television. It also defines its composition, functions and powers and to provide for matters connected therewith. The statute is devoid of any effective mechanism for monitoring the programme content.<sup>33</sup>

## **7.7 MEDIA REGULATION- RECENT DEVELOPMENTS**

Recently, the people are more conscious about their rights which include privacy right also. The concerns over privacy right are not merely confined to intrusion of media only. In India the Govt. took certain initiatives to enact a proper legislative framework to protect privacy right. Therefore the government appointed commissions and other platform to discuss the suitable regulatory framework for tuning the media to high standard of profession. The issues relating to aadhar card led to filing of around 22 cases and these were tagged by the Supreme Court for decision.<sup>34</sup>

### **7.7.1 National Consultation on Media Laws, 2014.<sup>35</sup>**

On 27th & 28th September 2014, the Law Commission of India in collaboration with National Law University, Delhi organized a consultation on regulation of Media. During consultation, the participants shared the possibilities of different kinds of regulation on media taking into account recent changes in the media sector. The participants proposed different kinds of regulations for tackling the issues relating to the media.

Most arguments favour self-regulation because it ensures independence of media due to non-interference of external agencies. Moreover, under self-

---

<sup>33</sup> *See, supra* at 262.

<sup>34</sup> *See, supra* CHAPTER 3-RIGHT TO PRIVACY-CONCEPT AND PERSPECTIVES.

<sup>35</sup> NATIONAL CONSULTATION OF MEDIA LAW, LAW COMMISSION OF INDIA & NATIONAL LAW UNIVERSITY, Delhi(26th-27th September 2014).

regulation the media can perform the function of watchdog very well. Non-governmental interference will ensure media freedom and enhance media innovation. It can be readily enforced since it evolved out of internalized rules. It should be given power to act suo moto and there should be proper enforcing the rules and regulations also.

Many other participants in discussion of consultation paper argued that the existing framework is sufficient to meet the problems of disclosure of private information. Others are of the opinion that it is necessary to amend existing guidelines governing disclosure of private information. The identity of person and private information should not be published without express consent. However, the visual media is continuing the violation of privacy right especially that of accused and vulnerable people. The visual media is telecasting the news and programmes without taking any measures to prevent the infringement. In this respect specific guidelines are needed.

The working paper recommended following:-

- a. Enactment of privacy law
- b. Specific norms for regulating the media.
- c. Mechanism to deter media intrusion in private space and subsequent publication of private information.
- d. Proper redressal mechanism in case of privacy violation.
- e. Journalists' personal responsibility to avoid privacy violation.
- f. Steps for public awareness
- g. Disclosure when there is overriding public interest in case of public figures.

### 7.7.2 Report of the Group of Experts on Privacy (Shah Committee), 2012.<sup>36</sup>

In modern age, the privacy concerns extends to data protection in internet, protection from unauthorized interception, surveillance activities, use of personal identifiers, bodily privacy including DNA as well as physical privacy. It also extends to health, finance, taxes, religion, education, status of person, citizenship, marriage etc. In this background on 26th December 2011, the Planning Commission of India appointed a Group of Experts to study the issues of privacy matters and to assist the preparation of Privacy Bill. It was constituted under the Chairmanship of Justice A.P. Shah, the former Chief Justice of Delhi High Court. The Committee submitted its report on 16th October 2012. The commission discussed recent developments along with constitutional status of right to privacy in the background of decisions of *Kharak Singh v. State of U.P.*<sup>37</sup>, *Gobind v. State of M.P.*<sup>38</sup>

The commission referred International Privacy Principles under which it discussed EU Regulation of January 2012.<sup>39</sup> It mainly added new rules and principles to the existing privacy principles in the background of new technological development. The new guidelines include the principles such as data minimization principles, right to be forgotten, accountability of data controllers, right to object by the data subject for the sending of direct marketing. It expanded the definition of sensitive data which included genetic data and data

---

<sup>36</sup> [http://planningcommission.nic.in/reports/genrep/rep\\_privacy.pdf](http://planningcommission.nic.in/reports/genrep/rep_privacy.pdf) (Last accessed 18th Sept 2016)

<sup>37</sup> AIR 1963 SC 1295; 1964 SCR (1) 332.

<sup>38</sup> AIR 1975 SC 1378.

<sup>39</sup> [http://ec.europa.eu/justice/data-protection/document/review2012/com\\_2012\\_II\\_en.pdf](http://ec.europa.eu/justice/data-protection/document/review2012/com_2012_II_en.pdf). (Last accessed 5th July 2016).

concerning criminal liability of related security measures. Other new rights include the right to data portability, right to regulate the use of profiling. It also highlighted the requirement of appointment of Data Protection Officers and Data Controllers along with their duties. It also referred the drafting of code of conduct covering various data protection sectors. The Commission discussed other legislative mechanisms in foreign countries as mentioned below.

The Commission took into account the U.S Consumer Privacy Bill of Rights<sup>40</sup> ensures consumers rights such as right to consent, notice, choice, transparency, openness, use of limitation, security, access and correction of documents and collection limitation, accountability of data controllers etc. The OECD Privacy Principles<sup>41</sup> mainly concentrated on three topics such as roles and responsibilities of key factors, geographic restrictions on data flows and proactive implementation and enforcement. It ensures that the data should be obtained by lawful and fair means and with the consent and knowledge of the data subject. It undertakes analysis of the economics of remedies and sanctions by enforcement authorities. The APEC (Asia-Pacific Economic Cooperation) Privacy Framework<sup>42</sup> mainly promotes e-commerce. It advocates self-regulation. Under accountability approach, it emphasizes on data protection obligation. It also concentrates on practical aspects of data flows and on the

---

<sup>40</sup> <http://www.whitehouse.gov/sites/default/files/privacy.final.pdf>.(Last accessed 6th September 2017).

<sup>41</sup> <http://oecdprivacy.org>.(Last accessed 6th September 2017).

<sup>42</sup> [http://publications.apec.org/-/media/APEC/Publications/2005/12/APEC-Privacy-Framework/05\\_ecsg\\_privacyframewk.pdf](http://publications.apec.org/-/media/APEC/Publications/2005/12/APEC-Privacy-Framework/05_ecsg_privacyframewk.pdf).(Last accessed 18<sup>th</sup> October 2017).(the APEC Framework, published by the Asia-Pacific Economic Cooperation, is a framework to protect privacy within and beyond economies and to enable regional transfers of personal information benefits consumers, businesses, and governments).

manner of interface between various players including companies, regulators and governments.

The commission enumerated certain National Privacy Principles which are on the basis of new emergence of privacy concerns and also on privacy principles of OECD, EU, and APEC etc. The principles says that there should be safeguards and procedures over the collection, processing, storage, retention access, disclosure, destruction and anonymization of sensitive personal information, personal identifiable information sharing transfer and identifiable information. It also establishes rights of data subject with respect to their sensitive personal information. The data controllers have obligation to put the data in safe. There should be Privacy Commissioners to monitor and regulate the mechanism.

The report demands the enactment of a Privacy Act which is capable of protecting both public and private sector organization. There should be privacy commissioner both at central and regional level. The report advocates a system of co-regulation through self-regulating organizations and their member organization and their member organizations. It demands the creation of offences, penalties and exceptions. It was also demanded that there should be proper redressal mechanisms to tackle the issues in proper way.

The report of the committee met the requirements of media sector to a greater extent. The government should take effective steps to bring in practical the recommendation of commission report.



### 7.7.3 The Communications Convergence Bill, 2001

This Bill was placed before the Parliament for regulating all forms of communications under a single regulatory authority. Now all forms of communications are regulated by different authorities. It causes much confusion and results in failure of objectives for which it had been constituted.<sup>43</sup> It is said that the Bill seeks to ensure access and use of all communications media without any discrimination.<sup>44</sup>

It proposed to replace several allied statutes relating to media. They are Indian Telegraph Act, 1885, The Cable T.V. Networks Act, 1995, The Indian Wireless Telegraphy Act, 1933, The Telegraph Wires (Unlawful Possession) Act, 1950 and The Telecom Regulatory Authority of India Act, 1997. The Bill aims to establish a regulatory framework for carriage and content of communication, multimedia and other related technologies and services.

Earlier radio, television, internet had no common communication mechanism. But today, the above media started to exploit satellite communication facility. Thus in course of time satellite communication bandwidth became common to all the above media. In this context the term convergence has been evolved.

It seeks to establish an autonomous commission under the title Communications Commission of India to regulate carriage of all forms of

---

<sup>43</sup> The idea of Convergence Bill had been adopted from the German Information and Communication Services Act, 1998 and the British Proposals which proposes cross media Regulatory Authority.

<sup>44</sup> It is similar to U.S. Telecommunications Act, 1996.

communications and for the establishment of an Appellate Tribunal.<sup>45</sup> However, privacy protection can be made effective only if the content of programme is properly monitored by an efficient body.

#### **7.7.4 The Broadcasting Services Regulation Bill, 2007**

The above Bill is proposed to enact a comprehensive legislation to give effect a statutory effect to the guidelines issued by the government from time to time. The preamble of the bill says that airwaves are public property and it is necessary to regulate the use of such airwaves in the interest of nation and public.

The preamble of the bill says that it seeks to promote, facilitate and develop in an ordinary manner the carriage and content of broadcasting. It also seeks to provide regulation of broadcasting services in India for offering a wide variety of entertainment, news, views and information in a fair, objective and competitive manner. The content regulation is another objective. It aims for the establishment of an independent authority to be known as the Broadcasting Regulatory Authority of India for regulating and facilitating development of broadcasting services in India. It is also designed to encourage broadcasting services to be responsive to the educational developmental, social, cultural and other needs and aspirations of people and include in their programming public service messaging and content.<sup>46</sup>

The broadcast media is a powerful transmitter of ideas and values and plays a pivotal role in not only providing entertainment but also disseminating

---

<sup>45</sup> The Communication Convergence Bill, 2001, Preamble; *See also*, MADHAVI GORADIA DIVAN, FACETS OF MEDIA LAW (2010).

<sup>46</sup> The Broadcasting Services Regulation Bill, 2007, Preamble.

information, nurturing but also cultivating diverse opinion, educating and empowering the people of India to be informed citizens so as to effectively participate in the democratic process, preserving, promoting and projecting the diversity of Indian culture and talent.<sup>47</sup> The bill defines ‘broadcasting ‘ as assembling and programming any form of communication content like signs, signals, writing, pictures, images and sounds and either placing it in electronic form on electromagnetic waves on specified frequencies and transmitting it through space or cables to make it continuously available on the carrier waves so as to be accessible to single or multiple users through receiving devices either directing or indirectly and all its grammatical variations and cognate expressions.<sup>48</sup> The Bill requires the registration of service provider and it can be rejected if the content of the channels is likely to threaten the security and integrity of the state or peace and harmony or public order in the whole or a part of the country or threaten relation with foreign countries.<sup>49</sup>

Here ‘content’ means any sound, text, data, picture (Still or moving) other audiovisual representation, signal or intelligence of any nature or any combination thereof which is capable of being created, processed, stored, retrieved or communicated electronically.<sup>50</sup>

The service provider shall not provide any broadcasting content that is not in conformity with the broadcasting content certification and regulation rules i.e., content code. Till the content code is notified, programme code and Advertising

---

<sup>47</sup> *Id.*

<sup>48</sup> *Id.* § 2(d).

<sup>49</sup> *Id.* § 4.

<sup>50</sup> *Id.* § 2(o).

code under Cable T.V. Network Rules, 1994 can be followed. The central government can order, in cases of external threat or war, the service provider to stop broadcasting its services.<sup>51</sup> The bill gives power to the chairperson of the Authority to monitor and direct the affairs of the Authority. A Public Service Broadcasting Council can be established to ensure effective compliance of public service broadcasting obligation upon broadcasting service providers and to impose suitable punishments in cases of violation. The punishment imposed was 3 to 5yrs imprisonment and 5 to 50 lakhs fine. The appeal will lie to Broadcasting Authority within a period of 30 days. The appeal from the decision of Broadcasting Authority will lie to Film Certification Appellate Tribunal (FCAT) in respect of violation of content code and before the Telecom Dispute Settlement and Appellate Tribunal (TDSAT) in respect of matters of all other violations. An appeal can be filed in the Supreme Court against the order of TDSAT or FCAT.

In this Bill also the government did not take the issue of content regulation very seriously. In the technologically developed scenario the the Bill did not contain anything to regulate the content of the programme in the visual media. The Bill has not been enacted and the initiation of regulation of broadcast media became vain.

---

<sup>51</sup> *Id.* §§5 & 6.

### 7.7.5 Self-Regulation Guidelines for the Broadcasting Sector, Draft 2008<sup>52</sup>

Recently the ministry of Information and Broadcasting drafted guidelines for the self regulation of Broadcasting sector with an intention to regulate the content of broadcasting.

It contains under various headings principles, self-regulation mechanisms, procedure for complaint redressal mechanism etc.<sup>53</sup>The protection of people from privacy invasion will comes under the regulation of programme content. Its relevancy lies in the fact that privacy can be protected by regulating the content of the programme. In its introduction, it states that the self-regulation guidelines set out principles, guidelines and ethical practices which shall guide the Broadcasting service provider (BSP) to stick on Certification Rules under Cable Television Networks (Regulation) Act, 1995. Here the responsibility to see whether the broadcasters comply with the rules lies with BSP.

The guidelines explains the term 'programme' in connection with broadcasting services and it means any television or radio broadcast and includes:-

1. Exhibition or films, features, dramas, news, advertisement and serials through video/audio cassette recorded or video /audio cassette players.

---

<sup>52</sup> [https://cablequest.org/pdfs/i\\_b/Self-Regulation-guidelines-for-Broadcasting-2008.pdf](https://cablequest.org/pdfs/i_b/Self-Regulation-guidelines-for-Broadcasting-2008.pdf)(Last accessed 9th Sep 2016)(*hereinafter* self regulation guidelines)

<sup>53</sup> In its two appendices, it contains certification rules under appendix 1 and list of rules and codes (selection) under appendix 2. The aim of draft rules is to regulate the content to ensure the standards of content of T.V programs and to protect the vulnerable people from harmful contents.

2. 'programming service' shall be construed accordingly, but does not include any matter that is wholly related to or connected with any private communication.<sup>54</sup>

The basic principle of guidelines requires that the programmes should not be a shocking and offending one and the BSP should see whether the programmes are aired within the time slot allotted to them as in Certification Rules. The BSP should take reasonable steps to ensure that the programmes are not depicted against the interest of minors which include privacy right also. For news and current affairs programme, BSP should edit the content, show (provide) warning, suitably mask and portions of news or current affairs visuals which are considered to be unsuitable.

The draft rule 2008 provides mechanisms for self-regulation of content. It intends to operate at two levels; at BSP level and at industry level. At BSP level, it should be the responsibility of BSP to see that Certification Rules under Cable T.V Network (Regulation) Act, 1995 are complied with. Also it should see that the principles, clarification, guidelines and interpretation, standards and norms stipulated by Central Government or BRAI.

To discharge the above functions effectively it should have its own mechanism. For this purpose, the draft rules provide for the appointment of content auditors and details should be published in the web site. Each BSP may also formulate its own guidelines and procedures for compliance with Certification Rules after consultation with content auditors. The chief editor of

---

<sup>54</sup> Self Regulation Guidelines, *supra* note,52, ¶10.

the channel should be the final authority regarding the content of the channel. In the case of live programmes, wherein, the public or any guest are participating, they should be given adequate briefing of the certification norms. The content auditor will not have personal liability for violation of certification Rules. He should exam and categorize programmes. He should entertain public complaints regarding content and bring it to the notice of chief editor of BSP, the matters regarding the violation of certification rules.

Television news has far reaching consequences and the number of news channel are increasing day by day. Due to tight competition among news channels to attract audience and to increase TRP rating, news channels are airing news which is not acceptable to a common man. Therefore, guidelines for airing programmes of news and newsworthiness should be should be strictly implemented.

With respect to privacy protection the guidelines or certification rules contain nothing specifically. The damage caused by shocking news or information which is purely private is irreparable. In this respect, there should be a separate guideline to protect private life of people. The content of the broadcast media programme is aired by individual broadcasters and at industry level regulatory bodies. The broadcasters seek to regulate privacy in broadcast media in following terms. It should:-

- a. ensure impartiality, neutrality and objectivity in reporting
- b. While reporting crime care should be taken and crime and violence should not be glorified.

- c. Depiction of violence or intimidation against woman and children
- d. Refraining from advocating or encouraging superstition and occultism, sting operation.

There was a plan to introduce a Bill titled Print and Electronic Media Standards and Regulation Bill, 2012 as a private Bill by the then M.P. Smt. Meenakshi Natarajan to constitute an overall media regulatory authority. But unfortunately it was not introduced.<sup>55</sup>The Bill was intended to provide for the constitution of the Print and Electronic Media Regulation Authority with a view to lay down standards for the print and electronic media. It also envisaged establishing a mechanism for investigating suo moto or into complaints by individuals against print and electronic media. According to her the media have been unable to self-regulate and it created serious issues. The Bill proposed to impose ban, imposition of punishment of fine up to rupees fifty lakhs, cancellation of licence etc. It was severely criticized by other members of the Parliament and described as a draconian one.<sup>56</sup>

### **7.7.6 Indian Privacy Code 2018<sup>57</sup>**

Recently, a group of lawyers and policy analysts together with Internet Freedom Foundation drafted a Privacy Code with the objective for having a good privacy regime in India. It is based on seven privacy principles.<sup>58</sup> The Code seeks

<sup>55</sup> <http://www.indiatoday.in>. (Last accessed 5th Aug 2016);

<sup>56</sup> Venkitesh Ramakrishnan, "A Bill and its Meaning." *Frontline Magazine*, 1st June, 2012, 12.

<sup>57</sup> <https://saveourprivacy.in/bill> (Last accessed 7<sup>th</sup> Jan 2019). The draft Privacy Code 2018 has been formulated in the light of recent issues relating to aadhar card, Cambridge Analytica and right to privacy.

<sup>58</sup> *See*, <https://saveourprivacy.in/principles>. (last accessed 2nd December 2018) The seven principles are 1. The individual rights are at the core of privacy and data protection. 2. A data protection law must be based on privacy principles. 3. A strong privacy commission



to protect the fundamental right to privacy of all natural persons and personal data concerning them. It aims to set out conditions upon which surveillance of natural persons and interception of communications that can be carried out. It also intends to constitute a Privacy Commissioner. The preamble of the Code also aims to harmonize any conflicting interests and competing legislations. Mainly the code deals with the collection, storing, surveillance and application of personal data that are collected from the individuals. From the point of view of media intrusion into the privacy of people, it is doubtful whether it is a sufficient legislation.

## **7.8 AUDIO-VIDEO RECORDING – REGULATION**

Today recording of images using long lens, CCTV camera, mobile camera etc made it very easy to record audio and video images. At present these equipments are employed without any privacy safeguards and it results in violation of privacy rights. Due to lack of precise regulatory rules and principles in India, the violation of privacy right by media is unquestioning. In U.K., there is UK CCTV Code of Practice which states best practices of using electronic devices.<sup>59</sup> It ensures effective administration of equipment, proper security measures of recorded information, limitation of disclosing recording materials. The recent Surveillance Camera Code of Practice, 2013<sup>60</sup> which had been

---

must be created to enforce the privacy principles. 4. Government should respect user privacy. 5. A complete privacy code comes with surveillance reform. 6. The right to information needs to be strengthened and protected. 7. International protection and harmonization to protect the open internet must be incorporated.

<sup>59</sup> <https://ico.org.uk/media/1542/cctv-code-of-practice.pdf>.(Last accessed 3<sup>rd</sup> December 2017)

<sup>60</sup> <https://www.gov.uk/government/publications/surveillance-camera-code-ofpractice>.(Last visited 4<sup>th</sup> December 2017)

formulated under Protection of Freedom Act, 2012, elaborately enumerated twelve guiding principles which should be observed by different relevant authorities.<sup>61</sup>

In India, the government tried to introduce Mobile Camera Phone Users (Code of Conduct), Bill 2006 which aimed to formulate code of conduct for the use of mobile cameras in public places. But unfortunately, the Bill had not been passed. Under the Bill the capturing of images of individuals is permitted only after getting consent of the individuals. Today there are no clear guidelines to

---

<sup>61</sup> *Id.* Guiding Principles ¶ 2.6 :- System operators should adopt the following 12 guiding principles:

1. Use of a surveillance camera system must always be for a specified purpose which is in pursuit of a legitimate aim and necessary to meet an identified pressing need.
2. The use of a surveillance camera system must take into account its effect on individuals and their privacy, with regular reviews to ensure its use remains justified.
3. There must be as much transparency in the use of a surveillance camera system as possible, including a published contact point for access to information and complaints.
4. There must be clear responsibility and accountability for all surveillance camera system activities including images and information collected, held and used.
5. Clear rules, policies and procedures must be in place before a surveillance camera system is used, and these must be communicated to all who need to comply with them.
6. No more images and information should be stored than that which is strictly required for the stated purpose of a surveillance camera system, and such images and information should be deleted once their purposes have been discharged.
7. Access to retained images and information should be restricted and there must be clearly defined rules on who can gain access and for what purpose such access is granted; the disclosure of images and information should only take place when it is necessary for such a purpose or for law enforcement purposes.
8. Surveillance camera system operators should consider any approved operational, technical and competency standards relevant to a system and its purpose and work to meet and maintain those standards.
9. Surveillance camera system images and information should be subject to appropriate security measures to safeguard against unauthorised access and use.
10. There should be effective review and audit mechanisms to ensure legal requirements, policies and standards are complied with in practice, and regular reports should be published.
11. When the use of a surveillance camera system is in pursuit of a legitimate aim, and there is a pressing need for its use, it should then be used in the most effective way to support public safety and law enforcement with the aim of processing images and information of evidential value.
12. Any information used to support a surveillance camera system which compares against a reference database for matching purposes should be accurate and kept up to date.

use CCTVs to monitor premises and detect unlawful activities in public places. It grossly results in misuse of technology and violation of rights. At the same time, they are not getting any awareness that their privacy right has been violated.

The committee demanded that during collection and dissemination of data the respective authorities should apply National Privacy Principles. But, the problem is that it cannot be applied to video and audio recordings in public places. Because, it captures images in public places and it is not able to limit the type and quantity of information collected. The principles such as collection, limitation, access & correction, consent and choice cannot be strictly applied here.

The important observations of the Shah Committee are as follows.

- a. There should be privacy commissioners at the centre and state level in order to protect the privacy right.
- b. There should be privacy standards which should be approved by privacy commissioner.
- c. The privacy right should be clearly defined.
- d. Decide the constitutional nature of right to privacy.
- e. Harmonizing of State National Privacy Principles into the enactment of privacy legislation, use of audio and visual recording, use of bodily and genetic material, use of personal information by the government and private sector.
- f. Specify the offences, penalties and remedies

g. Exemptions and limitations of right to privacy.<sup>62</sup>

The report of the Shah Committee is under consideration and it is expected that the government will implement it positively to make the journalism more worthy enough.

## **7.9 REGULATORY BODIES IN INDIA**

There are different regulatory bodies for media such as Press Council of India which mainly regulates print media, Broadcast Content Complaints Council for channels, News Broadcasters Association (NBA) for news channels. There are different regulatory bodies, which exercise powers over the broadcast media. The powers are vested upon Indian Broadcast Foundation, News Broadcast Association, Broadcast Content Complaints Commission, Electronic Media Monitoring Centre etc.

### **7.9.1 Broadcast Content Complaints Council (BCCC)<sup>63</sup>**

The Broadcast Content Complaints Council is a self regulatory body. The regulation of content is divided into news and non-news sectors. The industry level regulation of non-news is carried out by Broadcasting Content Complaints Council (BCCC) within the Indian Broadcasting Foundation (IBF). It issue directions to channels to modify or withdraw the objectionable content. From BCCC the matter goes to Ministry of Information and Broadcasting (IBF), which has authority to revoke permission to broadcast. It has formulated by Content Code and Certification Rules, 2011.for the purpose of regulations.

---

<sup>62</sup> See also, RISHIKA TANEJA & SIDHANT KUMAR, PRIVACY LAW- PRINCIPLES, INJUNCTIONS AND COMPENSATION(1<sup>ST</sup> ed.2014).

<sup>63</sup> <https://www.ibfindia.com>.(Last accessed 5<sup>th</sup> October 2017).

Broadcast Content Complaints Commission (BCCC) is an independent body set up by Indian Broadcasting Foundation. It consists of 13 members consisting of Chairman who is a retired judge of High Court and 12 other members. Out of these 12 members, there are 4 non-broadcaster members, 4 members from any national level statutory commission, and 4 broadcaster members.

It receives complaints from any person including NGOs, RWAs, Ministry of Information and Broadcasting. BCCC should ensure that the programmes are in conformity with self-regulatory content guidelines.<sup>64</sup>

The self-regulation guidelines are related to

1. National interest
2. Racial and Religious Harmony
3. Children and generally Accessible Programmes
4. Social values
5. Kissing, sex and neutrality
6. Violence & crime
7. Gambling
8. Horror & Occult
9. Drugs, smoking, Tobacco ,solvents and alcohol
10. Libel, slander and defamation
11. Harm and offence.

Here it is to be noted that the list does not contain anything regarding privacy right. It shows that the right to privacy has not been given sufficient attention.

---

<sup>64</sup> *Id.*

The complaint can be filed by the aggrieved person against any of the IBF member TV channels within 14 days from the date of first broadcast. But it would not cover films, movie, videos, film trailers or any other production which was telecasted after obtaining a certificate from Central Board of Film Certification (CBFC). This is a loophole in the mechanism for the regulation of content of the programme.

BCCC shall pass final order within 3 weeks of the receipt of complaint and if it has not taken decision within that time BCCC should intimate I & B ministry giving justification for the same. If the order of BCCC is not complied with it has power to issue warning to implement the order within 48 hours. Also, it has power to demand apology, issue directive to IBF to take necessary action to expel the concerned member. It can recommend the Ministry of Information & Broadcasting to take appropriate action against channel. Members of IBF are within the scope of redressal mechanism. Complaint against non-IBF members will be forwarded to the Information & Broadcasting Ministry.

### **7.9.2 News Broadcasters Association (NBA)<sup>65</sup>**

The news and current affairs channel is self-regulated by News Broadcasters Association (NBA), which was set up under the News Broadcasting Standards Authority (NBSA). The NBA consists of organizations that are members and submit themselves to regulation by the NBA. Therefore the jurisdiction of the NBSA is restricted only to members. NBA has code of ethics to regulate television content.

---

<sup>65</sup> [www.nbanewdelhi.com](http://www.nbanewdelhi.com).(Last accessed 8th October 2017).

NBSA empowered to warn, admonish, censure, express disapproval and fine any broadcaster in violation of the code a sum up to Rupees One lakh. It issued a code to adhere to the highest possible standards of public service and integrity. The journalists should report only those matters which are of public interest. The principle of self-regulation is for attaining the basic values and goals that should be served by the visual media. These principles should be followed in strict sense and it should not be confined in its letter.<sup>66</sup>It is also to avoid compromising the genre of television news by broadcasting of content that is malicious, biased regressive, knowingly inaccurate hurtful, misleading, or aimed at willfully concealing a conflict of interest.<sup>67</sup>

### **7.9.3 Electronic Media Monitoring Centre (EMMC)<sup>68</sup>**

The Government of India, Ministry of Information & Broadcasting, has established in 2008, the EMMC to effectively monitor and record the content of various T.V channels over Indian Territories for any violation of codes framed under the Cable T.V.Network (Regulation) Act, 1995.

The above bodies had been constituted to improve the quality of content of the programmes. Even then, the violations are continuing and effective steps have not been taken properly. The bodies are not effective in imposing

---

<sup>66</sup> Principles of Self-regulation, News Broadcasters Association, § 2, Code of Ethics and Broadcasting Standards.

<sup>67</sup> Id.¶ 2

<sup>68</sup> <https://mib.gov.in/broadcasting/electronic-media-monitoring-centre>. (Last accessed 24th July 2016)

punishment on the culprits. Their punishment may sometimes confine to saying of sorry or on fine only.<sup>69</sup>

## **7.10 JOURNALISTS NORMS AND PRIVACY**

From time to time the media had been subjected to several kinds of code of ethics. Some of the important codes of ethics with special reference to media are as follows<sup>70</sup>:-

### **7.10.1 National Integration Council Code of Conduct for the Media, 1962**

It contains number of provisions relating to publication of matters by media. It states that media should take all steps to develop a feeling of unity, solidarity and cohesion in the hearts of the people. It says that media should create a sense of common citizenship and a feeling of loyalty to the nation. It should not promote any kind of activities the aim of which was to create conflict, hatred and violence between the people. It can be seen that the code does not anything to protect the private life of the individuals.

### **7.10.2 Code of Ethics by International Public Relations Association at Athens, 1965**

The first All India Conference of Public Relations Practitioners adopted this Code. But this code also does not contain anything to preserve the privacy right against media intrusion. The code of ethics is not enforceable in court of

---

<sup>69</sup> Recently, in the history of television, the producer cum director of the serial apologized for showing sexual assault scenes in TV soaps response to the order of the BCCC, <https://deccanchronicle.com>. (last accessed 27<sup>th</sup> September 2019)

<sup>70</sup> Here among other guidelines in the code only those provisions which are related to privacy issues are given special reference.



law. Therefore, the journalists can easily escape from liability. The lacuna should be remedied by proper implementation of rules and regulations.

### **7.10.3 Code of Ethics for Broadcasters, 1969**

It is a nine point Code for the broadcasters which says about several prohibitions for the media. It says that the media should not involve in any kind of criticism of friendly countries. It should not publish those matters which are defamatory, obscene, contempt of court etc. It also does not contain any provision to guide the media while reporting matters which are not public.

### **7.10.4 Parliament Code of Ethics,1976**

This code of ethics for journalist has been formulated by Rajya Sabha. Among other provisions it states that journalists and newspapers shall not give currency to public rumours or gossip or even verifiable news affecting the private life of individuals.

### **7.10.5 International Code of Ethics, 1991**

It was adopted in Stockholm Symposium and is applicable to all media persons which contain guidelines. The drawback of it is that it is not a legal document as it does not contain any enforcing mechanism.

The code says that the objective of a journalist should be fair accurate and unbiased. They have a duty to protect the confidential sources of information. The media should ready to correct their mistake by publishing clarification. It should avoid absurd and obscene languages. While publishing news, care should be taken to avoid the names of victims of sexual offences, to offend the individual, the violation of privacy right of individuals, juveniles etc. Therefore,

privacy of an individual should always be safeguarded except in some exceptional cases. The code also requires that acts of violence should not be glorified and publications of photographs showing mutilated bodies, bloody incidents and abhorrent scenes should be avoided.

### **7.11 RIGHT TO PRIVACY BILL (DRAT)-AN ANALYSIS**

After the issue of Nira Radia Tape case<sup>71</sup> the Government felt that India need a specific privacy legislation to protect the privacy right of Indian people. The Govt. of India drafted Privacy Bill in the year 2011 and subsequently redrafted several times. But the Bill did not pass till now.

The Bill mainly aims to protect the right to privacy of citizens of India and to regulate the collection, maintenance, use and dissemination of their personal information and provide for penal action for violation of such right and for matters connected therewith.<sup>72</sup>

The Bill provides a definition for the term 'communication' as a process of sharing of facts, ideas, opinions, thoughts and information through speech, writing, gestures, sound, images, signals or pictures, graphs, symbols, diagrams between two or more individuals through telephonic conversations, radio messages, electronic mode (including internet or satellite) or postal letters or any other mode.<sup>73</sup> The 'interception of communication' is defined as 'undertaking the stopping of the transmission of any communication, or interception or detention including tapping of the telephone conversation or copying of data.'<sup>74</sup>

---

<sup>71</sup> *Ratan T Tata v. Union of India*, (2014) 1 SCC 93.

<sup>72</sup> The Privacy Bill, 2011, Preamble.

<sup>73</sup> *Id.*, § 2(d).

<sup>74</sup> *Id* § 2(i).

The term 'maintain' includes maintain, collect, use or disseminate.<sup>75</sup>The personal information is explained in the Bill as 'any information about an identifiable individual, but does not include the name, title or business address or telephone numbers of an employee an organization.'<sup>76</sup> The surveillance is covertly following a person or watching a person, placing secret listening or filming devices near him, or using information to obtain personal information about him. The term 'record' means any item, collection, or grouping of information about an individual that is maintained by an agency including, but not limited to, his education, financial transactions, medical history and that contains his name, or the identifying number, symbol or other identifying particular assigned to the individual, such as a finger or voice print or a photograph or DNA.

The Bill says that every individual shall have right to privacy. It continues to say that right of privacy of an individual shall include:-

- a. Confidentiality of communication made to, or, by, him (including his personal correspondence, telephone conversations, telegraph messages, electronic mail, and other modes of communications.
- b. Confidentiality of his private or family life.
- c. Protection of his honour and good name.
- d. Protection from search, detention or exposure of lawful communication between and among individuals.
- e. Privacy from his surveillance.

---

<sup>75</sup> §.2(j).

<sup>76</sup> §.2(m).

- f. Confidentiality of his banking and financial transactions.
- g. Confidentiality of his medical and legal information.
- h. Protection from his identity theft including criminal identity theft (posing as another person when apprehended of a crime) financial identity theft (using another's identity to obtain credit, goods and services), identity cloning (using another's information to assume his or her identity in daily life), medical identity theft (using another's identity to obtain medical care or drugs)
- i. Protection from use of his photographs, fingerprints, DNA samples and other samples taken at police stations or other places
- j. Privacy of his health information
- k. Protection of data relating to individual.<sup>77</sup>

Chapter III of the Bill prohibits the interception of communication between persons if the information can be accessed by any other reasonable means. The interception is allowed only in accordance with national privacy principles. It is also provided that the authorities should keep record of the details of interception which includes intercepted communication, extent of disclosed materials, number of copies made etc. The intercepted material should be destroyed as soon the purpose for which it has been required.

The Bill provides for the constitution of a committee called 'Central Communication Interception Review Committee' to look into the legality of interception order passed. But it does not clearly provides the powers of the

---

<sup>77</sup> The Privacy Bill, 2011, § 3

committee which will adversely affect the functioning of the committee. Chapter V of the Bill set out the mechanisms for the implementation of the procedures for interception by appointing a nodal officer by security agencies.<sup>78</sup>

Chapter V deals with prohibition of surveillance and its regulation. It says that no person shall undertake surveillance either by following a person or closed circuit television or other electronic mode so as to identify an individual and monitor any of his personal particulars and reveal in public his private or personal information. The provision also requires that the surveillance should not adversely affect the right to privacy which amount to a civil wrong.<sup>79</sup> The legality of taking and using of photographs, fingerprints and DNA samples is discussed in chapter VI and such activities are prohibited in public so as to violate one's privacy right. It can be permitted only in certain situations with his consent or under any authority of law.<sup>80</sup> The information relating to health status should not be collected and published by anyone so as to affect one's privacy right. The violation of the provision will amount to civil wrong. In case if it is collected with consent of person lawfully, it can be kept only for the purpose within a time frame and after that it should be destroyed.<sup>81</sup> The law relating to collection and disclosure of data is contained in chapter VII of the Bill.

The Bill allows the interception of communication only according to the provisions of Telegraph Act, 1885 and the permission of secrecy level officer in Ministry of Home Affairs. The draft Bill 2011 defines the term 'personal data or

---

<sup>78</sup> *Id.* §§ 14-23.

<sup>79</sup> *Id.* S.24.

<sup>80</sup> *Id.* §§ 25-26.

<sup>81</sup> *Id.* §§ 27-28.

personal information’ as any data that relates to a living or natural person, if such person can be identified from the data either directly or indirectly in conjunction with other data in possession or likely to come in possession of the person controlling the said data. It also includes any expression of opinion about a person as well.<sup>82</sup>It is applicable to all persons processing data using equipment located in India or collecting processing or using the personal data in India, whether having a place of business in India or not. The Bill defines the sensitive personal data as personal data relating to physical and mental health including medical history, biometric, bodily or genetic information, criminal convictions, password, banking credit and financial data, narco analysis or polygraph test data, sexual orientation. However, any information which is freely available or accessible in public domain or to be furnished under the Right to Information Act, 2005 should not be categorized as sensitive personal data for the purposes of the Act. This is one of the drawback of the Bill.

The Bill provides the exception that one cannot raise the claim of privacy protection in following cases.

- a. Sovereignty, integrity and security of India, strategic, scientific or economic interest of the State.
- b. Preventing incitement to the commission of any offence
- c. Prevention of public disorder or the detection of crime
- d. Preservation of rights and freedom of others
- e. The interests of friendly relations with foreign states or

---

<sup>82</sup> *Id.* §.2 (m).

- f. Any other purpose specifically mentioned in the Bill.<sup>83</sup>

The act of collection, processing, storage and disclosure of personal data, interception or monitoring individual communication, surveillance of the individual and sending unsolicited commercial communication to an individual are considered as infringement of privacy.

### 7.11.1 Privacy Principles

The principles lay down formalities for collection, storage, processing, and disclosure of personal data. The privacy principles are

- a. Notice

The Data controller should give notice to individual before the collection of personal information.

- b. Choice and consent

- c. The data controller should get consent from the individual before collection, use, disclosure of personal information. The individual can withdraw the consent at any time.

- d. Purpose limitation

The data collected by the controller should be adequate and relevant to the purpose of collection. It should be destroyed after the purpose has been accomplished.

---

<sup>83</sup> The exceptions provided in the Shah committee are similar to this. The additional exceptions provided by the Shah committee are

1. Disclosure on the ground of public interest
2. For the journalistic purposes
3. Historic and scientific research
4. Protection of individual rights and freedoms.

- e. The data controller should collect information only for the objects identified in the notice. This requirement is to prevent misuse of information.

The draft bill defines data controller as ‘any person who processes personal data and shall include a body corporate, partnership, society, trust, association of persons, govt., company, govt. department, urban local body, agency of instrumentality of state.

‘Data subject’ means any living individual, whose personal data is processed by a data controller in India.

- f. Access and correction

The individual in respect of which the data has been collected shall have access and opportunity to correct the information. He has right to get copy of the personal data.

- g. Disclosure of information

The data collector shall not disclose to third parties except with the informed consent and notice.

- h. Security

The data controller must keep the data collected in a secure manner by ensuring reasonable security safeguards against loss, unauthorized access, destruction, use, processing, storage, modification, unauthorized disclosure, either accidental or incidental or other reasonable foreseeable risks.



i. Openness

The data controller shall take necessary steps to implement practices, procedures, policies and systems in a manner proportional to the scale, scope and sensitivity of the data collected in order to ensure privacy principles. It should be produced in an intangible form, using clear and plain language and should be made available to individual.

j. Accountability

The data controller should be accountable for ensuring privacy principles. The measures involve implementation of privacy policies including tools, training and education, and regular external and internal audits etc.

The Bill suffers from several draw backs. The Bill seems to regulate the use of electronic devices rather than incorporating various aspects of protection of privacy right. The term ‘public figure’ included only those persons who are representatives in Parliament, state legislatures, local self-government bodies, an office bearers of recognized political parties.<sup>84</sup> But actually this narrow definition does not cover all public figures. It excluded other persons who come under the category of involuntary public figures.

On 12 the January 2017, Supreme Court has directed the government to establish a mechanism for the redressal of complaints against ‘content of private T.V channels and radio stations and accord due publicity to the measures to enable citizens approach it with their grievances. Recently, in 2017, the Central Government constituted a mechanism to deal with complaints relating to

---

<sup>84</sup> Privacy Bill, §2(b).

programmes in T.V, Radio, FM & Community radio. This is for the first time that the Government has constituted a committee for dealing with complaints. At district level, the chairman of Monitoring committee will be district Magistrate Police Commissioner. The public can file complaints to the above officials or through its redressal portal called pfportal.gov.in. to the Ministry of Information and Broadcasting. Until today, the complaint can be filed through its unions. The complaints of news channels can be submitted to-

- a. National Broadcasters Standards Authority (NBSA) for news channels
- b. Indian Broadcasting Content Complaints Council (BCCC) for non-news content.
- c. Advertising Standard Council of India for grievances against inappropriate advertisement

The grounds provided are indecent news and advertisement, indecent references to friendly states, references against religion, castes etc., programmes offending women and references against the integrity of India.

The intrusion of privacy results in the loss of trust. An ordered society works on the principle of trust between government and the people. It is trusted by the people that the unwanted attention would be regulated or restricted by the government and they will be safe in the sphere of privacy.<sup>85</sup>

---

<sup>85</sup> Scott Sundby, *Everyman's 4<sup>th</sup> Amendment: Privacy as mutual Trust Between Government and Citizen*, 94 COLUM.L.REV.1751(1994).

## **7.12 CONCLUSION**

It is a fact that the impact of visual media is very much high when compared to that of a print media. Besides, the communication scenario is flooded with different kinds of media. It is understood that the competition among various channels has been increased in an incredible manner which requires regulation in a proper manner.

The government has appointed various committees with an effort to formulate rules and regulations for press and media. In respect of visual media for content regulation the analogy of press is misleading and inappropriate. The Indian Telegraph Act, 1885 and the Cable T.V.Networks (Regulation) Act, 1995 are totally inadequate to govern the issues relating to visual media. These laws are not in line with the latest technologies in our country. The judiciary has pronounced in the land mark cases that the visual media is suffering from the lack of a proper regulatory mechanism. To prevent the visual media from encroaching the privacy right of the people the content regulation holds great significance. The visual media faces the problem of regulation by several regulatory bodies. The various codes of regulations introduced by the several authorities is the crucial problem to be addressed in the present scenario.

Another issue is centered on the dispute relating to the kind of regulation that is most suitable for visual media. It is criticized that self regulation is not sufficient to tackle the problems of the media. However, it is understood that self regulation is suitable and the problem lies on the implementation of the rules and regulation. For assuring an effective mechanism, an ideal, transparent, impartial

and courageous monitoring authority is lacking in the country. Even though, the government and other bodies are proposing various bills and rules, such as Convergence Bill, Privacy Code etc., with respect to content regulation of visual media it is felt that these are insufficient. The recent Privacy Bill is mainly concerned with data protection of individuals. It lacks any kind of regulation with respect to protection of privacy right against media entities.

The existing regulatory bodies can only admonish or censure the news agencies for violation of media or journalistic ethics. It should be changed and the regulatory body should be given more powers to punish the offenders.



## CHAPTER-VIII

### CONCLUSION AND SUGGESTIONS

*‘When science goes international and power-politico-economic power-crosses national frontiers, the human victim is too helpless to stand up against the challenge. Therefore, the resources of the law must be activated to provide a timely shield against violation by science of the basic values of the human order.’*

V.R.KRISHNA IYER, FREEDOM OF INFORMATION,  
143(1999).

The right to privacy is a basic, human and fundamental right which touches the fundamental values that are essential for a man to lead a dignified life. The concept of privacy right varies according to the nature, attitude, culture and mores of the society. In early period, the technological innovations were used by the people at a minimum level and they were able to keep their personal matters without any interference from others. But innovation and larger use of technological devices made it very easy to access and disseminate the information. Today technological devices pose great threat to the privacy of individuals.

The concept of privacy covers variety of aspects such as freedom to take decision, bodily integrity, solitude, freedom from surveillance etc. It provides a safe zone to release one’s emotional distress<sup>1</sup>. There are instincts in everyday life

---

<sup>1</sup> See *supra* chapter 2, at 25.

of a man which he consider as purely private, especially, in matters relating to health, finance, family, documents, communication etc. In this sense, it involves an aspiration for having a kind of seclusion from others. He wishes to be secured in privacy when he is not only in home but also in public place.<sup>2</sup>

The right to privacy has got wide attention at national and global level. The international instruments such as Universal Declaration of Human Rights (UDHR), International Covenant on Civil and Political Rights (ICCPR) and regional conventions like European Convention on Human Rights (ECHR) contain express provisions for the protection of privacy right. The underlying principles of these international documents have been expressly or impliedly incorporated in the municipal law of several countries.<sup>3</sup>

The authorities in legal luminary give meaning in different perspectives. However, a universal definition that is applicable irrespective of time and place is not possible<sup>4</sup>. But at the same time, it is understood that it creates issues to decide the extent of protection. It can be said that it is a right to be let alone as put forwarded by Justice Cooley. It is keeping away the other persons from knowing information about oneself. The exercise of control over the dissemination of personal information to a certain class of people is protected under privacy regime. It is for the individuals to decide to what circle of persons the information should be reached and also the kind of personal information.<sup>5</sup>

---

<sup>2</sup> *Id.* at 23.

<sup>3</sup> *Id.* at 48.

<sup>4</sup> *Id.* at 37.

<sup>5</sup> *Id.* at 39.

The right consists of several interests of an individual. It is a shield against unjustified interference into the private, family and home life. It prevents interference into the physical and mental integrity which is extended to freedom, honour and reputation.<sup>6</sup>

The right performs functions and carries values also. Alan Westin says that personal autonomy, emotional release, self-evaluation and limited and protected communication are the main functions of privacy. Thomas I Emerson categorized above functions in terms of values.<sup>7</sup> These functions and values in totality help an individual to participate in democracy in a successful way. Above values also enable the person for self development and individuality.<sup>8</sup> The common thread passes through all the definition pointed out to a single factor i.e., human dignity.<sup>9</sup> The right to privacy is violated not only when the private life is exposed or published but also when there is intrusion without publication.

Modern privacy law began its discussion with the publication of a seminal article 'Right to Privacy' by the Boston brothers Warren and Brandies in Harvard Law Review in 1898. The publication of wedding information of the closed relative, by the press had annoyed them and it prompted to write the article.<sup>10</sup> They borrowed the wordings of Thomas M Cooley and explained it as a right to be let alone. The main essence of their article was centered on the argument that the feelings, thoughts and sentiments should be protected. They called it as

---

<sup>6</sup> *Id.* at 37-44.

<sup>7</sup> *Id.*

<sup>8</sup> *Id.*

<sup>9</sup> *Id.* at 32

<sup>10</sup> *Id.* at 20

protection to inviolate personality. They advocated that it should be protected under law of tort as the interest in property was protected under law of trespass. They stated that the time had come to extend legal protection to the intangible objects such as feelings. The right to privacy is closely related to interest of personality. Therefore, they argued that, the rights and interests protected under law of intellectual property rights are application of general right to privacy.<sup>11</sup> Warren and Brandies stated that like any other right it should also be subjected to certain limitations. Primarily, one could not claim privacy right if the matter under consideration is of high value of public interest. The privacy right did not curtail the communication of any matter which made at public meetings or public places would come under the category of limitations. Lastly they stated that one could not claim privacy right when the publication was with the consent or he himself published the matter.<sup>12</sup> The Boston brothers were criticized by several jurists that they failed to give legal basis to explain the right. It had also been criticized that they failed to explain what amount to public interest when matters of privacy rights were concerned.<sup>13</sup>

Later William L Prosser developed the concept of privacy into four distinct privacy torts such as intrusion upon seclusion or solitude, public disclosure of embarrassing private facts about the plaintiff, publicity which places the individual in a false light in the public eyes and appropriation of name

---

<sup>11</sup> *Id*, at 22.

<sup>12</sup> *Id*

<sup>13</sup> *Id*



or likeness. The succeeding authorities also explained it in terms of dignity and personal liberty.<sup>14</sup>

In England, there is no general right to privacy. Therefore, the aggrieved persons who suffered from the infringement of privacy right were devoid of any remedy. The influence of European Convention on Human Rights was very great and it guaranteed the private and family life of individuals.<sup>15</sup> However, it should be read with other freedoms such as religious freedom under Article 9, right to receive and impart information and ideas under Article 10 and also the right to education under Article 2 of the First Protocol. Under the convention it became obligatory for the State to enact laws for the protection of privacy. In line with the Convention, the State enacted Human Rights Act, 1993, the provision is almost similar to that of Convention. The moral and physical integrity, personal identity, personal information, personal sexuality and personal space are considered to be come under the term private life under the above convention. In cases where violators were private parties, especially media, by the horizontal application of the rule, it had been argued that it was the obligation of the state to ensure privacy right. Famous public figures had been given remedy in cases where the media exposed unwanted personal information.<sup>16</sup> The legal system witnessed the debate over the extension of doctrine of confidential information where there was no prior relationship between parties. There were cases in which the courts applied above doctrine where there was misuse of personal

---

<sup>14</sup> *Id.* at 22

<sup>15</sup> See *Supra* Chapter 6 at 217.

<sup>16</sup> *Id.* at 222.

information.<sup>17</sup> The legal system witnessed the debate over the extension of doctrine of confidential information where there was no prior relationship between parties. There were cases in which the courts applied above doctrine where there was misuse of personal information.<sup>18</sup> The later development shows that the term personal information was interpreted as private information to extend the remedy for infringement of privacy right.<sup>19</sup>

In United States the constitutional right to privacy has been derived from rights enumerated in the Bill of rights. Besides, the article “Right to Privacy’ by Boston brothers was opened a gateway for the demand for the remedy of tort of invasion of privacy. The Restatement of Torts protected the privacy right in certain specific cases. It says that there is a tort of invasion of privacy if the information published is of a kind that would be highly offensive to a reasonable person.<sup>20</sup>

In New Zealand, the Privacy Act, 1993 was enacted to protect the personal information of individuals.<sup>21</sup> The privacy commissioner who is appointed under the Act has authority to deal with the complaints of privacy violation. But he has no authority to entertain the cases of invasion of privacy right by media. However, the Broadcasting Standards Authority (BSA) constituted under Broadcasting Act, 1989 provides certain guidelines for the media. There is also common law remedy of tort invasion of privacy if the private

---

<sup>17</sup> *Id.*

<sup>18</sup> *Id.* at 223

<sup>19</sup> *Id.*

<sup>20</sup> *Id.* at 225

<sup>21</sup> *Id.* at 237

life of individuals is disclosed without any justification. In this country the law in this respect is in line with American privacy jurisprudence.<sup>22</sup>

In Australia, the private life of individuals is ensured under constitution, statutes and common law. The free expression is impliedly guaranteed under the constitution as implied constitutional freedom of political communication.<sup>23</sup> The Privacy Act 1988 prohibits the disclosure of personal data of individuals. The intrusion into the personal life may be territorial or electronic intrusion.<sup>24</sup> The privacy right is preserved against visual media intrusion under Broadcasting Services Act, 1992. It contains Code of Conduct developed by Australian Broadcasting Authority (ABA).<sup>25</sup>

The Indian scholars prefer to adopt the definition and explanation given by foreign scholars. Our classic ancient books narrated methods by which privacy right can be protected.<sup>26</sup> The development of privacy right dates back to the civilization itself. It was closely linked with the customs that were followed by the people in a society. The civilization made the man to be conscious of between private and public. The early case laws during British period in India shows that the idea of privacy right centered on the construction of building, opening of windows of home and alteration of existing houses if it was exposed to the attention of opposite parties.<sup>27</sup> The ancient people constructed building in order to prevent notice from strangers. They consumed food only in an enclosed

---

<sup>22</sup> *Id.* at 248.

<sup>23</sup> *Id.* at 249.

<sup>24</sup> *Id.* 6 at 251.

<sup>25</sup> *Id.* at 252.

<sup>26</sup> *See Supra* chapter III, at 5.

<sup>27</sup> *Id.* at 56.

area to prevent unwanted attention.<sup>28</sup> Literally it involves the exclusion of others from unlawful interferences. It was believed that for peaceful enjoyment of life one should be kept free from unwanted attention.<sup>29</sup> Another important factor that should be taken into consideration is that India is a culturally enriched country and is different from western countries. Therefore the concept and perspective of privacy right should be interpreted in tune with Indian situation and culture.

The Constituent Assembly debate discussed the feasibility of inclusion of right to privacy in the Constitution of India. But it took the decision that since the contours of privacy right had not been determined and it required case by case development it is not proper to include under the Constitution of India.<sup>30</sup>

The land mark decision of Supreme Court of India, in *Justice K Puttaswamy v. Union of India* case elaborately discussed all the aspects and bestowed the privacy right with the status of fundamental right. It is beginning of a good privacy jurisprudence regime where India is trying to reach to the standard of international conventions.<sup>31</sup>

The nine Judge Bench of Supreme Court of India, by majority, decided that the right to privacy is an integral part and parcel of Article 21 of the Constitution. The court examined the correctness of the prior judgments of the Supreme Court, especially, *Kharak Singh*, *M.P.Sharma*, *Gobind* etc. The Supreme Court in *Puttaswamy* case overruled the above cases and upheld the constitutional status of privacy right. The judges gave their own individual

---

<sup>28</sup> *Id.*

<sup>29</sup> *Id.*

<sup>30</sup> *Id.* at 61.

<sup>31</sup> *Id.* at 71.

observations. It was observed that privacy right comprises repose, sanctuary and autonomy.<sup>32</sup> The court was of the opinion that it is the duty of the state to ensure dignified life of persons by observing that privacy right of individuals is not violating. The court highlighted that the individual has the right to privacy both against state and non-state parties. The court explained that the fundamental principles enshrined in the preamble and the freedoms guaranteed under Part III of the constitution of India forms the basis of privacy right.<sup>33</sup>

The court also pointed out that the right to privacy is not devoid of any reasonable restrictions like any other right. The privacy right can be subjected to reasonable restriction which are just, fair and reasonable. It had also been observed that the ground of restriction would depend upon the nature of right that is affected. For example, the intrusion by the state in some cases would attract reasonable test under Article 14 of the constitution. If various freedoms provided under Article 19 of the constitution is affected by privacy violation specific exceptions mentioned under it would decide legality. The observations of the court specifically clear that the thread of privacy right runs through various provisions of the Constitution.<sup>34</sup> The court has also pointed out the fact that individual interests should not be neglected always.<sup>35</sup>

In cases of interference by the State, the aggrieved party can find his remedy Article 21 of the Constitution. In *R. Rajagopal v. State of Tamil Nadu*<sup>36</sup>,

---

<sup>32</sup> *Id.* at 71 - 80

<sup>33</sup> *Id.*

<sup>34</sup> *Id.*

<sup>35</sup> *Id.*

<sup>36</sup> AIR 1995 SC 264; 1994 SCC (6) 632.

the court observed that in case of infringement by the private entities, the remedy lies under law of Torts. But, in India the protection of privacy under law of tort is in rudimentary stage.<sup>37</sup> It should be developed through case by case development. Therefore it is high time for the Indian legal system to adopt such measure especially when the media intrusion has become very easy now. We have several statutes which deal with several aspects of privacy.<sup>38</sup> But unfortunately there is no direct reference to the term privacy right. In the light of recent privacy judgment of Supreme Court, it is essential to draw the attention of the authorities in this line. In addition to this, in a right based society the people should be made aware of their rights especially in case of vulnerable section of the society.

Media is a major source of information. It is the eyes and ears of the general public. It serves several purposes to the society. Firstly, it is a medium to express ourselves and to establish our identity. Secondly, it is a foundation stone of all other rights in the sense that without the right of free expression we cannot achieve other rights. Finally, it is essential for the social and economic development of the country.<sup>39</sup> At International scenario the freedom of speech and expression is considered as the mother of all liberties.<sup>40</sup> The visual media enjoys the same extent of free expression as that of a citizen under the Constitution. But it should be noted that the responsibilities of media is considered in higher footing than that of a citizen.

---

<sup>37</sup> *Id.* at 105.

<sup>38</sup> *Id.* at 85.

<sup>39</sup> *See Supra* chapter IV at 112.

<sup>40</sup> *Id.* at 122.

The conflict between free speech and privacy interest demands the assessment of both rights. Both rights have their own values and they are complementary to each other. In some situations to make one's expression freely, right to privacy is essential. For example, while casting vote, an individual is enjoying both freedom of expression and right to privacy<sup>41</sup>.

The freedom of expression is of wider amplitude which includes several specific rights. The visual media can exercise the same level of freedom that of any other media. It includes freedom of opinion, the right to seek, receive and impart information and ideas regardless of frontiers, orally, either in writing or print, in the form of art, or through any other media of one's choice. However, in addition, the visual media enjoys the telecasting rights also.<sup>42</sup> It also performs the social function of conveying information without barrier so that people would become informative of everyday aspect of the society which is in public interest. They would be able to criticize the misdeed of public figures, politicians etc.<sup>43</sup>

No right is absolute and it is justifiable where a right is put under reasonable restrictions. In case of media freedom, it is firmly rooted that prior restraint would act as encroachment on media freedom. The right to privacy may be in tension between individual at one pole and society in another pole. The best way to tackle the problem is to balance both social need and individual need. To justify the legality of intrusion, the intruder has to prove the tripartite test, i.e., legality, legitimacy and proportionality. The case laws in this respect show that

---

<sup>41</sup> *Id.* at 140.

<sup>42</sup> *Id.* at 127.

<sup>43</sup> *Id.*

the grounds of restrictions may be social, moral and compelling public interest.<sup>44</sup> The justifications for invading the privacy right the consent and waiver.<sup>45</sup> It seems that the above justifications are often misused by the visual media.

The terms 'information in public domain' should be given a clear meaning. If the news gatherer is obtaining information by using surreptitious methods, it should be excluded from the purview of "information in public domain'. In other words, information to be categorized as in public domain, the information should be one which is easily available to public. It should also be remarked that if the information available only to a few number of people does not lose the character of 'information in private domain'.<sup>46</sup> In other words, the information readily available to some section of people does not convey the meaning that it is available to all.<sup>47</sup>

The freedom of information sometimes comes in conflict with right to privacy. The right to gather information is the corollary of right to freedom of speech and expression. The media aim to increase TRP rating by attracting the audience.

Recent reported cases laws show that media also engage in doing sting operations.<sup>48</sup> But at present there is no adequate law to regulate the media in engaging investigative journalism. It is not proper to allow the media in engaging investigative methods without a specific law.<sup>49</sup>

---

<sup>44</sup> *Id.* at 153.

<sup>45</sup> *Id.* at 154.

<sup>46</sup> *See Supra* Chapter V at 2168.

<sup>47</sup> *Id.*

<sup>48</sup> *Id.* at 208.

<sup>49</sup> *Id.* at 209.



Under the guise of investigative journalism, the visual media is engaged in using sting operation. The conduct of sting operation by the media is subjected to criticism as it is invading into the privacy of persons. The means and the ends of journalism should be devoid of unethical practices. The evidence which is obtained through surreptitious method should be subjected to strict scrutiny. There can be a separate wing of media to assist administration of justice and the present law should be suitably amended. The present law on the subject is silent in this regard<sup>50</sup>.

The culture of papparazi is increasing in our country also. In order to attract the audience the visual media is telecasting the news or programmes after adding the matters of private life.<sup>51</sup> Where public figures are concerned, the element of public interest will depend upon the factors such as their position held by him in the society and his approach to the publicity. It is also relevant to consider the values that they are promoting in the society. The personal details of a public figure can be exposed when his personal conditions is threatening the discharge of his official functions. The media should report private behavior of public figures where broader public issues are raised either by his behavior itself or by the consequences of its becoming widely known. The intrusion exceeds the limits of decency when the intimate details of life of a person which has no public value. Intrusion occurs when the media is publishing the embarrassing pose of public figures which was surreptitiously taken. It is also understood that the law

---

<sup>50</sup> *Id.*

<sup>51</sup> *Id.* at 190.

lags behind the need for the protection of privacy right of the public figures.<sup>52</sup> Therefore it is recommended that the privacy regime of Indian legal system should be revamped to protect the personal information from being misused.

The thesis also analyzed the privacy protection extended to various classes of people such as voluntary public figures and involuntary public figures. After going through protection given in various countries it is understood that the level and degree of protection is different in various countries. In India, the same level of protection is given to both private and public figures. But at the same time the private individual is enjoying a greater level when compared to that of public figures. After going through various aspects in this regard it is recommended that in India, a proper definition should be given to the term 'public figures'. It should be categorized as notable public figures, involuntary public figures, permanent public figures etc.<sup>53</sup>

There are instances where the ordinary people become a centre of attraction of media. It often happens when the media publishes the family details of the accused or victims thereby the latter become centre of attraction. The relatives suffer mental pain and loss privacy also. The journalists should not publish the information without their consent. Today there is no proper enforcement of this principle among journalists and there is unwanted intrusion into the privacy rights of ordinary people by the media. It is also seemed that media publishes pictures and disseminate information vulnerable sections of people which include women, children, tribal people, migrant people etc. The

---

<sup>52</sup> *Id.*

<sup>53</sup> *Id.* at 193.

issue relating to appropriation of their name or likeness should be properly addressed. The visual media uses blurred image of the above people which is capable of very easy identification.

It is equitable for media to publish all matters which are in public interest. The limits of public interest should be clearly defined. The ECHR convention says that national security, public safety, economic well being of the country, prevention of disorder or crime, protection of health or morals and the protection of rights and freedom of others are the elements of public interest. The principle of proportionality also helps to decide the limit of public interest. It says that the intrusion into the privacy should be proportionate to the aim that that is to be achieved<sup>54</sup>.

The disclosure of private facts can be justified only on the ground of legitimate public concern and when it is newsworthy. We need to have a clear clarification regarding the term newsworthiness. All public facts are not newsworthy.<sup>55</sup> Due care should be taken while reporting incidents of sexual offences, accident victims etc. and it should not violate the privacy rights of victims. When privacy right comes in conflict with free speech, the information which is newsworthy should be given importance. The term public interest cannot cover those aspects which are in the interest of the public. It should not be confused with 'in the interest of public.'<sup>56</sup>

---

<sup>54</sup> *Id.* at 199.

<sup>55</sup> *Id.*

<sup>56</sup> *See Supra* Chapter, 5 at 206.

Due to proliferation of new technologies the information and stories in the past can be archived and anyone can get access later. By publishing these stories repeatedly, the victim would definitely fall into trauma and it would amount to fresh intrusion of privacy right. This should read with the right to be forgotten. The legislature should introduce mechanisms to delete from the media accessing points the past misdeeds of individual by taking into account two matters; legitimate public interest and violation of privacy right. Our privacy regime should be strengthened to prevent above anomaly and adequate amendment should be incorporated in our law to prevent the media from involving such activities<sup>57</sup>.

The recent cases of encroachment of media into the private life of individuals led the legislature to take steps for the enactment of privacy statute. As a preliminary step a draft bill of privacy right 2011 had been framed by the Union Government.<sup>58</sup> It mainly aims to regulate the collection, maintenance, use and dissemination of their personal information. The draft also provides penalty for the violation of privacy right. The Bill extends its protection to the confidentiality of communication, private and family life, banking and financial transactions medical and legal information etc. Protection of honour and good name also come under the definition of privacy right. The definition also include protection of individuals from seizure, detention or exposure of lawful communication between individuals.<sup>59</sup> It is better to add the word

---

<sup>57</sup> See chapter III at 107.

<sup>58</sup> See Supra Chapter VII at 295.

<sup>59</sup> *Id.*

unlawful before seizure and detention to give the clarity to the definition. The Bill also seeks to provide protection to the citizens from identity theft. It prevents use of photographs, fingerprints, DNA samples and other samples taken at police stations or other places. The draft bill is mainly concerned with protection of data protection from violation of it by state and other entities. It seems that from the perspective of media intrusion, the definition is insufficient.<sup>60</sup>

The media freedom carries with it certain responsibilities also. Media should give truthful information, fair comment, opinion, criticism etc. They should observe code of conduct properly and should stand against the misuse of media freedom. The responsibilities of the media are self-imposed and they call for a voluntary code of ethics. This led to the formulation of self-regulatory rules. But, today media is crossing the lakshmana rekha to peep into the private affairs unethically and air it to earn more profit. The people expect that they would not be unnecessarily subject to unwanted attention.<sup>61</sup>

There is no need of regulation in the cases of natural competition. But when there is unhealthy and unfair competition, the regulation is essential for the purpose of welfare of public. It is a fact that now media is powerful commercial and business oriented.<sup>62</sup>

The above discussion pointed out to the fact that that media should be regulated. Here the issue is to what extend the media should be regulated.

---

<sup>60</sup> *Id.*

<sup>61</sup> *Id.* at 268.

<sup>62</sup> *Id.*

Now there are about 365 channels some of them are news channels and rest are entertainment channels. It is recommended that all channels should be brought under a single disciplinary and regulatory body. The media are subjected to market forces and prime importance is given to TRP rating rather than public interest.

There should be proper discussion between editors and other media persons to see that the programmes that they airing are not against code of ethics and are not violating privacy rights. To achieve these objective media personals should be given proper training from time to time. The recent reportage crosses the limit of decency and it requires regulation. An author called it as witch-hunt journalism and opined that if it conceived in the main stream media it would encroach into personal territory of people.<sup>63</sup>

The reasonable expectation of privacy cannot depend always on prevailing practices and existing understandings. The practices in the society should not be against values. While adopting legitimate method of observation we should respect the values which are essential for an ordered society. Therefore, while framing guidelines for visual media care must be taken to include those measures which are of high order of social value. Today visual media is concentrating on airing trivial matters with the objective of attracting the audience.

The objectives of journalism are to serve public interest in an accurate, unbiased and decent manner. The prepublication verification requires the editor

---

<sup>63</sup> Vidya Subrahmaniam, THIS JOURNALISM REQUIRES NO SWEAT, The Hindu, March,2010.

to check with due care and caution the authenticity and accuracy of the matter that are going to be published. The media shall not intrude or invade the privacy of an individual unless the public interest demands the disclosure. But once the matter is published it falls into public domain and it can be subjected to comment by the public. But it does not mean that the media can publish it again and again. It will again attract punishment for invasion of privacy. The explanation to para 6(rule 6) of the Journalistic conduct says that the things concerning a person's home, family, religion, health, sexuality, personal life and private affairs are covered by the concept of privacy excepting where any of these impinges upon the public interest. The norms also cautions against identification while reporting crimes involving rape, abduction or kidnap of woman/female or sexual assault on children or raising doubts and questions touching the chastity, personal character and privacy of woman, the names, photographs of the victims or other particulars leading to other identity shall not be published. The minor children and infants who are the offspring of sexual abuse or forcible marriage or illicit sexual union shall not be identified or photographed. S.228A of Indian Penal Code imposes two years punishment for revealing the name and identity of the victims. The Juvenile Justice (Care and Protection) Act 2000 contains the provision to protect the privacy of children which provides punishment for reporting the identity of children in conflict with law or child in need of care. In spite of all these provisions the visual media is constantly violating privacy right by publishing their identity. Therefore, the laws should be strictly implemented.

To decide the regulatory mechanism, certain factors should be taken into consideration. The content of the programme is usually left with the decision of editors. The journalists are gathering the information in accordance with the directions of the employer. Besides, they have to meet the target given by the employer. Secondly the source of information from which the journalists are gathering the news should be credible and reliable. In this new technological era, the news has assumed the character of commodity. It should have both qualitative and quantitative value. Lastly, the access by journalist in respect of documents, persons, places etc. should be subjected to precise and verified.

Therefore, the statement that the visual media is suffering from the lack of proper regulatory mechanisms to prevent unauthorized intrusion into the private life of individuals proved positively. The visual media is devoid of any proper regulatory mechanism in India. The case laws show that the visual media is peeping into the private life of individuals for gathering information. Therefore, following suggestions are recommended to make good the situation.

### **SUGGESTIONS**

1. Redefine the term 'media':- Today with the development of various kinds of technological devices any person can gather information. Therefore, even with mobile gadgets the people can invade the privacy right of individuals and they can disclose the personal information. In this background, it is necessary to redefine the term 'visual media' so that common man can be included as a publisher within the purview of the term.



2. Need of a Privacy Statute:-India needs a Privacy Act. The present Draft Privacy Bill is with several drawbacks. The draft Bill does not contain any clear provision for the regulation of privacy invasion by the visual media. The present Privacy Bill is concerned only with the protection of data belonging to individuals.
3. Amendment of the Constitution of India:- The Constitution of India should be amended to include privacy right as an exception to the freedom of speech and expression under Article 19(1)(a) of the Constitution of India.
4. Amendment of Indian Penal Code:- Today there is no explicit provision for the protection of privacy right under Indian Penal Code 1860. By taking into account of the apex court's judgement in Puttaswamy case, the responsibility of the State to protect the private life of individuals has been enhanced. Therefore the it is better to include a new section under the chapter 'Offences against Person'
5. Appointment of a Law Commission:- After the second Law Commission, the society has undergone a thorough social transformation. The innovation of new technology has been emerged and the privacy right of people is at stake. Therefore it calls for the appointment of another Law Commission to study the issues of visual media among other things. The Government should take care to see that experts in the fields of technology and law should be included in the Commission.

6. Widening the scope of Tort law of Privacy:- The action against the misuse of personal information by visual media and private entities is not well developed in India under law tort of Tort. It is only in the stage of development. The remedy for infringement of privacy right under law of tort should be further developed.
7. Appointment of a 'Committee on Super injunction and Right to be Forgotten' in relation to Media:- Both these are developing area in India. A committee should be appointed to examine possibility of granting super injunctions or anonymous injunction as a precautionary measure to prevent violation of privacy right.<sup>64</sup> Therefore, area of remedy of super injunction should be further explored and make necessary amendments in the relevant laws. Further intrusion and publication of the personal details will amount to violation of privacy right. The Indian legal system started to recognize this right. A specific provision should be incorporated to that effect in the privacy related statute very efficiently.
8. An Independent, Ideal and a Transparent Regulatory body:- A separate and single regulatory authority is better to address the issues relating to visual media. In addition, several controlling bodies for a single entity are not advisable. In this respect appointment of a Privacy commissioner for visual media is advisable as recommended by Justice Shah Committee.
9. Strict implementation of Regulations:- For regulatory purposes, visual media requires a specific law like Press Council of India Act. But care

---

<sup>64</sup> See chapter 7-Need for regulation

must be taken to provide strict implementation of punitive provisions in case of violation. The self regulatory rules are recommended to prevent chilling effect on media freedom.

10. Enactment of a proper Surveillance Code and Practice:-For employing the surveillance devices by visual media for gathering information a clear and well defined Surveillance Code of Practice should be formulated. This will be this will act as a check for using of sting journalism. A proper legislative backing and regulations are essential for investigative journalism as in other jurisdictions.

The visual media is an effective platform and its impact on the people is very great when compared to that of any other media. The visual media is suffering from a lack of proper and regulatory mechanism. The issues focused and suggestions recommended will help the legal authorities in India to formulate laws relating to visual media to ensure privacy right and to secure a dignified life.

.....❁\*❁.....

## **BIBLIOGRAPHY**

## LIST OF ARTICLES

1. A.Meiklejohn, *The First Amendment is an Absolute* (1961) SUP.CT.REV.245.
2. Alvin I Goldman & James C Cox, *Speech, Truth and the Free market for Ideas*, Legal Theory,2, (1996)
3. Amy L Peikoff, *Beyond Reductionism: Reconsidering Right To Privacy*, 3N.Y.U.J LAW &LIBERTY 1(2008)
4. Andrew Belsey, *Journalism and Ethics, Can they co-exist?* in MEDIA ETHICS: A PHILOSOPHICAL APPROACH (ed. Mathew Kieran)
5. C.Baker, *Commercial speech : A Problem in the Theory of Freedom*,62, IOWA L. REV.1 (1976)
6. C.Emerson, *Towards a General Theory of the First Amendment* 72(1963) YALE.L.J. 877
7. Charles Fried, *Privacy: A Moral Analysis*, 77 YALE. L.J 475 (1968)
8. D.Lange, *The speech and Press Clauses* (1975)23 UCLA L. REV.77
9. Daniel J. Solove, *Conceptualizing Privacy*, CAL.L.REV. 90 (2002) 1087
10. Daniel J.Solove, *A Taxonomy of Privacy*,UNIVERSITY OF PENNSYLVANIA L.REV.154(2006)
11. Danielle Keats Citron, Leslie Meltzer Henry, *Visionary Pragmatism and the Value of Privacy in the 21<sup>st</sup> Century*, 108 MICH.L.REV. 1107 (2010)
12. David M.O'Brien, *The Right of Privacy*,2 COLUM.L.REV.437(1902)
13. David Richards, *The Individual, the family, and the Constitution: A Jurisprudential Perspective*, 55 NY.L.REV.133 (1980)
14. E.L.Godkin, *Libel and its Legal Remedy*, 12 J.Soc.Sci.69, 80(1880)
15. Editorial, *Journalists On Call*, ECONOMIC & POLITICAL WEEKLY 7-8 (DEC 4, 2010).
16. Editorial, *Media Sting*, ECONOMIC AND POLITICAL WEEKLY, VOL.42, 52 (DEC. 29, 2007- JAN. 4,2008).
17. Edward J Bluestein ,*Privacy as an Aspect of Human Dignity: An Answer to Dean Prosser*,39 N.Y.U.L.REV.962(1964)

18. Edward Shills, *Privacy: Its Construction and Viscissitudes*, 31 LAW AND CONTEMPORARY PROBLEMS, 281,282,NO.2(Spring 1966)
19. Eyal Benvenisti, *Margin of Appreciation, Consensus, and Universal Standards*, INTERNATIONAL LAW AND POLITICS 31(1999)843
20. *Fragile Merchandise: A Comparative Analysis of the Privacy Rights for Public Figures*, AM. BUS. L. J.2012)
21. G. Misra, *Privacy and the Indian Legal System*, 12DEL.L.REV.46(1990)
22. Gavin Philipson, *Transforming Breach of Confidence? Towards a Common Law Right of Privacy under the Human Rights Act*, 726-758,66 MOD.L.REV.(2003)
23. Govind Misra, *Privacy; A Fundamental Right under the Indian Constitution*, DEL. L.REV.8 &9(1979-82)
24. Hyman Gross, *The Concept of Privacy*, 42 N.Y.U.L.REV.34 (1967)
25. I.BayoOloyede, *Press Freedom : A Conceptual Analysis*, J.SOC.SCI.,11(2):101-109(2005)
26. J. Norton, *Hosking v. Runting and the Role of Freedom of Expression*, [2004] AUCK. U. L. REV.245
27. James Rachels, *Why Privacy is Important?*, 4 PHIL & PUB. AFF.323(1975)
28. Jamie E.Nordhaus, *Celebrities Rights to Privacy : How far should the paparazzi be allowed to go?*, 18 THE REV. OF LIT.285(1999)
29. Jed Rubenfeld, *Right of Privacy*, 102 HARV.L.REV. 737 (1989)
30. Jeffrey Rosen, *The Right to be Forgotten*, STAN. L. REV.(2012)
31. John B. Whitton, Editorial Comment, *An International Right of Reply*, 44 Am.J.Int'l.L.141 (1950)
32. Jonathan Kahn, *Privacy as a Legal Principle of Identity Maintenance*, SETON HALL L. REV. 33(2003)371
33. Joshua Meyrowitz, *The Blurring of Public and Private Behaviours*, in 1 THE PUBLIC SPHERE 214,225-229(JOSTEINGRIPSURD, HALLVARD MOE, ANDERS MOLANDER & GRAHAM MURDOCK., 2011)
33. Judith Jarvis Thomson, *The Right to Privacy*, 4PHIL & PUB.AFF.295(1975)
34. K.Greenwatt, *Free Speech Justifications*(1989)89COLUMB. L.REV.119

35. Ken Gomerley, *One Hundred Years of Privacy*, WIS.L.REV. 1335 (1992)
36. Lillian R. BeVier, *Information About Individuals in the Hands of Government: Some Reflections on Mechanisms for Privacy Protection*, 4 WM. & MARY BILL RTS. J. 455 (1995)
37. Louis Lusky, *Invasion of Privacy: A clarification of Concepts*, LXII COLUM.L.REV.693 (1972)
38. Mac Cormick, *A Note Upon Privacy*, 89 L.Q.REV.23 (1976)
39. Mathew Howard, *Spycatcher Downunder: Attorney General for the United Kingdom v. Heinemann Publishers Australia*, WESTERN AUSTRALIAN LAW REVIEW 19 (1989)
40. Michael C James, *A Comparative Analysis of the Right to Privacy in the United States, Canada and Europe*, CONNECTICUT J. OF INTER. LAW 29 (Spring 2014)
41. N.A.Moreham, *Privacy in Public Places*, CAMBRIDGE LAW JOURNAL, 65(3) 606-635 (2006)
42. Pamela J Shoemaker, *News and Newsworthiness-A Commentary*, COMMUNICATIONS 31, 105-111 (2006)
43. R.Dhawan, *On the Laws of Press in India*, 26(3) JILI, 288(1984)
44. Richard A Posner, *The Right to Privacy*, 12 GEO.L.REV.393(1978)
45. Richard Murphy, *Property Rights in Personal Information: An Economic Defence of Privacy*,84GEO.L.J.2381(1996).
46. Robert B. Hall Borg, Jr, *Principles of Liberty and The Right to Privacy*, Law and Philosophy, 5,No.2(Aug.,1986)
47. Robert C Post, *Social Foundations of Privacy: Community and Self in the Common Law Tort*, CAL.L.REV.77 (1989)
48. Robert C Post, *Social Foundations of Privacy: Community and Self in the Common Law Tort*, CAL.L.REV. 77,957 (1989)
49. Roscoe Pound," *Interests in Personality*, HARV.L.REV. 28(1915) 343
50. Russel T Gorkin, *The Constitutional Right To Informational Privacy*, Duke Journal of Constitutional Law & Public Policy Sidebar,6 (2010)
51. Ruth Gavison, *Privacy and Limits of the Law*, 89YALE.L.J. 421 (1980)

52. S.N.Singh, *Constitutional Law-I, Annual Survey of Indian Law*, IND. L. INST., XLVIII :(2012)
53. Scott Sundby, *Everyman's 4<sup>th</sup> Amendment: Privacy as mutual Trust Between Government and Citizen*, 94 COLUM.L.REV. 1751(1994)
54. Solove, *Conceptualizing Privacy*, 90.CAL.L.REV.1087.1130 (2002)
55. Venkiteshramakrishnan, *A Bill And Its Meaning*, FRONTLINE MAGAZINE, 1ST JUNE, 2012, 12.
56. W.A.Parent, *Privacy, Morality and the Law*, PHILOSOPHY AND PUBLIC AFFAIRS 12 (1938): 269
57. Warren & Brandies, *Right to Privacy*, 4HAR.L.REV.193(1890)
58. Willaim L. Prosser, *Privacy*, 48COLUM L. REV.383(1960)
59. WW.VanAlstyne, *The Hazards to the Press of Claiming a Preferred Position* (1977)28 HAST.L.J..761

### **LIST OF BOOKS**

1. A.MEIKLEJOHN, *POLITICAL FREEDOM: THE CONSTITUTIONAL POWERS OF THE PEOPLE* (1965)
2. A.N.DICEY, *INTRODUCTION TO THE STUDY OF THE LAW OF THE CONSTITUTION* (10<sup>TH</sup>ED. 1959)
3. ADAM CARLYLE BRECKENRIDGE, *THE RIGHT TO PRIVACY, - A MOST COMPREHENSIVE RIGHT*, NOVEMBER (1970).
4. AHUJA.B.N., *THEORY AND PRACTICE OF JOURNALISM* (1988).
5. ALAN F WESTIN, *PRIVACY AND FREEDOM* (1967)
6. AMARTRYASEN, *DEVELOPMENT AS FREEDOM* (1999).
7. ANIEL DEFOE, *SHORTEST WAY WITH THE DISSENTERS* (1702).
8. AUSTIN, *LECTURES ON JURISPRUDENCE* (1869)
9. B.SIVARAO, *THE FRAMING OF INDIA'S CONSTITUTION- SELECT DOCUMENTS* 4 (2006).
10. BARNES H, *THE INDIAN PRESS* (1940).
11. BASTINADE G HENRICO, *MEDIA HISTORY AND THE STUDY OF MEDIA SYSTEMS*, MEDIA HISTORY (2008).



12. BLOY AND SARA HADWIN, LAW AND THE MEDIA, FORPRINT, BROADCAST AND ONLINE JOURNALISM (2<sup>ND</sup> ed.2013).
13. D.D.BASU, LAW OF THE PRESS, (5<sup>TH</sup> ed.. 2010).
14. D.R. MANEKAR, MEDIA AND THE THIRD WORLD (1979)
15. DANIEL L. BRENNER & WILLIAM L.RIVERS, FREE BUT REGULATED- CONFLICTING TRADITIONS IN MEDIA LAW (COLLECTED ESSAYS WITH COMMENTARY) (1989).
16. DUNCAN BLOY AND SARA HADWIN, LAW AND THE MEDIA-FOR PRINT, BROADCAST AND ONLINE JOURNALISM (2<sup>ND</sup> ed.2013).
17. E.GOFFMAN, THE NATURE OF DEFERENCE AND Demeanor, IN INTERACTION RITUAL : ESSAYS ON FACE TO FACE BEHAVIOR, (1967)
18. E.LLOYDSOMMERLAD, THE PRESS IN DEVELOPING COUNTRIES (1969)
19. ELLIOT'S DEBATES ON THE FEDERAL CONSTITUTION 507(1876)
20. ERIC BARENDT, FREEDOM OF SPEECH (2<sup>ND</sup> ed.. 2007).
21. FAIZAN MUSTAFA, CONSTITUTIONAL ISSUES IN FREEDOM OF INFORMATION-INTERNATIONAL AND NATIONAL PERSPECTIVES (2003).
22. G.MISRA, RIGHT TO PRIVACY IN INDIA, 83 (1994).
23. GAVISON&PHILIPSON, MEDIA FREEDOM UNDER HUMAN RIGHTS ACT (2010).
24. STEPHEN.J.A.WARD, GLOBAL MEDIA ETHICS: PROBLEMS AND PERSPECTIVES (2013).
25. HANNAH ARENDT, THE HUMAN CONDITION (1958).
26. HELEN FENWICK & GAVIN PHILIPSON, MEDIA FREEDOM UNDER HUMAN RIGHTS ACT (2000).
27. IAN KERR, VALERIE STEEVES, CAROLE LUCOCK (EDS.), LESSONS FROM THE IDENTITY TRAIL-ANONYMITY, PRIVACY, AND IDENTITY IN A NETWORKED SOCIETY(2009)
28. IRWIN ALTMAN, THE ENVIRONMENT AND SOCIAL BEHAVIOUR (1975)
29. J.HEBERMAS, COMMUNICATION AND THE EVOLUTION OF SOCIETY (1979).
30. J.S.MILL, ON LIBERTY (1913).

31. JOHN MILTON, AREOPGITICA: A SPEECH FOR THE LIBERTY OF UNLICENSED PRINTING, TO THE PARLIAMENT OF ENGLAND (1644).
32. JOJNE.NOWAH & RONALD D.ROTUNDA, CONSTITUTIONAL LAW (4<sup>TH</sup> ed.1991).
33. JOSTEIN GRIPSURD, INTRODUCTION: DISCOVERING THE PUBLIC SPHERE. IN DISCOVERING THE PUBLIC SPHERE.(JOSTEIN GRIPSRUD, HALVARD MOE, ANDERS MOLANDER AND GRAHAM MURDOCK, ed.,2011).
34. JULIE INNES, PRIVACY, INTIMACY AND ISOLATION (1992).
35. JURGEN HABERMAS, THE STRUCTURAL TRANSFORMATION OF THE PUBLIC SPHERE. AN INQUIRY INTO A CATEGORY OF BOURGEOIS SOCIETY (1991).
36. JUSTICE E.S.VENKATARAMIAH, FREEDOM OF PRESS-SOME RECENT TRENDS (1987).
37. K.K.MARTHEW ON DEMOCRACY, EQUALITY AND FREEDOM, ed., UPENDRABAXI, 1978).
38. KENT R.MIDDLETON& BILL F. CHAMBERLIN, THE LAW OF PUBLIC COMMUNICATION (2<sup>ND</sup> ed.1991).
39. KIRAN DESHTA, RIGHT TO PRIVACY UNDER INDIAN LAW (2011)
40. KUNDRA.S, MEDIA LAWS AND INDIAN CONSTITUTION (2005).
41. LARRY ALEXANDER, IS THERE A RIGHT OF FREEDOM OF EXPRESSION? (2005).
42. LIEVEGIES, MEDIATING HUMAN RIGHTS (2015)
43. MADABHUSHI SRIDHAR, THE LAW OF EXPRESSION-AN ANALYTICAL COMMENTARY ON LAW FOR MEDIA,19 (1<sup>ST</sup> ed.2012).
44. MADHAVI GORADIA DIVAN, FACETS OF MEDIA LAW (2010).
45. MARK TUNICK, BALANCING PRIVACY AND FREE SPEECH- UNWANTED ATTENTION IN THE AGE OF SOCIAL MEDIA 12 (2015).
46. MEDIA ETHICS: A PHILOSOPHICAL APPROACH (ed. MATHEW KIERAN).
47. N.A.MOREHAM, SIR MARK WARBY THE LAW OF PRIVACY AND THE MEDIA, EDS.TUGENDHAT AND CHRISTIE, 719 (3<sup>RD</sup> ed.,2016)
48. P.B. GAJENDRAGADKAR, LAW, LIBERTY AND SOCIAL JUSTICE, 89-90 (1965).

49. P.S.CHAUDHARI, SELECT ESSAYS ON THE INDIAN CONSTITUTION (1989).
50. PATRICK BIRKINSAW, FREEDOM OF INFORMATION-THE LAW, THE PRACTICE AND THE IDEAL18 (4<sup>TH</sup> ed.2010).
51. PROSSER & KEETON, THE LAW OF TORTS, (5<sup>TH</sup> ed.1984).
52. R.C.S.SARKAR, THE PRESS IN INDIA, (1<sup>ST</sup> ed.1984).
53. RAYMOND WACKS, PERSONAL INFORMATION: PRIVACY AND THE LAW (1980).
54. RICHARD CLAYTON & HUGH TOMLINSON, PRIVACY AND FREEDOM OF EXPRESSION (2001).
55. RISHIKA TANEJA & SIDHANT KUMAR, PRIVACY LAW- PRINCIPLES, INJUNCTIONS AND COMPENSATION (1<sup>ST</sup> ed.2014).
56. RUSSEL KIRK, THE ROOTS OF AMERICAN CAUSE (1974).
57. S.P.SATHE, THE RIGHT TO KNOW (1991).
58. SEBASTIAN PAUL, LAW, ETHICS AND THE MEDIA (3<sup>RD</sup> ed.2015).
59. SEERVAI, CONSTITUTIONAL LAW OF INDIA (4<sup>TH</sup> ed. 1991)
60. SIEBERT.F, T.PETERSON AND W.SCHRAMM, FOUR THEORIES OF THE PRESS (1956)
61. STEVEN KNOWLTON & BILL READER, MORAL REASONING FOR JOURNALISTS (2009).
62. THE PUBLIC SPHERE 214,225-229(JOSTEINGRIPSURD, HALLVARD MOE, ANDERS MOLANDER& GRAHAM MURDOCK., 2011)
63. THOMAS GIBBONS, REGULATING THE MEDIA 4 (2<sup>ND</sup> ed.1998).
64. THOMAS J EMERSON: THE SYSTEM OF FREEDOM OF EXPRESSION (RANDOM HOUSE, 1970)
65. THOMAS M COOLEY, A TREATISE ON THE LAW OF TORTS, 29 (2<sup>ND</sup> ed.1888).
66. THOMAS MCCARTHY, THE RIGHTS OF PUBLICITY AND PRIVACY (2<sup>ND</sup> ed.2008).
67. TUGENDHAT AND CHRISTIE, THE LAW OF PRIVACY AND THE MEDIA (EDS.N.A.MOREHAM, SIR MARK WARBY, 3<sup>RD</sup> ed.2016)
68. USHA M.RODRIGUES& MAYA RANGANATHAN, INDIAN NEWS MEDIA-FROM OBSERVER TO PARTICIPANT 72 (2015).

69. V.R.KRISHNAIYER, FREEDOM OF INFORMATION (1999).
70. VENKATIYER, MASS MEDIA LAWS AND REGULATIONS IN INDIA (2000).
71. VINCENZO ZENO-ZENCOVICH, FREEDOM OF EXPRESSION- A CRITICAL AND COMPARATIVE ANALYSIS, 18(2008)
72. W. FRIEDMANN, LAW IN A CHANGING SOCIETY, UNIVERSITY OF CALIFORNIA PRESS (1959)
73. W.PROSSER, THE LAW OF TORT,804(4<sup>TH</sup> ed.1974).
74. WADE AND GODFREY PHILIPS, CONSTITUTIONAL LAW AND ADMINISTRATIVE LAW, 465-66 (9<sup>TH</sup> ed.1977)
75. WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND (1765).
76. WILLIAM L. PROSSER & W. PAGE KEETON, LAW OF TORTS (1984 & SUPP.1988).

### **DICTIONARIES**

BLACK'S LAW DICTIONARY (6<sup>th</sup> ed.1990).

MITRA'S LEGAL & COMMERCIAL DICTIONARY (6<sup>th</sup> ed.2014).

NEW OXFORD DICTIONARY, 2(1993).

THE MERRIAM WEBSTERS DICTIONARY (10<sup>th</sup> ed.2009).

WEBSTER'S NEW WORLD COLLEGE DICTIONARY, NEW MILLENNIUM (4<sup>th</sup> ed.2006).

### **NEWS PAPER REPORTS**

1. VIJAY LOKAPPALLY, *Hardik, Rahul In Trouble Over TV Show Remarks*, THE HINDU, JAN 10, 2019.
2. VIDYA SUBRAHMANYAM, *This Journalism Requires no Sweat*, THE HINDU, MARCH, 2010.

## **REPORTS**

1. AN INQUIRY INTO THE CULTURE, PRACTICES AND ETHICS OF THE PRESS (LEVESON L.J.), VOL.IV.
2. ANNUAL REPORT OF THE MINISTRY OF INFORMATION AND BROADCASTING 1979-80(1980).
3. LAW COMMISSION OF INDIA, 42<sup>ND</sup> REPORT ON INDIAN PENAL CODE (1971).
4. REPORT OF THE FIRST PRESS COMMISSION (1954).
5. REPORT OF THE SECOND PRESS COMMISSION 19 (1982).
6. VERGHESE B.G. AKASHBHARTI, NATIONAL BROADCAST TRUST:REPORT OF THE WORKING GROUP ON AUTONOMY FOR AKASHVANI AND DOORDARSHAN, MINISTRY OF INFORMATION AND BROADCASTING (1978).
7. COMMITTEE ON PRIVACY, REPORT OF THE COMMITTEE ON PRIVACY 1972,CMND.5012.
8. FULTON COMMITTEE REPORT,CMND. 3638
9. REPORT OF COMMITTEE ON PRIVACY, CMND,5012 AT 10(1972)
10. ROYAL COMMISSION ON THE PRESS(CMND 6810,1977)
11. LAW COMMISSION OF INDIA,200TH REPORT ON TRIAL BY MEDIA: FREE SPEECH V. FAIR TRIAL UNDER CRIMINAL PROCEDURE(AMENDMENTS TO THE CONTEMPT OF COURT ACT,1971), 2006
12. THE COMM'N ON FREEDOM OF THE PRESS, A FREE AND RESPONSIBLE PRESS 86 (1947)
13. REPORT OF THE SECOND PRESS COMMISSION (1) (1982)

14. THE PUBLIC'S RIGHT TO KNOW: PRINCIPLES ON FREEDOM OF  
INFORMATION LEGISLATION (LONDON: JUNE 1999)

**INTERNATIONAL LEGAL INSTRUMENTS**

The African Charter on Human and People's Rights

The African Charter on Human and Peoples' Rights 1981

The African Commission on Human and People's Rights

The American Convention on Human Rights

The Convention on the International Transmission of News and the Right of  
Correction, 1962

The Declaration of the Principle of Freedom of Expression in Africa, 2002

The Declaration of the Rights of Man and of the Citizen, 1789

The European Convention on Human rights (ECHR)

The European Convention on Transfrontier Television, 1989

The Geneva Declaration, 1947

The Inter-American Declaration of Principles of Freedom of Expression 2000

The International Convention on Civil and political Rights, 1966

The International Covenant on Economic, Social and Cultural Rights 1966

The United Nations Declaration of Basic Principles of Justice for Victims of  
Crime and Abuse of Power 1985

The United Nations Declaration of Human Rights, 1948

## **INDIAN LEGISLATIONS**

The Aadhaar (Targeted Delivery of Financial and Other Subsidies, Benefits and Services) Act, 2016

The Advocates Act 1961

The Alexander Lyon's Bill of 1967

The Alexander Lyon's Bill, 1967

The Bonded Labour System (Abolition) Act, 1976

The Broadcasting Services Regulation Bill, 2007

The Cable Television Network Rules, 1994

The Cable Television Networks (Regulation) Act, 1995.

The Cantonment Act, 1924,

The Code of Civil Procedure, 1908

The Code of Criminal Procedure, 1973

The Code of Ethics and Broadcasting Standards.

The Conservation of Foreign Exchange and Prevention of Smuggling Activities (COFEPOSA) Act, 1974)

The Constitution of India, 1950

The Custom Tariff Act, 1975

The Customs Act, 1962

The Daily Newspaper (Price and Page) Order, 1960

The East Punjab Public Safety Act, 1949

The Gagging Act, 1857

The Human Rights Act, 1993

The Indian Easement Act, 1882

The Indian Evidence Act, 1872

The Indian Medical Council (Professional Conduct, Etiquette and Ethics) Regulations, 2002

The Indian Penal Code, 1860

The Indian Press (Emergency Power) Act, 1931

The Indian Privacy Code 2018

The Indian Telegraph Act, 1885

The Juvenile Justice Act, 1986

The M.P Police Regulations under Police Act, 1961

The Maharashtra Animal Preservation (Amendment) Act of 1995

The Medical Termination of Pregnancy Act, 1971

The Mobile Camera Phone Users (Code of Conduct), Bill 2006

The Muslim Women's (Protection of Rights on Divorce) Bill, 1986

The Newspaper (Price and Page) Act, 1956

The Newspaper (Price and Page) Act, 1956

The Newspapers (Incitement to Offences) Act 1908

The Official secrets Act, 1923

The POCSO Act, 2012

The PrasarBharati (Broadcasting Corporation of India) Act, 1990

The Press and Registration Book Act, 1867

The Press Council of India Act, 1978

The Prevention of Corruption Act, 1988

The Print and Electronic Media Standards and Regulation Bill, 2012



The Press Council (Procedure for Enquiry) Regulations, 1979

The Privacy Bill, 2011

The Punjab Excise Act, 1914

The Right to Information Act, 2005

The Self-Regulation Guidelines for the Broadcasting Sector, Draft 2008

The Special Marriage Act, 1954

The Cable Television Networks Act, 1995

The Chartered Accountants Act, 1949

The Communications Convergence Bill, 2001.

The Contempt of Court Act, 1971

The Hindu Marriage Act, 1955

The Indian Post Office Act, 1898

The Indian Telegraph Act, 1885

The Indian Wireless Telegraphy Act, 1933

The Indian Works of Defense Act, 1903

The Information Technology Act, 2000

The Medical Council Act 1956

The Northern Indian Canal and Drainage Act, 1873

The Representation of People Act, 1957

The Road Transport Corporation Act, 1950

The Slum Areas (Improvement and Clearance) Act, 1956

The Telegraph Wires (Unlawful Possession) Act, 1997

The Vernacular Press Act, 1878

The Walden Bill of 1969

The U.P.Pollice Regulations

The Vernacular Press Act 1878

The Working Journalist and other Newspaper Employees (Conditions of Service) and Miscellaneous Provisions Act,1955

### **OTHER FOREIGN LEGISLATIONS**

#### **AUSTRALIA**

The Broadcasting Services Act, 1992

The Federal Telecommunication (Interception) Act 1979

The Privacy Act 1988

#### **NEW ZEALAND**

The Broadcasting Act, 1989

The Films, Videos. Publications Classifications Act, 1993

#### **UK**

The Broadcasting Act, 1996

The Code of Practice, 1999

The Communications Act,2003

The Data Protection Act, 1998

The England's Justices of Peace Act, 1361

The Licensing Order Act, 1643

The Official Secrets Act, 1911

The Official Secrets Act, 1989

The Protection of Freedom Act, 2012

The Public Records Act, 1958

The Surveillance Camera Code of Practice, 2013

The Local Government (Access To Information) Act, 1985

The Local Government Act, 1939

The Public Bodies (Admission and Meetings) Act, 1960

**UNITED STATES**

The Bank Secrecy Act of 1970

The Cable Communications Policy Act of 1984

The Children's Online Privacy Protection Act of 1998

The Communications Assistance for Law Enforcement Act of 1994

The Computer Matching and Privacy Protection Act of 1988

The Driver's Privacy Protection Act of 1994

The Electronic Communications Privacy Act of 1986

The Employee Polygraph Protection Act of 1988

The Espionage Act, 1917

The Fair Credit Reporting Act of 1970

The Family Educational Rights and Privacy Act of 1974

The Foreign Intelligence Surveillance Act of 1978

The Freedom of Information Act, 1966

The Gramm-Leach-Bliley Act of 1999

The Health Insurance Portability and Accountability Act of 1996

Human Rights Act, 1988

The Identity Theft and Assumption Deterrence Act of 1998

The Personal Responsibility and Work Opportunity Reconciliation Act of 1996

The Preservation of Privacy Bill, 1972

The Privacy Act of 1974

The Privacy Act, 1993

The Privacy Protection Act of 1980

The Right to Financial Privacy Act of 1978

The Telephone Consumer Protection Act of 1991

The Fair Credit Reporting Act, 1970

The Financial Monetization Act of 1999

The Privacy Act of 1974

The U.S. Telecommunications Act, 1996

The Video Privacy Protection Act of 1988

The Video Voyeurism Prevention Act of 2004

#### **OTHER FOREIGN STATUTES**

The France Civil Code, 1970

The German Civil Code

#### **WEBSITES**

[http://downloads.bbc.co.uk/commissioning/site/code\\_of\\_practice.pdf](http://downloads.bbc.co.uk/commissioning/site/code_of_practice.pdf).

<https://deccanchronicle.com>

[http://ec.europa.eu/justice/dataprotection/document/review2012/com\\_2012\\_II\\_en.pdf](http://ec.europa.eu/justice/dataprotection/document/review2012/com_2012_II_en.pdf)

<http://hrlibrary.umn.edu/instree/u1circ.html>

<http://lawcommissionofindia.nic.in/reports/179rptp1.pdf>.

<http://lawcommissionofindia.nic.in/reports/rep200.pdf>

<https://oll.libertyfund.org/titles/elliott-the-debates-in-the-several-state-conventions-vol-1>

<http://oecdprivacy.org>

[http://planningcommission.nic.in/reports/genrep/rep\\_privacy.pdf](http://planningcommission.nic.in/reports/genrep/rep_privacy.pdf)

<http://www.indiatoday.in>.

<http://www.oas.org.juridico/english/treaties/b-32.html>.  
<http://www.whitehouse.gov/sites/default/files/privacy.final.pdf>.  
<https://apo.org.au/node/234789>  
<https://ico.org.uk/media/1542/cctv-code-of-practice.pdf>.  
<https://indiankanoon.org/doc/5439094>  
<https://mib.gov.in/satellite-tv-channel?nid=292391>  
<https://saveourprivacy.in/bill>  
<https://warburg.sas.ac.uk/pdf/emh290b2451517.pdf>.  
<https://www.article19.org.in>  
<https://www.gov.uk/government/publications/surveillance-camera-code-of-practice>  
<https://www.heinonline.com>  
<https://www.jstor.org>.  
<https://www.judiciary.uk/wpcontent/uploads/JCO/Documents/Reports/super-injunction-report-20052011.pdf>  
<https://www.livelaw.in>  
<https://www.nuj.org.uk/about/nuj-code>.  
[https://www.ofcom.org.uk/\\_\\_data/assets/pdf\\_file/0005/100103/broadcast-code-april-2017.pdf](https://www.ofcom.org.uk/__data/assets/pdf_file/0005/100103/broadcast-code-april-2017.pdf)  
<https://www.ohchr.org/EN/Issues/DigitalAge/Pages/DigitalAgeIndex.aspx>  
<https://www.ssrn.com/abstract=3104627>  
<https://www.westlawindia.com>

.....❁\*❁.....

## **LIST OF RESEARCH ARTICLES PUBLISHED**

1. VALUE OF PRIVACY IN HUMAN RIGHTS ERA-A RETHINKING, KERALA UNIVERSITY JOURNAL OF LEGAL STUDIES, VOLUME V (2012) ISSN 2278-2702, at 105-122.
2. NATIONAL SECURITY, SURVEILLANCE AND PRIVACY RIGHT-A STRUGGLE TO BALANCE, PROCEEDINGS OF INTERNATIONAL SEMINAR ON HEALTH, HUMAN RIGHTS AND INTELLECTUAL PROPERTY RIGHTS (2017) ISBN 978-81-938852-1-5. at 66-76.