

RIGHT TO PRIVACY IN THE ERA OF PAPARAZZI

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ABSTRACT

The media in Indian jurisdiction is referred to as the fourth estate of democracy, the legislature, judiciary and the executive being the other three. It has also been guaranteed a freedom of press under the aegis of freedom of speech and expression by the Indian constitution to ensure that it retains its independence and presents the absolute truth about the injustice and wrong doing prevailing in the society for people to mould their opinion and stand up against such prejudice. Moreover, media or the so-called paparazzi is expected to function within the boundaries of the rules and statutes created by the other three estates of democracy. This is suggestive of the fact that nothing is above the principle of “rule of law”. Unfortunately, in this era of commercialisation and competition, media seems to have transgressed the bars of ethical journalism for their commercial interests and political agenda in the guise of the fundamental right guaranteed to them. This has resulted in encroachment of the right to privacy of individual which is also expressly guaranteed by the Indian constitution to the citizens very recently due to upsurge of intrusion of their privacy by the government by using algorithms and digital technologies. Right to privacy is an inevitable human right that cannot be ignored by the state or any individual regardless of any circumstances. Moreover, the lack of accountability and transparency by the media would prove to be dangerous and may also lead to a situation of anarchy in a nation. Although, we understand that freedom of press is certainly an essential part of the freedom of speech and expression and is an critical requisite of a democratic arrangement, it cannot be allowed to transgress the restrictions put on them and cannot ignore to draw a line in the sand in the name of freedom of press and encroach upon the fundamental human right- right to privacy and also grip the freedom to contempt of court. This paper is an effort to analyse the need of media contribution and playing a vital role in establishing the justice and fairness in the Indian society.

INTRODUCTION

In this era, there is a tremendous upsurge in the amalgamation of both information and entertainment principles, which are driven by the burgeoning of different modes of communication in the form of both conventional media, such as print, radio, television, and film, and the newly innovated technology, the internet. There is no doubt that the revolution in the media industry have been a proved to be boon to the general public in India. In fact, the judiciary has also profited from the courageous media and taken suo moto cognizance of various matters depending on the news reports and media coverage of violations caused to human rights in India. While individuals appreciate the convenience of media and being kept apprised of ongoing events, they also realise that media pries into every corner of their social lives, thereby hampering the individual's "right to privacy" and causing the needless revelation of personal information to the eyes of masses giving rise to a conflict of interest. Preservation of individual rights is of utmost importance in a democracy; yet continuation of that democracy demands a press which provides necessary information upon which to base balanced self-rule. Therefore, reconciliation of the freedom of media and the right to privacy has evolved tentatively in such atmosphere. This, conflict, also requires an establishment of checks and balances so that a reasonable equilibrium may be achieved.

Meanwhile, the right to privacy has become firmly recognized in almost all geographies across the globe. Governments have understood the importance of emotional disturbance produced by unnecessary intervention into one's peace of mind. India has been a party to the United Nations Declaration on Human Rights (UDHR), 1948 even before its independence. In 1950, India declared itself to be a fully democratic nation, having accepted most of the basic values of the UDHR. Indian government realised the necessity of the press and its influence on the people of India. Press had played a very significant and prolific role in the independence drive. Such was the impact of the print media that it rattled the Britishers, as it gave a representation of a strong India, though the reality was a fragmented India ruled by princely rulers and masses in deep poverty. The framers of our Constitution knew the massive power bestowed on the press; therefore, they established the Freedom of Speech and Expression in Article 19(1) (a) of the Indian Constitution¹³⁸⁴ inspired by Article 19 of the

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¹³⁸⁴ The Constitution of India, art. 19(1)

UDHR¹³⁸⁵. However, in the thought process of the architects of Indian Constitution it never came to light, about the consequences of an unrestrained freedom of press.

Although Article 19(1) (a) does not explicitly mention freedom of press, the Supreme Court in *Romesh Thaper v. State of Madras*¹³⁸⁶, stated that “freedom of speech and expression” includes in its ambit the “freedom of press”. Post this, originated the first amendment of the Constitution in 1951, which amended Article 19(2). The new Article 19(2) provided ‘Nothing in sub clause (a) of clause (1) shall affect the operation of any existing law or prevent the state from making any law, in so far as such law imposes reasonable restrictions on the exercise of the right conferred by the said sub clause in the interests of the security of the state, friendly relations with foreign states, public order, decency or morality or in relation to contempt of court, defamation or incitement to an offence.’¹³⁸⁷ This amendment further extends the ambit of freedom of press under the Indian Constitution. In fact, media is known as the fourth estate of the constitution and a watchdog of the democracy expecting it to address the injustice prevailing in the society and exposing them to knowledge of the public hoping for rectification. However, it is also accepted that too much interference of this watchdog can be a matter of concern for individual as that would result in encroachment of their right to privacy which is recognized under Article 21 of the Indian constitution recently in the year 2019. Hence, it is expected that the fourth estate of this democracy acknowledges that privacy of individuals is respected and duty of media coverage is combined with the responsibility to protect the right to live with liberty and privacy provided to individuals by the Indian constitution. This paper will outline the concept of the freedom of press and also discuss on the conflict of such freedom with the basic human right-right to privacy. Furthermore, it will focus on the right of individuals with privacy in case of prejudiced media coverage along with the checks and balances that needs to be in place by the government to create a perfect balance between the two fundamental rights in question.

FREEDOM OF PRESS

One of the important fundamental rights recognised under the Indian Constitution is the “freedom of speech and expression which is guaranteed under article 19(1) of the

¹³⁸⁵ Universal Declaration of Human Rights

¹³⁸⁶ AIR 1950 SCR 594

¹³⁸⁷ The Constitution of India, art. 19(2)

constitution¹³⁸⁸. It is a principle that identifies the freedom of individual or a community to put forth their opinions and ideas without any unnecessary fear or hindrance. It was taken from the article 19 of the Universal Declaration of Human Rights and is also recognised in International human rights law in the International Covenant on Civil and Political Rights (ICCPR). Article 19 of the UDHR states that "everyone shall have the right to hold opinions without interference" and "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 choice"¹³⁸⁹. The version of Article 19 in the ICCPR later amends this by stating that the exercise of these rights carries "special duties and responsibilities" and may "therefore be subject to certain restrictions" when necessary "for respect of the rights or reputation of others" or for the protection of national security or of public order (order public), or of public health or morals".¹³⁹⁰

Freedom of press on the other hand is recognised as vital part of the freedom of speech and expression and therefore, jurists have recognised it as a fundamental right under the ambit of freedom of speech and expression to protect the media from unlawful restriction and to give them a right to disseminate the truth and injustice prevailing in the society for people to view and form opinions and for courts to apprise themselves and take necessary cognizance as and when it is required. This vital role played by the print and electronic media both is known to be a key instrument for understanding and evaluation of the social order.

However, as no right is absolute and unrestricted, article 19(2) of the Indian constitution talks about the restrictions put on the freedom of expression. Article 19(2) states that "nothing in sub clause (a) of clause (1) shall affect the operation of any existing law, or prevent the State from making any law, in so far as such law imposes reasonable restrictions on the exercise of the right conferred by the said sub clause in the interests of the sovereignty and integrity of India, the security of the State, friendly relations with foreign States, public order, decency or morality or in relation to contempt of court, defamation or incitement to an offence."¹³⁹¹ This above statement interestingly doesn't include privacy as a criterion to restrict freedom of press which is concern for the public at the moment considering the increase of the

¹³⁸⁸ Supra, art. 19(1)

¹³⁸⁹ Supra, art. 19 (1)

¹³⁹⁰ International Covenant on Civil and Political Rights, art. 19

¹³⁹¹ Supra, art.19 (2)

aggressive form of journalism in India. Although both rights in question cannot be equally balanced on a yardstick, government seems to have chosen to prejudice the privacy of individuals to deal with such a situation of conflict. In fact, media has always relied on freedom of speech and expression as a valid excuse to breach the individual's fundamental right of privacy by disclosing lurid personal details of people especially public personalities to the general public regardless of its necessity. In addition, freedom of press needs to be read along with the Right to information Act (RTI). The Indian law has made some exceptions to the rule of privacy in the interest of the public, especially, following to the enactment of the RTI Act. The RTI Act, makes an exemption under section 8 (1) (j), which exempts disclosure of any personal data to the world which is not connected to any public activity or of public interest or which would cause an unjustified intrusion of privacy of an individual¹³⁹². What constitutes an unjustified invasion of privacy is not well-defined. However, judges have taken an optimistic position on what constitutes privacy in different settings of the society.

RIGHT TO PRIVACY

Considering that the term "privacy" has very lately got its inception in this digital world, it is difficult to be understood in a theoretical sense. Conceptually, the right to privacy is an essential factor to ensure protection to an individual's dignity and to the society in general. Privacy is in itself a very wide term which includes privacy from various sources like privacy from press, unnecessary government and private bodies interference. In a democracy, it should solely be the individual who should have the right to decide about exposure of their personal details to the world. The journalists or the so-called press, who regardless of any ethics and decency and for their vested interests make the affairs of individual's life public. India, at present, does not have a codified law protecting privacy; the right to privacy is a deemed right under the Indian Constitution.

In *PUCL v. UOI*¹³⁹³, which is popularly known as the wire-tapping case, the question before the court was whether wire-tapping was an infringement of a citizen's right to privacy. The court held that an infringement on the right to privacy would depend on the facts and circumstances of a case. It observed that, "telephone conversation is an integral part of a man's personal life. Right to privacy would undoubtedly include telephone-conversation in

¹³⁹² The Right to Information Act, 2005, s. 8 (1)(j)

¹³⁹³ AIR 1997 SC 568

the privacy of one's household or workplace. Thus, the encroachment of individual's privacy by telephone-tapping would, attract Article 21 of the Constitution of India unless it is reasonably permitted under the procedure established by law." It further observed that the right to privacy also attracts Article 19 of the Indian constitution because 'when a person is having a conversation on telephone, he is exercising his right to freedom of speech and expression. The court, hence, has construed that the right to privacy is not an unqualified right, but a restricted right which needs to be considered on a case to case basis. It is the exceptions to the right to privacy, like 'public interest', that are the focus of this research paper.

Privacy under the constitution of India

Under the Indian constitution, Article 21 is a comprehensive provision i.e., "No person shall be deprived of his life or personal liberty except according to procedure established by law."¹³⁹⁴ The said provision has under its aegis included the right to privacy. It is now recognised as a fundamental right by the apex court of India. Moreover, the right to privacy has to be understood in the context of two fundamental rights: the right to freedom under Article 19 and the right to life under Article 21 of the Constitution. Although, right to privacy in India was recognised recently by the Supreme court in *Justice K. S. Puttaswamy v. Union of India*¹³⁹⁵, it was originally recognised as a fundamental right under the aegis of right to freedom of speech and expression. In the case of *Kharak Singh v. the State of U.P.*, the Supreme Court of India recognized that people of India had a fundamental right to privacy which was part of the right to life and liberty in Article 21 in addition to the right to freedom of speech and expression given under Article 19(1)(a) of the Indian constitution. This clearly implies that the relationship between the freedom of speech and expression and the right to privacy can coexist and augment instead of being prejudicial to each other. In fact, it is established by the recent judgement of *Justice K. S. Puttaswamy v. Union of India* that privacy is a necessary condition for the meaningful exercise of other guaranteed freedoms.

PRIVACY UNDER PERSONAL DATA PROTECTION BILL, 2019

Although, India does not have a codified law in force yet, the Personal Data Protection Bill (herein referred to as the "PDPB") is soon expected to become India's privacy law after

¹³⁹⁴ The Constitution of India, art. 21

¹³⁹⁵ 2017 10 S.C.C 1

receiving a green signal from the Parliament. The PDPB Bill is an almost mirror image of the Europe's General Data Protection Regulation (commonly known as the "GDPR"). It has, under the article 36 identified provisions regarding protection of personal data from media coverage. It states that "The provisions of Chapter II except section 4, Chapters III to V, Chapter VI except section 24, and Chapter VII shall not apply where (e) processing of personal data is necessary for or relevant to a journalistic purpose, by any person and is in compliance with any code of ethics issued by the Press Council of India, or by any media self-regulatory organisation." Journalistic Purposes has been defined as any activity means any activity intended towards the dissemination through print, electronic or any other media of factual reports, analysis, opinions, views or documentaries regarding (i) news, recent or current events; or (ii) any other information which the data fiduciary believes the public, or any significantly discernible class of the public, to have an interest in¹³⁹⁶. Given that India is yet to pass the PDP Bill, it will be interesting to see how the experts deal with the upsurge of media intervention and if they decide to restrict or modify the provision dealing with the processing of personal data of the individuals in the PDB Bill.

PRIVACY UNDER THE COMMON LAW OF TORT

Under the Common law, a private action for damages for unlawful invasion of privacy is maintainable. The printer and publisher of a tabloid, periodical or book are liable for damages if they circulate any material regarding the personal life of a national which includes his family, marital status, reproduction, parenting, child-bearing or schooling without his or her express consent. Nonetheless, it is imperilled by the following exceptions: 1. When the book or periodical is based on records available on public forum, including any court records- because the right to privacy no longer exists once a material becomes available in the public domain. 2. When the wrongful publication relates to the acts which are crucial to release of the official duties of a government official. - Unless the publication is proved to be untrue or motivated by hatred or thoughtless disregard for reality. Sometimes, when the privacy deed is protected under the tort of defamation, it is inadequate to protect the person's privacy. There is a fundamental difference between defamation and the exposure of public revelation of awkward private realities. Truth is an unqualified defence to the former, but not to the later.

¹³⁹⁶ The Personal Data Protection Bill, 2019, s. 36

This difference is crucial. This is the reason behind need of specific law protecting privacy of individual.

CONFLICT BETWEEN FREEDOM OF PRESS AND RIGHT TO PRIVACY

When considering the conflict between freedom of media to disseminate information and the right to privacy, there has always been a fundamental question about the relative weight of privacy versus public interest. Although, India currently does not have a codified law on the right to privacy, it has acquired constitutional recognition leading to drafting of the Personal Data Protection Bill (PDPB) in 2019. One of the questions to mull over is whether the PDPB, which is soon to come into force as India's privacy law, includes a provision to safeguard the individuals from privacy encroachment by the media. The answer to the question is unfortunately in negative, as PDPB, under its article 36(e)¹³⁹⁷ has allowed exemptions for processing personal data for journalistic purposes provided they are in compliance with code of ethics issued by Press Council of India (PCI) or any media self-regulatory authority. Journalists have been given the liberty to distribute views, opinions regarding any information that they (acting as data fiduciary) consider masses to have an interest in.

Article 36(e) certainly gives an impression that the government needed to put in more thought while exempting journalists from the responsibility to protect privacy under the PDPB. In fact, they have completely been heedless to such privacy violation by the media. Firstly, the obligation on data fiduciary to decide on the information that they deem masses to have an interest in does not create a perfect balance between the fundamental rights in question and seems to be quite discretionary. Media outlets should have the responsibility to show 'what is in public interest' rather than presentation of 'what the public is interested in'. Secondly, PDPB doesn't mandate any standards of necessity and proportionality to be met by journalists before infringing the right to privacy. Besides, it is highly unlikely that media trials shall be conducted as per any code of ethics considering media reportage and ethics rarely go hand-in-hand in this current period of yellow journalism prevailing in the nation at the moment in time.

MEDIA TRIALS

¹³⁹⁷ Supra note 6, s. 36

At this precise moment, India is hashing over the current trending phrase “media trial”. Media trial is a popular expression referring to the media becoming the judge, jury and the executioner and pronouncing its own verdict even before the court passes its judgement. Although media trials have been conducted in the past, the recent death of a famous Indian movie artist, burgeoned this prejudicial media coverage leading to a conflict with the fundamental human right - right to privacy.

Over the past few months, electronic media channels have been conducting parallel investigations in the form of unrestrained ‘media trial’ and broadcasting the unfortunate episode like a soap opera to an extent where several unnecessary sting operations, lurid details about the late actor’s medical history, doctor’s prescriptions, bank account details with transactions and more prominently, numerous private chats of all individuals, photographs and videos regardless of its relevance to the investigation are all put under the public glare. This aggressive and tendentious journalism has not only resulted in the violation of privacy rights of the individuals but also flouted the doctrine of ‘innocent until proven guilty’.

This makes us all ponder if the media has been given an exceptional right by the Indian constitution to intrude into the privacy of individuals in the name of ‘freedom of press’. In what follows, we will contemplate trials by the media, the so-called India’s fourth estate of democracy, vis-à-vis the right to privacy, including any checks and balances on it by the rule of law.

Is media trial even constitutional?

Courts in India haven’t explicitly declared media trial as unconstitutional; however, there has been a lot of criticism on this practice of media where it acts both as the accuser and the judge crushing the fundamental right to privacy of every individual tagged to a case with complete impunity. The so-called ‘watchdog of democracy’ follows these practices in the guise of exercising ‘freedom of press’ which is provided by Indian constitution under the aegis of the fundamental right, ‘Freedom of Speech and Expression’. It is believed by experts that this freedom allows media to intervene and help people build opinions and views on various issues of national interest; however, too much intervention is also a matter of concern. Therefore, article 19(1)(2) of the Indian constitution has contoured this right of media by listing grounds of restrictions upon the freedom of speech and expression as no freedom in this constitution is absolute and unfettered. Having said that, as discussed above, privacy is not counted among the reasonable restrictions to the right to freedom of speech and

expression. In addition, there is no specific legislation in India which directly protects right to privacy against excessive publicity by press including media trial which leaves individuals with no specific right against such intrusive media trial.

Any checks and balances?

Since at present, there is no codified law Media trials in general and in this particular sensational case is certainly tantamount to “contempt of court” which is also prescribed by the Indian constitution and the Contempt of Courts Act, 1971. The Contempt of Court Act defines contempt by stating that “No publication, which is calculated to poison the minds of jurors, intimidate witnesses or parties or to create an atmosphere in which the administration of justice would be difficult or impossible, amounts to contempt.”¹³⁹⁸ From a practical perspective, these checks on the media outlets are seldom paid attention to and in fact, it has been a far-flung practice of media to overlook the obligation of drawing a line in the sand when reporting sensational news.

The Press Council of India which has no jurisdiction on electronic media has issued an advisory¹³⁹⁹ maintaining that media should not conduct their own parallel trial or forecast the decision to avoid pressure during investigation and trial. The independent regulatory association, News Broadcasters Association (NBA) has enumerated detailed guidelines on areas where media needs to self-regulate. Unfortunately, in all these years of prejudiced media coverage, these watchdogs and their guidelines have not been taken seriously by those running the show.

CONCLUSION

Even though privacy is considered as a human right, its struggle with the freedom of speech and expression is seen from the perspective of privacy as a legal safeguard. The reason for this is because right to privacy is guaranteed to the citizens from the state actions instead of private actions by individuals. The obligations are put mostly on the states to protect individuals from unnecessary intrusions of privacy. The obligations put on individuals on safeguarding each other’s privacy is very limited or none at all. The need to protect the privacy rights also arises when the said human rights restricts the freedom of expression in some way or the other. The balance between the privacy right and freedom to press needs to

¹³⁹⁸ The Contempt of Courts Act, 1971, art. 2

¹³⁹⁹ Media Advisory, available at: <http://presscouncil.nic.in/WriteReadData/Pdf/FinalMediaadvisoryPR.pdf> (last visited on September, 11, 2020)

be assessed on the basis of demand of reasonable public interest. It is being noticed that the extra-intrusive media outlets, which is a creation of political agenda and the need to present sensational coverage to attract the public so that as to increase their commercial interests, has resulted in intrusion of 'right to privacy' by crossing the boundaries of the liberty given to them. This implies that the obligation to protect the right to privacy of individuals from the prejudicial media coverage is the need of the hour. In addition, government needs to maintain an equilibrium between the freedom of press and the right to privacy. Government should be responsible to ensure checks on the extend of use of the freedom of media and should maintain a balance when the media omits to draw the thin line between the private rights and public interest. With great power great responsibility, and thus, the fundamental right to freedom of speech and expression under article 19(1) (a) of the constitution of India corresponds with the responsibility not to violate the law considering that if journalistic institutions are left unchecked, it will lead to conflict of rights and ultimately anarchy. Therefore, media outlets while exercising their right to press under the aegis of right to freedom of speech and expression, should ensure fundamental right to dignity and privacy of the individual guaranteed under Article 21 of the Indian constitution. Media without an iota of doubt, forms the backbone of a democratic society and does assist in administering of justice; however, irresponsible media reportage without ethical and social responsibility is detrimental to the society. Both electronic and print media es expected to function ethically and need to understand the relevance of privacy and should not be categorised as newsflash. The basic human right, the right to privacy of an individual regardless of their position in a court case cannot be put at stake for news channels to serve their own selfish interests. It is evident that in the absence any proper regulation by the government, media should not be given carte blanche in the investigations process. They should not be allowed to exercise the fundamental right of free speech and expression to transgress bounds of prudence. Moreover, the exceptions granted for journalistic purposes without any adequate government guidelines is not only antagonistic for democracy but the consequences of not being accountable for the actions are even more detrimental to the social order. It is evident that a need for proper regulation of media houses by the government has arisen as right to privacy is inevitable.