

Freedom of Press and the Protection of Privacy

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Abstract: *The press is the only tocsin of a nation. When it is completely silenced, all means of a general effort are taken away. Thomas Jefferson Freedom of speech is the defensive wall of democratic government. This freedom is essential for the proper functioning of the democratic process, and in order to preserve the democratic way of life, it is essential that people should have the freedom to express their feelings and have the opportunity to make their views known and disseminated to the people at large. And press being a powerful media of mass communication plays its role in this process.*

Keywords: *Freedom of Press and the Protection of Privacy*

I. INTRODUCTION

According to the U.S Supreme Court, freedom of press includes more than merely serving as a neutral conduit of information between the people and their elected leaders or as a neutral form of debate besides creating a fourth institution outside the government as an additional check on the three branches - executive, legislative and judiciary. It is the prime function of the press to provide comprehensive and objective information on all aspects of the country's social, economical and political life.¹

The Right to Press

In a democracy, there are many ways to address genuine grievances of the people and there is no need to bring personal hardship to people, in the words of the father of the nation M.K. Gandhi. One of the objects of the newspaper is to understand the popular feeling and give expression to it; another is to arouse among the people certain desirable sentiments; the third is fearlessly to expose popular defects.ⁱⁱ In *Express Newspapers v. Union of India*,ⁱⁱⁱ the Supreme Court said that it is not to be understood, however, that the freedom of speech and expression includes the liberty to express or propagate one's own views only. It also includes the right to propagate or publish the views of other people; otherwise this freedom could not have included freedom of press which is obviously included in it. Expression includes the idea of, 'publication, and distribution or circulation as well as the right to receive the matter distributed. In India Right to freedom of the press is not specifically mentioned in Article 19(1) (a) of the Constitution, what is mentioned is only freedom of speech and expression, which relates to utterances in writing or in printing or manifestation or representation of feelings,

intention of thoughts in writings by an individual, but not includes freedom of the press. However, the constituent assembly debates would dispel that it was made clear by Dr. Ambedkar, chairman of the drafting committee, that no special mention of the freedom of the press was necessary at all as the press and an individual or a citizen were the same so far as their right of expression was concerned.¹ Therefore under Indian Constitution the law of England was followed where it is recognized that the law of the press was merely a part of the law of libel.² In *Romesh Thappar v. State of Madras*,³ and *Brij Bhushan v. State of Delhi*,⁴ the Supreme Court took it for granted that the freedom of the press was an essential part of the right to freedom of speech and expression. It was observed by Justice Patanjali Sastri in *Romesh Thappar* that the freedom of speech and expression included propagation of ideas, and that freedom was ensured by the freedom of circulation.⁵

II. THE RIGHT TO PRIVACY AND ITS PROTECTION

The right to privacy is, as a legal concept. It dates back to a Law Review article published in December of 1890 by two young Boston lawyers, Samuel Warren and Louis Brandeis. Roscoe Pound described this article as having done nothing less than add a chapter to our law. Fewer than ninety years later it is surprising to find that this relatively new chapter in our law appears to have fallen into such disarray that one United States Supreme Court Justice has characterized the right to privacy cases decided by his Court as defying categorical description. Paradoxically, a categorical description of the right to privacy was precisely what Warren and Brandeis

¹ Vasant Moon (ed), Dr. Babasaheb Ambedkar : Writings and Speeches, 403 (Vol 13, Dr. Ambedkar Foundation, Ministry of Social Justice & Empowerment, Govt. of India, 1994, Reprinted 2014 , New Delhi)

² *Dimming Arnold v Emperor*, AIR 1914 PC 116

³ AIR 1950 SC 124

⁴ AIR 1950 SC 129

⁵ AIR 1950 SC 124, 127

invented in 1890.⁶ Warren and Brandeis, who were the two leading American academicians and judges' state in their thesis, titled 'The Right to Privacy' in 1890 that:-

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 has through invasion upon his privacy, subjected him to mental pain and distress, far greater than could be inflicted by mere bodily injury.⁷

Though, the first step in the area of privacy was taken in *Nihal Chand v. Bhagwan Dei*,⁸ in which the High Court recognized the independent existence of privacy as emerging from customs and traditions of people. But in India the constitution does not grant in specific and express terms any right to privacy as such. Right to privacy is not enumerated as a Fundamental Right in the in the Constitution. However, such a right has been culled by the Supreme Court from Article 21 and several other provisions of the Constitution read with the Directive Principles of State Policy.⁹ However, for the first time, in 1963, in *Kharak Singh v. State of Uttar Pradesh*,¹⁰ a question was raised whether the right to privacy could be implied from existing Fundamental Rights, such as Art 19 (1) (d), 19 (1) (e) and 21. The majority of judges participating in the decision said that of the right to privacy that our Constitution does not in terms confer any like constitutional guarantee. On other hand, the minority opinion (Subba Rao, J.) was in favour of inferring the right to privacy from the expression 'personal liberty' in Article 21. In his view the right to personal liberty takes in not only a right to be free from restrictions placed on his movements. But also free from encroachments on his private life. It is true 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. Efforts has been made and the Supreme Court of India in *Gobind v. State of Madhya Pradesh*,¹¹ stated that the right to privacy encompasses and protects the personal intimacies of

the home, the family, marriage, motherhood, procreation and child rearing. The reasoning given by the Judges is based on the concept that at home individuals drop their mask and be their real self and not act in a manner that they might represent themselves outside the home. In this safe sanctuary of a home the prying eyes of the journalists should be kept away. Even if the person is a public figure it is a basic right of the individual by birth to be let alone at least at home and in their personal affairs. This gives relaxation to him and puts his head and body at rest. This restful period is needed in every individual so that he can function properly in his job or responsibility assigned to him in the public. The Press Council of India in its Journalistic Conduct Norms, 2010 Specify that the Press shall not intrude or invade the privacy of an individual, unless outweighed by genuine overriding public interest, not being a prurient or morbid curiosity. So, however, that once a matter becomes a matter of public record, the right to privacy no longer subsists and it becomes a legitimate subject for comment by the Press and the Media, among others. Special caution is essential in reports likely to stigmatize women. 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 or public interest.¹² The freedom of press and the right to privacy came seriously under consideration in *R. Rajagopal v. Tamilnadu*,¹³ in which the prison authorities attempted to prevent Nakkheeran, a Tamil Weekly, from publishing the autobiography of Auto Shankar, who had been sentenced to death. It was believed that publication may uncover the close nexus between the prisoner and several IAS and IPS officers and politicians. The contention of the respondent was that the alleged autobiography had not been written by the convict and that the convict had not authorized the publication. The Court proceeded on the assumption that the prisoner had neither written his autobiography nor had authorized the petitioner to publish the same and also that the publication would be highly defamatory of some officers and politicians. The court held that the government could not maintain a civil action for its defamation. The court also stated that right to privacy is implicit in Article 21 and it is a right to be let alone. But once the matter becomes public record or the person voluntarily submits himself into controversy then it may be a different question. The court granted the right to publish in so far as the information was gathered from public records. The court opined that no consent of the convict or authorization is necessary. The Court warned that if the

⁶ Dorothy J. Glancy, The Invention of The Right to Privacy, (Arizona Law Review, Vol 21, 1979)

⁷ Warren and Brandeis, The Right to Privacy, (Harv. L. Rev. Vol: 4, Dec 1990)

⁸ AIR 1935 All.1002

⁹ M.P Jain, Indian Constitutional Law, 1236 (Lexis Nexis Butterworths, 6th ed, 2010, Nagpur)

¹⁰ AIR 1963 SC 1295

¹¹ AIR 1975 SC 1378

¹² Press Council of India, Norm of Journalist Conduct, 12, (New Delhi, 2010)

¹³ AIR 1995 SC 264

publishers went beyond that, then they might be invading the prisoner's right to privacy and would be liable to that extent.

Right to Privacy is an inviolable human right. However, the degree of privacy differs from person to person and from situation to situation. The public person who functions under public gaze as an emissary/representative of the public cannot expect to be afforded the same degree of privacy as a private person. His acts and conduct as are of public interest ('public interest' being distinct and separate from 'of interest to public') even if conducted in private may be brought to public knowledge through the medium of the press. The press has however, a corresponding duty to ensure that the information about such acts and conduct of public interest of the public person is obtained through fair means, is properly verified and then reported accurately. For obtaining information in respect of acts done or conducted away from public gaze, the press is not expected to use surveillance devices. For obtaining information about private talks and discussion while the press is expected not to badger the public persons, the public persons are also expected to bring more openness in their functioning and co-operate with the press in its duty of informing the public about the acts of their representatives. The interviews/articles or arguments pertaining to public persons which border on events that are in public knowledge, if reported correctly, cannot be termed as intrusion into private life. There is a very thin line between public and private life and public persons should not to be too thick skinned to criticism. Newspapers are allowed scope of freedom in criticising persons who are in seats of power because their conduct discloses public interest provided their criticism is not motivated to gratify private spite of opponent/rival of public figure. The families of public figures are not valid journalistic subject, more so if it's reporting covers the minors. If public interest overrides the minor's right to privacy it will be proper to seek prior consent of the parents. When the individual concerned himself or herself reveals facts about private life before a large gathering then the shield of privacy should be deemed to be abandoned by the individual.¹⁴ Broadly speaking, the right to the freedom of expression impacts the right to privacy in negotiating such as:-

1. To what categories of data should the freedom of expression be limited in order to protect privacy?
2. In which context will freedom of expression impinge on privacy?
3. In what circumstances is it necessary that an individual be provided the right to privacy in order to protect the freedom of speech?

Thus, Violations of privacy that can result because of an expression are most commonly understood as privacy torts and include:

- a) Intrusion into an individual's personal affairs including public disclosure of a person's private life.
- b) Publicity which places an individual in false light in public, and -
- c) Use of an individual's own name for commercial purposes commonly understood as the right to publicity.

In District Registrar and Collector, Hyderabad and another v. Canara Bank and another,¹⁵ The Supreme Court of India expressed that internationally speaking the right to freedom of expression includes within it the right to anonymous speech, i.e. the right to express oneself without identifying oneself as the source of such expression. Another aspect of this is the right to pseudonymous speech where again the author of the information does not give his correct identity. In order for a person to express his/her thoughts and ideas, political, ethical, or otherwise a person requires a safe private sphere free from State or private interference. Therefore the right to privacy which would protect one's privacy actually goes hand in hand with the right to freedom of information and transparency. Thus, the relationship between the freedom of expression and privacy does not have to be a zero sum game but rather can be a positive sum game where both rights exist not only to not diminish each other but actively support and enhance each other. Again in the words of Hon'ble Supreme Court, the right to privacy has several aspects so there is no hesitation in holding that right to privacy is a part of right to life and personal liberty enshrined under Article 21 of the Constitution. Once the facts in a given case constitute a right to privacy Article 21 is attracted. The said right cannot be curtailed except procedure established by law.¹⁶ The court held that even a woman of easy virtue is entitled to her privacy and no one can invade her privacy as and when he likes.¹⁷ Similarly right to procreate is also covered under right to privacy.¹⁸

III. CONCLUSION

The term "private life" which ultimately relates to the term "Privacy" is not defined anywhere, it was only ascertained that Privacy it is an inviolable human right and the degree of privacy differs from person to person and from situation to situation. The public person who functions under public gaze as an emissary/representative of the public cannot expect to be afforded the same degree of privacy as a private person. It was held that the right to privacy is not absolute and reasonable restriction can be placed thereon in public interest under Article

¹⁴ Press Council of India, Right to Privacy – Public figures and Press, 85 (New Delhi, 2010)

¹⁵ 2005 (1) SCC 496

¹⁶ People's Union for Civil Liberties v. Union of India, AIR 1991 SC 207

¹⁷ State of Maharashtra v. Madhukar Naryan Mardikar, AIR 1999 SC 495

¹⁸ B.K. Parthasarathi v. State of Andhra Pradesh, AIR 2000 AP 156

19 (5). Therefore, the Press Council of India has guided and instructed the Journalist that While reporting crime involving rape, abduction or kidnap of women/females or sexual assault on children, or raising doubts and questions touching the chastity, personal character and privacy of women, the names, photographs of the victims or other particulars leading to their identity shall not be published. Minor children and infants who are the offspring of sexual abuse or 'forcible marriage or illicit sexual union shall not be identified or photographed. Intrusion through photography into moments of personal grief shall be avoided. However, photography of victims of accidents or natural calamity may be in larger public interest. And press has to remember that it is not a prosecutor in any investigation and should be guided by the paramount principle of a person's innocence unless the alleged offence is proved beyond doubt by independent reliable evidence and, therefore, even within the constraint of space, the material facts should find space in the rejoinder so that the public, as the ultimate judge of any matter, is guided by the complete and accurate facts in forming its opinion. The readers right to know all sides of any issue of public importance is a natural corollary of the freedom enjoyed by the press in a democracy.¹⁹ Though it appears certain that right to privacy cannot be absolute, yet the

media itself has to show self-restraint, and respect the privacy of the public figures. Where there is clash between the public person's privacy and public's right to know about his personal conduct, activities, habits and traits of character, impinging upon or having a bearing on public interest, the former must yield to the latter. The right to privacy has now become established in India, but as a part of Article 21 and not as an independent right in itself, as such a right, by itself, has not been indentified under the Constitution. The Court has however refused to define privacy saying, as a concept it may be too broad and moralistic to define it judicially. Whether right to privacy can be claimed or has been infringed in a given case would depend on the facts of the said case. This means that whether the right to privacy can be claimed or has been infringed in a given situation would depend on the facts of the said case, and view the Court takes to the matter. None can publish anything concerning personal matters without consent of the person so concerned except if it relates to larger public interest, peace and security of the State, whether truthful or otherwise and whether laudatory or critical. If one does so he or she would be violating the right to privacy of that of other and would be liable in an action for damages.²⁰

ⁱ New York Times v. Sullivan, 376 U.S. 254

ⁱⁱ Dr. Shikha Jain, *Good Governance & Media in Bihar*, 126 (Ocean Books Pvt. Ltd, New Delhi, 1st edn. 2016)

ⁱⁱⁱ AIR 1958 SC 578

¹⁹ Press Council of India, Norm of Journalist Conduct, (New Delhi, 2010).

²⁰ R. Rajagopal v. State of Tamil Nadu, AIR 1995 SC 264.