

# NEXUS BETWEEN PRIVACY AND MEDIA LAW

## UNDERSTANDING ITS APPLICATION TO THE FREEDOM OF THE PRESS

Archit Mishra,  
4<sup>th</sup> Year Student of Law, Symbiosis Law School (SLS), Pune

### INTRODUCTION

*When the speech condemns a free press, you are hearing the words of a tyrant.*

- **Thomas Jefferson**

The entire jurisprudence of media laws in India affects the lives of individuals directly or indirectly. These laws emanate from one of the significant articles of the Constitution of India i.e., Article 19(1) of the Constitution.<sup>1</sup> It is true that when we talk about issues like nexus between privacy and media law in terms of freedom of press various legal aspects like privacy rights, defamation, confidentiality, truth, broadcasting and advertising comes into the picture.<sup>2</sup> Media which is also known as the fourth pillar of the democracy is required to be an independent and free from any prejudices and biases to attain the true democracy. Press acts as an agent of checks and balances system on the ruling

government. While exercising such rights it is important to understand that media cannot enjoy any blanket immunity by taking the defence of Article 19 i.e., freedom of speech and expression and corresponding to this right there exists certain exception to it which are given under Article 19 like sovereignty and integrity of India, friendly relations with foreign States, public order, decency or morality, the security of the State, or in relation to contempt of court, defamation or incitement to violence.<sup>3</sup>

Thus after having a fair insight of what freedoms can be exercised by the media and what are its exceptions certain important questions arise i.e., what is the line of demarcation between exercising one's right

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<sup>1</sup> **Article 19 of the Constitution:-** Protection of certain rights regarding freedom of speech etc. (1) All citizens shall have the right (a) to freedom of speech and expression.

<sup>2</sup> Milky Way And Andromeda: Privacy, Confidentiality and Freedom of Expression, George Wei Sze Shun, (2006) 18 SAclJ 1.

<sup>3</sup> Bachan Singh v. State of Punjab, (1980) 2 SCC 684.

guaranteed through the Constitution and its limitations and what is the threshold limit after which the law will come into the picture. The entire jurisprudence is so subjective that what can be considered as one's freedom might be offensive for other.<sup>4</sup> Various instances from our country where press was seriously sabotaged were during the era of emergency and again after that when the film "*Kissa Kursi Ka*" was banned. Later in 1980s Salman Rushdie's book "*Satanic Versus*" was banned in India and recently in the last decade the show "*AIB Roast*" was taken down by the Youtube. The privacy rights and freedom of press was crucially facing each other again in 2015 when the movie by Leslee Udwin on the infamous "*Nirbhaya Case*" was banned. The analytical essay below is an attempt to revisit the existing laws and analyzing the corresponding provisions in the other courts and have a fair and an in depth analysis of this topic.

### **RIGHT TO BE FORGOTTEN AS PART OF RIGHT TO PRIVACY**

The Hon'ble Apex Court has declared Right to Privacy as an intrinsic part of Article 21 of the Indian Constitution.<sup>5</sup> With this right an

equally appreciated right i.e., the right to be forgotten also comes into the picture. The right to be forgotten means providing every individual the right or ability to erase, limit, delink, and delete personal information on the Internet that is embarrassing, irrelevant, or inaccurate.<sup>6</sup> Though this right was touched upon by the Data Protection Bill 2018 but there are two concerns with this right which was not touched by the Bill<sup>7</sup> i.e.,

- The information which is offending or concocted should not be posted at the first place and if it posted then it can be requested to remove it.<sup>8</sup>
- The information which has been posted against any individual or organization or religion if certain conditions like material inaccuracy is evident in that content.<sup>9</sup>

The judgement in the case of *Google Spain v. Gonzalez*<sup>10</sup> clearly mentions the fact that the right to be forgotten is more specific with respect to data protection and should be limited to search engines and thus this right promotes the right to privacy to all the

<sup>4</sup> Freedom of press in India : Constitutional Perspectives, Mahendra Tiwari, (2006) PL December 7.

<sup>5</sup> K. S. Puttaswamy (Retd.) & Anr. v. Union of India, (2017) 10 SCC 1.

<sup>6</sup> Commission Regulation 2016/679, the General Data Protection Regulation.

<sup>7</sup> Section 27, Data Protection Bill 2018.

<sup>8</sup> Robert Walker, "The Right to Be Forgotten", HASTINGS L.J. 257, available at

<[https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2017967](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2017967)>.

<sup>9</sup> Personal Data Protection Bill 2019: Unrestrained power to central government may undermine privacy, Prasanna Mohanty, December 17 2019, Business Today, Available at (<https://www.businesstoday.in/current/policy/personal-data-protection-bill-2019-central-government-power-may-undermine-privacy-of-citizens-people/story/392186.html>).

<sup>10</sup> *Google Spain v. Gonzalez*, ILEC 060 (CJEU 2014).

segments of online world and search engines.<sup>11</sup>

### **FREEDOM OF PRESS AND RIGHT TO PRIVACY – THE BALANCE (STING OPERATIONS)**

It is the settled law of the land that Article 19 not only confers freedom of speech and expression on citizens<sup>12</sup> rather through judicial expositions it is clear that it also encompasses within it's the right to receive the actual and correct information on matters related to public interest.<sup>13</sup> But the concerns related to media rights and privacy issues arise when the matters like sting operations come up. Recently the controversy of vandalism by alleged ABVP and Left group in the JNU campus and the sting operation conducted by the India Today is the classical example of the same.<sup>14</sup> Thus, whether the publication of the private communication between the members of any organization is in the interest of the public is a widely debatable issue and the matter of Rata Tata and Nira Radia Tape also mentions about the same.

Focusing on striking the balance between these two Cable Television Networks (Regulation) Act, 1995 was enacted and

Section 5 of the Act explicitly mentions the fact that the media houses are not allowed to transmit or retransmit any program which has anything obscene, defamatory, deliberate, false and suggestive innuendos and half truths. Moreover, there are certain rules which are also the part of the Act prescribing an ethical code to be followed by all the channels.<sup>15</sup>

In a famous case of Jagran T.V. Pvt. Ltd. vs Union Of India & Anr.,<sup>16</sup> the Hon'ble Court held that any false and concocted and fabricated sting violated the inherent privacy rights of any citizen and it was held that

*“while sting operations showing acts and facts as they are truly and actually happening may be necessary in public interest and as a tool for justice, but a hidden camera cannot be allowed to depict something which is not true, correct and is not happening but has happened because of inducement by entrapping a person.”*

Though the Right to Privacy has been recognized as a fundamental right by the Hon'ble Apex Court of India in K. S. Puttaswamy (Retd.) & Anr. v. Union of

<sup>11</sup> Right to be Forgotten-Recognition, Legislation and Acceptance in International and Domestic Domain, Ajay Pal Singh and Rahil Setia, [2018] 8.1 NULJ 37.

<sup>12</sup> Hamdard Dawakhana v. Union of India, AIR 1960 SC 554.

<sup>13</sup> State of Uttar Pradesh v Raj Narain, 1975 SCR (3) 333.

<sup>14</sup> JNU Tapes: India Today unmasks ABVP attackers in a big sting, Left role also exposed, Jamshed Ali

Khan, 11 Jan 2020, Available at (<https://www.indiatoday.in/india/story/india-today-sting-operation-jawaharlal-nehru-university-violence-jnu-attackers-abvp-delhi-police-aishe-ghosh-1635757-2020-01-10>).

<sup>15</sup> People's Union for Civil Liberties(PUCL) v. Union of India, AIR 1997 SC 568.

<sup>16</sup> Jagran T.V. Pvt. Ltd. vs Union Of India & Anr., WP(Crl.) No.1175/2007.

India<sup>17</sup> but even after the judgement currently, there is no separate legislation or law which grants protection to the right to privacy. In addition to this, the Sting Operations flout the norms established by the Press Council of India because it clearly does not provide information as to how such operation was planted and recorded.<sup>18</sup> The laws of other countries like United Kingdom mandates the media house to establish the fact that any action was serving the interest of the public if that is alleged to violate the privacy of any individual.<sup>19</sup>

### **CORRESPONDING LAWS IN OTHER COUNTRIES**

**United Kingdom:** In UK, there exists a self-regulatory commission Press Complaints Commission (PCC) which sets the ethical code to be followed by all the media houses and it clearly lays down that editors are not allowed to play with the privacy rights of the individuals unless the reason can be attributed to the welfare of public at large.<sup>20</sup>

**France:** Article 9 of the Civil Code of France protects the right to privacy and it says that each individual has the right to privacy as his/her inalienable right and it operated in

public and private sectors both. Moreover, the legal system of France imposes criminal liability on journalist if it is found that by their any action the right to privacy of individuals has been infringed.<sup>21</sup>

**Netherlands:** Under Article 10 of the Constitution of Netherlands, the right to privacy is protected and it has been granted the status of constitutional right. Moreover, another statutory body known as Netherlands Press Council regulates the conduct of media and standards of reporting and publication of any news. The regulation enacted by these bodies can only be done away with in any matter related to social issues, which can affect the public at large.<sup>22</sup>

**Sweden:** In Sweden, the right to privacy has been granted as a right if a constitutional in nature. Article 13 of the Swedish Constitution mentions that freedom of expression can be curtailed on the limited number of grounds like national supply, public order, sanctity of private life, prosecution of crime and national integrity. Moreover, unless there are strong reasons are put forward freedom of expression cannot be curtailed.<sup>23</sup>

<sup>17</sup> K. S. Puttaswamy (Retd.) & Anr. v. Union of India, (2017) 10 SCC 1.

<sup>18</sup> Expansion and Protection of Fundamental Rights By Judicial Interpretation and Intervention, Soli J. Sorabjee, (2014) 7 NUJS L Rev 1.

<sup>19</sup> Dialectics of Freedom of Expression, A. Lakshminanth and Mukund Sarada, CNLU LJ [2016-17].

<sup>20</sup> PCC website: <http://www.pcc.org.uk/>.

<sup>21</sup> <http://www.kbkcl.co.uk/2008/03/privacy-law-the-french-experience/%20and%20http://ambafrance-us.org/spip.php?article640>.

<sup>22</sup> <https://accountablejournalism.org/press-councils/Netherlands>.

<sup>23</sup> Swedish Penal Code, Available at <https://www.government.se/>.

## ANALYSIS WITH RELEVANT CASE LAWS

The Hon'ble Apex Court has recognized right to privacy as a part of our fundamental right under Article 21 in the Puttaswamy judgement.<sup>24</sup> While delving deeper we find that the legislature has already enacted other statutes which act as an exception to the right of privacy and one such ground is public interest and under Section 8(1)(j) of the RTI Act 2005<sup>25</sup> is the classical example of the same and it says that it is not allowed to disclose any personal information which has no connection by any stretch of imagination with the public interest since it invaded the right to privacy of individuals.<sup>26</sup>

The major loophole, which still exists in the Indian law, is that what amounts to invasion of the privacy rights of any individual is not defined in law. There are various statutes which govern the modalities of the Indian media like News Broadcasting Standard Authority (NBSA), Press Council of India (PCI) & Cable Television Networks (Regulation) Act, 1995. One of the most significant cases which is related to conflict between privacy rights and freedom of speech is R. Rajagopal v. State of Tamil Nadu<sup>27</sup> wherein a person was convicted for the charge of murder of 6 persons and in his

autobiography he mentioned about the corruption which exists at the gross level in the Police force and how politicians are involved in the heinous crimes. The Hon'ble Apex Court held that

*"A citizen has a right to safeguard the privacy of his own, his family, marriage, procreation, motherhood, child-bearing and education among other matters."*

The Hon'ble Court held that voluntary publication of any such personal information with ulterior motives without the prior consent of the concerned individual amounts to violation of the privacy rights of that individual irrespective of the fact whether the information is accurate or inaccurate.

**International Scenario:** Article 12 of the Universal Declaration of Human Rights, 1948 and it mentions that "No one shall be subjected to arbitrary interference with his privacy, family, home or correspondence, or to attacks upon his honour and reputation. Everyone has the right to the protection of the law against such interference or attacks." The gist of the article is that it restricts the arbitrary and unlawful interference of the state with the privacy rights of the individual.

<sup>24</sup> K. S. Puttaswamy (Retd.) & Anr. v. Union of India, (2017) 10 SCC 1.

<sup>25</sup> Anjali Bhardwaj v. Union of India, 2019 (3) SCALE 447.

<sup>26</sup> Right to Information Act, 2005

<sup>27</sup> R. Rajagopal v. State of Tamil Nadu, 1994 SCC (6) 632.

The Press Council of India is a statutory body formed in 1966 sets the guidelines for reporting the news in India. The guidelines laid down by the PCI says that the journalists should refrain themselves from paying unnecessary heed to sensitive witnesses, victims as that amounts to invasion of privacy.

**Hyderabad Rape Controversy:** A recent example of this issue is when majority of media houses on the internet flouted the guidelines by displaying the real name of the infamous Hyderabad Rape victim. Section 228 of the IPC explicitly mentions the fact that disclosing the identity of a rape victim is punishable. The media has disregarded the law of the land in the Aarushi Talwar case and in the case of the rape of an international student of Tata Institute of Social Sciences (TISS).<sup>28</sup> In the TISS case the media houses did not reveal the name of the victim rather revealed the name of the institute and the course the victim was pursuing which was again violating the guidelines issued by the PCI.

**Media Trial:** There has been a recent trend of media trial these days wherein just after an accusation media plays proactive role and

conducts their own investigation and convict the accused in their own house. The Hon'ble Delhi High Court in the case of Srichand P. Hinduja v. CBI<sup>29</sup> held that the right of a fair trial of an accused is of paramount importance and no civilised society should ever resort to opinion framed by trial done by media and advised that media houses should not adopt such commercial recourses where the accused have to face prejudice from the society because of the concocted reports planted by them. Though the court accepted the fact that media awareness of the case is important but the having a fair trial is an invaluable right.

The Hon'ble Supreme Court in the case of Sidhartha Vashisht @ Manu Sharma v. State (Nct Of Delhi)<sup>30</sup> has made a remark for the guidance of the media and told them to carefully evaluate the data which you show so that it does not cause obstruction in the way of justice. The Court also made a remark that if any action of media is causing interference in the process of justice and bias against or in favour of the accused then it would amount to parody of justice.

## CONCLUSION

<sup>28</sup> Kumar, Vinod, "Raped American student's drink not spiked in our bar," 16.04.09 Available at <http://www.mid-day.com/news/2009/apr/160409-Mumbai-News-Raped-American-student-date-drug-CafeXO-Tata-Institute-of-Social-Sciences.htm>, Anon, "Party pics boomerang on TISS rape victim" , 04 .05.09, Available at

<http://www.mumbaimirror.com/index.aspx?page=article&id=15&contentid=2009050420090504031227495d8b4e80f> [Last Accessed April 20,2011].

<sup>29</sup> Srichand P. Hinduja v. CBI, Crl.Misc.(Main) 3938/2003.

<sup>30</sup> Sidhartha Vashisht @ Manu Sharma v. State (Nct Of Delhi), CRIMINAL APPEAL NO. 179 OF 2007.

A privacy right of an individual in India is still not recognised as a separate substantive right and cannot be considered as an absolute right. The entire jurisprudence which has been evolved through various case laws appears to be very fragile. The paramount importance of securing the interest of the State can only be the ground where the freedom of the press can be gauged and any other broad grounds under which such freedom can be curtailed is not justified because of the obvious reasons of its misuse by the authorities of the State. The entire duty of determining strict and rigid standards of invoking exceptions to curtail these significant right vests within the Legislature and it is the need of the hour to lay down those standards. In addition to this, the Judiciary should also take strict measure against those media houses, which in the garb of freedom of speech and expression spread

false, baseless and concocted propaganda just to gather commercial gains.

It will not be wrong to say that the Indian media have failed miserably to recognize the demarcation between public and private space and Indian media have often violated their code of ethics by violating the privacy rights of the individuals and flouting the guidelines issued by PCI. According to me, this right to privacy is a negative right as recognized in Indian law and comes into picture only when there is an alleged violation of such right. The discretion, which is exercised by the media in determining the public interest and private interest should not be allowed, and the aftermath of exercising such discretion degrade the constitutional values of Freedom of Speech and Expression.