



Freedom of press and right to privacy in India

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Introduction

Freedom of speech and expression in the context of public interest is the Press – the print media and the broadcast media. It has taken the responsibility to inform the public about the functioning of the elected government. This includes all other matters in which public have a right to know. Right to discussion and criticize forms and active part of this right. In *Romesh Thappar v. State of Madras*¹, the Supreme Court has included press in the definition of freedom of speech or expression. In *L.I.C v. Munubhai Shah*², the Supreme Court reiterated as in *Indian Express Newspapers v. Union of India*³ stated that freedom to circulate ones views can be by word of mouth or in writing or through audio visual media. This right to circulate also includes the right to determine the volume of circulation⁴.

The press enjoys the privilege of sitting in the Courts on behalf of the general public to keep them informed on matters of public importance. The journalist therefore has the right to attend proceedings in Court and publish fair reports. This right is available in respect of Judicial and Quasi-Judicial

tribunals.⁵ The right to report legislative proceedings is also a part of the press freedom. In a democratic society it is necessary that the society shall be part of the discussions on policy matters. They need to know the details of debates, as transparency in governance is a must for the proper functioning of a democratic society. This right of the press to true reporting of parliamentary proceedings is protected by the Constitution.⁶ It also gives protection to true reporting of the proceedings of State Assemblies.⁷ A

⁵ .Saroj Iyer v. Maharashtra Medical (Council), A.I.R. 2002 Bom. 95.

⁶ . Article 361 – A of the Constitution of India (1) No person shall be liable to any proceedings, civil or criminal, in any Court in respect of the publication in a newspaper of a substantially true report of any proceedings of either House of Parliament or the Legislative Assembly or as the case maybe, either House of the Legislature of a state, unless the publication is proved to have been made with malice.

(2) Clause (1) shall apply in relation to reports or matters broadcast by means of wireless telegraphy as part of any programme or service provided by means of a broadcasting station as it applies in relation to reports or matters published in a newspaper. Explanation: In this article newspaper includes a news agency report containing material for publication in a newspaper.

⁷ .Ibid.

¹ . Ibid.

² ,L.I.C v. Manubhai Shah(1992)3

³ . Indian Express Newspaper v. Union of India (1985) 1. S..C.C 641.

⁴ ..Sakal Papers v. Union of India, A.I.R. 1962 S.C. 305.



similar protection is provided in the Parliamentary Proceedings (Protection of Publication) Act, 1977.

In *Tata Press Ltd v. Mahanagar Telephone Nigam Ltd*⁸, the Supreme Court also included into freedom of speech and expression the right to advertise or the right of commercial speech. Before this decision, advertisements were not considered as part of the definition of free speech. This decision reflects the dilution in the already wide freedom of speech and expression. It was in variance to the earlier limitation on this freedom, which was enunciated in *Hamdard Dawakhana v. Union of India*⁹, in which the apex court observed that commercial advertisement does not fall within the protection of speech and expression as there is an element of trade and commerce in them. But in Tata case, Supreme Court stated that advertising pays a large portion of the costs of supplying the public with newspaper. So for a democratic press the advertising subsidy is crucial. The court further observed that without advertising, the resources available for expenditure on reporting the 'news' would decline, which may lead to an erosion of its quality and quantity. In *Hindustan Time v. State of U.P.*,¹⁰ the Supreme Court again reiterated the importance of advertising and its connection with the circulation of paper.

The Right to Privacy - International obligations: UDHR 1948 in Article 12

⁸.Tata Press Ltd v. Mahanagar Telephone Nigam Ltd (1995) 5 S.C.C. 139.

⁹.Hamdard Dawakhana v. Union of India, A.I.R. 1965 S.C. 1167.

¹⁰.Hindustan Times v. State of U.P (2003) 1 S.C.C. 591.

and ICCPR 1996 in Article 17 give protection to the concept of privacy. Though freedom of speech and expression given in Article 19 of the UDHR 1948 and ICCPR 1966 was enshrined in Article 19(1) (a) of the Indian Constitution. We do not find such constitutional recognition given to privacy in India. Here, privacy is not given any separate constitutional status.

Right to life, liberty and security of person is enshrined in Article 3 of the UDHR 1948. This is recognized in Article 21 of the Indian Constitution. Privacy was not included in this Article. In *Nihal Chand v.*

*Bhagwan Dei*¹¹ during the colonial period, as early as in 1935, the High Court recognized the independent existence of privacy from the customs and traditions of India. But privacy got recognition in free India for the first time in *Kharak Singh case*.¹² In *Kharak Singh v. State of U.P.*, the Supreme Court struck down domiciliary visits by the police as it violates Article 21. But it was in the minority view given in this case by justice Subha Rao, that privacy got a recognition as a right included in Article 21 of the Constitution. In this case the apex court recognized privacy as part of right to life and personal liberty. Privacy was recognized as a separate right to life and personal liberty. Privacy was recognized as a separate right in UDHR 1948. This has failed to materialize in the same spirit as a fundamental right in the Indian

¹¹.Nihal Chand v. Bhagwan Dei A.I.R. 1935 All. 1002.

¹².Kharak Singh v. State of U.P. and Others 1964 S.C.R. (1) 332.



Constitution, like the right to speech and expression and right to life.¹³ Article 3 of the UDHR 1948, protects life and personal liberty, not privacy. In India privacy is described as part of right to life and personal liberty in Article 21 of the Constitution as there is no separate provision for privacy in the Constitution. Privacy has been defined by Supreme Court in *Sharada v. Dharampal*¹⁴ as 'the state of being free from intrusion or disturbance in one's private life or affairs', This is different and distinct from the life and liberty in Article 21 of the Constitution.

Indian view

India is member of the United Nations Organizations, so it is bound by Article 12 of the Universal Declaration of Human Rights, 1948 to bring in statutory enactments to keep itself in tune with the International Commitment. Further, Indian has also ratified the International Covenant on Civil and Political Rights, 1966¹⁵.

India does not give privacy a fundamental right status, while freedom of speech and expression is given

¹³ .U.D.H.R. 1948 –Article 3- Everyone has the right to life, liberty and security of person.

¹⁴ *Sharada v. Dharampal*, (2003) 4 S.C.C 493, at p.521.

¹⁵ . Article 17 of the International Covenant on Civil and Political Rights, 1966:

1. No one shall be subject to arbitrary or unlawful interference with his privacy, family, human or correspondence, nor to lawful attacks on his honor and reputation.

2. Every one has the right to the protection of the law against such interference or attacks.

protection under Article 19(1) (a). Privacy is not even enumerated among the reasonable restrictions to the right to freedom of speech and expression enlisted under Article 19(2). Nevertheless the Courts have protected this right to privacy to some extent not just under tort law but also under article 21 and under the reasonable restrictions enumerated in Article 19(2) of the Constitution.

Under the tort law, a personal action for damages would be possible for unlawful invasion of privacy. In these cases, the publisher and printer of Journal, magazine or book or the broadcaster and producer of a broadcast would be liable in damages. These would arise basically in relation to matters concerning the private life of the individual, which includes the family, marriage, parenthood, children and his sexual life. Let us have a look at some of them.

Morality and Decency: One of the restrictions imposed on right to free speech and expression is in the interest of 'morality' and 'decency'. There are several legislative provisions governing these two elements.¹⁶ A part from these

¹⁶ . The Indian Penal Code, 1860, section 292 -294 makes the sale, letting to hire, distribution, public exhibition, circulation, import, export and advertisement of obscene material an offence punishable with imprisonment and fine.

The Dramatic Performance Act, 1876, Preamble Section 3(c) : section 6 gives the government the power to prohibit public dramatic performances on the ground of obscenity and in case of violation imprisonment and fine follows. The Post Office Act 1898, Section 20:



provisions there are some judicial decisions also. These two terms have no specific meanings. These change according to the value system of a given society. It changes from one generation to another; and also from one Judge's perspective to another.

In ChandraKant Kalayandas Kakodkar v. State of Maharashtra¹⁷ the Supreme Court observed that such notions vary from country to country depending on their moral standard. But even within the same country, like India as you cross a few hundred kilometers, morality changes at varying lengths. This make it very difficult to straight jacket these concepts.

Obscenity

The definition of obscenity has been given by the Supreme Court as the quality of being obscene which means offensive to modesty or decency ; lewd, filthy and repulsive¹⁸.

prohibits the transmission by post any material on the ground of decency or obscenity.

to imprisonment and fine.

The Information Technology Act, 2000 section 67 makes the publication and transmission in electronic form of 'material' which is lascivious or appeals to the prurient interest or if its effect is such as to tend to deprave and corrupt persons who are likely, having regard to all relevant circumstances, to read, see or hear the matter contained or embodied in it – punishable with imprisonment and fine.

¹⁷ . Chandrakant Kalayandas Kakodkar v. State of Maharashtra (1969) 2 S.C.C 687.

¹⁸ . Ranjit D.Udeshi v. State of Maharashtra (Lady Chatterley's Lover) A.I.R. 1965 S.C. 881. AT.7.p. 885.

Distinction between obscenity and indecency is that while everything obscene is indecent, everything indecent is not obscene. Obscenity is quiet repulsive and provocative. Vulgarity is another aspect of it.

In Lady Chatterley's Lover¹⁹, that Supreme Court stated that : 'Sex and nudity in art and literature cannot be regarded as evidence of obscenity without something more. If the rigid test of treating with sex as the minimum ingredient were accepted, then hardly and writer of fiction today would escape the fate Lawrence had in his days', Similarly in Bobby Art International v. Ompal Singh Hoon²⁰, where a member of the Gujjar community filed a petition seeking to restrain the exhibition of the film 'Bandit Queen' on the ground that it was a slur on the woman hood in India and that the rape scene in the film was suggestive of the moral depravity of the Gujjar Community. Here the Supreme Court drew distinction between nudity amounting to obscenity and nudity which does not amount to obscenity. The Court stated that frontal nudity which the petitioner contended amounted to indecency within Article 19(2) and section 5-B of the Cinematograph Act was not to arouse prurient feelings but revulsion for the perpetrators. Thus the Court rejected the petitioner's contention.

All sex or sex connected matters are therefore not obscenity amounting to indecency. In K.A. Abbas v. Union of

¹⁹ . Ranjit D. Udeshi v. State of Maharashtra (Lady Chatterley's Lover) A.I.R. 1965 S.C. 881 pp. 887-88

²⁰ .Booby Art International v. Om Pal Singh Hoon (1996) 4. S.C.C.1.



India²¹, the Supreme Court observed that it was wrong to classify sex as essentially obscene or even indecent or immoral. The Court criticized the failure of parliament and the central government to separate the artistic and socially valuable from the obscene and indecent. It said that the law showed more concern for the depraved rather than the ordinary moral man.

Although, the Hecklin's test was overruled in England by the enactment of the Obscene Publications Act 1959,²² in India the Supreme Court of India adopted the Hecklin's test in *Ranjit D.Udeshi v. State of Maharashtra*²³. This case was concerning the conviction of a bookseller and his partners for being in possession of a book containing 'obscene' material. Lawrence's 'Lady Chatterley's lover' was the book in question. The court relied on Hecklin's test and interpreted the word 'obscene' to mean that which is 'offensive to modesty or decency; lewd, filthy and repulsive' and held that regard should be had to our community mores and standards.

Hecklin's test was later replaced by the likely readers test recognized under section 292(1) of the Indian Penal Code 1860²⁴. Here the question was

whether it was possible that those who are likely to read it may get access to it. The test was based on the 'target audience'. Thus in *Chandrakant Kalyandas Kakodkar v. State of Maharashtra*²⁵, the Supreme Court laid this new test. It stated that:

'it is duty of the Court to consider the article, story or book by taking an overall view of the entire work and to determine whether the obscene passages are so likely to deprave and corrupt those whose minds are open to such influences and in whose hands the book is likely to fall; and in doing so the influences of the book on the social morality or our contemporary society cannot be overlooked',²⁶

Similarly, in *Samaresh Bose*²⁷ the Supreme Court held that while judging whether there is obscenity the Judge should place himself in the position of a reader of every group in whose hands the book is likely to fall and should try to appreciate what kind of possible influence the book is likely to have in the minds of the readers.

Privacy under Article 21: Article 21 of the Indian Constitution clearly gives protection to life and personal liberty. In this perspective, though in different

²¹ .K.A. Abbas v. Union of India (1970) 2. S.C.C.780 pp. 802, 803.

²² . The Obscene Publications Act 1959, section 1 – states that if the entire article 'if taken as a whole, is such as to tend to deprave and corrupt persons who are likely, having regard to all relevant circumstances, to read, see or hear the matter contained or embodied in it'.

²³ . *Ranjit D.Udeshi v. State of Maharashtra* A.I.R 1956 S.C. 881.

²⁴ . Section 292 (1) of Indian Penal Code, 1860-For the purposes of subsection (2) a book, pamphlet, paper, writing, drawing, painting, representation, figure or any

other object shall be deemed to be obscene if it is lascivious or appeals to the prurient interest or if its effect, or (where it comprises two or more distinct terms) persons who are likely, having regard to all relevant circumstances to read, see or hear the matter contained or embodied in it.

²⁵ .*Chandrakant Kalyandas Kakodkar v. State of Maharashtra* (1969) 2 S.C.C. 687.

²⁶ . Ibid.

²⁷ . *Samaresh Bose v. Amal Mitra* (1985) 4 S.C.C. 289.



factual base, the Supreme Court for the first time recognized the 'Right to Privacy'. It was in *Kharak Singh v. State of U.P.*²⁸, that majority of the Bench Struck down domiciliary visits as being unconstitutional. Though they were yet unreceptive to the idea of privacy, the minority view by Justice Subha Rao held that Article 21's concept of liberty included privacy.²⁹

'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 rampant against encroachment on his personal liberty.'³⁰

Later the Supreme Court continued to elaborate on this issue of privacy. In a series of cases concerning journalist's seeking permission from the court to interview and photograph prisoners, the Court held that the press had no absolute right to interview or photograph a prisoner unless he consented to it. Though right to privacy was not the question, the Court impliedly acknowledged the right to privacy.

In *R. Rajagopal v. State of T.N.*³¹, which is the watershed in the field of privacy, the Supreme Court discussed the

right to privacy in the reference to Media. It was concerning the right of the publisher of a magazine to publish the autobiography of '*Autoshanker*' who was a condemned prisoner. The State contended that it exposed same sensational links between the police authorities and the criminal, so it was likely to amount to defamation and therefore should be restrained. It was in this context that privacy came up. The Supreme Court held that the press had every right to publish the autobiography of *Auto shanker* to the extent, as it appeared from the public records, without any permission. In case the publication went beyond the public record and published his life story, then it would amount to an invasion of his right to privacy. Here the Court regarded privacy in two aspects – firstly as a tortious liability, which gives an action for damages for invasion of privacy. Secondly – 'a right to be left alone' implicitly read into the right to life and liberty in Article 21.

In another similar case regarding Khushwant Singh's book '*Truth, Love and a Little Malice*', the³² then Union Minister for Animal Welfare, Ms. Maneka Gandhi, gave a petition in the Supreme Court stating that certain contents of his book, even if true, violated her right to privacy. The High Court held that 'well established principles' weigh in favor of the right of publication and there was no question of any irreparable loss or injury since respondent herself has also claimed damages which will be the remedy in case she is able to establish defamation and the appellant is unable to defend the same as per law.

²⁸ . *Kharak Singh v. State of U.P. and Others* 1964 S.C.R.(1) 332.

²⁹ . *Id.* At p.359.

³⁰ . *Ibid.*.

³¹ . *R. Rajagopal v. State of T.N* (1994) 6 S.C.C 632.

³² . *The Times of India*, Nov 10, 2001,p.7.



In an earlier case though in London³³, Ms Maneka Gandhi had won a libel suit against British writer Katherine Frank and her publishers, who had written Indira Gandhi's biography. She won an apology and damages along with deletion from the book of the offending passage referring to Sanjay and Maneka Gandhi's alleged involvement in the cover-up of a murder in 1976. In India this case failed as India had no law to protect the privacy and family of a person.

In *Kaleidoscope (India) Pvt. Ltd. V. Phoolan Devi*³⁴, where Phoolan Devi, one of India's most dreaded dacoit at one time, sought an injunction to restrain the exhibition of the controversial biographical film "Bandit Queen" in India and abroad. The Court stated that the film infringed her right to privacy. Though she was a public figure, whose private life was exposed to the press and though she had assigned her copyright in her writings to the film producers, still private matters relating to rape or the alleged murders committed by her could not be commercially exploited as news items or as matters of public interest.

But in *Bobby Art International v. Om pal Singh Hoon*³⁵ when the Supreme Court was confronted with the contention that *Bandit Queen* was a slur on the womanhood of India, the Court rejected the petitioner's contention that the frontal nudity was indecent within Article 19(2) and section 5-B of the Cinematograph Act 1952. The object of the scene, the Court said was to bring revulsion for the perpetrators, so there is

no indecency in the scene. Here the result of the decision was that even rape scenes can be shown, as public interest outweighs privacy in India.

Right to privacy was read into Section 5(2) of the Telegraph Act, 1885, by the Supreme Court in *People's Union for Civil Liberties v. Union of India*³⁶ which allowed interception of messages in cases of public emergency or in the interest of public safety. The Court held that the right to privacy included the right to hold a telephone conversation in the privacy of one's home or office and that telephone tapping infringed this right to privacy. The government had failed to establish proper procedure under section 7(2)(b) of the Act to ensure procedural safeguards.

Tort - Protection of privacy:

Following the common law system of adjudication Indian has adopted the principle of precedent system of adjudication. In this context, the Courts in India have recognized the tort law as a tool for preserving the individual's honor and esteem. The main offence prohibited by common law is defamation. Every person has the right to be respected. Reputation is an integral aspect of the dignity of an individual. As stated in *State of Bihar v. Lal Krishna Advani*³⁷, right to reputation is a facet of the right to life. Where any authority, in discharge of its duties traverses into the realm of personal reputation, it must provide a chance to the person concerned to have a say in the matter.

³³ . Ibid.

³⁴ . *Kaleidoscope (India) (P) Ltd. V. Phoolan Devi*, A.I.R. 1995 Del . 316.

³⁵ . *Bobby Art International v. Om Pal Singh Hoon* (1996) 4 S.C.C.1.

³⁶ . *People's Union For Civil Liberties v. Union of India* (1997) 1 S.C.C. 301

³⁷ .*State of Bihar v. Lal Krishna Advani* (2003) 8 S.C.C.361.



Indian Courts have come to give protection to reputation but at the same time they have defended the press also. Where the publisher, when he published the news item did not know of the existence of the plaintiff and later had published a correction in his paper, the Court held he was not liable for defamation.³⁸ This would not have been the course of action in UK. Such a case would come under the Defamation Act 1996³⁹ and now it would come under the Human Right Act⁴⁰ in UK. In UK, for a similar error would cost the press heavily in terms of money despite giving apology in the next issue. That would have a deterrent effect.⁴¹

³⁸ . *T.V. Ramasabha v. A.M Ahmad Mohideen* A.I.R. 1972 Mad. 398.

³⁹ . The Defamation Act 1996, section 2(4) – An offer to make amends under the section is an offer-(a) to make a suitable correction of the statement complained of and a sufficient apology to the aggrieved party. (b) – to publish the correction and apology in a manner that is reasonable and practicable in the circumstances and (c)- to pay to the aggrieved party such compensation (if any) and such costs, as may be agreed or determined to be payable.

⁴⁰ .Human Rights Act 1998- object – ‘An Act to give further effect to rights and freedoms guaranteed under the European Convention on Human Rights’.

⁴¹ . *Hulton v. Jones*. [1910] A.C. 20- Artemus Jones described as a church Warden, accused of living with a mistress in France. It was a fictional figure, but court awarded the person of that name damages. *Cassidy v. Daily Mirror Newspapers Ltd*. [1929]2 K. B.331- paper published photographs of the plaintiff’s husband with an unnamed lady, announcing their

Reference to the Plaintiff

Defamation requires that the plaintiff should be identified by name or description or position or photograph or by anything which would enable the reader or viewer to know or recognize him, which would consequently cause defamation. Even if the libel statements are not made directly against a person but he is aggrieved by them, then he has the right to maintain a complaint⁴². In *John Thomas v. Dr. K. Jagdeesan*⁴³, it was held that, the words ‘by some person aggrieved’ indicates that the complainant need not be the defamed person himself. Here therefore it was held that the director of an organization against which defamatory statements are made could be the aggrieved person. In *G. Narasimhan v. T.V Chakkappa*⁴⁴ it was held that if a defined group is defamed, then each member of that group can file a complaint, even if it does not specifically mention his name.

Published or Broadcasted by the Defendant

The law of defamation comes into operation only when the statement is

engagement, which was not so. The paper had to give damages.

⁴² . Criminal Procedure Code (1973), section 199 –No Court shall take cognizance of an offence under chapter XXI of the Indian Penal Code except on a complaint made by some person aggrieved by the offence. Chapter XXI of the Indian Penal Code 1860 deals with defamation, having sections 499-502.

⁴³ .*John Thomas v. Dr. K. Jagadeesan* (2001) 6 S.C.C.30.

⁴⁴ .*G. Narasimhan v. T.V. Chakkappa* (1972) 2 S.C.C.680.



published to another person or persons other than the persons defamed. Where copies of statement are sent to others it amounts to defamation. It is enough if it is told to just one person. In *Mahendar Ram v. Harnandan Prasad*⁴⁵, the defendant had sent a registered notice to the plaintiff containing defamatory allegations against him. It was written in Urdu with which the plaintiff was not conversant. So he got another person to read it in the presence of some other persons. In this case, the Court does not take it as publication because there was no evidence to show that the defendant knew that the plaintiff did not know the Urdu script. In *In Re. S.K. Sundaram*⁴⁶, where an advocate sent a telegram to the then Chief Justice of India, containing contemptuous and defamatory statements against the then Chief Justice, it was held that sending a telegram amounts to publication since both before and after transmission the message is read by the telegraphic staff, If it was sent in a letter form then it will not amount to defamation.

Truth as Defense

In all cases of defamation truth cannot be taken as a defense. It is a defense in case of civil action for libel or slander. In case of criminal prosecutions under Indian Penal Code, this defense of truth has not been recognized.⁴⁷ It has to

⁴⁵ .*Mahendar Ram v. Harnandan Prasad* A.I.R. 1958 Pat. 445.

⁴⁶ .*In Re. S.K. Sundaram*(2001). 2 S.C.C. 171,

⁴⁷ . Chapter XXI: Defamation – section 499: Whoever, by words either spoken or intended to be read, or by signs or by visible representations, make or publishes any imputation concerning any person intending to harm, or knowing or

be proved that the publication was made in public faith and for the public good⁴⁸. In *Sewakram Sobhani v. R.K.Karanjia* ,⁴⁹ a magazine had published a report that a female detainee in the Bhopal Central Jail had become pregnant through the appellant, a politician. This news report had been made from a government enquiry report. The Court held public good as a defense under the ninth exception to section 499 of the Indian Penal Code, 1860. The justification was that the prison being a public institution should be disciplined properly. And this news was based on reliable sources in good faith for public good.

A defamatory statement should be genuine so as to come under the defense of justification by truth. Mere belief that it was thought to be genuine is not enough. It must be proved to be true and genuine. In case of truth as defense, the defendant has to establish it. All defamatory statements are presumed to

having reason to believe that hereinafter expected, to defame that person.....Ninth exception – Imputation made in good faith by person for protection of his or other's interests – It is not defamation to make an imputation on the character of another provided that the imputation be made in good faith for the protection of the interests of the person making it, of any other person or for the public good.

⁴⁸ .*Sewakram Sobhani v. R.K.Karanjia* (1981) 3 S.C.C.208. The Supreme Court held that the ninth exception of Section 499 of Indian Penal Code 1860 needs that the imputation must be shown to have been made in (i) in good faith and (2) for the protection of the person making it or of any other person or for the public good.

⁴⁹ . *Ibid.*



be false and it is for the defendant to rebut this presumption⁵⁰.

Fair Comment : Just like justification by truth, the defense of fair comment is also a complete defense against an action for defamation. These defenses are needed for media; otherwise its working can be affected, which is to bring forth opinion, fair comment and criticism.

To get protection under the ninth exception to section 499 of the Indian Penal Code 1860, both public good and good faith have to be established⁵¹. Even the contempt of court proceedings after the Contempt of Court (Amendment) Act, 2006, truth is maintained as a defense to contempt action.⁵².

Sub Judice Reporting: When a case is being conducted in the Court, it is presumed that Court will do fair Justice in the matter. Nothing should interfere in that especially the media. Media should not conduct a parallel trial of *sub judice* matters. A judge shall decide the matter on the merits of the case and objectively. This is not possible when there is so much discussion in the matter through the media, as it creates a clouded atmosphere disturbing the serenity.

In *Saibal Kumar v. B.K. Sen*⁵³ the Supreme Court held that it is improper for a newspaper to conduct parallel investigation into a crime and publish its results. Trial by newspapers must be prevented when trial is in

progress in a tribunal of the country. The reason being, that this interferes with the cause of justice.

Reporting is different from investigation of the same matter. Reporting is the function of the media to give the public, knowledge concerning the administration of justice that is taking place. Formation and expression of opinion is needed to safeguard against judicial error. Beyond reporting of cases, moving into conducting the investigation alongside the governmental system is overstepping by the media. Various opinions expressed in the media reports can bring in prejudice to the mind of the judges.

In *Saroj Iyer v. Maharashtra Medical (Council) of Indian Medicine*⁵⁴, the Court held that as a part of the open justice system, the journalists have a fundamental right to attend proceedings in Court under Article 19(1) (a) of the Constitution. They have a right to publish a faithful report of the proceedings in the Court. So this fundamental right of the press is along with the duty to publish or broadcast things witnessed by them in the Courts and not to be couple and mix it with their investigation report.

Vulnerable Matters.

An ordinary citizen needs to know subjects and events of public interest. This right does not however go to the extent of knowing the name of the rape victim or family problem of a public figure. These information do not fall within the category of newsworthiness of the news. It was stated in *State of Punjab*

⁵⁰ .Mitha Rustomji v. Nusservanji Nowroji, A.I.R. 1941 Bom. 278.

⁵¹ . *Harbajan Singh v. State of Punjab* A.I.R. 1966 S.C. 97.

⁵² .The Contempt of Courts (Amendment) Act, 2006, section 2, substitutes section 13 of the Contempt of Court Act, 1971.

⁵³ .*Saibal Kumar v. B.K. Sen* A.I.R. 1961 S.C. 633.

⁵⁴ . *Saroj Iyer v. Maharashtra Medical (Council) of Indian Medicine* A.I.R. 2002 Bom. 97.



v. *Gurmit Singh*,⁵⁵ that the identity of rape victims should be protected not only to save them from public humiliation but also to get the best available evidence which the victim may not be in a position to provide if she is in public. In *People's Union for Civil Liberties v. Union of India*⁵⁶, the Supreme Court further upheld the validity of section 30 of the Prevention of Terrorism Act, 2002, regarding holding of in-camera proceedings for the protection of a witness whose life is in danger. In these cases, the identity and address of the witness is kept secret. There are so many enactments providing in-camera procedures and protection of the identity and other details of persons associated with the case.⁵⁷ So it is implicit in the

⁵⁵ . *State of Punjab v. Gurmit Singh*, (1976) 2 S.C.C 384, pp. 404—05.

⁵⁶ . *People's Union for Civil Liberties v. Union of India* (2004) 9 S.C.C. 580

⁵⁷ .The Indian Penal Code 1860, section 228-A – prohibits publication of name of a victim of a sexual offence. Fair comment is allowed.

Indian Divorce Act 1869, Section 53- Proceedings under the Act may be heard behind closed doors in certain circumstances.

The Special Marriages Act 1954, section 33 - In-camera proceedings – if either party desires or Court decides.

The Hindu Marriage Act 1955, section 22 – In-camera proceedings allowed if either party so desires or Court decides.

The Official Secrets Act 1923, section 14 – empowers the Court to exclude the public from proceedings if prejudicial to the safety of the state, subject to section 7.

The Contempt of Courts Act 1971, section 4- prohibits publication of proceedings in-camera in certain cases.

The Prevention of Terrorism Act 2002, section 30 (repealed from 21st Sept 04) – permitted the holding of proceedings in-camera where the life of the witness was in danger.

The Children Act 1960, section 36- prohibition of names or photograph or address or school or any identity of children in any case be published, unless the authority feels it is in the interest of the child. The Juvenile Justice (care and protection of children) Act 2000, section 21- prohibition of publication of name or photograph or address or school or any identity of a juvenile in conflict in any case in media or visual media unless the authority feels it is in the interest of the child.

Information Technology Act 2000, section 72- Breach of Confidentiality and Privacy –Save as otherwise provided in this Act or any other law for the time being in force, if any person who, in pursuance of any of the powers conferred under this Act, rules or regulations made there under, has secured access to any electronic record, book, register, correspondence, information, document or other material without the consent of the person concerned discloses such electronic record, book, register, correspondence, information, document or other material to any other person shall be punished with imprisonment for a term which may extend to 2 years or with fine which may extend to one lakh rupees or both.

Right to Information Act 2005, section 8(1) (j) – Information which relates to personal information the disclosure of which has no relationship to any public activity or interest or which would cause unwarranted invasion of Privacy of the individual unless the central public information officer or the state public information officer or the appellate



Indian Law that private and confidential matters in certain cases should be given utmost protection. But this is not enough, it has to put in practice by the courts by strict gagging orders, as is done in UK where in Baby P abuse case,⁵⁸ the High Court released the names of the couple who abused the toddler and in the process killed the baby, only after the case was decided and parties put in safe places. Indian Courts have to use their powers and not wait for the victim to ask for these protections.

Contempt of Court

Contempt of Court happens not just when judges are criticized but also when matters which are sub judice are discussed and criticized in the press. This results in lowering the role of the judiciary in the administration of justice. When the issue is before the Court, it is considered the duty of media to allow the course of law to take place. They can report the matter in Court in a fair manner and not critically. They should wait for the final outcome of the case. This is the object behind the reasoning given by the Court in *Rajendra Sail v. M.P. High Court Bar Association*⁵⁹. The Supreme Court warned the media against sensationalizing of the issues and stressed that the press needed a strong

authority, as the case may be, is satisfied that the larger public interest justifies the disclosure of such information; provided that the information which cannot be denied to the Parliament or a State legislature shall not be denied to any person.

⁵⁸ . 'Couple named in Baby P abuse case' Agence France – presse, London, retrieved 20/08/2009

⁵⁹ . *Rajendra Sail v. M.P. High Court Bar Association* (2005) 6 S.C.C. 109.para 31 at p.125.

internal system of self regulation. It said that the reach of the media is very large and large numbers of people believe it's reporting to be true.⁶⁰ This freedom of the press should be exercised in the interest of the public good. Court also stated that the press should have an efficient mechanism to scrutinize the news reports pertaining to such institutions such as judiciary, which because of the nature of their office cannot reply to publications.⁶¹

Thus the freedom of the press should be used by them cautiously. Normally, truth and good faith have been recognized as defenses to charges of contempt. Now with the amendment of Contempt of Courts Act 1971⁶², truth has been made a legal defense to a charge of contempt. A trial by press, electronic media or public agitation is an antithesis to the rule of law. It can only lead to miscarriage of justice⁶³. Therefore, it may be contempt to publish an interview with the accused or a potential witness⁶⁴ because there is always a likelihood that the trial is prejudiced by these publications or broadcasting. If the media in the process of reporting adds anything in excess to the actual proceedings in the Court, it no doubt amounts to interference with justice. In UK, where Courts are convinced of the fact that media has influenced the jury, then the case is taken away from that Court and

⁶⁰ . Ibid.

⁶¹ .Ibid.

⁶² . The Contempt of Court (Amendment) Act 2006 –Section 2 substituting section 13 of the Contempt of COURTS Act, 1971.

⁶³ . State of Maharashtra v. Rajendra Jawanmal Gandhi.(1997) S.C.C. 386.

⁶⁴ . *R.v. Savundranayagan* [1968] 3 All E.R. 439.



posted to a Court far away from that area. In India, it is very difficult to prove that the judge has been influenced by the media talk. But there is no doubt that no person even if it is the judge can stop himself from keeping track of the news of the day. There is every possibility of not only the judges but also the witnesses getting influenced.

The intention of the reporter to interfere with the administration of justice or not is immaterial in determining whether it constitutes contempt of court⁶⁵. The possibility of influence has to be considered and not the intention of the journalist.

The Law Commission Reports: The Forty Second Law Commission examined the various aspects of right to privacy under Chapter 23 of its 42nd Report and recommended for insertion of a new chapter to be called "offences against privacy" to substitute the existing chapter XIX making unauthorized photography and use of artificial listening or recording apparatus and publishing such information listened or recorded as offences⁶⁶.

The Law Commission in its one hundred and fifty sixth report stated that right to privacy is a vast subject and its scope has been widened considerably under Article 21 of the Constitution by the Supreme Court under its various decisions⁶⁷. The Law Commission admitted that on studying the matter of privacy as extended under Article 21 of

the Constitution and also in the various reports of foreign law commissions, it would recommend that these offences cannot appropriately be incorporated in the IPC. Therefore it stated that the recommendation of its 42nd Report to include 'Offence against privacy' is deleted and that a separate legislation should be there to comprehensively deal with such offences against privacy.⁶⁸

The dispute regarding when the case is said to be 'pending' had caused a lot of controversy. The report stated that Indian Supreme Court holds publication, prejudicial after 'arrest' as criminal contempt. It was settled in A.K. Gopalan⁶⁹ wherein the Supreme Court stated that it is from the point of arrest that contempt arises. This report also agree with this decision. India is signatory to the Madrid Principles⁷⁰ on the Relationship between the Media and Judicial independence 1994, wherein the basic principle stated was that though it is the function and right of the media to gather and convey information to the public and to comment on the administration of justice, including cases before, during and after trial, it should be done without violating the principle of presumption of innocence. Therefore the yardstick is whether media reporting has violated the basic principle that an accused is presumed to be innocent till pronounced guilty by the court.

⁶⁵ . *S.K. Sundaram : Inre* (2001) 2 S.C.C.; A.I.R. 2001 S.C 2374.

⁶⁶ .*Law Commission of India, 42nd Report on the Indian Penal Code*, 1971, Chapter 23, pp.336-340

⁶⁷ . Law Commission of India, 156th Report on the Indian Penal Code vol. 1 August, 1997,p.340.

⁶⁸ . Id. At. p.341.

⁶⁹ . *A.K Gopalan v. Noodeen* 1969 (2) S.C.C 734.

⁷⁰ .Madrid Principles on the Relationship between the Media and Judicial Independence ----- convened by the International Commission of Jurists in Madrid from 18-20 Jan. 1994.



Recent Trends of Trial by Media:

Recently the press, especially the electronic media has been very enthusiastic to grab and report it even before the Police or other channels get to know about it. This investigative journalism is good but at the same time it is going out of hand. There is no way to regulate it or stop it. Though we have the Press Council of India, which was established around twenty two years before, the electronic media will not come under its regime. The PCI entertains more than 10,000 complaints a year, has no teeth and the purpose is defeated as it evokes no fear or sanction. Simply an apology is demanded from the press, if found guilty. These types of liberal approaches are not going to remedy the harm caused by press reporting. More stringent measures are to be adopted to curb the malady though self-regulation can operate as a useful and viable tool.

New Governmental Policy: The Government in its zeal to bring liberalization in media has allowed foreign direct investment into it. The policy brought in 2003, permits upto 26% in print media, while in broadcasting, it is allowed upto 100%⁷¹. This is in a situation, where there is no law to control the tyranny of electronic media. With the doors open for the foreign media to invade India with their ideas and

⁷¹. www.Dailymail.co.uk. A government appointed panel advises Indian government to increase FDI in print media from 26% to 49% - retrieved on 07/02/13.

experiment with the Indian youth, the government is taking no urgent steps to bring in a regulation to control the widespread electronic media.

Conclusion

Freedom of press was included in this right to speech and expression by the Apex Court in *Romesh Thapper v. State of Madras*.⁷² Here the Court held that this freedom includes right to propagate ideas including the right to circulate. All the above factors further gave impetus to press but at the same time that right of an individual to plead right to privacy against undue interference by press was completely denied as this right to privacy was not given an independent status as fundamental right on the same footing as of freedom of press in the Constitution. The framers of the Constitution failed to imbibe the full spirit of UDHR 1948 by neglecting to recognize the right to privacy as a fundamental right.

Privacy as a term never came into the minds of legislators. The courts also gave decisions on the lines of the various offences mentioned above. The other grounds left for the victims were only Article 19(2) and Article 21 of the Constitution. There was no legislative effort to codify and protect privacy till date neither in the Constitution nor in any legislation. The victims had to always depend on the court's discretion and interpretation of privacy, when the question of infringement of privacy was considered. This has been a loophole since the time of independence. It is therefore recommended that the Constitution should be amended to

⁷². *Romesh Thappar v. State of Madras* (1950) S.C.R. 594.



include this right to Privacy as the first step. Once the grundnorm is amended, the position of privacy will be legally at par with international standards. Then is the need to enact a Privacy Act. Thirdly the need to amend the Contempt of Court Act 1971, to give the courts, specific powers apart from the general powers to issue gagging orders and other orders to protect an accused from media intrusion which has the effect of tampering with evidences and witnesses and causing interference in administration of justice. Also as stated in Rajendra Sail's case⁷³, we need a strong press council in India. It should be a strong regulatory authority with representatives of legal, social, common man and press. Presently the Press Council is dominated by the different newspapers.

In Parshuram Babaram Sawant v. Times Global Broadcasting Co, Ltd.⁷⁴, Retd. Justice P.B. Sawant's photograph was flashed as Jusitce P.K. Samantha, Retd. Justice of Calcutta High Court, who was alleged to be involved in the famous Provident Fund scam of 2008. It gave a false impression among viewers that the plaintiff was involved in the scam. To conclude with, the former Chief Information Commissioner of India, Wajahat Habibullah⁷⁵ as then he was, had also demanded a law on Privacy complimentary to the law on Right to Information. He had stated that while all information regarding the government should have public accountability, there should be a law to respect privacy also to

run parallel to it.⁷⁶ Therefore the need for the Right of Privacy is inevitable.

⁷³ . Rajendra Sail v. M.P. High Court Bar Association (2005) 6 S.C.C. 109.p.125.

⁷⁴ . Special Civil Suit No. 1984/2008 in Pune trial court.

⁷⁵ . KP Saikiran 'CLC for Law on Privacy' January 31, 2009, The New Indian Express p.11.

⁷⁶ . Ibid.