

ISSN :2582-6433



INTERNATIONAL JOURNAL FOR LEGAL RESEARCH AND ANALYSIS

Open Access, Refereed Journal Multi Disciplinary
Peer Reviewed 6th Edition

VOLUME 2 ISSUE 6

www.ijlra.com

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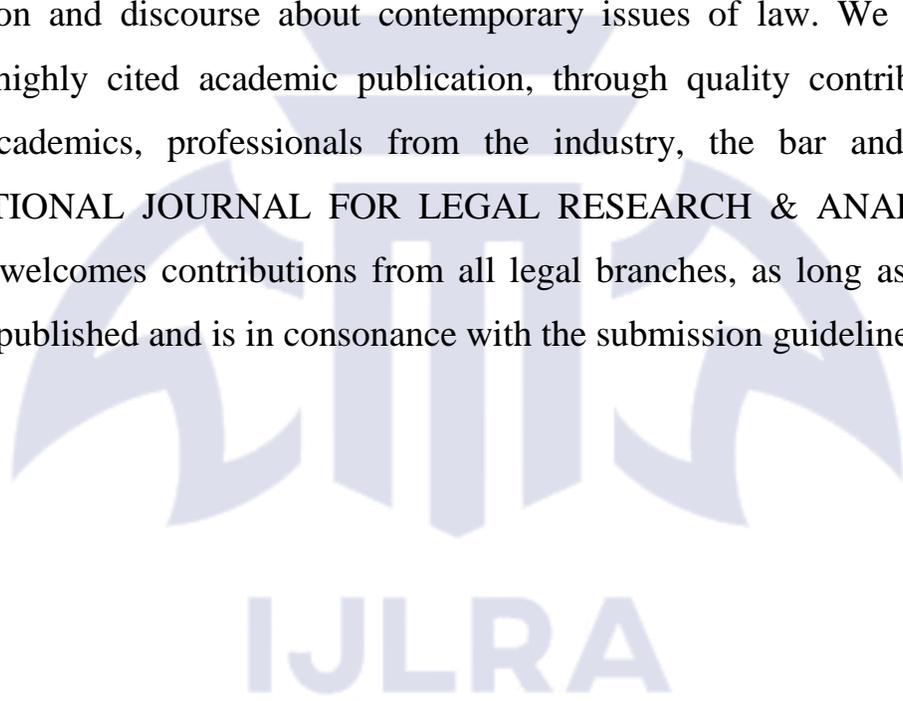
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Privacy & Media Law

Authored By

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Abstract

In their research, the authors try to delineate the emerging privacy concerns in India and the existing media norms and guidelines on the right to privacy. The research examines the existing media norms (governed by Press Council of India, the Cable Television Networks (Regulation) Act, 1995 and the Code of Ethics drafted by the News Broadcasting Standard Authority), the constitutional protection guaranteed to an individual's right to privacy upheld by the courts, and the reasons the State employs to justify the invasion of privacy. The paper further records, both domestic and international, inclusions and exceptions with respect to the infringement of privacy.

Keywords: Privacy, Code of Conduct, Ethics, Press Council, Media,

Introduction

A few years back on satirical release, Peepli [Live], accurately captured what takes place in media news rooms. The film revolves around a debt-ridden farmer whose announcement to commit suicide ensue a media circus. Ironically, in the case of the Radia tapes, the same journalists found themselves in the centre of the media's frenzy-hungry, often intrusive and unverified style of reporting.[1] Exposés, such as, the Radia tapes and Wikileaks have thrown open the conflict between the right to information, or what has come to be called 'informational activism', and the right to privacy. Right to information and the right to communicate the information via media is guaranteed under Article 19(1) (a) of the Constitution of India. In *State of Uttar Pradesh v Raj Narain*,[2] the Supreme Court of India held that Article 19(1) (a), in addition, to guaranteeing freedom of speech and expression, guarantees the right to receive information on matters concerning public interest. However, more recently concerns over balancing the right to information with the right to privacy have been raised, especially, by controversies like the Radia-tapes.

For instance, last year Ratan Tata filed a writ petition before the Supreme Court of India alleging that the unauthorised publication of his private conversations with Nira Radia was in violation of his right to privacy. The writ, filed by the industrialist, did not challenge the action of the Directorate-General of Income Tax to record the private conversations for the purpose of investigations. Instead, it was challenging the publication of the private conversations that took place between the industrialist and Nira Radia by the media. Whether the publication of those

private conversations was in the interest of the public has been widely debated. What the Tata episode brought into focus was the need for a law protecting the right to privacy in India. India, at present, does not have an independent statute protecting privacy; the right to privacy is a deemed right under the Constitution. 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.

The higher judiciary of the country has recognised the right to privacy as a right “implicit in the right to life and liberty guaranteed to the citizens of this country by Article 21”. The Indian law has made some exceptions to the rule of privacy in the interest of the public, especially, subsequent to the enactment of the Right to Information Act, 2005 (RTI). The RTI Act, makes an exception under section 8 (1) (j), which exempts disclosure of any personal information which is not connected to any public activity or of public interest or which would cause an unwarranted invasion of privacy of an individual. What constitutes an unwarranted invasion of privacy is not defined. However, courts have taken a positive stand on what constitutes privacy in different circumstances.

The purpose of this paper is to delineate the emerging privacy concerns in India and the existing media norms and guidelines on the right to privacy. At present, the media is governed by disparate norms outlined by self-governing media bodies, like the Press Council of India, the Cable Television Networks (Regulation) Act, 1995 and the Code of Ethics drafted by the News Broadcasting Standard Authority (NBSA). The paper examines the existing media norms, constitutional protection guaranteed to an individual’s right to privacy and upheld by courts, and the reasons the State employs to justify the invasion of privacy. The paper records, both domestic and international, inclusions and exceptions with respect to the infringement of privacy.

The paper traces the implementation of media guidelines and the meanings accorded to commonly used exceptions in reporting by the media, like, ‘public interest’ and ‘public person’. This paper is not an exhaustive attempt to capture all privacy and media related debates. It does, however, capture debates within the media when incursion on the right to privacy is considered justifiable. The questions that the paper seeks to respond to are: When is the invasion on the right to privacy defensible? How the media balances the right to privacy with the right to information? How is ‘public interest’ construed in day-to-day reporting? The questions raised are seen in the light of case studies on the invasion of privacy in the media, the interviews conducted with print journalists, the definition of the right to privacy under the Constitution of India and media’s code of ethics.

Constitutional Framework Of Privacy

The right to privacy is recognised as a fundamental right under the Constitution of India. It is guaranteed under the right to freedom (Article 19) and the right to life (Article 21) of the Constitution. Article 19(1) (a) guarantees all citizens the right to freedom of speech and expression. It is the right to freedom of speech and expression that gives the media the right to publish any information. Reasonable restrictions on the exercise of the right can be imposed by the State in the interests of sovereignty and integrity of the State, 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. Article 21 of the Constitution provides, "**No person shall be deprived of his life or personal liberty except according to procedure established by law.**" Courts have interpreted the right to privacy as implicit in the right to life. In *R.Rajagopal v. State of T.N.*[3]; and *PUCL v. UOI*[4], the courts observed that the right to privacy is an essential ingredient of the right to life.

For instance, in *R. Rajagopal v State of Tamil Nadu*, Auto Shankar — who was sentenced to death for committing six murders — in his autobiography divulged his relations with a few police officials. The Supreme Court in dealing with the question on the right to privacy, observed, that the right to privacy is implicit in the right to life and liberty guaranteed to the citizens of the country by Article 21. It is a ‘right to be left alone.’ "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 publication of any of the aforesaid personal information without the consent of the person, whether accurate or inaccurate and ‘whether laudatory or critical’ would be in violation of the right to privacy of the person and liable for damages. The exception being, when a person voluntarily invites controversy or such publication is based on public records, then there is no violation of privacy.

In *PUCL v. UOI*,^[5] 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 important facet of a man's private life. Right to privacy would certainly include telephone-conversation in the privacy of one's home or office. Telephone-tapping would, thus, infract Article 21 of the Constitution of India unless it is permitted under the procedure established by law."** It further observed that the right to privacy also derives from Article 19 for **"when a person is talking on telephone, he is exercising his right to freedom of speech and expression."**

In *Kharak Singh v. State of U.P.*,^[6] where police surveillance was being challenged on account of violation of the right to privacy, the Supreme Court held that domiciliary night visits were violative of Article 21 of the Constitution and the personal liberty of an individual.

The court, therefore, has interpreted the right to privacy not as an absolute right, but as a limited right to be considered on a case to case basis. It is the exceptions to the right to privacy, like ‘public interest’, that are of particular interest to this paper.

International Conventions

Internationally the right to privacy has been protected in a number of conventions. For instance, the Universal Declaration of Human Rights, 1948 (UDHR) under Article 12 provides 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 UDHR protects any arbitrary interference from the State to a person’s right to privacy. Similarly, International Covenant on Civil and Political Rights, 1976 (ICCPR) under Article 17 imposes the State to ensure that individuals are protected by law against “arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation. [7]

Thus, ensuring that States enact laws to protect individual’s right to privacy. India has ratified the above conventions. The ratification of the Conventions mandates the State to take steps to enact laws to protect its citizens. Although, human right activists have periodically demanded that the State take adequate measures to protect human rights of the vulnerable in society, the right to privacy has received little attention.

Similarly, Article 16 of the Convention on the Rights of the Child (CRC) provides protection to a minor from any unlawful interference to his/her right to privacy and imposes a positive obligation on States who have ratified the convention to enact a law protecting the same. India does have safeguards in place to protect identity of minors, especially, juveniles and victims of abuse. However, there are exceptions when the law on privacy does not apply even in case of a minor.

The right to privacy, therefore, is not an absolute right and does not apply uniformly to all situations and all class of persons. For instance, privacy with respect to a certain class of persons, like a person in public authority, affords different protection as opposed to private individuals.

Public Person

In case of a representative of the public, such as a public person, the right to privacy afforded to them is not of the same degree as that to a private person. The Press Council of India (PCI) has laid down Norms of Journalistic Conduct, which address the issue of privacy. The PCI Norms of Journalistic Conduct, recognises privacy as an inviolable human right, but adds a caveat; that the degree of privacy depends on circumstances and the person concerned.

In the landmark judge's asset case, *CPIO, Supreme Court of India vs Subhash Chandra Agarwal*,^[8] the court recognised the tension between the right to information and the right to privacy, especially, with respect to public persons. The case arose from an application filed by a citizen who was seeking information under the RTI Act on whether judges of high courts and Supreme Court were filing asset declarations in accordance with full resolution of the Supreme Court. The court held that information concerning private individuals held by public authority falls within the ambit of the RTI Act. It remarked that whereas public persons are entitled to privacy like private persons, the privacy afforded to private individuals is greater than that afforded to those in public authority, especially in certain circumstances.

The court commented:

"A private citizen's privacy right is undoubtedly of the same nature and character as that of a public servant. Therefore, it would be wrong to assume that the substantive rights of the two differ. Yet, inherent in the situation of the latter is the premise that he acts for the public good, in the discharge of his duties, and is accountable for them. The character of protection, therefore, afforded to the two classes — public servants and private individuals, is to be viewed from this perspective. The nature of restriction on the right to privacy is therefore, of a different order; in the case of private individuals, the degree of protection afforded is greater; in the case of public servants, the degree of protection can be lower, depending on what is at stake."

In testing whether certain information falls within the purview of the RTI Act, the court said one should consider the following three tests:

- whether the disclosure of the personal information is with the aim of providing knowledge of the proper performance of the duties and tasks assigned to the public servant in any specific case;
- whether the information is deemed to comprise the individual's private details, unrelated to his position in the organization, and,
- whether the disclosure will furnish any information required to establish accountability or transparency in the use of public resources.

Would this rule hold true for information on relatives/ friends of public persons? The rule is that,

unless, private information on relatives/friends of public person's impacts public interest and accountability, the information should not be revealed.

In 2010, the media reported that Sunanda Pushkar, a close friend of the Minister of State for External Affairs, Shashi Tharoor, holds a significant holding in the IPL Kochi team. The media exposure led to the exit of Shashi Tharoor from the government. While the media's questioning of Pushkar's holdings was legitimate, the media's reporting on her past relationships and how she dressed had no bearing on public interest or accountability.[9] The media accused Pushkar of playing proxy for Tharoor in the Rs. 70 crore sweat equity deal. Much of the media attention focussed on her personal life, as opposed to, how she attained such a large stake in the IPL Kochi team. It minutely analysed her successes and failures, questioned her ability and accused her of having unbridled ambition and greed for money and power.[10]

If one was to consider the rules of privacy set by the court in the judges assets' case much of the personal information published by the media on Tharoor and Pushkar, failed to shed light on the IPL holdings or the establishment of the nexus between the IPL holdings and the government involvement.

The tests delineated by the court in considering what personal information regarding a public authority may be shared under the RTI Act, can be adopted by the media when reporting on public officials. If personal information divulged by the media does not shed light on the performance of a public official, which would be of public interest, then the information revealed violates the standards of privacy. Personal details which have no bearing on public resources or interests should not be published.

The media coverage of the Bombay terror attacks displayed the same lack of restraint, where the minutest details of a person's last communication with his/her family were repeatedly printed in the media. None of the information presented by the media revealed anything new about the terror attack or emphasised the gravity of the attack.

A senior journalist, who talked off the record and reported on the Mumbai terror attacks, agreed that the media overstepped their limits in the Mumbai terror attacks. As per her, violation of privacy takes place at two stages: the first time, when you overstep your boundaries and ask a question you should not have, and the second, when you publish that information. Reflecting on her ten years of reporting experience, she said, "Often when you are covering a tragedy, there is little time to reflect on your reporting. Besides, if you, on account of violating someone's privacy, choose not to report a story, some competing paper would surely carry that story. You would have to defend your decision to not report the story to your boss." The competitiveness of reporting and getting a story before your competitor, she agreed makes even the most seasoned journalists ruthless sometimes. Besides, although PCI norms exist, not many read the PCI norms or recall the journalistic ethics when they are reporting on the field.[11]

The PCI Norms reiterate that the media should not intrude "the privacy of an individual, unless outweighed by genuine overriding public interest, not being a prurient or morbid curiosity." [12] The well accepted rule, however, is that once a matter or information comes in the public domain, it no longer falls within the sphere of the private. The media has failed to make the distinction between what is warranted invasion of privacy and what constitutes as an unwarranted invasion of privacy. For instance, identity of a rape or kidnap victim that would further cause discrimination is often revealed by the media.

Safeguarding Identity Of Children

The Juvenile Justice (Care and Protection of Children) Act lays down that the media should not disclose the names, addresses or schools of juveniles in conflict with the law or that of a child in need of care and protection, which would lead to their identification. The exception, to identification of a juvenile or child in need of care and protection, is when it is in the interest of the child. The media is prohibited from disclosing the identity of the child in such situations.

Similarly, the Convention on the Rights of the Child (CRC) stipulates that:

Article 16

1. No child shall be subjected to arbitrary or unlawful interference with his or her privacy, family, or correspondence, nor to unlawful attacks on his or her honour and reputation.
2. The child has the right to the protection of the law against such interference or attacks.

Article 40 of the Convention, states that the privacy of a child accused of infringing penal law should be protected at all stages of the proceedings.

Almost all media, print and broadcast, fail to observe these guidelines. Prashant Kulkarni[13] (name changed), who was a photographer with Reuters a few years ago, said that in Reuters photographs taken by photojournalists could not be altered or edited, to ensure authenticity.

As far as taking photographs of certain vulnerable persons is concerned, he admitted to photographing street children who are drug addicts on the streets of Mumbai. The photographs were published by Reuters. However, when he was on an assignment for an NGO working with children, the NGO cautioned him about photographing children who are drug addicts, to protect their identity. Similarly, identity of HIV and AIDS patients, including children, should be protected and not revealed. Children affected with HIV and AIDS should not be identified by name or photograph, even if consent has been granted by the minor's parents/guardian.

As a rule, Kulkarni said, he does not seek consent of individuals when he is taking their photographs, if they are in a public place. If they do not object, the assumption is that they are comfortable with being photographed. The PCI norms do not expressly provide that consent of a person should be sought. But, journalists are expected to exercise restraint in certain situations. Likewise, identifying juveniles in conflict with law is restricted. This includes taking photographs of juveniles that would lead to their identification.

Kulkarni, who extensively covered the Bombay train blasts in 2006, explains, "At the time of the Bombay train explosions, I avoided taking pictures that were gory or where dead people could be identified. However, I did take photographs of those injured in the blast and were getting treated in government hospitals. I did not expressly seek their consent. They were aware of being photographed. That is the rule I have applied, even when I was on an assignment in West Africa. I have never been on an assignment in Europe, so am not sure whether I would have applied the same rule of thumb. Nonetheless, now as a seasoned photographer, I would refrain from taking pictures of children who are drug addicts."

Safeguarding Identity Of Rape Victims

Section 228A of the Indian Penal Code makes disclosure of the identity of a rape victim punishable. In the recent Aarushi Talwar murder case and the rape of an international student studying at the Tata Institute of Social Sciences (TISS) the media frenzy compromised the privacy of the TISS victim and besmirched the character of the dead person.[14] In the TISS case, the media did not reveal the name of the girl, but revealed the name of the university and the course she was pursuing, which is in violation of the PCI norms. In addition to revealing names of individuals, the PCI norms expressly states that visual representation in moments of personal grief should be avoided. In the Aarushi murder case, the media repeatedly violated this norm.

The media in both cases spent enough newsprint speculating about the crimes. Abhinav Pandey[15] (name changed), a senior journalist reporting on crime, agrees that the media crossed its boundaries in the TISS case by reporting sordid details of how the rape took place. "Names of victims of sexual crime cannot be reported. In fact, in many instances the place of stay and any college affiliation should also be avoided, as they could be easily identified. Explicit details of the offence drawn from the statement given by the victim to the police are irrelevant to the investigation or to the public at large. Similarly, names of minors and pictures, including those of juveniles, have to be safeguarded."

"Crime reporters receive most of their stories from the police. Therefore, one has to be careful before publishing the story. At times in the rigour of competitive journalism, if you decide to publish an unverified story, as a good journalist you should present a counter-point. As a seasoned journalist it is easy to sense when a story is being planted by the police. If you still want to carry the story, one has to be careful not to taint the character of a person," he adds.

"For instance, in my reporting if I find that the information will not add to the investigation, I will not include it in my copy. Last year, we had anonymous letters being circulated among crime reporters which alleged corruption among senior IPS officers. Instead of publishing the information contained in those letters with the names of the IPS officers, we published a story on corruption and cronyism on IPS officers. In the Faheem Ansari matter, who was an accused in the 26/11 trial, I had received his email account password. Accessing his account also amounts to violation of privacy. But, we only published the communication between him and some handlers in Pakistan, which we knew would have an impact on the investigation. Our job requires us to share information in the public domain, sometimes we would violate privacy. Nonetheless, one has to be cautious."

Trial By Media & Media Victimization

The PCI norms lay down the guidelines for reporting cases and avoiding trial by media. The PCI warns journalists not to give excessive publicity to victims, witnesses, suspects and accused as that amounts to invasion of privacy. Similarly, the identification of witnesses may endanger the lives of witnesses and force them to turn hostile. Zaheera Sheikh, who was a key witness in the Gujarat Best Bakery case, was a victim of excessive media coverage and sympathy. Her turning hostile invited equal amount of media speculation and wrath. Her excessive media exposure possibly endangered her life. Instead, of focussing on the lack of a witness protection program in the country, the media focussed on the twists and turns of the case and the 19 year old's conflicting statements. The right of the suspect or the accused to privacy is recognised by the PCI to guard against the trial by media.

Swati Deshpande,[16] a Senior Assistant Editor (Law) at the Times of India, Mumbai, observes that, "As a good journalist one will always have more information than required, but whether you publish that information or exercise restraint is up to you." In a span of 11 years of court reporting, as per her, there have been instances when she has exercised the option of not reporting certain information that could be defamatory and cannot be attributed. If an allegation is made in a court room, but is not supported by evidence or facts, then it is advisable that it be dropped from the report.

"In the Bar Dancers' case which was before the Bombay High Court, the petition made allegations of all kinds against certain ministers. I did not report that, although I could have justified it by saying it is part of the petition, and I was just doing my job. The allegation was neither backed by facts nor was it of public interest. As a rule one should report on undisputed facts. Then again, with court reporting one is treading on safer grounds, as opposed to other beats."

"In cases of rape when facts are part of the judgment, you report facts that are relevant to the judgment or give you an insight on why the court took a certain view and add value to the copy. One should avoid a situation where facts revealed are offensive or reveal the identity of the victim. The past history of both the victim and the accused should not be reported."

She admitted, that "Media reporting often gives the impression that the accused has committed the crime or the media through its independent investigation wing has found a particular fact. When in fact, it has relied entirely on the information given by the police and failed to question or verify the facts by an independent source. The result is that most crime reporting is one-sided, because the information received from the police is rarely questioned."

As per her, to a certain degree the publication of Tata–Radia conversations did violate Tata's privacy. "Media needs to question itself prior to printing on how the information is of public interest. Of course, as a journalist you do not want to lose out on a good story, but there needs to be gate keeping, which is mostly absent in most of the media today."

In the Bofors pay-off case[17] the High Court of Delhi, observed that, "The fairness of trial is of paramount importance as without such protection there would be trial by media which no civilised society can and should tolerate. The functions of the court in the civilised society cannot be usurped by any other authority." [18] It further criticised the trend of police or the CBI holding a press conference for the media when investigation of a crime is still ongoing. The court agreed that media awareness creates awareness of the crime, but the right to fair trial is as valuable as the right to information and freedom of communication.

The 200th report of the Law Commission dealt with the issue of **Trial by media: Free Speech vs Fair Trial under Criminal Procedure**. The report, focussed on the pre-judicial coverage of a crime, accused and suspects, and how it impacts the administration of justice. The Contempt of Courts Act, under section 2 defines criminal contempt as:

"...the publication, (whether by words, spoken or written or by signs, or by visible representations, or otherwise), of any matter or the doing of any other act whatsoever which prejudices or interferes or tends to interfere with the due course of any judicial proceedings; or interferes or tends to interfere with or obstructs or tends to obstruct, the administration of justice in any manner."

Section 3(1) of the Act exempts any publication and distribution of publication, "if the publisher had no reasonable grounds for believing that the proceeding was pending". In the event, the person

is unaware of the pendency, any publication (whether by words spoken or written or signs or visible representations) interferes or tends to interfere with or obstructs "the course of justice in connection with any civil or criminal proceeding pending at the time of publication, if at that time he had no reasonable grounds for believing that the proceeding was pending." The report emphasizes that publications during the pre-trial stage by the media could affect the rights of the accused. An evaluation of the accused's character is likely to affect or prejudice a fair trial.

If the suspect's pictures are shown in the media, identification parades of the accused conducted under Code of Civil Procedure would be prejudiced. Under Contempt of Court Act, publications that interfere with the administration of justice amount to contempt. Further, the principles of natural justice emphasise fair trial and the presumption of innocence until proven guilty. The rights of an accused are protected under Article 21 of the Constitution, which guarantees the right to fair trial. This protects the accused from the over-zealous media glare which can prejudice the case. Although, in recent times the media has failed to observe restraint in covering high-profile murder cases, much of which has been hailed as media's success in ensuring justice to the common man.

For instance, in the Jessica Lal murder case, the media took great pride in acting as a facilitator of justice. The media in the case whipped up public opinion against the accused and held him guilty even when the trial court had acquitted the accused. The media took on the responsibility of administering justice and ensuring the guilty are punished, candle light vigils and opinion polls on the case were organised by the media. Past history of the accused was raked up by the media, including photographs of the accused in affluent bars and pubs in the city were published after he was acquitted. The photographs of Manu Sharma in pubs insinuated how he was celebrating after his acquittal.

The Apex Court observed that the freedom of speech has to be carefully and cautiously used to avoid interference in the administration of justice. If trial by media hampers fair investigation and prejudices the right of defence of the accused it would amount to travesty of justice. The Court remarked that the media should not act as an agency of the court.[19]

The Court, commented, "Presumption of innocence of an accused is a legal presumption and should not be destroyed at the very threshold through the process of media trial and that too when the investigation is pending." [20]

Sting Operations

On 30 August, 2007 Live India, a news channel conducted a sting operation on a Delhi government school teacher forcing a girl student into prostitution. Subsequent to the media exposé, the teacher Uma Khurana[21] was attacked by a mob and was suspended by the Directorate of Education, Government of Delhi. Later investigation and reports by the media exposed that there was no truth to the sting operation. The girl student who was allegedly being forced into prostitution was a journalist. The sting operation was a stage managed operation. The police found no evidence against the teacher to support allegations made by the sting operation of child prostitution. In this case, the High Court of Delhi charged the journalist with impersonation, criminal conspiracy and creating false evidence. The Ministry of Information and Broadcasting sent a show cause notice to TV-Live India, alleging the telecast of the sting operation by channel was "defamatory, deliberate, containing false and suggestive innuendos and half truths." [22]

Section 5 of the Cable Television Networks (Regulation) Act, 1995 and the Cable Television Network Rules (hereafter the Cable Television Networks Act), stipulates that no programme can be transmitted or retransmitted on any cable service which contains anything obscene, defamatory, deliberate, false and suggestive innuendos and half truths. The Rules prescribes a programming code to be followed by channels responsible for transmission/re-transmission of any programme.

The programme code restricts airing of programmes that offend decency or good taste, incite violence, contains anything obscene, defamatory, deliberate, false and suggestive innuendos and half truths, criticises, maligns or slanders any individual in person or certain groups, segments of social, public and moral life of the country and affects the integrity of India, the President and the judiciary. The programme code provided by the Rules is exhaustive. The Act empowers the government to restrict operation of any cable network it thinks is necessary or expedient to do so in public interest.

The court observed that false and fabricated sting operations violate a person's right to privacy. It further, observed, "Giving inducement to a person to commit an offence, which he is otherwise not likely and inclined to commit, so as to make the same part of the sting operation is deplorable and must be deprecated by all concerned including the media." It commented 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." [23]

The court criticised the role of the media in creating situations of entrapment and using the 'inducement test'. It remarked that such inducement tests infringe upon the individual's right to privacy. It directed news channels to take steps to prohibit "reporters from producing or airing any programme which are based on entrapment and which are fabricated, intrusive and sensitive." [24]

The court proposed a set of guidelines to be followed by news channels and electronic media in carrying out sting operations. The guidelines direct a channel proposing to telecast a sting operation to obtain a certificate from the person who recorded or produced the same certifying that the operation is genuine to his knowledge. The guidelines propose that the Ministry of Information and Broadcasting should set up a committee which would have the powers to grant permission for telecasting sting operations. The permission to telecast a sting operation should be granted by the committee only if it is satisfied about the overriding public interest to telecast the sting operation. The guidelines mandate that, in addition, to ensuring accuracy, the operation should not violate a person's right to privacy, "unless there is an identifiable large public interest" for broadcasting or publishing the material. However, the court failed to define what constitutes 'larger public interest'.

The PCI norms also lay down similar guidelines which require a newspaper reporting a sting operation to obtain a certificate from the person involved in the sting to certify that the operation is genuine and record in writing the various stages of the sting. The decision to report the sting vests with the editor who merely needs to satisfy himself that the sting operation is of public interest.

In addition, to the Cable Television Networks Act and the PCI norms, the News Broadcasting Standard Authority (NBSA) was set up in 2008 as a self-regulatory body by News Broadcasters Association. [25] The primary objective of the NBSA is to receive complaints on broadcasts. The NBSA has drafted a Code of Ethics and Broadcasting Standards governing broadcasters and television journalists. The Code of Ethics provides guiding principles relating to privacy and sting operations that broadcasters should follow.

With respect to privacy, the Code directs channels not to intrude into the private lives of individuals unless there is a "clearly established larger and identifiable public interest for such a broadcast." Any information on private lives of persons should be "warranted in public interest." Similarly, for sting operations, the Code directs that they should be used as "a last resort" by news channels and should be guided by larger public interest. They should be used to gather conclusive evidence of

criminality and should not edit/alter visuals to misrepresent truth.

In a recent judgement on a supposed sting operation conducted by M/s. Associated Broadcasting Company Pvt. Limited[26] on TV9 on 'Gay culture rampant in Hyderabad', the NBA took suo motu notice of the violation of privacy of individuals with alternate sexual orientation and misuse of the tool of sting operation. NBA in its judgement held that the Broadcaster had violated clauses on privacy, sting operations and sex and nudity of the Code of Ethics. It further, observed, that the Broadcaster and the story did not reveal any justifiable public interest in using the sting operation and violating the privacy of individuals. In this particular case, the Broadcaster had revealed the personal information and faces of supposedly gay men in Hyderabad to report on the 'underbelly' of gay culture and life. However, the news report, as NBSA observed, did not prove any criminality and was merely a sensational report of gay culture allegedly prevalent in Hyderabad.

The PCI norms provide that the press should not tape-record conversations without the person's express consent or knowledge, except where it is necessary to protect a journalist in a legal action or for "other compelling reason." What constitutes a compelling reason is left to the discretion of the journalist.

It was in the 1980s, that the first sting operation on how women were being trafficked was carried out by the Indian Express reporter Ashwin Sarin. As part of the sting, the Express purchased a tribal girl called Kamla. Subsequently, in 2001, the sting operation conducted by Tehelka exposed corruption in defence contracts using spy cams and journalists posing as arms dealers. The exposé on defence contracts led to the resignation of the then defence minister George Fernandes. Sting operations gained legitimacy in India, especially in the aftermath of the Tehelka operation, exposing corruption within the government. The original purpose of a sting operation or an undercover operation was to expose corruption. Stings were justifiable only when it served a public interest. Subsequent to the Tehelka exposé, stings have assumed the status of investigative journalism, much of which has been questioned in recent times, especially, with respect to ethics involved in conducting sting operations and the methods of entrapment used by the media. Further, stings by Tehelka, where the newspaper used sex workers to entrap politicians have brought to question the manner in which stings are operated. Although, the overriding concern surrounding sting operations has been its authenticity, as opposed to, the issue of personal privacy.

For instance, in March 2005 a television news channel carried out a sting operation involving Bollywood actor Shakti Kapoor to expose the casting couch phenomenon in the movie industry. The video showing Shakti Kapoor asking for sexual favours from an aspiring actress, who was an undercover reporter, was received with public outrage. Nonetheless, prominent members of the media questioned the manner in which the sting was conducted. The sting was set up as an entrapment. The court has taken a strong view against the use of entrapment in sting operations. In the case of the Shakti Kapoor sting, privacy of the actor was clearly violated. The manner in which the sting was conducted casts serious doubt on who was the victim.[27]

Additionally, the sting violated the PCI norms. It failed to provide a record of the various stages of how the sting operation was conducted. In United Kingdom, the media when violating privacy of a person has to demonstrate that it is in the interest of the public.

International Law on Media & Privacy Ethics United Kingdom

The Press Complaints Commission (PCC), UK is a self-regulatory body similar to NBA. The PCC has put down code of ethics to be followed by journalists. The PCC guidelines provide that everyone has the right to privacy and editors must provide reason for intrusions to a person's privacy. This includes photographing individuals in private places without their consent.

Interestingly, private places include public or private property "where there is a reasonable expectation of privacy." In India however, as Kulkarni pointed out, photographs are taken without the consent of an individual if he/she is in a public space.

Like the PCI norms, the PCC Code lays down guidelines to follow when reporting on minors (below 16 years of age) who have been victims of sexual assault. As per the guidelines, the identity of the children should be protected. Further, relatives or friends of persons convicted or accused of a crime should not be identified without their consent, unless the information is relevant to the story. References to a person's race, colour, sexual orientation and gender should be avoided. For instance, the media reportage of the TISS rape case, which revealed the nationality and colour of the victim, would be in violation of the PCC Code. In the TISS rape case, the information on the nationality and colour of the victim was not only irrelevant to the story, but as amply demonstrated by the media it reinforced prejudices against white women as 'loose or amoral'. [28]

As far as sting operations are concerned, the PCC lays down that the press must not publish material acquired by hidden camera or clandestine devices by intercepting private messages, emails or telephone calls without consent. However, revealing private information in cases of public interest is an exception to the general rule to be followed with respect to individual privacy. The PCC defines public interest to include, but it is not restricted to:

- "i) Detecting or exposing crime or serious impropriety
- ii) Protecting public health and safety
- iii) Preventing the public from being misled by an action or statement of an individual or organisation"

It requires editors to amply demonstrate that a publication is of public interest. In case the material is already in public domain the same rules of privacy do not apply. However, in cases involving children below 16 years of age, editors must demonstrate exceptional public interest that overrides the interest of the child. Tellingly, the PCC recognises freedom of expression as public interest.

The PCC, to ensure that persons are not hounded by the media have started issuing desist orders. The PCC issues a desist notice to editors to prevent the media from contacting the person. Preventive pre-publication is when the PCC pre-empts a story that may be pursued or published and attempts to either influence the reporting of the story in a way that it is not in violation of a person's privacy or persuades the media house not to publish the story. The PCC, however, does not have the powers to prevent publication.

Further, United Kingdom is a member of the European Convention on Human Rights (ECHR), which guarantees the right to privacy under Article 8 of the Convention: "**Everyone has the right to respect for his private and family life, his home and his correspondence.**"

However, there is no independent law which recognises the right to privacy. The judiciary however has protected the right to privacy in several occasions, like in the famous J.K. Rowling case where the English Court held, that a minor's photograph without the consent of the parent or guardian, though not offensive, violates the child's right to privacy. [29]

France

The French legal system protects the right to privacy under: Article 9 of the Civil Code.

Article 9 of the Civil Code states:

Everyone has the right to respect for his private life. Without prejudice to compensation for injury suffered, the court may prescribe any measures, such as sequestration, seizure and others,

appropriate to prevent or put an end to an invasion of personal privacy; in case of an emergency those measures may be provided for by an interim order. The right to privacy allows anyone to oppose dissemination of his or her picture without their express consent.

Article 9 covers both the public and private spheres, and includes not merely the publication of information but also the method of gathering information. Also, in France violation of one's privacy is a criminal offence. This includes recording or transmitting private conversations or picture of a person in a private place without the person's consent. This implies that privacy is not protected in a public place. Any picture taken of a person dead or alive, without their prior permission, is prohibited. Buying of such photographs where consent of a person also constitutes as an offence. Journalists, however, are not disqualified from the profession if they have committed such an offence.[30]

France has the Freedom of the Press of 29 July 1881 which protects minors from being identified and violent and licentious publication which targets minors. It punishes slander, publication of any information that would reveal the identity of a victim of a sexual offence, information on witnesses and information on court proceedings which include a person's private life.[31]

Sweden

Privacy is protected in Sweden under its Constitution. All the four fundamental laws of the country: the Instrument of Government, the Act of Succession, the Freedom of the Press Act, and the Fundamental Law on Freedom of Expression protect privacy. The Instrument of Government Act of 1974 provides for the protection of individual privacy. It states that freedom of expression is limited under Article 13 of the Constitution:

"Freedom of expression and freedom of information may be restricted having regard to the security of the Realm, the national supply, public safety and order, the integrity of the individual, the sanctity of private life, or the prevention and prosecution of crime. Freedom of expression may also be restricted in economic activities. Freedom of expression and freedom of information may otherwise be restricted only where particularly important reasons so warrant."

Sweden has a Press Council which was established in 1916. The Council consists of the Swedish Newspaper Publishers' Association, the Magazine Publishers' Association, the Swedish Union of Journalists and the National Press Club. The Council consists of "a judge, one representative from each of the above-mentioned press organisations and three representatives of the general public who are not allowed to have any ties to the newspaper business or to the press organisations."

Additionally, there is an office of the Press Ombudsman which was established in 1969. Earlier the Swedish Press Council used to deal with complaints on violations of good journalistic practice. After the setting up of the Press Ombudsman, the complaints are first handled by the Press Ombudsman, who is empowered to take up matters suo motu. "Any interested members of the public can lodge a complaint with the PO against newspaper items that violate good journalistic practice. But, the person to whom the article relates to must provide a written consent, if the complaint is to result in a formal criticism of the newspaper." [33]

The Swedish Press Council reports that in the recent years, 350-400 complaints have been registered annually, of which most concern coverage of criminal matters and invasion of privacy. Sweden, additionally, has a Code of Ethics which applies to press, radio and television. The Code of Ethics was adopted by the Swedish Co-operation Council of the Press in September 1995. The Code of Ethics for Press, Radio and Television in Sweden has been drawn up by the Swedish Newspaper Publishers' Association, the Magazine Publishers' Association, the Swedish Union of

Journalists and the National Press Club.

The Code of Ethics lay down norms to be followed in respect of privacy. It states that caution should be exercised when publishing information that:

- Infringes on a persons' privacy, unless it is obviously in public interest,
- Information on suicides or attempted suicides
- Information on victims of crime and accidents. This includes publication of pictures or photographs[34]

Race, sex, nationality, occupation, political affiliation or religious persuasion in certain cases, especially when such information is of no importance, should not be published.

One should exercise care in use of pictures, especially, retouching a picture by an electronic method or formulating a caption to deceive the reader. In case a picture has been retouched, it should be indicated below the photograph.

Further, the Code asks journalists to consider "the harmful consequences that might follow for persons if their names are published" and names should be published only if it is in the public interest. Similarly, if a person's name is not be revealed, the media should refrain from publishing a picture or any particulars with respect to occupation, title, age, nationality, sex of the person, which would enable identification of the person.

In case of court reporting or crime reporting, the Code states that the final judgement of the Court should be reported and given emphasis, as opposed to conducting a media trial. In addition, Sweden has incorporated the ECHR in 1994.

Japan

The Japan Newspaper Publishers & Editors Association or Nihon Shinbun Kyokai (NSK),[35] was established in 1946 as an independent and voluntary organisation to establish the standard of reporting, and protect and promote interests of the media. The organisation as part of its mandate has developed the Canon of Journalism, which provides for ethics and codes members of the body should follow. The Canon recognises that with the easy availability of information, the media constantly has to grapple with what information should be published and what should be held back. The Code provides that journalists have a sense of responsibility and should not hinder public interests. In addition, to ensuring accuracy and fairness, the Code states that respect of human rights, includes respect for human dignity, individual honour and right to privacy. Right to privacy is acknowledged as a human right.

Japan does not have an information ministry or organs like the PCC in the U.K. or the Press Ombudsman in Sweden. Apart from the Canon, the NSK has a code for marketing of newspapers, an advertising code and the Kisha club guidelines.[36]

Japan in 2003 formulated the Personal Information Protection Act, which regulates public and private sector. The Act, which came into effect in 2005, aims to ensure that all personal data collected by the public and private sector are handled with care. The Act requires that the purpose of collecting personal information and its use should be specified, information should be acquired by fair means, any information should not be supplied to third parties without prior consent of the individual concerned.

Netherlands

The right to privacy is protected under Article 10 of the Netherlands Constitution. Further, the Article also provides for the enactment of Rules for dissemination of personal data and the right of persons to be informed when personal data is being recorded.

Netherlands also has the Netherlands Press Council which keeps the media in check. The Code of the International Federation of Journalists and the Code of Conduct for Dutch Journalists was drafted by the Dutch Society of Editors-in-Chief to establish media reporting standards. These guidelines can be disregarded by the media only in cases involving social interest.

The Code recognises:

- That a person's privacy should not be violated when there is no overriding social interest;
- In cases concerning public persons violation of privacy would take place, but they have the right to be protected, especially, if that information is not of public interest;
- The media should refrain from publishing pictures and images of persons without prior permission of persons. Similarly, the media should not publish personal letters and notes without the prior permission of those involved;
- The media should refrain from publishing pictures and information of suspects and accused; and
- Details of criminal offence should be left out if they would add to the suffering of the victim or his/her immediate family and if they are not needed to demonstrate the nature and gravity of the offence or the consequences thereof.

Conclusion

The right to privacy in India has failed to acquire the status of an absolute right. The right in comparison to other competing rights, like, the right to freedom of speech & expression, the right of the State to impose restrictions on account of safety and security of the State, and the right to information, is easily relinquished. The exceptions to the right to privacy, such as, overriding public interest, safety and security of the State, apply in most countries. Nonetheless, as the paper demonstrates, unwarranted invasion of privacy by the media is widespread. For instance, in the UK, Sweden, France and Netherlands, the right to photograph a person or retouching of any picture is prohibited unlike, in India where press photographers do not expressly seek consent of the person being photographed, if he/she is in a public space. In France, not only is the publication of information is prohibited on account of the right to privacy, but the method in which the information is procured also falls within the purview of the right to privacy and could be violative. This includes information or photograph taken in both public and private spaces. Privacy within public spaces is recognised, especially, "where there is reasonable expectation of privacy." The Indian norms or code of ethics in journalism fail to make such a distinction between public and private space. Nor do the guidelines impose any restrictions on photographing an individual without seeking express consent of the individual.

The Indian media violates privacy in day-to-day reporting, like overlooking the issue of privacy to satisfy morbid curiosity. The PCI norms prohibit such reporting, unless it is outweighed by 'genuine overriding public interest'. Almost all the above countries prohibit publication of details that would hurt the feelings of the victim or his/her family. Unlike the UK, where the PCC can pass desist orders, in India the family and/or relatives of the victims are hounded by the media.

In India, the right to privacy is not a positive right. It comes into effect only in the event of a violation. The law on privacy in India has primarily evolved through judicial intervention. It has failed to keep pace with the technological advancement and the burgeoning of the 24/7 media news

channels. The prevalent right to privacy is easily compromised for other competing rights of 'public good', 'public interest' and 'State security', much of what constitutes public interest or what is private is left to the discretion of the media.

Notes

[1]The Radia Tapes' controversy concerns recording of conversations between the lobbyist Nira Radia and politicians, industrialists, bureaucrats and journalists with respect to the 2G spectrum scam. The tapes were recorded by the Income Tax Department. The role played by the media, especially some prominent journalists, in scam has been questioned. A handful of magazines and newspapers have questioned the media ethics employed by these journalists, whose recorded conversations are in the public domain or have been published by a few political magazines. The publication of the recorded conversations by a few media publications has received a sharp reaction from the said journalists. They have accused those media journals of unverified reporting and conducting a smear campaign against them.

[2]1975 AIR 865, 1975 SCR (3) 333.

[3](1994) 6 S.C.C. 632.

[4]AIR 1997 SC 568.

[5]AIR 1997 SC 568.

[6]AIR 1997 SC 568.

[7]International Covenant on Civil and Political Rights, Part III Art. 17. Available at: <http://www2.ohchr.org/english/law/ccpr.htm> [Last accessed 20/04/2011].

[8]W.P. (C) 288/2009

[9]PTI, Media just turned me into a 'slut' in IPL row: Sunanda Pushkar, 23/04/2010 Available at http://articles.timesofindia.indiatimes.com/2010-04-23/india/28149154_1_sunanda-pushkar-shashi-tharoor-ipl-kochi [Last accessed 20/04/2011].

[10]Vrinda Gopinath, "Got A Girl, Named Sue", 26/04/2010 Available at <http://www.outlookindia.com/article.aspx?265098> [Last accessed 20/04/2011]

[11]Interview with Senior Assistant Editor, Hindustan Times, on 18.04.11.

[12]Guideline 6 (i) Right to Privacy, Norm if Journalistic Conduct, PCI.

[13]Interview with a freelance photographer and a former Reuters photographer on 16.04.11.

[14]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].

[15]Interview with Abhinav Pandey, crime reporter with a leading newspaper, on 21.04.11.

[16]Interview with Swati Deshpande, Senior Assistant Editor (Law), Times of India, on 15.04.11.

[17]Crl.Misc.(Main) 3938/2003

[18]Ibid.

[19]Sidhartha Vashisht @ Manu Sharma vs State (Nct Of Delhi), Available at <http://www.indiankanoon.org/doc/1515299/>.

[20]Ibid

[21]WP(Crl.) No.1175/2007

[22]Ibid

[23]Ibid

[24]Ibid

[25]NBA is a community formed by private television & current affairs broadcasters. As per the NBA website, it currently has 20 leading news channels and current affairs broadcaster as its members. Complaints can be filed against any of the broadcasters that are members of NBA on whom the Code of Ethics is binding.

[26]For additional details, please refer to the website: <http://www.nbanewdelhi.com/authority-members.asp> [Last Accessed April 20,2011]

[27]TNN, "Full video will further embarrass Shakti", 15.03.2005 Available at http://articles.timesofindia.indiatimes.com/2005-03-15/mumbai/27849089_1_sting-operation-shakti-kapoor-film-industry.

[28]For more details please refer to the PCC website: <http://www.pcc.org.uk/> [Last Accessed April 20,2011].

[29]Singh, A., May 2008, "JK Rowling wins privacy case over son's photos"<http://www.telegraph.co.uk/news/uknews/1936471/JK-Rowling-wins-privacy-case-over-sons-photos.html> [Last Accessed April 20,2011].

[30]For more details, please refer to: <http://www.kbkcl.co.uk/2008/03/privacy-law-the-french-experience/> and <http://ambafrance-us.org/spip.php?article640> [Last Accessed April 20,2011].

[31]For more details, please refer to:<http://www.ambafrance-uk.org/Freedom-of-speech-in-the-French.html> [Last Accessed April 20,2011].

[32]<http://www.po.se/english/how-self-regulation-works> [Last Accessed April 20,2011].

[33]Ibid.

[34]Please refer to this website for additional details: http://ethicnet.uta.fi/sweden/code_of_ethics_for_the_press_radio_and_television and <http://www.po.se/english/code-of-ethics/85-code-of-ethics-for> [Last Accessed April 20,2011].

[35]<http://www.pressnet.or.jp/english/index.htm> [Last Accessed April 20,2011].

[36]Kisha Clubs, are clubs where only a few media houses/newspapers have access to public institution information. They have been criticised for its lack of openness and encouraging monopoly on reporting.

