"RIGHT TO PRIVACY AND FREEDOM OF PRESS- CONFLICTS AND CHALLENGES"

Thesis submitted to the

Cochin University of Science and Technology

for the award of the degree of

Doctor of Philosophy

in

The Faculty of Law

By

GIFTY OOMMEN

Under the Supervision of

Dr. V.S SEBASTIAN

Associate Professor

SCHOOL OF LEGAL STUDIES

COCHIN UNIVERSITY OF SCIENCE AND TECHNOLOGY

KOCHI-682 022, KERALA

2013

School of Legal Studies
Cochin University of Science and Technology
Kochi – 682 022, Kerala, India

Dr. V.S. Sebastian
Associate Professor

Certificate

This is to certify that the thesis entitled **"Right to Privacy and Freedom of Press - Conflicts and Challenges"** submitted by Ms. Gifty Oommen for the degree of Doctor of Philosophy, is to the best of my knowledge the record of bonofide research carried out under my guidance and supervision from 11/9/07 at the School of Legal Studies, Cochin University of Science and Technology. This thesis or any part thereof has not been submitted elsewhere for any other degree.

Kochi -22
June 2013

Dr. V.S. Sebastian
(Supervising Guide)

Certificate

This is to certify that the important research findings included in the thesis entitled **"Right to Privacy and Freedom of Press-Conflicts and Challenges"** have been presented in a research seminar at School of Legal Studies, Cochin University of Science and Technology on 25th January 2012.

Gifty Oommen
(Research Scholar)

Dr. V.S. Sebastian
(Research Guide
School of Legal studies)

Dr. N.S. Soman
(Director, School of Legal studies)

Kochi -22
June 2013

Declaration

I declare that the thesis entitled **"Right to Privacy and Freedom of Press- Conflicts and Challenges"** for the award of the degree of Doctor of Philosophy is the record of bonofide research carried out by me under the guidance and supervision of Dr V.S.Sebastian, Associate Professor, School of Legal Studies, and CUSAT. I further declare that this work has not previously formed the basis of the award of any degree, diploma, associate-ship or any other title or recognition.

Kochi-22
June 2013

Gifty Oommen
(Research Scholar)

Preface

In this age of electronics, when even minute gadgets can take pictures in most secretive and private places and transmit them to various information providers, which is further modified and manipulated to suit their varying needs, and all this within seconds and accessed by millions of viewers around the globe, is definitely an apt period for thinking of developing a protective regime against this excessive invasion of privacy by press. The danger lies in the fact that access to information has become so easy especially for the press through these years, while at the same time right of an individual to secure his privacy has become difficult due to great leaps and bounds in technology.

The press especially the electronic media is absolutely unbridled with hardly any legislative mechanism enabling an unexpecting person, taken unawares by an overenthusiastic journalist, to book the journalist and the channel under law. This medium moves at the speed of light, looking at rate they throw informations across millions of people viewing them, without much verification done regarding the authencity of the news item, at the source level. The reason being high competition to bring the news at the earliest to the viewers and provide first-hand information to them, so as to keep the viewership rating up. This viewership rating in turn, generates breeding ground for more funds, through advertisements for the channel. Today it is sad to note, that most of the owners of the various news channels and newspapers are profit oriented and some of them are entrepreneurs and not basically media people. Due to lapse on the part of the government to frame stringent legislation to control this abuse of media power, violations by the media go rampant.

The Constitutional and legal rights, especially the basic right of privacy, which is an inherent right of being left alone in the solace of privacy is the most affected right of all rights violated by the media. Press has further developed a psedomechanism of escapism, when it comes to violation of privacy by pleading ignorance of the folly committed and tendering a technical apology. The fact remains that the damage to the image of the victim has already been done and there is no effective remedy to remove this damage neither from the part of the media nor by the government.

While the right to freedom of press has undergone great progress and developed today as a powerful lobby, the equal and opposite right of an individual to be protected against unwarranted intrusions by press into their privacy has shrinked today and finds no established independent place in the Indian Constitution.

India is a signatory to the United Nations Declaration of Human Rights 1948 and the International Covenant on Civil and Political 1966, the two major International instruments, building the foundations of the major democracies and the constitutions of the world. Both these instruments give an independent and upper position to right to privacy compared to right to freedom of speech and expression. The freedom of press finds its place under this right to freedom of speech and expression. Both these rights are the two opposite faces of the same coin. Therefore, without the right of privacy finding an equal place in Indian law compared to right to freedom of speech and expression, the working of democracy would be severely handicapped and violations against citizens rights will be on the rise.

It was this problem in law and need to bring a balance between these two conflicting rights that induced me to undertake this venture. This heavy burden to bring in a mechanism to balance these two rights culminated in me to undertake this thesis titled "Right to Privacy and Freedom of Press – Conflicts and Challenges".

I am most thankful for the completion of my thesis to my only Lord and Saviour Jesus Christ, who was the strength and motivation to bring this thesis into its fullness. There were lot of times when my thought process would be moulded in absolutely different directions leading my thesis into a new light which I knew for certain, was my Jesus leading me gently as a shepherd leads his sheep into greener pastures and water. '*I look up to the mountains, where will my help come from, my help comes from the Lord who made the heaven and the earth, he will not allow my foot to slip, he who watches over Israel will neither slumber nor sleep. He will keep me from all harm and watch over my life, the Lord will watch over my coming and going out both now and for evermore. Amen.'*

My most respected guide, Dr V.S. Sebastian was so humble and gentle during the long process of thesis formation but at the same time meticulous when it came to correction. I cannot forget his special interest to make it the most perfect thesis under his guidance. My special thanks are due to him.

I am very much obliged to my husband, who did the major typing for me in the first stage, which was indeed very helpful for me. I cannot help but remember my daddy, who wanted to see me finish this thesis, which sadly did not materialize in his lifetime.

I thank Dr J.V.Vilanilam, the former Vice Chancellor of Kerala University, Dr Sebastian Paul, PCI member and K.M. Roy, senior journalist for giving me their views and thoughts in this matter.

I thank all the staff and non-teaching staff of the School of Legal Studies, Cochin University of Science and Technology for their timely help in times of need.

Gifty Oommen

Contents

…..ꕥ…..

List of Cases

[26] *Cantrell* v. *Forest City Publishing Co*., 419 U.S. 245 (1974).

[27] *Cape Publications, Inc*. v. *Bridges*, 423 So. 2d 426 (Fla. App. 5th Dist. 1982), 8 Med. L.Rptr. 2535, 2536.

[28] *Cason* v. *Baskin*, 30 So.2d 635 (Fla. (1947).

[29] Cassidy v. *Daily Mirror Newspapers Ltd.*[1929]2 K.B .331.

[30] *Chandler* v. *Florida*, 449 U.S. 560, 101 S. Ct. 802 (1981).

[31] *ChandrakantKalayandasKakodkar* v. *State of Maharashtra* (1969) 2 S.C.C. 687.

[32] *Cinel* v. *Connick* 792 F. Supp. 492 (1992).

[33] *Clnhurst* v. *Shereham Hotel* 58F.Supp. 484 (D.D.C 1945).

[34] *Cohen* v. *Cowles Media Co* 501 U.S. 663, 669 (1991).

[35] *Corelli* v. *Wall*, (1906) 22 T.L.R. 532.

[36] *Cox Broadcasting Corp*. v. *Cohn*, 420 U.S. 469 (1975).

[37] *Curtis Publishing Co*. v. *Wallace Butts* 388 US 130 (1967).

[38] *Daily Times Democrat* v.*Graham* 276 Ala. 380 (1964).

[39] *Delhi Judicial Service Association* v. *State of Gujarat*, (1989) 2 *Scale* 748.

[40] *Dennis* v. *US* (1951) 341 U.S.

[41] *Dering* v. *Uris* [1964] 2Q.B. 669.

[42] *Dietemann* v. *Time, Inc*., 449 F.2d 245, 246 (9thcir. 1971).

[43] *Douglas* v. *Hello!*[2003] 3 All E.R. 996.

[44] *Estate of Berthianme* v. *Pratt*, MD, 395.A.2d 792 (MC. 1976.

[45] *Estes* v. *Texas*, 381 U.S. 532 (1965).

[46] *Flake* v. *Greensboro News Co*., 212 N.C. 780, 195 S.E.55(1938).

[47] *Food Lion* v. *Capital Cities/ABC,* Inc., 984 F. Supp. 923 (M.D.N.C 1997), 25 Med. L.Rptr. 2185.

[48] *The Florida Star* v. *B.J.F*., 491 U.S. 524 (1989).

[49] *Galella* v.*Onassis*, 487 F. 2d 986, 995 (2d Cir, 1973).

[50] *Gannett Co., Inc*. v. *Depasquale,* 443 U.S. 368, 378 (1979).

[51] *Gertz* v. *Robert Welch*., Inc., 418 U.S. 323, 348, 94 S. Ct. 2997, 3011 (1974).

[52] *Gill* v. *Hearst Publishing Co*. 253 P2d 441 (Cal.1953).

[53] *Gillick* v. *BBC* [1996] E.M.L.R. 267.

[54] *G. Narasimhan* v. *T.V. Chokkappa* (1972) 2 S.C.C. 680.

[55] *Gobind* v. *State of Madhya Pradesh* A.I.R. 1975 S.C. 1378.

[56] *Griswold* v. *Connecticut* (1965) 381 U.S. 479.

[57] *HamdardDawakhana* v. *Union of India*, A.I.R. 1965 S.C. 1167.

[58] *Harbajan Singh* v.*State of Punjab* A.I.R. 1966 S.C. 97.

[59] *Hindustan Times* v. *State of U.P.* (2003) 1 S.C.C. 591.

[60] *HRM Prince of Wales* v. *Associated Newspapers Ltd* .[2006] All E.R(D) 335.

[61] *HRM Princess of Wales* v. *MGN Newspapers Ltd and others* (1993) 8 November (unreported) pp. 4-5.

[62] *Hustler* v. *Falwell*, 485 U.S. 46, 108 S. Ct. 876 (1988).

[63] *Hutton* v. *Jones* [1910] All.E.R.29.

[64] *Indian Express Newspaper* v. *Union of India*, A.I.R. 1986 S.C.51.

[65] *Inre, Harijai Singh*, 1997 Cri. L.J. 58 (S.C.).

[66] *In Re M.V.Jayarajan* , 2011(4)K.H.C. 437 (DB) .

[67] *In Re. S.K Sundaram* (2001) .2 S.C.C .171.

[68] *Irvin* v. Dowd, 366 U.S, 717, 719, 81 S.Ct. 1639, 1641 (1961).

[69] *Jackson* v. *Playboy* 574F.Supp. 10 (S.D. Ohio 1983).

[70] *John* v. *MGN Ltd* ,*The Times*, December 14,1995,p.6.

[71] *John Thomas* v. *Dr. K. Jagadeesan* (2001) 6 S.C.C. 30.

[72] *K.A. Abbas* v. *Union of India* (1970) 2 S.C.C. 780 pp. 802, 803.

[73] *Kaleidoscope (India) (P) Ltd* v *Phoolan Devi* A.I.R. 1995 Del. 316.

[74] *KartongenKemiOchForvaltning AB* v. *State*, 2004 C.C.R.285.

[75] *Katz* v. *United States* 389 U.S. 347 (1967).

[76] *Kaye* v. *Robertson* [1991] F.S.R. 62.

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

[78] *Kyllo* v. *United States* 533 U.S. 27(2001).

[79] *Lady Anne Tennant* v. *Associated NewspapersGroup Ltd,* (1979) F.S.R 298.

[80] *Lenon* v. *News Group Newspaper* [1978] F.S.R.573.

[81] *Leverton* v. *Curtis Pub.Co*., 192F.2d 974 (3d.Cir .1951).

[82] *Lewis* v. *Daily Telegraph Ltd* [1963] 2 All E R, 151.

[83] *Liberty Lobby, Inc.* v. *Dow Jones & Co*., 838 F. 2d 1287, 1298, (D.C. Cir. 1988) 14 Med. L. Rptr. 2249.

[84] *L.I.C.* v. *Manubhai Shah* (1992) 3 S.C.C. 637.

[85] *Mahendar Ram* v. *Harnandan Prasad* A.I.R .1958 Pat. 445.

[86] *Man* v. *Rio Grenade Oil Inc*., 28F Supp.845 (N.D.Cal.1939).

[87] *Maneka Gandhi* v. *Union of India*, A.I.R.1978 S.C.597.

[88] *Manu Sharma* v. *State (NCT of Delhi)* 2010 (6) S.C.C.1.

[89] *Mckennit* v. *Ash* [2006] E.W.C.A. Civ. 1714.

[90] *Melvin* v. *Reid*, 112 Cal. App. 285, 297 Pac. 91(1931) .

[91] *Metter* v. *Los Angeles Examiner* 35 Cal. App. 2d 304, 95p.2d491 (2d Dist. 939).

[92] *Mille*r v. *California* 413 U.S.23-24 (1973).

[93] *Miller* v. *NBC*, 232 Cal.Rptr.668 (1986).

[94] *M.P. Lohia* v. *State of West Bengal*, 2005 (2) S.C.C. 686.

[95] *M.P. Sharma* v. *Satish Chandra* 1954 S.C.R. 1077 .

[96] *Mosely* v. *News Group Newspapers* (2008) E.W.C.H. 687 (Q.B.).

[97] *Murray* v. *Express Newspapers Plc. and Another*[2007] E.W.C.H 1908 (Ch.).

[98] *Murphy* v. *Florida* 421 U.S. 794, 95 S. Ct. 2031 (1975), 1 *Med. L. Rptr*. 1232.

[99] *NareshShridharMirajkar* v. *State of Maharashtra*, A.I.R. 1967 S.C. 1.

[100] *Nebraska Press Association* v. *Stuart* (1976) 427 U.S.539.

[101] *Newstead* v. *London Express Newspapers* [1940] I K.B. 377 .

[102] *New York* v. *Ferber*.1982, 458 U.S. 747, 752-753, 10 2S.Ct. 3348 (1982), 8 Mid. L. Rptr. 1809.

[103] *New York Times Co.* v. *Sullivan*, 376 U.S. 254 (1964).

[104] *Nihal Chand* v. *BhagwanDei* A.I.R. 1935 All.1002.

[105] *Osmers*v. *Parade Publications, Inc*, 234 F. Supp. 924, 927 (S.D.N.Y. 1964).

[106] *ParshuramBabaramSawant* v.*Times Global Broadcasting Co. Ltd*. ,Special ivil Suit No. 1984/2008 in Pune trial court.

[107] *Peck* v. *UK* (2003) 36 E.H.R.R. 41.

[108] *People* v. *Simpson,* 1995, http://en.wikipedia.org/wiki/o.j.Simpson, retrieved on 25/11/10.

[109] *People's Union for Civil Liberties* v. *Union of India* (1997) 1 S.C.C. 301.

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

[111] *Penthouse* v. *McAuliffe*, 533F.Supp.50(N.D.Ga 1981).

[112] *Perspective Publications* v. *State of Maharashtra*, A.I.R. 1971 S.C. 221.

[113] *Pollard* v. *Photographic Co.,* 40 Ch.Div. 345(1888).

[114] *Prince Albert* v. *Strange*, 64 E.R.293 (1849).

[115] *Pring* v. *Penthouse Intern., Ltd*., 695 F. 2d 438 (10th Cir. 1982), 8 *Med. L. Rptr*. 2409 .

[116] *Rajendra Sail* v. *M.P High Court Bar Association* (2005) 6 S.C.C. 109.p.125.

[117] *Rama DayalMarkarha* v. *State of Madhya Pradesh*, A.I.R. 1978 S.C. 921 at p.

[118] *Ranjit D. Udeshi* v. *State of Maharashtra*(Lady Chatterley's Lover) A.I.R. 1965 S.C .881. at7. p. 885.

[119] *R* v. *Broadcasting Complaints Commissionex p. Granada Television Limited* [1995] E.M.L.R 163.

[120] *R* v. *Central Criminal Court exp. Godwin and Crook*[1995] 1 F.L.R 132 .

[121] *R* v. *Central Independent Television Pictures* (1994) Fam 192.

[122] *R* v. *Dean of St. Asaph*.(1784) 3 TR. 428.

[123] *R* v. *Hecklin* [1868] L.R.3 Q.B..360.

[124] *R*. v. *Loveridge*.2 Crim.App. R. 29 (2001).

[125] *Richmond Newspapers, Inc*. v. *Virginia*, 448 U.S. 579–80 (1980).

[126] *R. Rajagopal* v. *Tamil Nadu*, A.I.R. 1995 S.C. 264.

[127] *R*.v. *Savundranayagan*(1968) 3 All ER 439n.

[128] *Rinaldi* v. *Viking Penguin*, 52 N.Y. 2d 422, 438, N.Y.S.2d 496, 420 N.E.2d.977(1981).

[129] *Roberson* v. *Rochester Folding Box Co*, 64 N.E.442 (N.Y.1902).

[130] *RomeshThapper* v. *State of Madras* , A.I.R.1950 S.C.129.

[131] *Rosenblatt* v. *Baer*, 383 US.75, 92, 86, S. ct.669, 679 (1966).

[132] *Roth* v. *U.S.*354 U.S.476 (1957).

[133] *Sahara India Real Estate Corporation Ltd. and Ors*.v.*Security and Exchange Board of India and Ans.* Civil Appeal No. 9613 of 2011 and C.A. No. 9833.

[134] *Saibal Kumar v. B.K Sen*A .I .R. 1961 S .C 633.

[135] *Sakal Papers* v. *Union of India*, A.I.R. 1962 S.C. 305.

[136] *Samaresh Bose* v. *AmalMitra*(1985) 4 S.C.C. 289, p. 318.

[137] *Saroj Iyer* v. *Maharashtra Medical (Council) of Indian Medicine*, A.I.R. 2002 Bom .95.

[138] *Seattle Times* v. *Rhinehart*, 467 U.S. 20, 22, 104 S. Ct. 2199, 2202 (1984), 10 *Med L. Rptr* at 1711.

[139] *SewakramSobhani* v. *R.K.Karanjia (*1981) 3 S.C.C.208.*MithaRustomji* v.*NusservanjiNowroji*, A.I.R. 1941 Born. 278.

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

[141] *Shelly Films Ltd* v.*Rex Features Ltd.* [1994] E.M.L.R. 134.

[142] *Sheppard* v. *Maxwell*, 384 U.S. 333, 335 (1966).

[143] *Shivarajan* v.*The State* I.L.R. 1959 Ker. 319.

[144] *Shulman* v. *Graip W Productions*, 59 Cal. Rptr.2d 434 (1997).

[145] *Sides* v. *F.R. Publishing Co*., 113 F. 2d 806, 809 (C.C.A.2d) 1940.

[146] *S.K Sundaram: Inre,* (2001) 2 S.C.C: A..I.R. 2001 S.C 2374.

[147] *Smith* v. *US*, 431 U.S 291, 300-02, 309(1977).

[148] *Sr .Sephy and others* v. *Union of India and another* 2009 (1) K.H.C. 121.

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

[150] *State of Kerala* v. *Aboobacker*, 2006 K.H.C. 1026: I.L.R. 2006 (3) Ker. 672: 2006 (3) K.L.J.165: 2006(4) K.L.T. S.N. 49.

[151] *State of Maharashtra* v.*RajendraJawanmal Gandhi,* (1997) S.C.C. 386.

[152] *State of Punjab* v. *Gurmit Singh,* (1976) 2 S .C .C. 384, pp. 404-05.

[153] *Stephens* v. *Avery* [1988] 2 All E.R.477.

[154] *Subarao* v. *Advocate General* A.I.R. 1981 SC 755.

[155] *Sunday Times* v. *United Kingdom*. App.No. 6538/74, 2 Eur. H.R. Rep. 245 (1979).

[156] *Sweenek* v. *Pathe News*, E.D.N.Y.1936, 16F.Supp.746, 747.

[157] *Tata Press Ltd* v. *Mahanagar Telephone Nigam Ltd* (1995) 5 S.C.C. 139.

[158] *Theakston* v. *MGN Ltd* [2002] E.M.L.R. 22.

[159] *Time, Inc.* v. *Hill*, 385 US 374; 17L. Ed. 2d 456 (1967) .

[160] *Tocco* v. *Time, Inc*, 195 F. Supp. 410 (E.D. Mich. 1961).

[161] *Tolley* v. *Fry & Sons* Ltd [1931] All E.R. 131.

[162] *T.V Ramasabha* v. *A.M. Ahmad Mohideen* A.I.R. 1972 Mad .398.

[163] *Von Hannover* v. *Germany* (2006) 43 E H R R 7.

[164] *Washington* v.*New York News Inc*., 37A.D 2d 557, 322 N.Y.S. 2d 896 (1971).

[165] *Watts* v. *Times Newspapers,* [1996] 1 W.L.R. 427.

[166] *Williams* v. *Settle* [1960] 1W.L.R1077.

[167] *Wolfson* v. *Lewis*, 924 F.Supp. 1413, 1424 (E.D. Pa . 1996).

[168] *X* v.*Y and others* [1988] 2 All E.R.648 .

[169] *Youssoupoff* v. *MGM Pictures* Ltd (1934) 50 T.L.R. 581.

[170] *Zacchini* v. *Scripps – Howard Broadcasting*, 433 U.S. 562 (1977).

Abbreviations

ICCPR	International Covenant on Civil and Political Rights
BBC	British Broadcasting Corporation
CCTV	Closed Circuit television
CMP	Civil Miscellaneous Petition
CPC	Civil Procedure Code
CrPC	Criminal Procedure Code
ECHR	European Convention on Human Rights
FDI	Foreign Direct Investment
PCI	Press Council of India
UK	United Kingdom
UN	United Nations
USA	United States of America

Chapter 1
INTRODUCTION

Privacy means the private pursuits of a person which encompasses his right to be free from intrusion or publicity. It means to be out of the public eye while enjoying the little joys of life with his or her family. It is an integral part of a person's personality and therefore difficult to define its boundaries in legal terms. It is in fact similar to his shadow. In a civilized society no one can imagine to have a life without privacy. But in social life one is forced to compromise on the scope and on the extent of this right for other reasons. Each of us has given up a considerable part of our privacy to participate in the so called democratic governance. Therefore when you gain something from someone, you are bound to loose something in return. In our contract oriented society, every benefit or facility has a price on it and in most cases it is privacy. For many benefits, e.g. to get a ration card or a credit card or anything from the government or private company, we have to give details of our family and bank. This information can in turn reap profits for the company if given to agencies who give it to market oriented companies for marketing their products. An information which is thus given in trust now becomes public. This is simply one instance in which for a collective right of the society to get benefit, privacy, an individual right is sacrificed .Privacy is bought so low in this market oriented world as people do not realize the cost they have paid till they are put in a situation where they suddenly feel de-robbed of all privacy and made a product marketed by someone they do not even know. This is the cost

one pays to have a democratic government, if proper checks and balances are not formulated as and when needed.

Privacy therefore becomes a very difficult concept to be defined. One may say he believes in privacy but still agree to have a CCTV installed in offices or allow his credit card to be shown or give personal data to get a bank account or allow wire tapping or allow press reporters to enter homes with cameras. All this is done on the pretext that social interests or as we state in legal terms 'public interest' is more important than individual interest. The government is supposed to protect the privacy rights but they constitute the largest agency collecting huge amounts of data of its citizens for the issuance of social benefits, and this data someway finds its way to outsourcing agencies, and the whole matter comes in the public domain. Police are also supposed to be protectors of individuals but they also on the pretext of the larger right called 'public interest' invade our homes even during the sleep or night hours. The most unregulated invasion of privacy takes place through the media against which the society is supposed to keep mum as they are kept under a deception that media is people speaking for themselves. Today, invasion of privacy includes a wide range of behavioral attitudes from different sections of the society. Due to the technological developments it becomes very difficult to detect as to from which direction intrusion is coming. It is not possible to deal with each and every aspect of invasion into privacy. Therefore this thesis will limit its scope of study to invasion of privacy by the media.

The mass media has been said to be the most frequently accused agency, responsible for the invasion of privacy. They have been in the past elevated to the position of the Fourth Pillar of the democratic

government after legislature, judiciary and executive. This upliftment at the hands of the legislature and judiciary has been largely responsible for this unprecedented growth in their confidence to bypass all barriers under the pretext of public interest. The man's very existence has been made public, ruled by the laws of his government. Though civilization is known as the process of setting man free from man.

Freedoms of press means freedom to present, publish, broadcast, circulate and transmit through any media, news to the masses. This has won freedom for ideas, people and nations throughout the world. It has been through a long battle that this freedom, which eventually emerged victorious in democratic countries. This is explicit from its adaptation in the First amendment of the American Constitution in 1791 which stated that "The Congress shall make no law …abridging the freedom of speech or of the press…"[1]

A free press stands in different positions of enlightening, informing, mediating, discussing, evaluating on behalf of the people and of the government. It is termed as a via media to get ideas across the huge table of power and vote bank.

In a democratic polity, responsible and mature media is essential to build up the nation. The function of free speech under our system of governance is to invite diverse opinions. It may indeed best serve its purpose when it induces a condition of unrest, which creates dissatisfaction with conditions as they are, or even stir the people to anger. Speech is often provocative and challenging. It may strike at

[1] Constitution of America.

prejudices and preconceptions and have profound unsettling effects as it presses for acceptance of an idea.

Along with the democracy attaining maturity the mass media should also mature by being more informative and responsible to build up a mature thinking society. But this did not happen because as the media became powerful being the only repository of information to the public, other interests crept into its fabric. These interests came under the guise of competition, commercialization, politics and power lobbying of the government. The aftermath of all these are dilution of ethics, morality and even disrespect for individual privacy and freedom. As a result any fact, situation, or a person can became a commercial product for the media to entertain people with gossip, which the press wanted people to know about. This has caused the present fear which has been expressed by the people through various discussions on TV channels, newspapers, seminars with a view to bring in a curb on this unbridled freedom of press. As stated in the article published by the famous *Warren and Brandeis* as early as in 1890

> 'that Instantaneous photographs and newspaper enterprise have invaded the sacred precincts of the home… private devises threaten to make good the prediction that 'what is whispered in the closet shall be proclaimed from the house tops'. The press is overstepping in every direction the obvious bounds of propriety and of decency' [2]

While the right to freedom of press has undergone great progress and developed today in leaps and bounds, the equal and opposite right of

[2] Warren and Brandeis, 'The Right to Privacy',4 Harv. L. Rev. 193.(1890).

an individual to be protected against unwarranted intrusions by press into their privacy finds no established independent place in the Indian Constitution.

India is a signatory to the United Nations Declaration of Human Rights 1948 and the International Covenant on Civil and Political 1966, the two major International instruments, building the foundations of the major democracies and the constitutions of the world. Both these instruments give an independent and upper position to right to privacy compared to right to freedom of speech and expression, under which freedom of press find its place. Both these rights are the two opposite faces of the same coin. Therefore, without the right of privacy finding an equal place in law just like the right to freedom of speech and expression, the working of democracy would be severely handicapped and violations against citizens will be on the rise.

It was this problem in law and need to bring a balance between these two conflicting rights that induced me to undertake this thesis project titled "Right to Privacy and Freedom of Press – Conflicts and Challenges".

Therefore it is in this stressed world that a man is further subjected to invasion of his private moments. This privacy in private places or public places when not on duty is essential and a subject of great relevance not only in the field of law but also through an eye of a sociologist and a psychologist. The sociologist only enumerates the problems while the psychologist deals with the after effect of it on the psychology of a person. Law and law givers have the greatest responsibility as they have to alienate the problem and legislate on it.

The positive efforts of the law giver has greater dimension compared to the other two agents of correction. This aspect was the motivating factor to undertake this study work.

Our government has not seen given enough thought to this right to privacy. This concept has never risen in any of the discussions. The law has always been on the lines of common law principles in reference to decency, morality, dignity and defamation which are way old concepts. These concepts have long been replaced in the country of its origin, where with the advent of the Human Rights Act of 1998, UK has recognized the concept of privacy in home and outside. Though the concept of breach of trust and confidence, defamation are still used there, it has all brought under the ambit of the Act of 1998. Along with this the mature press that they have is regulated strongly by the UK government. Even the Courts are responsible enough not to reveal the names of the accused and victims till the case is finally disposed of and thereby the interests of the parties are protected. None of these protections are prevailing in India. We have an absolutely free press, regulated by a Press Council of India, which is dominated by press persons and protected by politicians. The judicial attitude is also not encouraging to the help less individual against the violations by the press. Judicial strictures generally fall on deaf ears. All this cumulates to make a single man isolated in his huge world of rights.

This study brings forward the conflict between Right to Privacy and Freedom of Press. The Press content, that they form an integral part of a democracy and so given such protection in the Constitution. This is needed. Shall we give an unbridled freedom to propagate their will? After commercialization the news coverage has been reduced to a

commodity. It has become news creation rather than news coverage. For this purpose, the press is ready to go to any extent, to create news matter involving public persons and celebrities. This involves invasion into privacy and causes severe damage to their reputation and social status. This raises the necessity of protecting the privacy of individuals. However this privacy is also with limitation with respect to public interest. The freedom of press as against the right to privacy of an individual often comes in conflict. Therefore this study deals with the effectiveness of law in India regarding protection of Privacy and the Freedom of the Press .The study also is an attempt to frame the concept of Privacy and the need for its legal protection.

This study will have nine chapters; the second chapter after introduction will be dealing with the history of media and privacy, which will give the historical development of media and privacy in India and at the international level. Studying the contemporary democratic countries such as United Kingdom and United States of America in the matter of Privacy laws is important, as we in India look forward to these countries for direction in law making and in judicial decision making. These studies will be dealt in chapter three and four, drawing parallels with the international standards prevalent today and their domestic mechanism for dealing with interference by Media into Right to Privacy. The fifth chapter deals with the review of the Indian situation and the available literature on Right to Privacy as of now, the judicial review and the latest problems in this area. The sixth chapter deals with investigative journalism with its dangerous weapons in the form of long distance lens, morphing , sting operations, all causing violations of law in one form or the other. These methods have long invaded Indian media, with no

restriction coming from the government to stop it or punish it .This chapter will study the course of development in investigative journalism in all the three nations dealt in the earlier three chapters, on the line of legislative and judicial methods, used to bring a curb on wrong methods used to gather news and information. The seventh chapter deals with the exclusive power given to courts in the Contempt of Courts Act 1971 to deal with any interference by the media in the course of administration of justice. This chapter deals with the ambit of the power and its extent and its possible use in protection of Privacy. The eighth chapter deals with the administrative mechanism available in the form of the Press Council of India 1978, to control press through self regulation. This chapter deals with the object behind this act and its defects and limitations. Finally the last chapter enumerates the problems encountered in the field of privacy and its protection in the present system through an analysis of the international standards and its incorporation in India. This is done in the backdrop of the prevalent position in democratic countries. Finally the study concludes with its suggestions and recommendations on the line of United Nations Declaration on Human Rights 1948, giving Privacy a status equal to Right to Freedom of Press in India.

.....ൠ.....

Chapter 2

HISTORY OF RIGHT TO PRIVACY AND FREEDOM OF PRESS

2.1 History of Freedom of Press - International Perspectives

Press had to struggle through centuries to have the freedom as of today. The fight began somewhere in the 1600's. It had to overcome opposition from monarchs, parliament and even from the Courts. In England, there were constraints such as licensing of books and papers, harsh penalties for illegal or offending publications, seizure of press and jail for criminal libel. In 1644 John Milton spoke against licensing,[1] in 1689 the English Bill of Rights restrained the monarchy,[2] while later ‚John Locke's contribution concerning tolerance and free speech as a natural right was highlighted[3]**.** All these culminated in forming the licensing law of 1694. This gave rise to new papers coming into the scene.[4]

Reformers grew bold in the 1700's, such was in the form of Cata's letters (1720 -23) and letters of Junius (1769 -72) in England, the latter criticizing George III's regime on behalf of the people of England. It was during this period John Wikes, M.P. and Editor of the North Britain Newspaper (1763) was acquitted of libel charge.[5]

---

1 *Journalism Ethics for the Global Citizen*, p.1-4, available at http://www.journalismethics.ca/medialaw/history of free press htm- retrieved on 13/12/2010 at 6 pm.

2 *Ibid.*

3 *Ibid*.

4 *Ibid.*

5 *Ibid.*

Though reporting on Parliament was allowed in 1771 and constitutional guarantee was given to the press in the US under the First Amendment and in France under the Declaration of the rights of Man and Citizen in 1789. Still the libel threat was used in England to regulate press as a powerful charge because truth was not recognized as a defense. [6]

Threat of libel got weakened when Fox's libel law was passed in 1792, which increased the power of juries who were inclined to support the editors. Edmund Burke who was a theorist of the English Constitution, towards the end of the 18th century, rose in the Parliament to talk about a new player in democracy, the printing press or the *Fourth Estate* as it is termed today.[7] Free press of today emerged in the 19th century across Europe and US.

The 20th century saw the inclusion of this press freedom in International treaties and Conventions[8] such as Universal Declaration of Human Rights 1948[9], International Covenant on Civil and Political Rights 1966[10] and also European Convention on Human Rights 1950[11].

---

6 *Ibid.*

7 *Ibid.*

8 *Ibid.*

9 U.D.H.R.1948,Article 19-"Everyone has a right to freedom of opinion and expression, this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers."

10 I.C.C.P.R.1966, Article 19-"1- Everyone shall have the right to hold opinions without interference.2. Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds regardless of frontiers , either orally , in writing or in print , in the form of art or through any other media of his choice.3. The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary. (a) for respect of the rights or reputation of others.(b) for the protection of national security or of public order, or of public health or morals.''

Then came the regional conventions such as American Convention on Human Rights 1969, which defined the press freedom in Article 13[12]. This Article states that its exercise shall not be subject to prior censorship but shall be subject to subsequent imposition of liability which shall be expressly established by law to the extent necessary to ensure respect for the rights and reputation of others, protection of national security, public order or public health or morals.[13] Article 14 recognizes the right to reply by media, to those harmed by their communications.

Freedom of press is perhaps the most projected right in the US and protected with great zeal and commitment. The First Amendment to the American Constitution provides that the 'Congress shall make no law abridging the freedom of speech or the press'[14]**.** This means that any law can be challenged on the sole ground that it violates the freedom of the

---

[11] E.C.H.R. 1950, Article 10-"1. Everyone has the right to freedom of expression, his right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This article shall not prevent states from requiring the licensing of broadcasting, television or cinema enterprises. 2. The exercise of these freedoms , since it carries with it duties and responsibilities , may be subject to such formalities , conditions , restrictions , or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety , for the prevention of disorder or crime, for the protection of health or morals , for the protection of the reputation or the rights of others, for preventing the disclosure of information received in confidence , or for maintaining the authority and impartiality of the judiciary.''

[12] The American Convention on Human Rights 1969, Article 13: Everyone has a right to freedom of thought and expression. This right includes freedom to seek, receive and impart information and ideas of all kinds regardless of frontiers, either orally, in writing, in print, in the form of art or through any other medium of one's choice.

[13] *Ibid.*

[14] First Amendment of the American Constitution in 1791- ' Congress shall make no law respecting an establishment of religion , or prohibiting the free exercise thereof, or abridging the freedom of speech or of the press, of the right of the people peacefully to assemble, and to petition the government for a redress of grievances.'

speech and expression and the law made in violation of this Amendment will be struck down as invalid. However this right is not absolute, other interests can overcome it, such as the reputation of others, privacy and protecting the interest of parties in a fair trial. In fact, this freedom of expression comes in conflict with many other interests and therefore restraint on it is a must. The UN declaration of 1948 in Article 10 brings in restrictions in cases of fair trial [15] and Article 12[16] puts restrictions on the ground of privacy. Most of the Bill of Rights such as Article 10[17] of the European Convention 1950 lists out some interests as exceptions to the right of freedom of expression.[18] The aspects are highlighted as there is the need to develop other interests as well for the social development.

In the UK, which has a greater history of law making compared to the US, had no Bill of Rights protecting the freedom of expression. It was only with the inception of the Human Rights Act 1998, that the right to freedom of expression was given a legislative recognition in UK.[19]

Historically, in English law, there was no such thing as 'media freedom' as a legal concept. More typically, under the traditional English view, freedom of the press was simply the absence of a prior system of censorship. In Britain, the law of media freedom merely consisted of application of law from common law decisions. Since the

[15] U.N. Declaration of 1948- Article 10- "Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal in the determination of his rights and obligations and of any criminal charge against him.

[16] U.N. Declaration of 1948- Article 12-" No-one shall be subjected to arbitrary interference with his privacy , family , home or correspondence , nor to attacks upon his honour and reputation . Everyone has the right to the protection of the law against such interference or attacks."

[17] *Supra* n.8.

[18] *Ibid.*

[19] The Human Rights Act ,1998.

enactment of Human Right Act, 1998, the position of media has changed in UK as now the freedom of expression is an express right under a statute.

May 3, is a date on which the world community celebrates the fundamental principles of press freedom, to evaluate press freedom around the world, to defend the media from attacks on their independence and to pay tribute to journalists who have lost their lives in the exercise of their profession. It was proclaimed as the world press freedom day. The UN General Assembly in 1993, following a recommendation adopted at the 26 the session of the UNESCO's General Conference in 1991 made the above proclamation.[20] *Shriram Venekar* of the *The Times of India* and *Sebastian D'Souza* of *Mumbai Mirror* have earned great praise from the Supreme Court for taking pictures of *Kasab* in the night of 26/11, which were used as evidence against him.[21]

2.2 History of Media in India

The history of media in India dates back to Kautilya's '*Arthashastra*'[22]**.** The Muslim rulers brought into effect a system by appointing a 'Waqaya Navis' (events reporter) in every 'Suba' capital[23]**.** For the common people news was circulated by proclamations and through word of mouth. It was in the 16th century that Christian missionaries first brought the printing press to India. India's first newspaper and the first printed weekly appeared on 29th January 1780,

[20] www.Unesco.org/new/en.

[21] 'Times Heroes Hailed by the S.C., say They Just Stuck to Their Duty', *The Times of India,* Kochi, Sept. 8, 2002, p.9.

[22] Vidisha Barua, *Universal's Press and Media Law Manual*, Universal Law Publishing Company Pvt. Ltd, (2002). p. 26-34.

[23] *Ibid.*

when James Augustus Hicky brought out the first issue of the '*Bengal Gazette*' or '*Calcutta General Advertiser'*. It constituted of ten pages only. The paper was opposed to the East India Company. It strongly upheld the liberty of the press. The second newspaper of India was the *Indian Gazette*, established in November 1780. Gradually in February 1784 were published the *Calcutta Gazette* and *Oriental Advertiser*. In 1785 came the *Bengal Journal* and the *Oriental Magazine* and the *Calcutta Amusement*, which was the first monthly publication.[24] In 1786 came the *Calcutta chronicle*, in 1785 Richard Johnsten started the *Madras Courier*. Boyd came out with '*Hirkaru'* in 1793. Two years later *Madras Gazette* appeared. The first English newspaper in Bombay was the *Bombay Herald*, which appeared in 1789. In 1790, Luki Ashburner began the Bombay Courier and in 1791 appeared the *Bombay Gazette.* After 1790, there erupted lot of news papers and 1794 saw the '*Asiatic Mirror'*, the *'Indian World'*, '*The Calcutta Courier'* and the '*Bengal Harkaru'* in 1795 and the '*Telegraph*' and the '*Oriental Star'* in 1798.

In 1789, Governor General, Wellesley came to India and was angry by an article in the '*Asiatic Mirror'*. Therefore, he issued notorious regulations in 1790 for the control of the press in India. It contained several elements such as:-

1) Every printer of a Newspaper to print his name at the bottom of the paper.

2) Every editor and proprietor of a news paper to deliver his name and place of abode to the Secretary to the government.

3) No paper to be published on Sunday.

[24] *Id.* at p.27.

4) No paper to be published at all, until it shall have been previously inspected by the secretary to the government.[25]

The *Bengal Gazette* of 1816 was a landmark as for the first time a paper was brought out by an Indian. The Indian was Gangadhar Bhattacharjee, a votary of Raja Ram Mohan Roy's liberal ideas. During the period of Lord Warren Hastings in 1818 the Department of Censor of Newspapers was abolished by him. He instead laid down certain restrictions on editors such as newspapers were not allowed to publish matters relating to:-

1) Government of India or offensive remarks leveled against the public conduct of the members of the council, of Judges of the Supreme Court or the Lord Bishop of Calcutta.

2) Having tendency of any intended interference with the religious opinions.

3) Private scandals and personal attacks on individuals tending to excite discussion in society.[26]

Later, Raja Ram Mohan Roy started the first Indian language newspaper in Bengali and Persian.[27] In 1920, he used the English Brahaminical magazine in Calcutta to spread his reformative ideas. Lord William Charles Metcalfe along with Macaulay played an important role in the freedom of the press. Later he introduced the Act XL of 1835 which repealed many earlier Acts imposing restrictions. Lord Canning's

[25] *Ibid*.

[26] *Id.* at p.28.

[27] First Bengali Newspaper '*Sambad Kaumudi'*, First Persian Newspaper '*Mirat Ul-Akhbar'*.

Act of 1857 reintroduced licensing which applied to all kinds of publications. This gave the government discretionary power to grant and revoke licenses. This was rightly called the 'Gagging Act'.**[28]**

The Indian Penal Code came in 1860. It laid down offenses like obscenity and defamation which the writers and editors are liable to commit. Later through amendments other offences were also added.[29]

After 1857, some of the well known English periodicals were G.A. Natesan's '*Indian Review',* Sachidanand Sinha's '*Hindustan Review'*, Ramanand Chatterjee's '*Moder Review'* and Tej Bahadur Sapru's '*Twentieth Century'*. The politically oriented magazines of the pre-independence era were Bal Gangadhar Tilak's '*Kesari'* and '*Mahratta*', Annie Besant's '*Commonweal',* Abul Kalam Azad's *'Al-Hilal'*, Mahatma Gandhi's '*Young India'* and *'Harijan'*, Lala Lajpat Rai's '*People',* Natrajan's *'Indian Social Reformer'* and Bal Krishnan Bhat's *'Hindu Pradeep'*.[30]

There were many other important journals in the vernacular languages and some of them were '*Digdarshan'* and *'Gnyanprakash'* in marathi, '*Anandniketan'* and '*Kalhi*' in Tamil, '*Biswin Sadi'* and '*Shama'* in Urdu, '*Asha*' and '*Samaj'* in Oriya, '*Krishapatrika'* , '*Andhra Prabha'*, *Andhra Patrika*' and '*Andhra Jyoti'* in Telegu.

Reuters sent a representative to India in 1866 to cover business developments in India. K.C. Roy, an Indian Journalist in the first decade of the 20th century decided to establish an India news agency.

---

[28] *Ibid.*

[29] *Id.* at p.29.

[30] *Ibid.*

He along with two other British journalists founded the *Associated Press of India* (API). Soon Roy broke away and formed the *Press News Bureau* (PNB). Later Reuters in the year 1919 acquired both API and PNB.[31]

S. Sadanand set up the *Free Press of India* (FPI) in the 1930's, which later got shut down and from it emerged the *United Press of India* (UPI) in 1933. Reuters introduced tele-printer in 1937 which brought down the subscription rates and made news available to small newspapers also. After independence, the Indian interest of Reuters was bought over by the Indian & Eastern Newspaper society. This formed the *Press Trust of India* (PTI). PTI entered into an agreement in 1949 for purchase of Reuter's news and sale of Indian news to the British Agency. Later in 1959, it made arrangements with Agence France Presse (AFP) and the United Press International (UPI). Later UPI was shut down in 1958 and PTI was the only big news agency in India.[32] The press suffered a lot under the Gagging Act. The act provided:-

1) The keepers of printing presses shall make a declaration before a magistrate.

2) The printer and the publisher shall make a declaration with a precise description of the premises where the printing of the publication is conducted.

3) The printer shall deliver free of expense to the government two copies of each issue of the newspaper.[33]

---

[31] *Ibid.*

[32] *Id.* at.p.30.

[33] *Ibid*.

The press and registration of the Books Act was passed in1867, which was to regulate printing presses and newspapers. With independence, the Constitution of India under Article 19(1)(a) gave the fundamental right of freedom of speech and expression, thus recognizing the importance of media in a democratic government.

The Apex court has been in the forefront to protect this right as can be seen through their decisions. In March 1950, the Chief Commissioner of Delhi issued an order under section 7(1) (c) of the East Punjab Public Safety Act 1949, to the '*Organizer*'[34]. It was stated that this english weekly of Delhi has been publishing highly objectionable matters constituting a threat to public law. Therefore the press authorities were required to submit for scrutiny all communal matters and news and views about Pakistan to the above authority. The Court held that the imposition of pre-censorship on a journal by the government is a restriction on the freedom of press and struck the order down.

Similarly, the need to have a free press was emphasized by Justice Patanjali Sastri who observed:

> "Freedom of speech and expression of the press lay at the foundation of all democratic organizations for without free political discussions, no public education, so essential for the proper functioning of the process of popular government is possible. A freedom of such amplitude might involve risks of abuse. But the framers of the Constitution may well have reflected with Madison, who was the leading spirit in the preparation of the First Amendment of the Federal Constitution ,

[34] *Brij Bhushan* v. *The State of Delhi*,1950 S.C.R.605.

that it is better to leave a few of its noxious branches to their luxuriant growth than by pruning them away, to injure the vigour of those yielding the proper fruits ."[35]

The Court stated this and struck down the notification which banned the entry into or circulation, sale or distribution in Chennai of the newspaper "*Crossroads*".[36]

The extent of this freedom of press was further broadened and the Apex Court extended it beyond the geographical boundaries in *Maneka Gandhi* v. *Union of India.*[37] The Court propounded that preventing anyone from going abroad to communicate his ideas or thoughts would be direct interference with the freedom of speech and expression.[38]

Later, the Apex Court considered this fundamental right of freedom of press as part of the basic structure of the Constitution.[39]Though this freedom forms part of the basic structure, it is not absolute in its nature. As observed in *Romesh Thapper* [40] this freedom of speech and press does not confer an absolute right to speak or publish without responsibility, whatever one may choose or an unrestricted or unbridled licence that gives immunity for every possible use of language and prevents punishments for those who abuse this freedom.[41]

---

35 *Romesh Thapper* v. *State of Madras* , A.I.R.1950 S.C.129.

36 *Ibid*.

37 *Maneka Gandhi* v. *Union of India*, A.I.R.1978 S.C.597.

38 *Ibid.*

39 *Indian Express Newspaper* v. *Union of India*, A.I.R. 1986 S.C.515.

40 *Romesh Thapper* v. *State of Madras* , A.I.R.1950 S.C.124.

41 *Ibid.*

In 1950, the Constitution was amended by the First amendment, and Article 19(2) was inserted to give power to the government to put reasonable restrictions on the freedom of press on the lines of security of India, friendly relations with foreign states, public order, decency or morality, contempt of court, defamation, incitement to an offence and sovereignty and integrity of India**.**[42]

As the press freedom grew, the Press Council of India was established in 1965 to regulate the press. But on June 26, 1975 internal emergency was declared and the operation of Article 19 was suspended and media's freedom restricted. [43] The cabinet also approved a proposal to impose a precensorship to further restrain the press in 1975**.**[44]

The movie '*All the President's Men'* which depicted the Watergate scandal was banned in India.[45] **'***Aandhi*' a Hindi movie believed to be the life story of the then Prime Minister Indira Gandhi, which was cleared in January 1975 by the Board of Film Censors went through difficult times during the emergency period. In July 1975, the exhibition of the film was suspended for two months and finally a revised version of the film was cleared on March 24, 1976**.**[46]

With the resignation of Indira Gandhi as Prime Minister of India after the spell of emergency, media came out strongly and in a more powerful manner. The Press Council Act was subsequently enacted in 1978**.**[47]

---

[42] First Amendment of the Indian Constitution in 1950.

[43] Vidisha Barua , *Universal 's Press & Media Law Manual*, Universal Law Publishing Co.Pvt.Ltd. (2002), p.11.

[44] *Id.* at p.12.

[45] *Id* .at p. 13.

[46] *Ibid*.

[47] *Id.* at p. 31.

2.3 History of Privacy: International perspective

Protection of people against invasion into their privacy is not a new concept. In early times though the word privacy was not used, it was normally covered under the term defamation and breach of confidence. *The law of the 12 Tables* compiled about 300 hundred years after the founding of Rome prescribed that anyone who slandered another and injured his reputation will be beaten with a club. The Bible also forbids any one bearing false witness against his neighbor[48]. In ancient Britain at the time of Alfred in the 9th Century slander was charged depending on the slanderer's social standing. The penalty was tearing out of tongue[49]. The only way to escape was paying the victim the price set for each social class. Accordingly, a prince was worth 1500 Shillings, a noble man 300, a farmer 100 and an agricultural serf between 40 and 80[50]. In English law the Church Court tried slander cases in connection with the conduct and morality of its members. Such a defendant was referred to as a '*diffamatus*'[51], one whose reputation was bad enough to justify bringing him to trial. In cases where bad reputation was unfounded, the Church Court then dealt with the people who spread the non proven false statements about the defendant. The ones who committed slander have thus committed the crime and face punishment as in the Langston Constitution of 1222[52].

---

[48] Dwight L. Teter, Jr.Bill Loving, *Law of Mass Communications – Freedom of Control of Print Broadcast Media*, New York Foundation Press (2001), p. 161.

[49] Winston S. Churchill, '*A History of the English Speaking Peoples: The Birth of Britain'* Bar nes and Noble, New York (1993), p.67.

[50] *Id.* at p. 6.

[51] Theodore F.T. Plucknett, *A Concise History of the Common Law* , Butterworth, London, (1948), p.455.

[52] *Ibid*.

If we go back to 1275, we would find protection of this legal concept. With the creation of *De Scandalis Magnatum,* an Act of the English Crown, in 1275, slander of the leading men of England was made a crime. It was re-enacted in 1378[53]. The penalties for such statements were severe- the loss of the ears for spoken words and the loss of the right hand where the statements were in writing. These were intended to preserve the government and this became important in preserving the freedom of the press and public in the US. The Court of Star Chamber took jurisdiction to try these cases where criminality was involved[54]**.** In the 16th Century local and Church Courts in England began to try cases concerning spoken attacks on personal reputations. English legal traditions were incorporated into America and into India during the colonial times.

Since the development of freedom of press, the right to privacy which was implicit as an inalienable right started shrinking, the forerunner being USA, where the right to privacy had no constitutional base . Along with this even the tort protection in law started to shrink due to the constitutional status being given to press. There have been two great developments in the history of privacy law, one being derived from the article 'The Right to Privacy' by Samuel Warren and Louis Brandies in 1890.[55] It was from this article that the idea of a tort remedy for invasions of privacy was conceived. They analyzed a number of decisions in the area of defamation, property, implied contract and

---

[53] Norman 1. Rosenberg, *Protecting the Best Men : An Interpretive History of the Law of Libel,* (University of North Caroline Press, Chapel Hill , (1986),p.4.

[54] *Id*.at p.9.

[55] Samuel D. Warren and Louis D. Brandeis, "The Right to Privacy", 4 Harv. L.Rev.193(1890).

copyright law and finally concluded that privacy right, which they named as the "right to be let alone" should be recognized as an independent tort.[56]

The second great derivation towards the development of privacy law was when Dean William Prosser published his famous article on the subject in 1960.[57] He studied the court decisions on cases of invasion of privacy and determined that the law of privacy actually comprised of four distinct torts. These include (i) intrusion upon the plaintiff's seclusion or solitude or into his private affairs, (ii) public disclosures of embarrassing private facts about the plaintiff, (iii) publicity which places the plaintiff in a false light in the public eye and (iv) appropriation , for the defendant 's advantage , of the plaintiff's name or likeness.[58]

These definitions of Prosser regarding the four privacy torts were later adopted by the Restatement (second) of Torts.[59] The four torts stated are closely interrelated. Many a times, the gap is between an offence in private and an offence in public. This gap creates confusion as to whether there is privacy in public spots or only at homes. As the area of private domain keeps increasing, what is private space is yet to be determined regarding the concept of right to privacy.

Privacy is the right of an individual to determine for himself or herself as to when, how, about what and to what extent information about

---

[56] *Id.* at pp.197-213.

[57] William L.Prosser, 'Privacy',48 Cal .L.Rev.383(1960).

[58] *Id.* at p.389.

[59] *Restatement of the Law*,(second),*Torts* (1977), The American Law Institute @cyber. law.harvard. edu /privacy/privacyR2dTorts.Retrieved on 12/08/2012.

them is communicated to others. This could be in the public realm as well at private places.

Professor Ruth Gavison in her article [60] has defined privacy as 'a limitation of others' access to an individual. She divided this into three components (1) secrecy[61], which relates to the information known about a person; (2) anonymity [62] which has to do with the attention paid to a person and (3) solitude[63], which relates to physical access to a person.

Each person is aware of the gap between what he wants to be and what actually is, between what the world sees of him and what he knows to be his much more complex reality. In these situations, the person puts on a mask. And if intrusion takes place and breaks this mask, in many cases, this may result in depression in that person. This is again breach of privacy of his personality and personal behavior in private moments and in public. 'Public privacy' comes into discussions of privacy only because one takes the word 'public' and 'private' in its full sense. In reality, 'public' simply means society and its interests while 'private' is thought of in relation to boundaries which separate the society from an individual's interest. Therefore, it is important to discuss as to while a person definitely surrenders a great deal of privacy when a person moves in to the public domain. But it does not mean that he forfeits all legitimate expectations of privacy. Therefore, it becomes very important that privacy components are there in 'public' life also, without which a healthy public life is impossible.

---

[60] Ruth Gavison, 'Privacy and the limits of law', 89 Yale L.J.421,426 (1980).

[61] *Id* .at p.429-32.

[62] *Id* .at p.432-33.

[63] *Id* .at p. 433.

Invasion into privacy involves when one party, taking something intimate to another person without the latter's consent. Equity demands that the latter's interest should take precedence over the desires of the former party .Here none of the interests is either absolute and therefore has to be balanced in the competing social setup. Affluent people can purchase big estates with house fenced from public view but people in crowded areas have neither privacy at home or outside. To say that they have consented to public inspection especially by media would be very inappropriate.

Technology has developed to such an extent that even a mobile phone could record and photograph. Now due to free lancing in journalism, this information can within seconds come on a local cable network. The time gap between collection of news and dissemination is very less. This reduces the time to rethink and reconsider whether to send it to public domain or not, as there is no time to censure at press offices. Along with this is the competition, as to which channel publicizes the news item first.

Technology therefore was the second threat to privacy identified by Warren and Brandies, hundred and twenty years ago. Twenty first century has brought in a wide variety of surveillance devises ranging in different sizes and having varied functions. Once the news and photographs are released through the media to the world, then it reaches millions of people across the globe. The impact through media is great and the loss for the victim is irreparable. That is the reason why the process of dissemination of news is important when studying and evaluating the extent of harm caused to the victim regarding the element of offensiveness, when determining invasion into privacy.

Since the United Nations embraced privacy as an integral part of human rights in 1948,[64] it was very soon followed by the International Covenant on Civil and Political Rights 1966,[65] which has given privacy international recognition. The European Convention on Human Rights also gave privacy a very important place in it.[66] The commendable aspect regarding this convention was the ability to bring the convention along with privacy constituent into state legislations.

Though all these conventions recognized privacy but unfortunately none has defined the meaning of the term. Codification of the term privacy is not yet found though there have been attempts to define it. One definition put forward is that privacy is 'a circle around every individual human being which no government - - - - ought to be permitted to overstep' and that it is 'some space in human existence thus entrenched around and sacred from authoritative intrusions'.[67] In other words, this means personal autonomy in a person's life. This can be further divided into two realms. First is the realm dealing with a person's decisions regarding his personal life and second is the realm wherein he has control

---

[64] U.D.H.R.-Article 12-' 1.No one shall be subject to arbitrary or unlawful interference with his privacy , family, human or correspondence nor to lawful attacks on his honour and reputation.2. Everyone has the right to the protection of the law against such interference or attacks.'

[65] I.C.C.P.R.-Article 17-' No one shall be subject to arbitrary or unlawful interference with his privacy , family, human or correspondence nor to lawful attacks on his honour and reputation. 2. Everyone has the right to the protection of the law against such interference or attacks.'

[66] European Convention 1950-Article 8- '1- Everyone has the right to respect for his private and family life, his home and his correspondence. 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with law and is in interests of national security , public safety , for the prevention of the national security, disorder and crime or for the protection of health or morals.

[67] J.S. Mill, *Principles of Political Economy*, Penguin, (1970), p.306.

over his information which is projected to the outside world. This second realm is where a conflict of interest is possible between the private interest of the person and the public interest of the society as a whole.

European Court has been very attentive to the rise in violations of privacy. This is evident in their decisions, in one of which the court accepted that a lack of remedy by the UK court,[68] in respect of entry by the reporters into a private home to film that home, amounted to breach of Article 8 of the Convention, although there was no invasion of privacy. European Court has in fact brought right to privacy into reality through its Convention and the due to the pressure imposed on the member states to legislate on its lines. Now Human Rights Act 1998 has been enacted in United Kingdom, which is a copy of the European Convention 1950. This makes right to privacy part of the law of the land in UK.

The right to privacy is accepted in the whole of Europe due to the strong control exerted by the European Union over Europe. This should be an example for the rest of the world to give this right a fundamental status in their respective countries.

Contempt of court in relation to media is an extended version of invasion of privacy in the court. When media prejudices the court proceeding, it amounts to interference in rendering fair trial, in such cases contempt of court is a weapon in the hands of courts. Fair trial is given protection under Articles 10 and 11 of the UN Declaration of

[68] *Barclay* v. *United Kingdom*, (1999) Appl. No.35712/97.

Human Rights 1948.[69] This is viewed as an exception to Article 17 of the convention, dealing with press freedom. In seeking to avoid such interferences with the course of justice, while at the same time giving due protection to press, it has chosen to adopt either a protective or a neutralizing model or a mixture of both.[70]

Under the protective model, the state seeks to protect court proceedings by preventing the media from publishing potentially prejudicial material. This model is used in the UK. In UK they have the Contempt of Court Act 1981 to initiate action against the media. In the neutralizing model, the emphasis is placed on dealing with the procedures in the courts, aimed at ensuring the impartiality of the jury. These involve the use of issuing strong directions to the jury, changing the trial venue, stays etc. If neutralizing measures fail, the remedial measure of acquittal is resorted to by the courts.

In the US the First Amendment provides immense and unqualified freedom to the press, the US courts resort to the neutralizing model rather than issuing sanctions against the press. In *Nebraska Press Association*[71], the Supreme Court held that adverse publicity before a

---

[69] U.N. Declaration 1948- Article 10-" Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal in the determination of his rights and obligations and of any criminal charge against him ."Article 11-1." Everyone charged with a penal offence has the right to be presumed innocent until proved guilty according to law in a public trial at which he has had all the guarantees necessary for his defence . 2. No-one shall be held guilty of any penal offence on account of any act or omission which did not constitute a penal offence under national or international law , at the time when it was committed . Nor shall a heavier penalty be imposed than the one that was applicable at the time the penal offence was committed."

[70] Helen Fenwick , *Civil Liberties and Human Rights* , T.J.International , Padstow , Cornwall (2002), p. 319.

[71] *Nebraska Press Association* v. *Stuart* (1976) 427 U.S.539.

trial would not necessarily have a prejudicial effect on it and that therefore a prior restraint would not be granted. The position is different in both the countries, which gives us the choice to adopt the best method, protecting the press as well as to maintain the sanctity of the courts.

The International regulations on media finally concluded at Madrid, the Madrid Principles on the relationship between the media and judicial independence in 1994. India was a party to this convention, which evolved the 'basic principle' concept. This 'basic principle' was that in a trial the accused is innocent till proved guilty by the court[72]. Therefore while reporting the court proceedings ,clear conditions have to be followed that no matter is publicized which affects the fair trial of the accused , and no judgment should be passed other than the decision of the court.[73] It clearly stated that the freedom of expression as stated in International convention (ICCPR) 1966, in Article 19 emphasizes the function and rights of the media. The function of the media, being to gather and convey information to the public and to comment on the administration of justice, which includes cases before, during and after trial without violating the concept of presumption of innocence.[74] So here also the commission reestablished the basic underlying concept, i.e. presumption of innocence and stated that media should keep itself distanced from violating that concept[75]. Along with this, the Judges were allowed to maintain secrecy of trial and therefore in-camera proceedings were allowed. The media were not given a right to

[72] The Madrid Principles on the relationship between the Media and Judicial Independence 1994, Madrid.

[73] *Ibid.*

[74] *Ibid.*

[75] *Ibid.*

broadcast or record Court trials unless it is so allowed by the country concerned.[76] The Commission elaborated that the strategies for implementation of these rules should be aided by judges.[77] They should assist the press by providing summaries of judgments to them and by answering their questions.[78] It concludes by stating that the balance between independence of Judiciary and freedom of the press and respect of the rights of the individual is difficult to achieve but that the process to bring this balance should continue.[79]

2.4 History of Privacy in India

India has in the early times followed the common law principles of Brittan, giving protection to individuals in specific areas of interests such as defamation, breach of confidence and trespass. This has long been regarded as insufficient. The first step in India giving some directions in the area of privacy was in *Nihal Chand* v. *Bhagwan Dei*[80] in which the High Court recognized the independent existence of privacy as emerging from customs and traditions of people. Gradually, the Apex Court in several decisions[81] though not in relation with the freedom of press determined the existence of this right to some degree. As stated by R.S. Sarkaria[82]:

---

[76] *Ibid.*

[77] *Ibid*.

[78] *Ibid*.

[79] *Ibid*.

[80] *Nihal Chand* v. *Bhagwan Dei* A.I.R. 1935 All.1002.

[81] *M.P. Sharma* v. *Satish Chandra* 1954 S.C.R. 1077 and *Kharak Singh* v. *State of U.P* A.I.R. 1963 S.C. 1295.

[82] Sarkaria ,"Should the Press be given Special Dispensation?" 12 P.C.I. Rev. 1, 32 (1991).

> "While all individuals are equal, certain vulnerable categories require added protection: children, women, the aged, the mentally retarded or handicapped, the sick etc. Thus rape and molestation of women, sexual abuse of children are fit cases where privacy should be respected and the names, photographs or other particulars leading to the identity of the victims or sordid details of the offence should not be publicized to those unconcerned with law enforcement or with administrative jurisdiction in the matter, in other words sensation or a morbid curiosity cannot be a just ground for invasion of privacy at the cost of causing added hurt and trauma to the victims".

The Supreme Court stated in *Gobind* v. *State of Madhya Pradesh*[83] that the right to privacy encompasses and protects the personal intimacies of the home, the family, marriage, motherhood, procreation and child rearing. The reasoning given by the Judges is based on the concept that at home individuals drop their mask and be their real self and not act in a manner that they might represent themselves outside the home. In this safe sanctuary of a home the prying eyes of the journalists should be kept away. Even if the person is a public figure it is a basic right of the individual by birth to be let alone at least at home and in their personal affairs[84]. This gives relaxation to him and puts his head and body at rest. This restful period is needed in every individual so that he can function properly in his job or responsibility assigned to him in the public.

The Forty Second Law Commission examined the various aspects of right to privacy under Chapter 23 of its 42nd Report and recommended

[83] *Gobind* v. *State of Madhya Pradesh* A.I.R. 1975 S.C. 1378.

[84] *Ibid.*

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 offences[85]. The Law Commission in its one hundredth 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 decisions[86]. Various countries abroad have also dealt with the various aspects of right to privacy in separate legislations e.g. the Law Reform Commission of Hong Kong in its Report of December 1996 entitled "Privacy, regarding the Interception of Communications", has referred to various legislations in different countries regulating interception of communication.[87] The Law Communication has recommended that several jurisdictions, including common law, have legislation regulating interception of communications and although the scope of protection by such legislation varies , all the statues apply criminal sanctions to safeguard the privacy interests of individuals in one way or another [88]. The Law Reform Commission of Ireland in its Consultation Paper headed 'Privacy; Surveillance and Interception of Communications' has recommended for the enactment of a separate Act to protect the privacy of the individual from intrusive surveillance.[89] The National Seminar on Criminal Justice in India, organised by the Law

[85] Law Commission of India, *42nd Report on the Indian Penal Code*, (1971), Chapter 23, pp.336-340.

[86] Law Commission of India, *156th Report on the Indian Penal Code* vol.1 August, (1997), p.340.

[87] *Id.* at p. 332.

[88] *Id.* at p. 333.

[89] *Ibid.*

Commission on 22nd and 23rd February, New Delhi, many participants viewed that inclusion of offence against privacy in IPC, are bare and sketchy and do not meet the existing demands of society for protection of privacy of individuals.[90]

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.[91]

The freedom of press and the right to privacy came seriously under consideration for the first time in *R. Rajagopal* v. *Tamilnadu*[92] in which the prison authorities attempted to prevent *Nakkheeran*, a Tamil Weekly, from publishing the autobiography of Auto Shankar, who had been sentenced to death. It was believed that publication may uncover the close nexus between the prisoner and several IAS and IPS officers and politicians. The contention of the respondent was that the alleged autobiography had not been written by the convict and that the convict had not authorized the publication. The Court proceeded on the assumption that the prisoner had neither written his autobiography nor had authorized the petitioner to publish the same and also that the publication would be highly defamatory of some officers and politicians. The court held that the government could not maintain a civil action for

[90] *Ibid*.

[91] *Id.* at p. 341.

[92] *R. Rajagopal* v. *Tamil Nadu*, A.I.R. 1995 S.C. 264.

its defamation. The court also stated that right to privacy is implicit in Article 21 and it is a right to be let alone. But once the matter becomes public record or the person voluntarily submits himself into controversy then it may be a different question[93]. The court granted the right to publish in so far as the information was gathered from public records. For this the court opined that no consent of the convict or authorization is necessary. The court warned that if the publishers went beyond that, then they might be invading the prisoner's right to privacy and would be liable to that extent.

Conclusion

The historical perspectives elaborated in above paragraphs give the development of press and privacy in the international and domestic levels. It is clear that the international conventions give priority to privacy, being a primary inalienable individual right without which the very existence of human being is impossible. These conventions also give freedom of press an important position in regard to development of a democracy, but under restrictions, being a secondary right. Without this right a democracy fails to mature in a proper way, but for this it is important that it is properly regulated.

The Madrid convention 1994 emphasized the need of measures, in the form of Press Councils, Ombudsman for the Press and also by having a code of ethics for the media. Though the Press Council came in 1978, it was only in 2010 that the Press Council of India finally came up with a code of ethics. Since then the PCI has been regulating the Press.

.....ജോ.....

[93] *Id.* at p. 529.

Chapter 3

RIGHT TO PRIVACY AND FREEDOM OF THE PRESS IN THE UNITED KINGDOM

Freedom of the press means freedom to present publishes, broadcast, circulate and transmit through any media, news to the masses. It has been a long battle for this press freedom to be recognized, which eventually seems to have emerged victorious in democratic countries.

Press through its diverse use, engages itself in enlightening, informing, mediating, discussing, evaluating on behalf of the people and of the government. It can be termed as a media for transmission of ideas across the huge table of power of the government to the vote bank and vice versa.

Problem arises when this freedom starts overstepping into individual right to privacy. Generally no freedom unconditional and unobstructed is good for a healthy society. The value of privacy is as inalienable as the very air we breathe. UK has always given privacy a very important status as compared to press. This is seen manifested in the Tort law even in the absence of any specific legislation in this area.

The Indian courts rely and follow the decisions of British Courts. This makes the study of UK position before and after the Human Rights Act 1998 necessary. Indian scene as of today seems to be similar to that of UK position before1998.

3.1 Press Freedom in the United Kingdom

The very notion of freedom of the press developed in the West. In England there were restraints imposed on this freedom through licensing and censorship. In 1644 John Milton spoke against licensing[1]. He was one among the school of social contractarians,[2] who propounded that there exist in society a social contract where citizens give up some of their powers to the government in exchange of protection of their rights. After printing was invented, towards the later part of the fifteenth century, newspapers emerged very soon, causing press to become a powerful medium of expression. This led to press taking up issues against monarchy, such being the arguments by Milton in his *Arepagitica*, which led to there being no censorship or licensing since 1695.[3]

3.1.1 State Limitations

Freedom of press was granted in England as right to print and publish anything except that which constitutes sedition, obscenity, defamation, contempt of Court and blasphemy.[4] Common law was always in the forefront in creating laws in the area of privacy and has been trying to find a remedy against actions based on trespasses, libel, confidentiality and contempt of court as will be shown through the study below. In this process tort law developed with hardly any legislation to refer to, except justice, equity and good conscience for its guidance.

---

1 Sita Bhatia, *Freedom of Press*, Nice Printing Press, New Delhi, (1997) ,p.187.

2 *Ibid.*

3 *Ibid.*

4 *R.*v. *Dean of St. Asaph*.(1784) 3 T.R. 428.

3.1.2 Earlier Cases of Confidentiality

One of the earliest cases on confidentiality is *Prince Albert* v. *Strange*[5]**,** in which the Court developed the concept that a drawing made of a family is protected under implied contract of confidentiality, and therefore no publication is allowed. Therefore, the court prohibited not merely the reproduction of the etchings which the plaintiff and Queen Victoria has made for their own pleasure but also the publishing of a description of them. This was the beginning of protection afforded to thoughts and emotions expressed through the medium of writing or arts, though it was apparently in the line of breach of trust**.** [6]

3.1.3 Public Figure – No Contract

English Courts dismissed petitions, if they felt that libel has not yet been established in cases of absence of contract. The plaintiff in Corelli v. Wall was a well-known author who sought to restrain the defendants from publishing a series of postcards depicting imaginary scenes in the private life of the plaintiff[7]. Here the court was not convinced that though publication of post cards had taken place, there was no sufficient evidence to prove libel .The reason was based on the ground that once a person is a public person, she forgoes some part of her privacy, unless it is based on a written contract and its violation has occurred .The court

---

5 *Prince Albert* v. *Strange*, 64 E.R.293 (1849).

6 *Abernetty* v. *Hutchinson* 3L.J. Ch.209(1825) . where an injunction granted on the ground of breach of confidence holding that publication of unpublished lectures without the consent of the Plaintiff, a distinguished surgeon, was wrong. In *Pollard*v. *Photographic Co.,* 40 Ch.Div. 345(1888), the Court emphasized the ambit of breach of contract, wherein a photographer who had taken a lady's photograph under ordinary circumstances was restrained from publishing it without her permission.

7 *Corelli* v. *Wall*, (1906) 22 T.L.R 532 .

dismissed the motion as it did not feel justified in intervening before libel was established.

3.1.4 Public Figure – Defamation

In *Tolley* v. *Fry & Sons*[8] the case was regarding a caricature of plaintiff, a well known golfer playing golf with a packet of their chocolate in his pocket. The plaintiff, Tolley received damages in defamation on the basis that the advertisement carried an innuendo that he had interfered with the plaintiff's amateur status by advertising the defendant's goods for reward**.** Similarly, attimes, it is the simple

In a sensitive case of marriage of Duke of Argyll, the Court granted casualness on the part of the press, which can hurt a person. In *William* v. *Settle*[9]**,** the defendant was a professional photographer who took photographs at the plaintiff's wedding. Two years later, when the plaintiff's wife was pregnant her father was murdered. The defendant sold the copies of wedding photos without the knowledge of the plaintiff, who held the copyright. The plaintiff successfully sued and was awarded 1000 Pounds as damages. Such was the case where *Daily Mail* was made to pay damages for publishing private house party photographs of Princess Margaret[10]. These were times when press started using its freedom to gain publicity at the cost of public personalities. injunction to Margaret. This was a matter where the husband disclosed private affairs of his marriage with Margaret, to the press. The court granted the plea of the plaintiff, against her husband

---

8 *Tolley* v. *Fry & Sons Ltd.* [1931] All E.R. 131.

9 *Williams* v. *Settle*[1960] 1W.L.R1077.

10 *Lady Anne Tennant* v. *Associated Newspapers Group Ltd,* (1979) F.S.R 298.

Duke of Argyll and also against '*The People'* from publishing articles on their marriage[11].

3.1.5 No privacy – when everything made public

The above case was distinguished from *Lenon* v. *News Group Newspapers Ltd*.[12] In this case the court denied the injunction petition by John Lenon to prevent publication in the *News of the world* an article by his former wife about their married life. The court stated that both John & Cynthia have been in the news talking to the press of their lives and having themselves made their life public, their life is no more private. The court made it clear that when parties themselves want publicity, then the press cannot be blamed for their action.

3.1.6 Slander

When a person's reputation is injured through words spoken or written it amounts to defamation. The media freedom must be seen in the light of these basic rights of an individual. The act of publishing or broadcasting can cause damage either knowingly or without being aware of it. The person committing the wrong and the people involved in it; all run the risk of being sued. Irresponsible statements published or broadcasted without careful investigation carried out in the matter can cause damage running to huge amounts.

In *Youssoupoff* v. *M.G.N. Pictures Ltd*.[13], the plaintiff had claimed that after she played the role of Princess Natasha, who had slept with Rasputin in the story, in the film '*Rasputin, the Mad Monk'*. The press

[11] *Argyll* v. *Argyll and others* [1965] 1 All E.R. 611.

[12] *Lenon* v. *News Group Newspaper* [1978] F.S.R.573.

[13] *Youssoupoff* v. *M.G.M. Pictures* Ltd (1934) 50 T.L.R. 581.

identified her with that character, causing her to be pictured as a immoral person, which caused the act of slander. She claimed damages as due to this irresponsible act of the media, she lost friends. She received 25,000/- pounds as damages on the basis that the film meant that she had been seduced by Rasputin and which was not so in real and it was made to be true by the media so it was therefore defamatory on the part of the media.

In this case, though what was stated was true regarding the character that the claimant played, still it happened to be defamatory.

3.1.7 Among whom defamed

When an act or statement is exposed to a section of people, and that causes lowering of the status or reputation of the person claiming to be affected by the media, then the act causes defamation to the claimant. [14]

3.1.8 Liability falls on a series of people

In situations where defamation takes place, it is not just the journalist who writes is liable but along with him the sub-editor, editor, printer, distributor and retail seller of the newspaper may be sued. In such cases the printer, distributor and newsagent may use the defense of innocent dissemination[15]contained in section 1 of the Defamation Act, 1996.

3.1.9 Construction in cases of Defamation

The material written should be read and construed in the normal sense. When one reads it, it should give ground for thinking about that person in the wrong line, which should actually be contrary to the actual facts, then that would cause it to be defamatory. It should not be a

[14] *Ibid.*

[15] The Defamation Act, 1996, section 1.

case, wherein there are many meanings but only the bad meaning is selected[16].

The construction of the meaning changes from time to time .For example to call someone 'gay' few years ago was fine as it meant he was a care free man. Today calling someone 'gay' would be defamatory.

3.1.10 Ordinary Man

The courts have held that to decide whether a statement is defamatory or not, the meaning may thus be difficult to construe and must be decided on the basis of the words used.

In *Lewis v. Daily Telegraph* the House of the Lords stated,

[The ordinary man does not live in an ivory tower and he is not inhibited by knowledge of the rules of construction. So he can and does read between the lines in light of his general knowledge and his experience of worldly experience. Ordinary men and women have different temperaments and outlooks. Some are unusually suspicious and some are unusually naïve. One must try to envisage people between these two extremes and see what is the most damaging meaning that they would put on the words in question].[17]

3.1.11 Self Contained Answer / question

In many cases the journalists pose leading questions. Sometimes the journalists even go further by framing their questions in a manner insulting the person interviewed. In some cases the question are fixed to get a specific answer or the answer is self-evident. In *Gillick v.*

[16] Neill L.J. in *Haitt* v. *Newspaper Publishing Plc*, *The Times*, November 9, 1989,p.7.

[17] *Lewis* v. *Daily Telegraph Ltd* [1963] 2 All E. R.151.

B.B.C.[18], the case was concerning the broadcast of a live television programme on the 25th anniversary of the opening of the first Brook Advisory Centre. Mrs. Gillick, who had won a legal battle to restrict the government order, to offer contraceptives to girls under 16, was questioned by the presenter of the programme. The question was - "But after you won that battle……there have been at least two reported cases of suicide by girls who were pregnant." The question meant that if contraceptives were allowed, the girls would not have committed suicide .She alleged that she felt she was made morally responsible for the deaths of the two young girls. The Court of appeal held that the words were capable of bearing a defamatory meaning.

3.1.12 Hidden Meaning (Innuendo)

Sometimes the words used may appear innocent but have a hidden meaning. Claimant will have to prove that though these words are not *perse* defamatory in themselves, but that they become defamatory in certain situations. In UK, this is called *true innuendo* and is best explained by the *Tolley* case wherein the claimant[19] was an amateur golfer who was shown in an advertisement for the defendant's chocolate, he was able to prove that certain people familiar with the golfing world would think that he had been paid for the advertisement and had used his amateur status. On the face of it, there was nothing defamatory in the advertisement.

3.1.13 False Innuendo

This happens where there is an attribution of an inner meaning to a sentence. On reading, the reader would at once discern the underlined

[18] *Gillick* v.*B.B.C.* [1996] E.M.L.R. 267.

[19] *Tolley* v.*Fry & Sons Ltd*. [1931] All E.R. 131.

meaning. For example, a statement that the policeman is bound to be honest implies just the reverse meaning. In *Hutton v Jones*[20], a newspaper reported a real life incident of a motor festival in Dieppe. In this the morality of one Artemus Jones, a church warden from Peckham was raised. The paper stated that "there is Artemus Jones, with a woman who is not his wife, who must be – you know the other thing……" A barrister by the name of Artemus Jones took this statement, as meant against him. The court accepted his theory, that any one reading it will possibly understand that it meant he was an immoral man, though it was not stated by the paper as such. He was successful in his case against the paper, though he was actually not the Church Warden.

Again the defendant paper may become liable where though the statement is true of one person but would turn out to be defamatory of someone else having the same name. In *Newstead v. London Express Newspapers*[21] the defendant paper published a statement that one Harold Newstead, 30 years old from Camber well had been convicted of bigamy. The claimant, a different person, by the same name, age and place succeeded in his libel claim.

In case of photographs also, the same principles are applied. *The Sunday Times* had the photograph of a different Nigel Watts, who was also an artist[22]. Nigel Watts, the artist, was successful in his suit for damages as many people who read the article would have understood it to refer to him.

---

[20] *Hutton* v. *Jones* [1910] All E.R.29.

[21] *Newstead* v. *London Express Newspapers* [1940] I K.B. 377 .

[22] *Watts* v. *Times Newspapers* ,[1996] 1 W.L.R. 427.

3.1.14 Offer of amends

When an offer of amends is made by the defendant, the option to accept it or not vests on the claimant. If it is accepted by the aggrieved party then no further action in libel or slander can be taken by that party against the person who made the offer of amends.

3.1.15 Damages

Payment of damages is the general rule followed by the courts. This came in with the tort law concept to put back the person in the same position as if no damage has been done.[23] As these are cases, decided by the jury, therefore, sometimes the damages are fixed too high. In those cases the judge reserves the right to reduce the amount. Such was the *Elton John*'s case[24], in which the Court of Appeal, reduced the amount of damages awarded by the Jury, which the *Sunday Mirror* had to pay to *Elton Jones* for wrongly stating that he slept with some women.

In another case[25] Court of Appeal clarified and stated that it was not to be allowed that a claimant should receive compensation for injury to his reputation, that was heavily in excess of that which he would have received in case of serious personal injury.

At the same time, there are cases for example; in an exceptional case[26] the Jury awarded only half a penny to a successful claimant. The question was regarding mention of his name, in *Exodus book*, as a doctor, an ex-prisoner of Auschwitz concentration camp, who had been

---

23 *Ibid.*

24 *Ibid.*

25 *John* v. *M.G.N. Ltd.* ,*The Times*, December 14,1995,p.6.

26 *Dering* v. *Uris* [1964] 2Q.B. 669.

forced by the Nazis to perform experimental surgical operations on other persons. Here court gave him only honorary damages. So though damage is the rule, there are variations in its application.

3.1.16 Injunction

Injunctions are normally granted only in exceptional cases. The situation in which it is normally granted is where damages would alone not serve the purpose. Those are cases, where similar acts are bound to be repeated, such been the commercial interest involved in it. In those cases, to prevent further cause of action, injunctions are granted. It was unusually awarded in 2003 to restrain *The Sunday Mail*, from publishing untrue allegations about sexual conduct of the Princess of Wales[27].

3.1.17 Malicious Falsehood

Defamation results in degrading the status of the claimant. Sometimes the statements made might be untrue, but not defamatory. Here claimant can bring an action in malicious falsehood. Like in *Kaye v Robertson*[28] the claimant was a well-known star of a television series called 'Allo Allo'. He had undergone very extensive surgery on his head due to an accident. The defendant was the editor of *Sunday Sport*, a tabloid renowned for far-fetched "Scoops". He was responsible for journalists who interviewed and photographed the claimant in his hospital bed. The claimant sought injunction to prevent publication on the ground of malicious falsehood. He stated that he did not give consent and was not in a fit condition to give consent and just after the interview, he forgot about the incident. The court was satisfied that there was a cause of action.

---

[27] Peter Carey & Jo Sanders, *Media law*, Sweet& Maxwell, (3rd Edition 2004) , p. 72.

[28] *Kaye* v.*Robertson* [1991] F.S.R. 62.

3.1.18 Malice

Malice simply means to act without just cause or excuse and with some indirect and dishonest motive. Like in *Kaye's* case[29]**,** it is evident; there was malice in the conduct of the journalist as the journalist could understand that Mr. Kaye was not in a fit condition to give any informed consent to the interview.

3.1.19 Breach of confidence

This remedy has been demanded mostly by celebrities. In May 2004[30], the House of Lords gave judgment in the case brought by Supermodel Naomi Campbell against newspaper *The Mirror*. This has hastened the development of breach of confidence in privacy.

The case of Naomi Campbell gave rise to a new action called the Campbell confidence. This action is different from the existing law of confidence. The difference is a very subjective test; which states the different principle as to whether the information is confidential or whether it is private. Sex life forms a part of an individual's very secret life. It was held by the courts over a long period of time that matters relating to marriages should be kept undisclosed and confidential[31]. Thus this includes sex life also outside the wedlock. This is just not limited to sex life but it further includes family, correspondence etc. Here the court made it clear[32]that anything, which even a celebrity wants to keep anonymous and the exposure of which only causes agony to the person , and in which the there is no public interest involved fails the test of need

[29] *Ibid.*

[30] *Campbell* v. *M.G.N. Limited* [2004] U.K.H.L. 22 .

[31] *Argyll* v. *Argyll and others* [1965] 1 All E.R.611.

[32] *Supra n.30.*

of publication. This is the principle involved and stated as Campbell confidence. Ironically, this case came up after the Human Rights Act 1998 became the law of UK. The courts were still struggling to fix the parameters of privacy, as the Act did not define privacy but left it at the discretion of the courts.

3.1.20 Campbell Confidence

In *Campbell* v. *M.G.N. Limited*[33]**,** the House of Lords established a slightly different line from the traditional breach of confidence action. The crucial question before the court was whether the benefit of the publication is proportionate to the harm caused due to disclosure, which interferes with the right of privacy. The news paper has to show that there is public interest in each element of private information that the publication will disclose. The Court held that although there was public interest in exposing Ms. Campbell's deceit, this was insufficient to justify the ancillary points[34]. The judgment stated that journalists are to demonstrate public interest in each and every item of information contained within a story and not just the story as a whole.[35]Thus the difference between breach of confidence rule[36]and Campbell rule is that – the question is not concerning breach but whether each and every element in the story serves public interest. If it does not serve public interest in each and every element of the story, then it definitely causes breach of privacy. The Campbell rule therefore puts greater burden on the media.

---

[33] *Campbell* v. *M.G.N. Limited* [2004] U.K.H.L. 22 .

[34] *Ibid.*

[35] *Ibid*.

[36] *Supra n.31.*

3.1.21 Private Affairs in Public Domain

Private is something that is not in the public realm. In *Douglas v Hello***!**[37]**,** Michael Douglas and Catherine Zeta-Jones marriage event was held to be a private occasion though hundreds of people attended it. The photographs of the married couple were held to be confidential. The guests were told that the wedding was private and that photography & camera was forbidden and this was held to be important.

Just before this decision in *Theakston's* case[38], where the television presenter Jamie Theakston was stated to have attended a brothel. The Court held that brothel was a public place and therefore there could be no privacy regarding the description of events there. Therefore he could not claim the privilege of this right.

The difference outlined through both cases is that in Douglas, the right to photography was given exclusively to *'OK'*, a glossy magazine. The guests were also told it is a private affair. While in *Theakston* case, the events happened in a public place. In this he had no pre-event legal protection unlike in *Douglas* case.

The attitude of the European Court of Human Right seems to be different in relation to the above matter. In *Peck* v.*U.K.*[39]**,** the European Court dealt with the disclosure of CCTV footage to media organizations. This showed a person on a main road in Brentwood town centre carrying a knife. The individual had just attempted suicide, and because of the coverage his life was saved. Peek later brought action for invasion of

[37] *Douglas* v. *Hello!*[2003] 3 All E.R. 996.

[38] *Theakston* v. *M.G.N. Ltd.* [2002] E.M.L.R. 22 .

[39] *Peck* v. *U.K.* (2003) 36 E.H.R.R. 41.

privacy by the CCTV, against the UK government. UK government stated that this was in public domain. The European Court instead extended the rights given Article 8[40] to an individual's right in public. The Court held that there is a "zone of Interaction of a person with others, even in a public context, which may fall within the scope of private life"[41], though it was held that the CCTV recording itself was lawful and it saved his life also. Therefore, it was held that further disclosure of the CCTV footage to the media was violative of the privacy of Mr. Peck.

3.1.22 Employment Contract

Most of the time, the media gets information from employees of famous individuals when they are out of employment. Such was an incident where Lady Archer[42], wife of Jeffery Archer was awarded 2,500 pounds as damages and was given injunction against her former personal assistant, Jane Williams. Jane had disclosed in communication with various newspapers and in one such deal, one Sunday paper put in this story of Lady Archer having undergone cosmetic surgery. The court accepted this communication to the press as breach of employment contract, which has to be kept away from the press. The Court gave preponderance to the duty of confidence over the right to freedom of expression.

---

[40] The European Convention on Human Rights (ECHR), 1950, Article 8 reads :-

I. Everyone has the right to respect for his private and family life, his home and his correspondence.

II. There shall be no interference by public authority with the exercise of this right except such as is in accordance with law and is necessary in a democratic society in the interests of national security, public safety, for the prevention of disorder and crime or for the protection of health or morals.

[41] *Supra n.*39.

[42] *Archer* v.*Williams* [2003] E.M.L.R. 38.

3.1.23 Friendly Relationship

Here we find that courts do not allow disclosure even by friends. Such was the case where a newspaper published a report that the claimant[43] had a lesbian affair with the wife of a notorious criminal. The paper obtained the information from a friend of the claimant's in whom the claimant had confided this matter. The court took this as an offence on the part of the friend and allowed the claimant to bring action against the friend to stop its further dissemination.

3.1.24 Confidential Data in Public Interest

An employee[44] of the claimant health authority supplied the reporter with information obtained from hospital records revealed that two doctors working in the area had AIDS. The defendants contended that it was in the public interest that the names of the doctors be disclosed. The Court held that public interest in protecting the confidentiality of hospital records outweighed the public interest of freedom of press. The reason given was that victims of the disease should not be deterred by fear of discovery from going to the hospital for treatment. A permanent injunction was granted preventing publication.

3.1.25 Public Figures

In the case of *Campbell,* though it involved a celebrity, the court accorded privacy. *Alcoholics Anonymous* and *Narcotics Anonymous*, which were organizations to rehabilitate drug addicts, were allowed to use these names as they seek to provide assistance with anonymity. If the public feel that their medical records and photographs of attending

[43] *Stephens* v.*Avery* [1988] 2 All E.R.477.

[44] *X* v.*Y and others* [1988] 2 All E.R.648 .

therapy sessions would most likely come in the papers, then it runs contrary to the objective of curing these people, which most often are celebrities. This runs opposite to the interest of the Society[45]. So though generally the level of privacy is less for celebrities, still there is always scope for court to differ, the discretion being vested in them. This is the reason for not allowing damages to Campbell for pictures taken while on the public road but at the same time allowing damages when it came to media exposing her visits to *Alcoholics Anonymous*, a centre for rehabilitation. The level of thinking is undergoing a lot of change in the UK. Since the influence of European Convention 1950 is overwhelming, one cannot go ahead without referring to the 2004 European Court decision in *Von Hannover* v. *Germany***.**[46]

3.1.26 Extension by European Court of Human Rights

The May 2004 decision in *Campbell* had stated that a picture of the claimant going about her business in a public road would not result in damages being awarded. In June 2004, European Court of Human Rights found that it could give damages in such cases. This was in the case of *Von Hannover* v. *Germany*[47]. Here Von Hannover, called otherwise Princess Caroline of Germany was always troubled by press ,taking her photographs , while horse riding , skiing and when spending time with her children. It was as if her whole life was under public lens. She was greatly pained and brought her plea to the German Courts. This right to

---

[45] Melville Brown, Amber "Camera Shy – the Interaction between the Camera and the Law of Privacy in the UK", *International Review of Law, Computers & Technology*, (2008), p. 214. http://dx.doi.org/10.1080/13600860802496400 retrieved on 12/06/09 at 8.56 AM.

[46] *Von Hannover* v. *Germany* [2004] E.M.L.R.379; (2005) 40 E.H.R.R. 1.

[47] *Ibid.*

privacy was denied to her as the Court felt this is a risk one undergoes if you are a public personality. She moved the European Court against the decision of the court .The European Court held that photographs which revealed nothing but the claimant's horse riding, skiing and shopping had infringed Princess Caroline's rights. The Court found that her rights had not been sufficiently protected by the laws of Germany**.** The German law considered her to be a public figure, 'par excellence' unless she could show that she was in a private spot out of the public eye. Her grievance was against unauthorized publication of the photographs in the German magazines – *Bunte, Freiseit* and *Neue Post*.

The European Court of Human Rights found that the photographs did not show her fulfilling any public role. They were in fact concerning her private life. For the first time the Court drew a difference between *Von Hannover* the Princess and Caroline the woman. The court distinguished the two positions, the role of the Princess was a public one, where she was accessible to the media as her activities were of public interest while the role of Caroline the woman was her private life, when she was not doing any public duty but was simply living her life as any ordinary woman, this private life is away from the eyes of the media as there is no public interest involved in it. The Court enquired whether these photographs of her private time made an issue of public debate. Finally the court stated that there was no need of exposing these matters to public as there was no public debate on that issue. So she had a legitimate expectation of privacy.

3.1.27 Family of Public Figure

J.K. Rowling, the author of *Harry Potter*, her original name being Mrs. Murray, was a wife and mother of two children. She brought an

action on behalf of their toddler son David over the unauthorized publication of his photograph in a push-chair with her and her husband on a street in *Edinburgh*[48]. The newspaper settled the claim, but the picture agency, *Big Pictures*, fought the case on the ground that the boy could have no expectation of privacy on a public road. Court agreed to this contention stating 'if a simple walk down the street qualifies for protection, then it is difficult to see what would not'[49]. But this decision of Patten J. was turned down by the Court of Appeal in May 2008 as the emphasis was on the child. The simple reason was that children are vulnerable and require greater protection. The Court stated that it will adopt a stricter approach regarding privacy infringement of minors. The Court of Appeal referred to the *Voluntary Code of Conduct*[50], which provided that 'Editors must not use the fame, notoriety or position of the parent or guardian as sole justification for publishing details of a child's private life'[51]. Whether they are children of ordinary or famous parents, they all are on the same footing in cases of protection[52].

3.1.28 International Efforts to Protect Privacy of Children and Victim

The United Nation's Convention on the Right of the Child (1989) is formulated to protect children's right to freedom of expression,[53] protection of privacy and against attacks on his or her honor and reputation[54]. Articles 34 and 36 require governments to protect

---

[48] *Murray* v.*Express Newspapers Plc and Another* [2007] E.W.C.H 1908 (Ch).

[49] *Id*. Patten J.

[50] Press Complaints Commission. Clause 6.

[51] *Ibid.*

[52] *Supra n. 48.*

[53] The United Nation's Convention on the Right of the Child 1989, Article 13.

[54] *Id.* Article 16.

children from all types of exploitation including pornography[55]. *The European Convention on the Exercise of Children's Rights* (1996) also stresses children's right to express their own views in decisions affecting them.

The UN Convention on the Right of the child states that an individual is regarded as a child until he or she attains the age of 18 years. It was *the Council of Europe Recommendation* on *a European Strategy for Children* (1996) that introduced the call for a change in the way children are viewed in society. *The Covenant of Europe's Recommendation No. R(91) 11*, *concerning sexual exploitation, pornography and prostitution of and trafficking in, children and young adults ,* highlights the responsible role the media has to play in reporting on this matter , where in the identity of the victims is protected and to frame appropriate rules of conduct in this direction. *The Council of European Recommendation No R(85) 11* also enumerates on the position of the victim in the Framework of Criminal Law and procedure , and draws attention to the interests of the victim and the need to protect him/her from any publicity which will unduly affect his/her private life or dignity.

3.1.29 Photographs

Photographs now constitute an important part of the press coverage. On many occasions, the photographs convey damaging information, rather than the article itself. This usually happens, when in seclusion or

[55] Neeti Tandon , ' Secondary Victimization of Children by the Media; An analysis of Perceptions of Victims and Journalists', *International Journal of Criminal Justice Sciences*, Vol 2 issue 2 July – December (2007). http://creativecommons.org/ licenses/by-nc-sa/2.5/in/ retrieved on 12/6/09 .

in public. Such was the case of *Theakston* v.*M.G.N.*[56], where one Jaime was photographed in a brothel when he was least prepared for publicity. A visit to a brothel need not necessarily be for their services, it could be connected to some social activity or for newsgathering. Simply giving photographs without any explanations in such cases can be very much misleading. CCTV recordings give rise to far-fetched controversies than that can be anticipated. British radio DJ Sara Cox in 2003[57], brought a legal battle against *The People* newspaper for an amount of 50,000/- Pounds over the publication of unauthorized photographs of her naked body in her Jacuzzi on her honeymoon outside a private villa in Seychelles on a private island. The photograph was taken by a long-lens from a boat offshore. The court stated that this act of the press violated her private right to be left alone. This decision goes well with the *Von Hannover* decision.

Similarly, Sienna Miller in 2008 obtained 37,500 pounds for the unauthorized publication in *the News of the world* and *The Sun* of photographs of her in a costume in a closed set of the film, *Hippie Hippie Shake*[58].

In the case of *H.R.M. Princess of Wales*[59] decided, even before the passing Human Rights Act of 1998, Duke J had no hesitation in granting interim injunctions to prevent the *Daily Mirror* and others from

---

[56] *Theakston* v.*M.G.N. Ltd.*[2002] E.M.L.R. 22 .

[57] Melville Brown, Amber ' Camera Shy – the Interaction between the camera and the law of privacy in the UK', *International Review of Law, Computers & Technology*, (2008), 22:3, p. 217. http://dx.doi.org/10.1080/13600860802496400. retrieved on 12/6/09 .

[58] *Ibid.*

[59] *H.R.M. Princess of Wales* v.*M.G.N. Newspapers Ltd. and others* (1993) 8 November (unreported) pp. 4-5.

publishing photographs of the Princess exercising in a gymnasium, taken by the gymnasium owner without her knowledge or consent. Her case was based on breach of Contract and breach of Confidence. Also in *Shelly Films* case[60], the defendant was restrained from publishing photographs, taken without permission on the set of the film *Frankenstein.*

3.1.30 Public Interest

Truth should be revealed to the public, especially if a public figure makes an untrue statement and the hypocrisy should be exposed. In *Campbell*'s case she never contended invasion into privacy in relation to her being a drug addict though she had made a false statement earlier that she was not a drug addict[61]. Mr. Justice Eady in his judgment[62] concerning the Canadian Folk singer Loreena Mckennitt, stated that the unauthorized biography written by her one time friend Nieman Ashwas, was a bad practice. He stated that the book revealed private information of the singer, as the author was very close to her. The Judge stated this behavior, as a very high degree of misbehavior and said the mere fact that a celebrity fell short of ideal behavior like others could not justify exposure of her life to the public in the supposed public interest. There is no public interest in this matter.

In some cases even court order is of no help, such is the extent of harm done. Such was the case of *Max Mosely*, President of the governing body of Motor Sport Worldwide, the Federation Internationale del'

---

60 *Shelly Films Ltd* v. *Rex Features Ltd.* [1994] E.M.L.R. 134.

61 *Supra n.33.*

62 *Mckennit*t v.*Ash* [2007] E.M.L.R. 113; *The Times* December10,2006.

Automobile[63]. He had been filmed on a secret camera while engaged in sexual activity with five women in the basement of a private flat. An article was published regarding it on 30 March 2008 on the News Group Newspapers Website together with the filmed footage. He sought injunction to stop further publication but within few days, there had been 435,000 hits on the on-line version of the article of the complainant, with the video footage viewed approx: 1,424,959 times. The Court stated that the material is so widely accessible that an order would make very little practical difference.

3.1.31 Paparazzi and Diana

Lord Spencer, brother of Diana the Princess of Wales stated: ……that of all the ironies about Diana, perhaps the greatest was this ….. A girl given the name of the ancient goddess of hunting was in the end the most hunted person of the modern age[64]. The problem comes from freelance paparazzi (professional photographers who specialize in taking photographs of famous people and selling them to the media), who go to any extent to take these photographs. Princess Diana has been blamed of opening herself to the press for her own purposes and at the same time blaming the press when it goes out of her control.

In one case, Princess Diana had to obtain an injunction against Martin Stenning, a photographer, from harassing her for a long time in

[63] *Mosely* v. *News Group Newspapers* [2008] E.W.C.H. 687.

[64] 'Princess Diana, Privacy law and press freedom in the United Kingdom-UK Law online', p. 4, http//www.leeds.ac.uk/law/hamlyn/princess.htm. Retrieved on June 12, 2000 .

August 1996[65]. In an earlier case involving the same photographer, the princes jumped out of her car and took his motorcycle ignition key to stop him from following her. The writ treated the freelance press photographer like a stalker. He was prevented from communication or attempting to communicate, molesting, assaulting and harassing her or otherwise interfering with her safety.[66]

Princess Diana's tragic death in a car crash in Paris, wherein her partner Mr. Dodi Fayed was also killed raised great concerns regarding privacy and press freedom in the UK. Still the death of Princess Dianna was the subject of more newspaper coverage than many other events. It set a media record, according to Durrants Press Cuttings agency[67]. Thus even in death the press was behind her.

3.1.32 Broadcasting, through Television, and Internet

Broadcasting through television and publishing through website can cause extended injury and the news can cross borders and be out of the control from the source. When statutory protection was lacking, there came a dispute as to the responsibility of the press towards miners, in *R v.Central Independent Television Pictures.*[68] The issue was regarding a series of television programs called '*Scotland Yard'* that depicted the work of the Police. One such programme was concerning a man who was convicted of an offence involving indecency with young boys and sentenced to six years imprisonment. When the plaintiff saw a trailer of the programme, she recognized the man as her former husband and the

[65] *Id.at p. 3.*

[66] *Ibid.*

[67] *Ibid.*

[68] *R.* v.*Central Independent Television Pictures* (1994) Fam 192.

father of her daughter aged five years old. In order to avoid harm to her daughter, she asked the programme to be altered to prevent identification of the man as her father. The defendant company did not agree. Though the plaintiff obtained an injunction from the court, the Court of Appeal unanimously allowed an appeal by the defendant. The court held that however distressing it may be for the child, it cannot apply to the publication. If such a justification is allowed, it could be exercised to restrain the identification of any convicted criminal who has young children. Though the case ended up unsuccessful, a complaint was lodged with the Broadcasting Complaints Commission; which also dismissed the complaint, ruling that the broadcast of the full programme was justified in public interest, though it was an invasion into the privacy. Years later in *R*.v. *Broadcasting Complaints Commission*[69], two television documentaries showed some existing film footage of children in connection with their subject matter, one of which happened to be a child murderer. The parents of the children shown in the footage of the impending broadcast were not warned. One matter was relating to Annette Wade, a child who had been raped and murdered in 1989. Two years later, *Granada Television* broadcasted a program titled 'How safe are our children? The programme showed a photograph of Annette and foot age from a previous programme showing the police searching for her. Annette's father saw the programme by chance in a crowded pub and became acutely distressed. *Granada* argued that these matters were already in public domain. The Court said that this fact alone did not prevent it being an infringement of privacy. Here the court elaborated upon Article 8 of the ECHR and stated that privacy extended to his family.

[69] *R*.v. *Broadcasting Complaints Commission ex p. Granada Television Limited* [1995] E.M.L.R 163.

Court applied the same reason as applied in Annette's case in Max Mosley, who got engaged into sexual activity with five[70] women. The courts have stated that whether you are involved in a positive or negative act, the question is whether the matter exposed to the public comes within public interest or is simply used for commercial gains. When there is no public interest manifested, then the media gets no protection, even if it happens to be a negative act which is disclosed, by the media.

3.1.33 Remedies

The most sought out remedy by the claimant is an injunction but it is rarely given. The next remedy sought is damages. Though in some cases no amount of money can possibly compensate, such as in the case of *Mosley,* still compensation is given. *Campbell*[71] received only 3500 Pounds, while Michael Douglas and Catherine Zeta[72] Jones got around 15,000/- Pounds. Max Mosely recovered an amount of 60,000/- pounds[73]. Though the Courts have stated that damages should not go as high as for loss of body parts, definitely thus there is a limit to which damages can be awarded.

3.1.34 Balance between Private Information and Public Interest

The underlying concepts involved by the British Courts through the various decisions; can be based on answers to certain questions.
They are as follows:

1) Whether there has been breach of confidence or contract?

---

[70] *Mosley* v. *News Group Newspapers*[2008]E.W.C.H. 687 (Q.B.) .

[71] *Supra n.33.*

[72] *Supra n.37.*

[73] *Supra n.70.*

2) Whether there has been implied breach of confidence?

3) Whether there is defamation?

4) Whether there is reasonable expectation of privacy in relation to that private information. – Which categorizes information, which escapes protection as being trivial or minor?

5) Whether the information claimed to be private is in public domain?

6) The balance to be struck between the public interest and the privacy involved in publishing of that information.

The last test is considered to be the best test and it balances properly the right to privacy and the right to freedom of information. The last test has been derived through the *Campbell decision* and the later decision in *HRM Prince of Wales* v. *Associated Newspapers* Ltd[74].

3.1.35 Before and after Human Rights Act 1998

Even before the enactment of Human Rights Act, 1998, the movement of English Courts was getting flexible towards privacy, reflected through doctrine of confidence. After the Act, in the *Campbell* case, it was extended to questions as to disclosed facts, whether the person had a reasonable expectation of privacy. The Courts started viewing information already in the public domain as entitled to protection on the ground that it could still be viewed as private. In *Campbell* both types of public domain issue arose. The issue of pictures of *Campbell* walking out to buy a bottle of milk is something in the public domain and need no protection. At the same time photos showing

[74] *H.R.M.Prince of Wales* v. *Associated Newspapers Ltd*. [2006] All E.R.(D) 335.

her going for drug treatment, in the opinion of the court, though in public domain, needed protection. Thus, it was made clear that the gathering of information in a public spot did not mean it lost its confidentiality.

The above approach was made clearer in *Von Hannover* [75]*Case*, showing the Strasbourg view. *Von Hannover* laid the foundation of Privacy Law. Here the European Court of Human Rights stated that simply taking photographs of the princess while in public infringes her right to privacy until and unless, it is while she is performing a public duty.[76] In-fact, no liability like in *Von Hannover's case* has yet been imposed in by the British Courts. In *Mckennit* v.*Ash.*[77], though Buxton L.J. did not agree with the above decision but he did conclude that under section 6(1)[78] and (3) of the Human Rights Act, 1998, the Courts as a public authority, is required not to act in a way incompatible with a convention right. He stated that this can be done by absorbing the rights in article 8[79] and 10 of European Convention on Human Rights for breach of privacy.

3.1.36 Contempt of Court Proceedings

Contempt of Court proceedings are based on the acknowledged concept that no one should interfere with the due administration of justice. The principle being that a fair trial should take place having all

---

[75] *Supra n.*46.

[76] *Ibid.*

[77] *Mckennit* v. *Ash* [2006] E.W.C.A. Civ. 1714.

[78] Human Rights Act 1998, section 6(1) reads : "It is unlawful for a public authority to act in a way which is incompatible with a convention right", Section 3 of H.R.A. 1998 reads : 'Public Authority' includes (a) a court or tribunal.

[79] E.C.H.R., 1950, Article 8- "*Right to respect for 'Privacy'* ", E.C.H.R., Article 10 - "*Freedom of Expression*".

the principles of natural justice. If a trial is conducted simultaneously by someone else, it would definitely debar a proper trial.

A news report giving the confessions by members of the murderer's family and neighbours could affect the subconscious mind of a Judge who reads the paper and if this Judge happens to sit over the case, it might affect the trial, especially in a country where jury system is practiced. It therefore becomes more relevant that newspapers should not conduct parallel trial while the case is in the Court. As Lord Diplock remarked: 'trial by newspaper or, as it should be more compendiously expressed today, trial by media, is not to be permitted in this country'[80].

3.1.37 Criminal Court

The court likely to be affected by media in UK is the Crown Court. Here all criminal trials are held by jury. It is just not the Jury; even Judges can get biased by media reports. In *Attorney-General* v. *British Broadcasting Corporation and Hat Trick Productions* Limited[81], contempt proceedings were brought in relation to the popular BBC Comedy programme '*Have I got news for you'*. The then presenter Angus Dayton referred to the Maxwell brothers, who were awaiting trial for fraud as "heartless scheming bastards". Each respondent was fined 1,000/- Pounds, as the Court stated that it had been shown at peak time and had been repeated and had reached a total audience of some 6.1 million people.

---

[80] *AttorneyGeneral* v. *English* [1983] A.C.116.

[81] *AttorneyGeneral* v. *British Broadcasting Corporation* and *Hat Trick Productions Limited*, unreported, 12 June 1996 as cited in - Peter Carey & Jo Sanders, *Media Law* , Sweet & Maxwell Ltd. London, (2004) ,p. 161.

In *Attorney-General* v. *Morgan*[82], it was concerning a large scale conspiracy to distribute counterfeit money. The article was titled "*We smash 100 m Pound fake cash ring*". Tony Hassan and Anthony Caldori applied for a stay of proceedings at trial due to the article in *The News of the World*. At the time of publication of the article the time delay to trial was about eight months. The Court held that, although this was a delay of considerable time, still there is every possibility that the jury would remember the references, the criminal background of both, and it could not be forgotten and therefore could prejudice the trial. At the same time in *Attorney General* v. *Independent* [83]*Television News* regarding murder of a police officer, the news item stated that the suspect was an Irish Republic terrorist who had been convicted of the murder of an SAS Officer. Trial took place nine months after the broadcast. But here the Court did not find that press had committed any contempt because the Court stated that the time gap was enough for memories of news item to fade.

3.1.38 Time of publication

Sometimes the timing of the publication is very crucial. It can cause substantial loss or damage. Such was the case of *Attorney-General* v. *M.G.N. Limited*[84], where the paper published an interview with the father of the victim of an assault, in which, among those charged included Leeds United Footballers. The article stated that it was racially motivated. The Jury was told that such was not the case. This publication in the news came in over the weekend when the jury was sitting to decide

[82]*AttorneyGeneral* v. *Morgan* [1998]E.M.L.R. 294.

[83]*AttorneyGeneral* v. *Independent Television News* [1995]1Cr.App.R.204 I.T.N.

[84]*AttorneyGeneral* v. *M.G.N.Limited* [2002] E.W.H.C.907.

the verdict and therefore it was thought that it would prejudice the decision. As a result, the trial got aborted and costed more than 1 million Pounds. Such being the case, *'The Sunday Mirror'* was fined 75,000/- Pounds but in another case, '*The Sun'* was fined only 35,000/- Pounds because they had apologized quickly[85]for their wrong.

The media might state that though the jury might get biased, the Judge can be independent and can also appoint people who have not read this article. This seems to be a difficult proposition. Such careless attitude of the media puts the burden on the prosecution to prove the seriousness of the risk involved. In many such cases, jury trial may be terminated and the pecuniary loss involved may run into a large amount.

3.1.39 Fair and accurate report of legal proceedings

The Contempt of Court Act of 1981 protects fair[86] and accurate report of legal proceedings. Section 5 also states that where it appears to be necessary for avoiding a substantial risk of prejudice to administration of justice, the court may order that the publication of any report of the proceedings or any part thereof be postponed for such period as the court thinks necessary for that purpose. At the same time, a publication[87]made as

---

85 *AttorneyGeneral* v. *News Group Newspapers* (April 16, 1999, unreported) as cited in Peter Carey & Jo Sanders, *Media Law*, Sweet & Maxwell Ltd London,(2004), p. 162 . Here one accused was convicted of conspiracy to bomb and the Jury adjourned overnight to consider the murder charge. *The Sun* published an allegation that the man McCartle was under arrest as an IRA Snipper. Due to this publication, the murder charge was abandoned and the case was referred to the Attorney General for prosecution.

86 The Contempt of Court Act 1981, section 4(1) reads 'a person is not guilty of Contempt of Court under the Strict liability rule in respect of a fair and accurate report of legal proceedings – held in public, published contemporaneously and in good faith'.

87 *Id.s.* 5.

or as part of a discussion in good faith of public affairs or other matters of general public interest is not to be treated as a contempt of court under the strict liability rule if the risk of impediment or prejudice to particular legal proceeding is merely incidental to the discussion.[88]

3.1.40 Innocent Publication or distribution

The Act states that a person is not guilty of Contempt of Court[89] under the strict liability rule, if at the time of publication or distribution having taken all reasonable care, he does not know and has no reason to suspect that relevant proceedings are active.

3.1.41 Relevant Proceedings Active

Only Criminal proceedings which are active attract section 3 of the Contempt of Court Act, 1981. These proceedings get active when a person is arrested with or without warrant, issue of summons or service of a document specifying a change. They cease to become active when the arrested person is released with being charged or no arrest is made within 12 months of the issue of warrant or the case is discontinued or the defendant is acquitted or sentenced or is found unfit to be tried[90].

3.1.42 Discussion of Public Affair

The Act through section 5[91] gives another defense to publishers in matters of public interest. The defense is seen successfully used by

---

88 *Ibid.*

89 The Contempt of Court Act 1981, s. 3.

90 *News Desk – UK*; Law update Contempt of Court http://www.newsdesk-uk.com/law/contempt.html retrieved on 25/7/09.

91 The Contempt of Court Act 1981, section 5: "A publication made as or as part of a discussion in good faith of public affairs or other matters of general public interest is not

the media in *Attorney-General* v. *English*[92]. *The Daily Mail* had published an article in support of a pro-life candidate for parliamentary election criticizing the practice of allowing deformed bodies to die of starvation.

This article was published in the same week when a doctor was tried for murder. The fact against him was that he had allowed a handicapped boy to starve. An order for having committed strict liability contempt against the editor and owners of the paper was not allowed by the Court. The above defense of discussion of public affairs was taken by the media. The test put forward by the Court was whether the risk created by the words actually written by the media, was more in the nature of discussion of public affairs and, was no more than an incidental consequence of getting its main theme across. In this case the *Daily Mail* article made no mention of the doctor's trial and therefore, the paper succeeded in its plea.

3.1.43 Intentional Contempt

Though a person may escape under the Act of 1981, where the risk of prejudice is merely incidental to the discussion of public affairs, it is still possible to connect that person of contempt under the Common Law offence of Contempt[93]. In *Attorney-General* v. *News Group Newspapers Ltd.,*[94] '*The Sun'* had published articles 'Rape Case Doc: Sun Acts' and

to be treated as a contempt of court under the strict liability rule of the risk of impairment or prejudice to particular legal proceedings is merely incidental to the discussion".

92 *AttorneyGeneral* v. *English* [1982]2 All E.R. 903.

93 Section 6(c) of the Contempt of Court Act,1981 reads, "Nothing in the foregoing provisions of the Act ……. restricts liability for Contempt of Court in respect of conduct intended to impede or prejudice the administration of justice".

94 *AttorneyGeneral* v.*News Group Newspapers* Ltd;[1988] 2 All E.R. 906 .

'Doc groped me, says girl'. The articles referred to the alleged rape of an eight year old girl by a 'Dr. B'. The Director of Public Prosecution in the absence of any evidence corroborating the girl's story, decided not to proceed with the case. At that time, *The Sun* made an offer to the girl's mother to fund a private prosecution of the doctor. She accepted the offer and after the doctor was acquitted, the Attorney-General brought an application for contempt at Common law against *The Sun*. The press was fined 75,000/- pounds by the Court.

The above decision was criticized on the basis that proceedings against the doctor were neither pending nor imminent at the time of publication. So no Contempt should have occurred, in this case.

Attorney-General v Sport Newspapers Ltd[95] was a case regarding an article by '*The Sport'* concerning missing school girl Anna Humphries, who was raped and murdered by David Evans. Evans was arrested in France five days later and convicted in the following year. The Court held that in this case, the publishers had not intended to prejudice the administration of justice.

3.1.44 Reporting of Cases

On an arrangement between the court and press, the journalists are seated in the Court to get the case on hand. This is done as they are supposed to represent the people. In UK they are even allowed to attend hearings – such as Youth Court proceedings[96]. In certain cases, the court may hold *in camera* proceedings, where there could be danger of disorder in the Courtroom or identity of witness or who needs protection etc. Even in

[95] *AttorneyGeneral* v.*Sport Newspapers* Ltd [1991]1 All E.R 503.

[96] The Children and Young Persons Act, 1933, s. 47.

such cases, the media may make representation to be allowed in, and can also appeal against the decision to the Court of Appeal[97].

3.1.45 Children or Young Persons

Normally, when a juvenile is involved in a case, the Court directs, as per section 39 of the Children and Young Persons Act, 1993[98], the press not to reveal the name, address or any particulars which leads to the identification of the child or young person. No picture of the child or young person shall be published or broadcasted.[99]

In R. v.*Central Criminal Court exp. Godwin and Crook*[100], Mr. and Mrs. S were tried and convicted of manslaughter of their son and cruelty to three of their other children. In this case the Court made an order under section 39 for the protection of children. The section states that where a person is charged with a sexual offence and if the Director of Public Prosecutions is of the opinion that the three elements stated therein are satisfied viz: (i) that a child is involved as a victim or witness, (ii) it is to avoid prejudice to the child and (iii) the offence is of the nature to be tried in the Crown Court, then in this situation the case will be transferred to the Crown Court without any consideration by the magistrates[101].

3.1.46 Youth Justice and Criminal Evidence Act, 1999

This Act requires that where young people are involved in an offence, which is in Court, then there should be a ban on reporting

---

[97] The Criminal Justice Act, 1988, s. 159.

[98] The Children and Young Persons Act, 1993, s. 39.

[99] *Ibid.*

[100] *R.* v.*Central Criminal Court exp. Godwin and Crook* [1995] 1 F.L.R. 132.

[101] Criminal Justice Act 1991, s. 53.

anything which leads to their identification.[102] This protection is available from the moment a criminal investigation starts[103].

3.1.47 Rape Cases

In rape cases, special care is taken and it is an offence to publish or broadcast the name, address or pictures of a woman once she or any other person had made an allegation of a rape offence against her[104].This restriction remains in force for the lifetime of the victim. Once she is accused of rape, the law becomes more stringent.[105] Then no matter or article likely to lead members of the public to identify the woman shall be published or broadcasted[106].

In certain instances, the media will be allowed to publish, where the judge makes a direction to remove restrictions.[107] This is done where an application by the person accused of a rape offense before the trial, for inducing persons to come forward likely to be needed as witness or if the judge feels public interest demands the restriction to be removed[108]

The offence of rape includes attempted rape, aiding, abetting, and counseling, procuring rape, conspiracy and burglary with an intention to rape. The woman who is the victim may give written consent to the publication of the matter which may lead to her identity. This can be

[102] The Youth Justice and Criminal Evidence Act, 1999, s.44.

[103] *Ibid.*

[104] Sexual Offences(Amendment) Act, 1976, s. 4(1)(a).

[105] *Id.* at s. 4(1)(b).

[106] *Id.* at s. 4(1)(b).

[107] *Id.* at s. 4 (2) and (3).

[108] *Ibid*.

used by the media as defence[109]**.** The benefit of anonymity is given to male rape victims also[110].

3.1.48 Journalists Sources

The information obtained by journalists is usually from people who want to keep their anonymity. So the source of information needs to be protected in public interest. Contempt of Court Act, 1981 protects the right unless it can be established that disclosure is necessary in view of national security, justice, prevention of crime or disorder[111].

Conclusion

From the common law to the recent Human Rights Act, 1998, the object is to protect the inalienable right of privacy against the powerful media houses. By its inherent power of interpretation the courts have succeeded in resisting the commercial thirst of the press. The courts have always protected media if it is in the public interest. The difficulty arises when profit motive is intricately twined with the necessity of public interest, as defense, by media. Here it becomes difficult for the courts to separate one from the other. Such was the case of *Naomi Campbell***,** where the press strongly pleaded, that their main object was to expose the false statement made by her, that she is not a drug addict**,** while actually she was**.** It was indeed a tough time for the Court, to protect her ,as she was taking treatment to get healed, in spite of the fact that the press were right in their argument regarding her hypocrisy and their public right to expose it**.**

[109] *Id.* s. 4(5A) .

[110] Male rape was made an offence by the Criminal Justice and the Public Order Act, 1994.

[111] The Contempt of Court Act, 1981, section 10.

The Court very clearly explained that there is no public interest in exposing a person's false statement if it is going to hamper the person's mental state and de motivate the person from taking further treatment. In such a case the public has nothing to gain but in the process may lose the country's top model. In this case it is very clear that the main object of the press was in fact to make commercial profits as this news item will sell millions of copies of tabloid, on the defense of public interest. The courts have come out strongly for a single individual as against the power block media. The compensations awarded have gone in millions depending upon the damage and the profit made on that behalf. It is indeed a commendable approach on the part of the court in line with justice, equity and good conscience.

The government of UK is taking a very strong exception to this practice regarding media freedom and it is to be seen how the parliament deals with it. Such approaches are needed when the media houses reach levels where they can easily dictate its terms. This is definitely a very big blow to media, as lately they have been transcending all boundaries, national and international to reap commercial gains and rule nations by lobbying with no regard to human dignity and respect.

.....ൠ.....

Chapter 4

RIGHT TO PRIVACY AND FREEDOM OF PRESS IN THE UNITED STATES OF AMERICA

4.1 Introduction

United States of America is the land which is known for its First Amendment, which guarantees freedom of expression. Fourteenth Amendment makes the state comply with its provisions to ensure due process for its citizens. Although the word 'privacy' does not appear in the Constitution of America, through the due process clause the Supreme Court has given privacy a constitutional position based on the First, Third, Fourth, Fifth , Ninth and the Fourteenth Amendments[1]

---

[1] **First Amendment** – Right of freedom of religion, freedom of speech, freedom of the press, freedom of assembly and freedom of petition.

Third Amendment – prohibits the government from using private homes as quarters for soldiers during peace time without the consent of the owners.

Fourth Amendment – guards against searches, arrests and seizure of property without a specific warrant or a probable cause to believe a crime has been committed. Some rights to privacy have been enforced from this amendment.

Fifth Amendment – prohibits double jeopardy, forbids punishment without due process of law and prohibits self incrimination.

Ninth Amendment – declares that the listing of individuals rights in the Constitution and the Bill of Rights is not meant to be Comprehensive and is retained by people.

Fourteenth Amendment – defines a set of guarantees for US citizenship, prohibits states from abridging citizens privileges or immunities and rights to due process and equal protection of the law. United States Constitution from Wikipedia, the free encyclopedia http://en.wikipedia.org/wiki/united -states-Constitution Retrieved on 27/7/09.

4.1.1 Privacy

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

> 'intensity and complexity [2] of life , attendant upon advancing civilization, have rendered necessary some retreat from the world and man under the refining influence of culture, has become more sensitive to publicity so that solitude and privacy have become more essential to the individual, but modern enterprise and invention has through invasion upon his privacy, subjected him to mental pain and distress, far greater than could be inflicted by mere bodily injury.'[3]

At no time in American history has the 'right to privacy' generated such heated controversy as in Watergate.[4] It disclosed confidential official secrets, which resulted in the resignation of President Nixon of the United States of America. Watergate provided the impetus for the landmark Privacy Act 1974, which limits the federal government's ability to disclose information about a citizen. [5]

4.1.2 Early Developments of Privacy in USA

Though there were many cases on privacy, the first higher American Court to deal with this right was a New York Appellate

---

2 Warren and Brandeis ,'The Right to privacy', 4 Harv. L. Rev.193.(1890).

3 *Ibid*.

4 www. referenceforbusiness.com/encyclopedia. Retrieved on 27/02/2013.

5 *Ibid.*

Court, in 1902. In *Roberson* v. *Rochester Folding Box Co*,[6] Chief Justice Parker stated that right of privacy–is the right to be left alone and he mentioned about the article written by Warren and Brandeis .The Court said that invasion into a marriage goes against privacy concept"[7]

But it was only in 1965[8], that the US Supreme Court implied a right to privacy in the US laws, wherein the Court struck down a law prohibiting the use of contraceptives. The Court said the very idea as repulsive to the notion of privacy surrounding the marriage relationship.[9] In *Katz* v. *United States*[10], it was held that an individual is protected by Fourth Amendment wherever he or she has a 'remarkable expectation of privacy'.[11] Protection of privacy under the Fourth Amendment seems to have been confusing. The reason being that the Fourth Amendment does not refer to privacy; it only states protection from seizures and arrests etc.[12]. The law must develop a more objective and sociologically accurate description of privacy. When it comes to privacy, many a times it is discriminated between lesser privacy right and greater privacy right. The violation of greater privacy right happens when the society has nothing to gain from that publicity but the individual suffers a great loss due to that media exposure. The reason being that privacy is culturally diverse concept

6 *Roberson* v. *Rochester Folding Box Co*, 64 N.E.442 (N.Y.1902).

7 *Ibid.*

8 *Griswold* v. *Connecticut* (1965) 381 U.S. 479, http://www.legalserviceindia.com/articles/ pri- r.html retrieved on 28/7/09.

9 *Ibid.*

10 *Katz* v. *United States* 389 U.S. 347 (1967) .

11 *Ibid*.

12 *Supra n.* 1.

and it is unlikely that a single fair hierarchy of privacy concerns can be formulated which can satisfy all people everywhere

4.1.3 Social View and Newsworthiness

The social view of the First Amendment focuses on the utility of the First Amendment for society at large. Speech ought to be protected to promote rich public debate leading to an informed citizenry capable of casting intelligent ballots[13]. In choosing between these two approaches of social view of First Amendment and Newsworthiness, the Supreme Court and lower Courts have embraced the social view in their analysis of private facts and the lower courts have designed a newsworthiness criterion to advance this object.

While the newsworthiness criterion to protect speech that enriches public debate is clearly defined, its application is not defined. The reason being that one court could hold that disclosure of one's sexual identity is newsworthy because it influences the public impression of gays[14]. While another Court could consider it not newsworthy because information so personal should not be of public concern such was the case where the Alabama Supreme Court held that publication of a photograph showing the plaintiff with her dress blown up as she was leaving a farm house was an invasion of the plaintiff's privacy[15].

The problem is that either of these views is consistent with the social view, this grants Court broad discretion and allows inconsistent

---

[13] Joseph Elford,Trafficking in Stolen Information:A" Hierarchy of Rights''-Approach to the Private Facts Tort'',105 *Yale Law Journal* ,p.729 (1995).

[14] *Id.at* p. 730.

[15] *Daily Times Democrat* v. *Graham* 162 SO. 2d474(Ala.1964) *id*. at 478 .

results, stripping the First Amendment of its ability to provide uniform protection of speech[16].

These questions many a time rise in the case of embarrassing private facts. Courts have been seen bending in favor of public disclosure in some cases while in others the Courts favor privacy.

4.1.4 Past History

In *Melvin* v. *Reid*[17], the matter was regarding revealing of the past history of one time prostitute, who had been tried for murder and acquitted after which she changed her character and got married. Some time later her past history was exhibited in a film using her maiden name. She was scorned and abandoned by her friends. The Court favored the plaintiff's case, concluding that usage of plaintiff's name after her reformation was not justified by morality and was a direct invasion into her inalienable right, viz. right to privacy.[18]

4.1.5 False facts

In *Time Inc* v. *Hill*[19], the plaintiff brought an action in a New York State Court under a New York statute protecting the right to privacy for damages alleging that an article in *Life magazine* reported that a new play portrayed an experience suffered by plaintiff and his family when held hostage by escaped convicts in plaintiff's home. The US Supreme Court Held that in the absence of proof that the defendant published it with the knowledge of its falsity, the statute is not applicable.

---

16 *Ibid.*

17 *Melvin* v. *Reid*, 112 Cal. App. 285, 297 Pac. 91(1931) .

18 *Ibid.*

19 *Time, Inc* v. *Hill*, 385 US 374; 17L Ed 2d 456 (1967) .

In yet another case[20], *Cantrell* v. *Forest City Publishing Co.,* a mother and her son brought an action against the respondents, a newspaper publisher and a reporter, for invasion into privacy based on a feature story in the newspaper discussing the impact upon the plaintiff's family of the death of the father in a bridge collapse. The story contained a number of inaccuracies and false statements about the family. The US Supreme Court explained that in this case the lower Courts including District Judge and the Court of Appeal had made an error. They were not referring to the *New York Times*[21] "actual malice" standard, as explained therein but to the common-law standard of malice that is generally required under state tort law to support an award of punitive damages. In cases where facts are 'in a false light' the court should focus on the defendant's attitude towards the plaintiff's privacy and not on the truth or falsity of the material published.

4.1.6 The Actual Malice Standard

Malice and false or reckless behavior on the part of the press is often mixed up in US case discussions. If facts prove that there is malice, it could be case of libel or slander. Simply because the facts are false is sometimes not enough to convince the US Courts as seen in some of the earlier cases. *Sullivan* in fact established the "actual malice standard," which has to be followed before press reports about public officials or public figures can be considered to be defamatory and hence allowed free reporting of the Civil Rights Campaign in the Southern United States. It was held that the plaintiff has to prove that the publisher of the statement in question knew that the statement was false or acted in

[20] *Cantrell* v. *Forest City Publishing Co*., 419 U.S. 245 (1974).

[21] *New York Times Co.* v. *Sullivan*, 376 U.S. 254 (1964).

recklessly, in total disregard of its truth or falsity. Because of the heavy burden of proof, to prove what is inside a person's head, such cases involving public figures rarely prevail and the media goes scot-free.

Before this decision, there was large number of libel actions against news organizations from the Southern States. They were reporting on Civil Rights infringements and wide spread disorder in Southern States. This decision gave protection to the press to report about these violations without fear[22]. It has been repeatedly quoted as precedent by several later decisions of the US Supreme Court.

4.1.7 "Malice"

Following the *Sullivan's* case, the US Supreme Court held in *Curtis Publishing Co.* v. Wallace Butts[23] that libel charges may be held sustainable, only if it is proved that there was actual malice on the part of a journalist and it was not enough to prove that what was published was inaccurate.

4.1.8 'Newsworthy' as Defense

In *Cinel* v. *Connick*[24] the facts were regarding seizure of home made videotapes by local police authorities, from a priest engaged in homosexual activity with two young parishioners, copies of which were subsequently leaked to local investigative reporters who broadcasted a part of them. Though the material was improperly leaked from investigative files, the Federal District Court held that disclosure of the information did not violate the plaintiff's right of

---

[22] *Ibid.*

[23] *Curtis Publishing Co*. v. *Wallace Butts* 388 U.S. 130 (1967).

[24] *Cinel* v. *Connick* 792 F. Supp. 492 (1992).

privacy because the information reflected on the guilt or innocence of the plaintiff-priest and was therefore protected by the' newsworthiness' privilege.

At the same time certain news items were held not qualify the test of 'newsworthiness'. In *Leverton* v. *Curtis*[25] *Pub. Co.,* the Court had to consider the interference by the press without the consent of the aggrieved person. The plaintiff was photographed at the scene of a traffic accident, where due to no fault of her own, she was hit by an automobile. This picture appeared in the local newspaper the next day. Later the picture was used by the defendant in its magazine twenty months later to illustrate an article discussing an injury resulting from pedestrian's carelessness. The captions along with the picture stated that plaintiff had been injured through her own negligence. The plaintiff charged that defendant's use of the picture violated her privacy as it reflected a wrong notion of her accident, which went against 'newsworthiness' concept. The Court gave judgment in favor of the plaintiff. In this case there is no 'newsworthiness' in the picture as the picture had no relevance to the topic discussed, though the object behind the picture and caption were good. Here the journalist acted little carelessly in choosing this picture.

4.1.9 Social View

In *Cox Broadcasting Corp*. v. *Cohn*[26], the reporter employed by a television channel during a news report of a rape case, broadcasted the deceased rape victim's name, which he had obtained from the public records available for inspection. The father of the victim brought a damage action claiming that his right to privacy has been invaded by the

[25] *Leverton* v. *Curtis Pub. Co*., 192F. 2d 974 (3d. Cir .1951).

[26] *Cox Broadcasting Corp*. v. *Cohn*, 420 U.S. 469 (1975).

broadcast of his daughter's name. The Company argued that the rape victim's name was a matter of public interest.

The Georgia Supreme Court held that once the rape victim's name is in the official records open to public inspection, there is no invasion of privacy. This was a decision in favor of social view, by protecting newspapers that publishes a rape victim's name, which was obtained from official Court records.

Later, in *Florida Star* v. *B.J.F,*[27] the view of the Supreme Court was changed slightly in the privacy perspective. Appellant *B.J.F* reported to the police department that she had been robbed and sexually assaulted. The Department prepared a report which identified *B.J.F* by her full name and placed it in the Department's press room. The Department had not restricted access to the room or to the reports available there. A *Star* reporter-trainee sent to the press room copied the police report verbatim, including *B.J.F*'s full name. Later her name was included in a "Police Report" story in the paper, in violation of the *Star*'s internal policy. The Court protected the newspaper by stating that truthful publication is automatically constitutionally protected and that there is no zone of personal privacy within which the State can protect the individual from intrusion by the press, even to the extent that a State can never punish publication of the name of a victim of a sexual offence.[28] This decision shows a conceptual variation in the thinking of US Supreme Court Judges. Social view does not allow the right of privacy to extend so far

[27] *The Florida Star* v. *B.J.F*., 491 U.S. 524 (1989).

[28] *Ibid*.

that it prevents publication of the details of a person's involvement in a crime or calamity[29].

4.1.10 Fictionalizing – not a defense

Publication of news, which has the effect of fictionalizing the facts to make it commercial, which may otherwise be permissible, has been held actionable in *Man* v. *Grenade*[30]**.** Plaintiff was a chauffeur who was, held up by a robber, shot & suffered serious physical harm. This incident left him mentally ill, to such an extent, that mere mention of the incident caused acute nervous attacks. Almost a year and a half after the shooting, the defendant Corporation produced over a radio station in San Francisco, a dramatization of the holdup using the plaintiff's name without his consent. Plaintiff claimed that the broadcast caused him severe mental anguish, aggravated by phone calls from friends and that as a result he became too upset to drive safely and was discharged from his job. Defendant's motion to dismiss the case was denied on the authority of Melvin v. *Reid*[31]*, wherein* the court had stated that past history should not be shown if it causes trauma to the plaintiff, thereby the court recognized the right to privacy.

In these cases, man became a public figure against his will. Actually disclosure of these events was less informational and more harmful, just like in the case of a photograph of a woman, whose dress was lifted up by a jet of air at a farm house, showing her panties. The Court ruled, that it failed the test of "legitimate news interest to the

---

[29] *Clnhurst* v. *Shereham Hotel* 58F. Supp. 484 (D.D.C 1945).

[30] *Man* v. *Rio Grenade Oil Inc*., 28F Supp.845 (N.D.Cal.1939).

[31] *Supra* n.17.

public" and upheld an award of $4166 to plaintiff for invasion of her privacy[32], as it revealed her very private part of her body.

4.1.11 Reality made a commercial gain

There are several television programmes in the USA that shows paramedic's or firemen rescuing people. When someone calls for emergency assistance, a television camera follows them to the house. Here the victim is hardly in a position to either consult or protest to the invasion of privacy[33].

In *Miller* v *N.B.C.*[34], the Court commented on the dearth of precedents for similar intentional trespasses and invasions of privacy. The Court referred to some of the precedents[35] and many of them involved bizarre facts, and not accidentally. So all involved intrusions were generated by curiosity. The Court in *Miller* – made it clear that a film crew entering a home with paramedic's was an intentional trespass that is actionable in tort. Hence the Court extended the protection of tort law as in UK.

In Baser v *Time, Inc*[36], the case was regarding a photograph printed in *Time Magazine* along with a story that the woman picturized was a hospitalized "starving glutton" who ate vast amounts of food and yet was loosing weight. Here the Missouri Supreme Court affirmed a verdict of

---

[32] *Daily Times Democrat* v. *Graham*, 162 SO. 2d474(Ala. 1964).

[33] *Shulman* v. *Graip W Productions*, 59 Cal. Rptr.2d 434 (1997).

[34] *Miller* v *N.B.C.*, 232 Cal.Rptr.668 (1986).

[35] Hospital intrusion cases where the person whose privacy was invaded was ill or dying, e.g. *Barler* v. *Time*, Inc; 159S.W 2d 291(MO. 1942); *Estate of Berthianme* v. *Pratt*, MD, 395. A.2d 792 (MC. 1976), where the hospital authorities summoned the Press to take pictures of a deformed infant who had died in the operating room.

[36] *Baser* v. *Time*, Inc, 348 MO. 1199, 159 S.W 2d 291(1942).

$1500/- against *Time Magazine* for invasion into woman's privacy. However in *Metter* v. *Los Angeles Examiner*[37], the photograph of a woman who committed suicide came in the papers. The Court held that a woman, who jumped from the twelfth floor, has thereby waived the right of privacy and her husband's as well.

4.1.12 Lack of Consent

Consent of the performer is important before a picture of the performer is put in the papers or broadcasted for advertisement. In *Zacchini* v. *Scripps Howard Broadcasting*[38], the case was concerning the filming of an entire act of a circus performer and showed as television news broadcast in 1972. The day before the filming, the performer had asked the reporter not to film it. The performer sued for "unlawful appropriation" of his performance. The US Supreme Court and the Ohio Supreme Court held that the television station had no immunity under freedom of press[39].

4.1.13 Interest or likeness

Prosser in his article[40] and in the Restatement (Second) of Torts[41] classifies four basic kinds of privacy rights of which the third type reflects protection of publication of private facts, for example, sexual relations, personal letters, family quarrels, medical treatments,

---

[37] *Metter* v. *Los Angeles Examiner* 35 Cal. App. 2d 304, 95p.2d491 (2d Dist. 1939).

[38] *Zacchini* v. *Scripps – Howard Broadcasting*, 433 U.S. 562 (1977).

[39] New York Civil Rights law makes it a misdemeanor the unauthorized use, within the state of the name, portrait or picture of any living person for advertising purposes or trade (Section 51)

[40] William L. Prosser, 'Privacy', 48 *California Law Review* 383 (1960).

[41] *Restatement (Second) of Torts* at pp. 652 A – 652 I (1977).

photographs of person in his/her home and Income tax details.[42] Another kind of privacy Prosser describes is a person's likeness[43]. This kind of privacy is widely accepted in the USA. Cases normally involve interest in likeness in reference to usage of it for commercial advertising. In *Flake* v. *Greensboro News Co.* a North Carolina case[44] the plaintiff was a popular singer and a radio entertainer. The city of Greensboro was host to the "Folies diparee". In an advertisement in defendant's newspaper, Sallie Payne gave her figure to "Mett's Rye and Whole wheat bread". However, the equally attractive face and figure of plaintiff were by mistake inserted into the advertisement in Payne's place. Plaintiff sued in libel and violation of the right to privacy, alleging that the "folies" was a 'sensual performance or sex parade'. Plaintiff recovered an award of $6500/-. Later, on appeal the North Carolina Supreme Court threw out the libel stating that to accept plaintiff's argument on the "folies" would be a wrong comment of many young ladies who earn living in that manner and ordered a new trial on privacy violation.

4.1.14 Public Figures

In USA, it has been considered for a very long period, that a public figure is a person who by his accomplishments, fame or profession or for other reasons gives the public a legitimate interest in his work, affairs, character and life. It includes people in diverse fields who have come into prominence and public attention is focused upon him as a person. Such public figures were held to have lost to some extent at least their

---

42 *Ibid*.

43 *Ibid.*

44 *Flake* v. *Greensboro News Co*., 212 N.C. 780, 195 S.E.55(1938).

right of privacy mainly for reason that they sought publicity and now they could not complain that their affairs have become public. This gives future rights to the Press to inform the public about them and their affairs.

'News' includes all events and matters of information which are out of the routine schedule and which have "that indefinable quality of information which arouses public attention"[45]. This privilege of the press was used for dissemination of news which was not necessarily limited to public interest. In determining where to draw the line, the Courts were asked to exercise censorship because many a times people caught in this trap were people who never sought publicity but had in some cases tried to avoid it. Their peculiar position had to some extent cost them some part of their privacy and they had no remedy, until they lost importance in the eyes of the press.

Such was the case of *William Sides*[46] a famous child prodigy in 1910. Twenty-five years later the New York Magazine got interested in him and followed him. *Sides* had attempted to cancel his identity and became a bank clerk with no need to use his unusual mathematical abilities for which he was known in his childhood and lived a quiet life. The appearance of the articles pained him greatly. The Court stated that public figures are subjects of considerable interest, so it would be improper to bar their expression in the news of the day. But in *Cason* v. *Baskin* [47] the plaintiff was an "ageless spinster" who was portrayed in *Cross Creek*, a book. Defendant *Baskin* revealed the intimate characteristics of Miss Cason, who resembled 'an

[45] *Sweenek* v. *Pathe News*, E.D.N.Y.(1936), 16F. Supp.746, 747.

[46] *Sides* v. *F.R. Publishing Co*., 113 F. 2d 806, 809 (C.C.A.2d) (1940).

[47] *Cason* v. *Baskin*, 155 Fla. 198, 20 So., 2d.243(1943).

angry and efficient canary' and possessed 'a special brand of profanity'. The Court held that she was entitled to be let alone, although only minimal damage was proved[48].

It has been presumed that only appropriation for a commercial use is actionable, but not all commercial uses are 'commercial' in this sense. *Sides*' story had no ingredients of commercial nature in it and it was of no use except to bring him pain. The decisions can be best explained in terms of a judicial evaluation of the value of information. The value judgment as to the medium is flexible, rather than rigid.

Thus it can be stated that private citizens claiming misappropriation of identity test must show a personal emotional harm. While celebrities are said to have 'waived' their interest in privacy, they must show an economic harm to succeed in litigation. In both privacy and publicity rights, the issue is the use to which the identity is put.

Courts are often dealing with issues which involve both the commercial and newsworthy aspects. Many of them favour a broader interpretation of commercial aspect when dealing in reference to right of publicity claims whereas a broader defiance to the First Amendment is seen in invasion of privacy claims under the newsworthiness defense.

Thus in many cases concerning publicity and privacy law, the societal interest in freedom of expression is given overriding importance over genuine personal privacy interests.

---

[48] *Cason* v. *Baskin*, 30 So.2d 635 (Fla.1947).

It was stated by the Court in *Arrington*[49], that an inability to vindicate a personal predilection for privacy is part of the price every person must pay for a society in which information and opinion flow openly. In this case, Mr. *Arrington* found the content of the article to which his photograph was attached insulting to a black person of middle class and also to him. Still the Court did not sustain a claim for invasion of privacy as it meant difficulty in preserving a person's privacy just because he is a black. Similarly in *Jackson* v. *Playboy*[50] *Enterprises*, three minor boys were not aware that their presence outside their home would subject them to publication of their picture without their authorization in a pornographic magazine. Though the boys contended, this caused humiliation, the Court was not moved. The Court wanted them to show if at all the defendant appropriated for its own benefit some value in plaintiff's identity – only then privacy could stand under Ohio law.

Thus here again the concept of free speech dominated privacy. So it is better and more promising for private individuals seeking to recover for the unauthorized use of their identity would be to bring a cause of action under the right against publicity. Most statutes do not preclude non-celebrities from protection under the right of privacy[51], where they can claim the cost of their photos and news as commercial products from the press.

---

[49] *Arrington* v. *New York Times Co*., 434 N.E. 2d 1319, 1323 (N.Y. 1982).

[50] *Jackson* v. *Playboy* 574F. Supp. 10 (S.D. Ohio 1983).

[51] Clari E. Gorman, " Publicity and Privacy Rights: Evening out, the Playing Field for Celebrities and Private Citizens in the Modern Game of Mass Media ", 53 DePaul L.Rev. 1247, (2004).

In this modern age of mass media, it is essential, that lines be drawn between the right against publicity and personal control over the commercial use of one's image and news.

4.1.15 The Clinton Issue

It would be right to recall the former US President Clinton issue, wherein he was[52] accused of extra marital sex, while in office. Finally when there was no other way out, he painfully faced the American public, and admitted his guilt, at the same time also pleaded that even Presidents have private lives. He urged that it is time, to stop this prying into private lives.

4.1.16 EU Directive and US Public Figures

When we compare the position under European Court of Human Rights in *Von Hannover*[53] with that of the Californian Supreme Court in *Gill* v. *Hearst Publishing Co*[54], we find a substantial difference. In the latter case, a husband and wife were photographed without their consent while they were, cuddling each other in a public market place. The Court ruled that the publication of the photograph did not itself constitute an actionable invasion of privacy. In this case, there was no news worthiness nor any public interest served, still the US Court justified the press. The view was that they had voluntarily exposed themselves to public gaze and so had waived their right of privacy. While in the former case, of *Von Hannover* even though she was a public figure, the European Court protected her privacy in public places. In the US case,

---

[52] *The Indian Express,* August 19,(1998) Wednesday p. 15.

[53] *Von Hannover* v. *Germany* (2006) 43 E. H. R. R. 7.

[54] *Gill* v. *Hearst Publishing Co*. 253 P2d 441 (Cal.1953), See also *DC Gregorio* v. *CBS, Inc*, 473 NYS2d 922 (Sup. 1984).

the US Court by 'inclusive clause' protected the press, while in the Von Hannover case; the court by 'exclusive clause' protected the public figure. This makes the distinction very vivid and clear.

4.1.17 Obscenity

Though pornography is protected by the First Amendment, this is not the case with obscenity. The Courts were not bold enough to define obscenity. John Marshall Harlon, the former Justice of the United States Supreme Court expressed that if anyone undertakes to examine the Supreme Court's decision regarding obscenity it would find himself in utter bewilderment.[55] The reason for the confusion could be that it could not be equated to straight crimes like theft, rape etc. What is obscene is a subjective question. Art and culture also contribute to it. So it becomes all the more difficult.

4.1.18 Development of obscenity laws

Peter Holmes was convicted in 1821 for publishing John Cleland's Memoirs of women of pleasure, also known as Fanny Hill[56]. During the period between 1820 and 1830, several states passed laws limiting the distribution and sale of obscene materials. This was a period of popular reforms like prohibition and recognition of woman's rights. The first of the laws on obscenity came up in1873. It was the outcome of the workmanship of Anthony Comstock. This postal law implemented through the Post Office department banned books on sex education. In *Roth v. United States*[57], one of the earliest cases on this subject, the

[55] Don R. Pember, *Mass Media Law,* University of Washington- Seattle –Wm.C. Brown Publishers, Dubuque, Iowa, (1987), p. 410.

[56] *Id.* at p. 412.

[57] *Roth* v. *U.S.*354 U.S.476 (1957).

United States Supreme Court ruled that obscenity falls outside the general protection granted to press under the First Amendment.

4.1.19 Tests of Obscenity

The Supreme Court and High Courts have heard many cases on obscenity before and after the decision in *Roth.* Various tests have been formulated and applied; each test had its problems. The first of its kind to be experimented was the *Hecklin test*.[58] It was borrowed from the British Law. It stated that a work is obscene *if it tends to deprave and corrupt* those whose minds are open to such immoral influences and in whose hands it could possibly come into. This was a very hard test and the American Courts also decided that if any part of a book or play or magazine was obscene, then the entire work would be obscene.

4.1.20 After Hecklin

Later after seventy-five years, in *Roth,* the Supreme Court overruled the *Hecklin test* declaring that compelling the adult population to read only what children might safely read was unconstitutional[59].

In *Roth* v. *U S*,[60] it was stated that obscenity is not protected by the First Amendment. According to *Roth – Memoirs test*, as given in the above case, the material as a whole must appeal to erotic interest in sex, and it should have an impact on a reasonable person and not a child or oversensitive person. Along with this, the Court should find it running contrary to existing social standards of sex and term this material as having no social value.

---

[58] *R.* v. *Hecklin* [1868] L.R.3 Q.B.360.

[59] *Butter* v. *Michigan* 352 U.S.380 (1957).

[60] *Supra* n. 54.

In comparison to *Hecklin's test*, this test gave great liberty to an otherwise somewhat tough interpretation. This did not satisfy many people. Finally a commission on obscenity and pornography was established in 1967. They came with the theory that exposure to obscene material does not produce harmful effects. This was criticized and very rightly so; as obscene matter does contribute to painful and harmful incidents, if not evidenced, at least in many cases. This report was not accepted by the Senate.

4.1.21 Miller Test

In 1973, in *Miller* v. *California*[61], where Marvin Miller sent five unsolicited brochures to a restaurant in Newport Beach. It contained advertisement of four erotic books and one film having pictures and drawings of men and woman engaged in a variety of sexual activities. The recipient of the mailing, complained to police and *Miller* was convicted. In this case majority of the Supreme Court judges reached agreement regarding obscenity. It stated that material is obscene *if an average person applying contemporary standards, finds that the work taken as a whole appeals to prurient interest*, depicts in an offensive way sexual conduct and that *the work lacks serious literary, artistic, political or scientific value.*

In comparison to *Roth-Memoirs test*, this *Miller's test* would appear to be more conservative. Here it went further to state that it need not just lack social value but it must also be harmful to society. Chief Justice Warren Burger's main thrust was concerning a quality of life.

---

61 *Mille*r v. *California* 413 U.S.23-24 (1973).

The defects in each test were that it was made up of words and these words meant different meaning for different people. The test in use today is that if a work has serious literary value it is not obscene. What is then serious literary value? This is disputable. In USA, it is now rather a dispute of words rather than dispute over kinds of works that are obscene. The decision of *Miller* v. *California* holds its sway through *Smith* v. *US*[62] and *Pope* v. *Illinois* to *Reno* v. *Aclu* [63]. The concept of obscenity in US can be summarized as follows.

1) An average person applying contemporary local community standards, finds that the work taken as a whole appeals to prurient interest.

2) The work depicts in a patently offensive manner, sexual conduct specifically defined by applicable state law.

3) The work in question lacks serious literary, artistic, political or scientific value.

4.1.22 Meaning of Community

What do you mean by community or community standards? Some consider children to be part of community, like in *Hecklin's test*, while the same was rejected in *Roth Memoirs test*. But all the same these standards included impact on sensitive or insensitive person, as all adults form part of the entire community.

---

[62] *Smith* v. *U.S.*, 431 U.S.291, 300-02, 309(1977) and *Pope* v. *Illinois*, 481 U.S. 497, 500 -01(1987)

[63] *Reno* v. *Aclu*, 521 U.S. 844, at 878 n.44 "Citizens' Guide to Federal Obscenity Laws" (1998). (http:/www.wsdoj.gov/criminal/opt/links/ citizens guide - visited on 5/11/09 .

4.1.23 Patent offensiveness

Miller's decision can be separated into two parts, *firstly* patent offensiveness as determined by community standards and *secondly* sexual conducts specifically defined by applicable state law.

Patent offensiveness, as it suggests, means something which on the very face of it is offensive to every reasonable man.[64]

The second element specifies that there should be a statute explaining the description of obscenity.[65] It is generally held that if the statute is not specific in regard to the definition of obscenity, it can be construed to contain it if situation demands.

4.1.24 Serious value

The last criterion to determine obscenity is whether there is any serious literary, artistic, political or scientific value in that disputed matter. If this element is missing then the disputed matter cannot stand the test at all. This judgment has to be made by the Judges and not to be measured according to the community standards[66].

4.1.25 Children

Concerning children, this aspect of *serious value* is strictly adhered to distribution of written descriptions or other kinds of depictions or drawings of children engaged in sexual conduct that are not taken as

[64] Examples include – "representation or descriptions of ultimate acts, normal or perverted, actual or simulated" and "representations or descriptions of masturbation, excretory functions and lewd exhibition of the genitals".

[65] Example – it can state that obscenity contains presentation of nudity, sexual excitement, Sexual conduct, bestiality, extreme or bizarre violence, cruelty and brutality on human body functions or eliminations.

[66] *Penthouse* v. *McAuliffe*, 533F.Supp.50(N.D.Ga. 1981).

obscene otherwise and that do not involve live performances continue to get protection under First Amendment[67].

To summarize, *Miller test* holds the ground in USA, to determine whether something is obscene or not. It provides a balance between community standards and patently offensive aspects under state law along with the protection given to *serious value* in terms of literary, artistic, political or scientific terms.

4.1.26 Defamation

The modern concept of defamation was stated in USA in *Rosenblatt* v. *Baer*[68] , where the Court stated that it is the right of a man to protection of his own reputation from unjustified invasion and wrongful hurt and it reflects no more than our basic concept of the essential dignity and worth of every human being – a concept which is at the root of any decent system of ordered liberty[69].

4.1.27 Elements of Libel

Defamation can be in the form of libel or slander. Libel is stronger in terms of evidentiary value. There are some necessary elements to be satisfied before it is being recognized as a libel suit. It is not till you publish the statement that libel litigation starts its process. It is not until this published matter comes into somebody's attention, that it becomes a libel. The reason being that only then it can cause damage to somebody's personality. The act of clerk typing a defamatory letter to someone can constitute defamation though some courts do not agree with this theory of

---

[67] *New York* v. *Ferber*. 1982, 458 U.S. 747, 752-753, 10 2S. Ct. 3348 (1982), 8 Mid. L. Rptr. 1809.

[68] *Rosenblatt* v. *Baer*, 383 U.S.75, 92, 86, S. ct.669, 679 (1966).

[69] *Ibid*.

publication; on the ground that an organization is one entity[70]. Therefore in some cases such consideration does make a difference.

Again there is some confusion as to when publication takes place concerning a news item. Some are of the view that, it is when a magazine[71] is mailed to subscribers, while others categorically state it is only when it reaches the intended people[72].

Reporting on rebroadcast also causes another problem. The problem arises when the publisher publishes the defamatory statement again. Thus now it is stated that if a newspaper does that, it constitutes a new defamation suit[73].

Another issue which may come up is when the defamatory matter may be a statement made during an interview. The Common law has held that one who republishes it 'adopts' as his own and is liable equally[74] with the original defamer.

Sometimes, it just happens when a matter is reported without defaming someone, as it is just a statement of a fact. Such was the case where a Church Bishop, Frederick D. Washington sued the *New York Daily News*[75] and columnist Robert Sylvester for his printed statement

---

[70] Dwight L. Teeter.Jr and Bill Loving, *Law of Mass Communication – Freedom and Control of Print and Broadcasting Media*, Tenth Edition, New York Foundation Press (2001), p.168.

[71] *Tocco* v. *Time, Inc*, 195 F. Supp. 410 (E.D. Mich. 1961).

[72] *Osmers* v. *Parade Publications, Inc*, 234 F. Supp. 924, 927 (S.D.N.Y. 1964).

[73] *Rinaldi* v. *Viking Penguin*, 52 N.Y. 2d 422, 438, N.Y.S.2d 496, 420 N.E.2d. 977(1981).

[74] *Liberty Lobby, Inc.* v. *Dow Jones & Co*., 838 F. 2d 1287, 1298, (D.C. Cir. 1988) 14 Med. L. Rptr. 2249.

[75] *Washington* v. *New York News Inc*., 37A.D 2d 557, 322 N.Y.S. 2d 896 (1971).

that Washington had attended a nightclub performance at which a choir member of his church sang. The Bishop argued that his church did not approve of its spiritual leaders attending night clubs and this statement in the news defamed him. The Court termed this matter as a '*warm human interest story'* in which general interest is involved. It is not a case of libel as it was not an attack on his integrity.

One of the leading cases which illustrate the fine distinction between actionable statements and the price one pays for public recognition came up in the case *Rev. Jerry Falwell* v. *Larry Flynt*[76], the publisher of *Hustler magazine.* Falwell and Flynt were taken as opposite poles in regard to morality. In 1988, Flynt published a cartoon parody advertisement which asserted that Falwell had lost his virginity to his mother in a drunken state in an outhouse. Falwell sued for libel, invasion of privacy and intentional infliction of emotional distress. The Supreme Court held that commentary on a public figure needed utmost protection of the First Amendment as speech and expression holds priority over privacy in U.S., so here again action on privacy failed.

Finally, the last ingredient in a defamation case is actual damages. Actual damages are compensatory damages and include -:

1) Pecuniary loss, direct or indirect or special damages.
2) Damages for physical pain and inconvenience.
3) Damages for proven mental suffering and
4) Damages for injury to reputation.

[76] *Hustler* v. *Falwell*, 485 U.S. 46, 108 S. Ct. 876 (1988).

In *Gertz* v. *Robert Welch, Inc.,* [77], the Court decided that the states have a strong and legitimate interest in compensating private individuals for injury to reputation but it may not be limitless. To claim damages actual malice has to be proved rather than mere negligence. This can be illustrated by the case of *Pring* v. *Penthouse Intern., Ltd*[78].In this case *Kimerll Jayne Pring*, who was "Miss Wyoming" of 1978, won a jury award of $25 million in punitive damages plus $1.5 million in compensatory damages from *Penthouse magazine* in 1981. She had alleged that a *penthouse* story falsely implied that she was sexually promiscuous and immoral. But this award was quickly halved by Federal District Court Judge Clearance C. Brimmer. Penthouse appealed and was finally cleared of its liability. Similarly in *Burnett* v. *National Enquirer* case,[79] Carol Burnett was falsely portrayed by the *National Enquirer* as drunk and was awarded a huge damage. But this was also later reduced to half by the appellate Court.

4.1.28 Reporting of Court Proceedings : Early cases

Pretrial reporting is definitely an offence against fair trial. It can also be termed as pre-trial publicity. In one of the earliest cases, that came up for consideration before the Supreme Court was *Irvin* v. *Dowd*[80]. In this case, the defendant, Leslie Irvin, an accused in a murder case, was subjected to a series of prejudicial news against him. This was in response to sex murder committed by him to which he confessed. Many of the items published or broadcasted before Irvin's trial referred

---

[77] *Gertz* v. *Robert Welch*., Inc., 418 U.S. 323, 348, 94 S. Ct. 2997, 3011 (1974).

[78] *Pring* v. *Penthouse Intern., Ltd*., 695 F. 2d 438 (10th Cir. 1982), 8 Med. L. Rptr. 2409 .

[79] *Burnett* v. *National Enquirer Inc*., 144 Cal. App. 3d 991, 193 Cal. Rptr. 206 (1983), 9 Med. L. Rptr. 1921.

[80] *Irvin* v. Dowd, 366 U.S, 717, 719, 81 S.Ct. 1639, 1641 (1961).

him as the 'confessed slayer of six'. Even his advocate received criticism for defending his case. His advocate wanted and was granted a change in the venue of trial. When the trial began, 90% of the jurors had already formed some opinion about Irvin's guilt. Though his advocate complained that four of the seated jurors had stated that Irvin was guilty, still the trial continued. Irvin was found guilty and the jury sentenced him to death. Lengthy appeals brought Irvin's case to the US Supreme Court. Still his case was not decided on its merits. It was only in 1961, that all nine members of the Supreme Court agreed that Irvin had not received a fair trial. The reason being that the jury was already prejudiced against him due to media trial. He was therefore given a new trial, although he was still convicted, but this time to life imprisonment and not to death.

Justice Tom. C. Clark stated in his majority opinion that Courts do not need that Jurors be totally ignorant of the facts and issues involved in a criminal trial. It is enough if a juror can give a verdict based on evidence presented in the Court of law.

In the past five decades in US, free trial has faced controversies against a free press. This took place in the wake of several nationally publicized trials and assassination of President John F. Kennedy in 1963, Senator Robert Kennedy and Martin Luther King in 1968[81].

The American Bar Association accused[82] that because of widespread publicity of 'Lee Harvey Oswald's alleged guilt, along with statement by

[81] Dwight L. Teeter, Jr. and Bill Loving, *Laws of Mass Communication – Freedom and Control of Print and Broadcast Media*, Tenth Edition New York Foundation Press, (2001), p. 504.

[82] William A. Hachten, *The Supreme Court on Freedom of the Press: Decisions and Dissents*: Iowa State University Press, (1968), p.106.

officials and disclosures of evidence; it would impose difficulty to empanel an unprejudiced jury and give the accused a fair trial.

In 1975 and 1984, the Supreme Court looked back into the Issue of considering pre-trial publicity. *Murphy* v. *Florida*[83], was regarding the conviction of Jack Roland Murphy for robbery. He alleged that the jury had been prejudiced by news coverage that included references to his prior felony convictions and details of the crime for which he was tried. The Supreme Court stated, keeping with the majority opinion in *Irvin* v. *Dowd*[84] that 'qualified jurors need not, however be totally ignorant of the facts and issues involved'. Though the Court agreed that the Constitution required a panel of "impartial" jurors, it stated that it is not necessary that they should be totally ignorant of the facts and issues involved. The relevant point to be noted is that, the Court was not concerned of the fact as to whether the juror is ignorant of the facts and issues in the case. The basic and fundamental question was whether the mind of jurors had become prejudiced to such an extent that it would affect their judgment in the case.

4.1.29 Press during Trial Proceedings

Televising trial became quite common during the 1960's. It was in the crucial case of financier Billie Sol Estes[85] in a swindling case, that Estes though convicted, was allowed a new trial due to the manner in which a Judge allowed his original trial to be televised.

---

[83] *Murphy* v. *Florida* 421 U.S. 794, 95 S. Ct. 2031 (1975), 1 Med. L. Rptr. 1232.

[84] *Irwin* v. *Dowd*, 366 U.S., 717, 719, 81 S.Ct. 1639, 1641 (1961).

[85] *Estes* v. *Texas*, 381 U.S. 532,553, 85 S. Ct. 1628, 1638 (1965).

By 1970's cameras were brought back into the Court room by number of states. Finally in *Chandler* v. *Florida*[86], the Supreme Court stated:

> "An absolute constitutional ban on broadcast coverage of trials cannot be justified simply because there is a danger in some cases that prejudicial broadcast accounts of pretrial and trial proceedings may impair the ability of jurors to decide the issue of guilt or innocence……."[87].

After this decision, states have allowed cameras in Courtrooms, but subject to Judge's discretion as to whether it disrupts the functioning of the Court[88].

Thirty six states approve cameras in trial and appellate Courts[89]. A very live illustration of media trial by reporting of Court proceedings is the case of *O.J. Simpson*[90]. In this case, this American football player was accused of killing his ex-wife and her boyfriend. The trial was televised and he was finally acquitted by the Criminal Court in 1995. This was a case, which went through a very lengthy internationally publicized criminal trial which was followed sequence by sequence by the American audience. Later, in 1997 in a civil court on similar facts, a unanimous jury decided that he was guilty of causing wrongful death of Ronald Goldman and battery of Nicole Brown. This issue opened up discussions by many critics regarding the negative impact of the Sixth

---

86 *Chandler* v. *Florida*, 449 U.S. 560, 101 S. Ct. 802 (1981).

87 *Ibid*.

88 *Ibid*.

89 *Supra* n.81 at p. 523.

90 *People* v. *Simpson,* 1995, http://en.wikipedia.org/wiki/o.j. Simpson, retrieved on 25/11/10 .

Amendment, which allowed televising of Court proceedings. Most of the African Americans felt justice was done, while most of the white Americans felt that justice was not done.[91] If the criminal court proceedings were not televised, the verdict might have been different.

4.1.30 Vulnerable Section of the Society

All this freedom is under the control of the Judge in charge. The camera coverage involving juveniles, victims of sex crimes, domestic relations case is normally forbidden. The Judicial Conference in USA has the authority to declare trials open to TV Cameras on Federal Civil cases. However, the more controversial cases are governed by the Federal rules of Criminal Procedure. This can be attended only with permission from the US Supreme Court and Congress.

4.1.31 Restrictive (Gag) order

Though in *Nebraska Press Association* v. *Stuart*[92], judicial orders gagging the press were discouraged. The basic issue is that gag orders will still continue against media unless challenged and set aside by the Court. The Supreme Court of the US unanimously upheld the gag order preventing release and publication of deposition material in *Seattle Times* v. *Rhinehart*[93]. The *Nebraska press* tests for prior restraint are:-

1) Publicity must impair the right to a fair trial.

2) No less restrictive alternative to prior restraint available.

---

91 *Ibid.*

92 *Nebraska Press Association* v. *Stuart* 427 U.S. 539, 542, 96 S. Ct 2791,2795 (1976).

93 *Seattle Times* v. *Rhinehart*, 467 U.S. 20, 22, 104 S. Ct. 2199, 2202 (1984), 10 Med L. Rptr. at 1711.

3) A prior restraint would effectively prevent the harm to defendant's rights.

4.1.32 Legislative Measures

In USA, they have the Privacy Act, 1974 which establishes a code of fair information practice that governs the collection, maintenance, use and dissemination of personally identifiable information about individuals that is maintained in system of records by Federal agencies.

The information can be given only on a written request by or with the prior written consent of the individual to whom the record pertains – exceptions allowed for census and governmental purposes[94].

New technologies can create new ways to gather private information. In USA, it was thought that heat sensors intended to be used to find marijuana growing operations would be acceptable. In 2001, in *Kyllo* v. *United States*[95], it was decided that thermal imaging devices that can reveal previously unknown information without a warrant does indeed constitute a violation of privacy.

This is because the danger in the ability to gather and send database without the individual knowing it is very great today. The existing global privacy rights framework has been criticized as incoherent and inefficient.

Privacy laws in USA have grown much in a very haphazard fashion. It is a mixture of Common law, Federal and State Statutory law.

---

[94] Privacy Act of 1974. http:/en.wikipedia.org/wiki/privacy Act of 1974.

[95] *Kyllo* v. *United States* 533 U.S. 27(2001).

The Constitution omits the word" privacy" entirely. US Courts have recognized this right. As stated by Justice Douglas[96] that First, Third and Fourth Amendment imply privacy.

US have different laws, which appears on the face of it, to protect privacy. These are Privacy Act, 1974 and The Federal Trade Commission Act, 1914. In fact, these laws are only for the protection of data of individuals and companies. They are in the form of consumer protection measures. In these cases, when one enters into an agreement, one is advised regarding the privacy of the institution and its details. These include issues like false advertising and other types of fraud. Apart from these, the recent US Patriot Act, 2001, which was enacted to combat terrorism, makes it very difficult to protect privacy in US. Today anything and every thing can be exposed or searched by government agencies if they have any reason for doubt under the Patriotic Act. This hampers right to privacy to a great extent in US.

4.1.33 Contempt of Court

In USA, they do not have Contempt of Court laws like in India. There are certain rules[97] of Contempt of Court which both State and Federal Courts apply. These are usually in the form of violation of orders. Contempt laws are not used against the press for interfering in sub-judice matters, but in certain cases, it does come in the shape of 'restrictive gags', which has been already discussed earlier. Though restrictive gags are to be used against the media it is very sparingly seen practiced.

---

[96] *Griswold* v. *Connecticut*, 381 U.S. 479 (1965)

[97] Barry .S. Engel "United States Contempt of Court Principles as applied in the Asset Protection Planning Context" Esq., F.O.1. http:/www.offshoreinstitute.com/contempt. html.

Conclusion

So one can conclude that in US, the position of privacy is weak especially as it is not specifically protected under the Constitution, while press is protected by the Constitution. The situation is quite like India. Another problem which is there in the US is that the Contempt of Court rules are only limited to disrespect of Courts. It is usually not extended to media involvement in subjudice matters. There it is the question whether media exposure affects the Jury or not. It is felt in the US that the question is whether the jury is prejudicially affected in such a manner as to prejudice the trial. But after *O.J. Simpson's* case, even this argument against the press is dampened, as the whole trial was emotionally carried off by media exposure.

In all other matters the Courts have to consider the fact that whether the matter is newsworthy or not when the question raised is affecting the reputation or undue exposure. Even in the case of obscenity one finds the U.S. Courts very unwilling to interfere if art and lifestyle predominates the issue. U.S. has Privacy Act, 1974 to protect dissemination of matter from records, which is a must in USA and also Federal Trade Commission to protect consumer against false advertising and fraud. These enactments are not concerned to privacy as an inalienable right of man. Today due to fear of terrorist attacks, the government of US has become more restrictive in giving privacy rights to its citizens.

In conclusion, one can say that Freedom of Press dominates the scene in US. To prove a privacy case against media is not easy. One has to take all the weapons against them – such as fair trial violation, not newsworthy, has got no social value and also prove actual malice on the part of the press. This becomes all the more difficult for a public person

who becomes public by office, fame or profession. In these cases, the Court moves with a preconception that public interest demands public to know of their lives. It is a cost you pay for publicity. But then what about people who get publicity for no fault of their own? There again the Court has no help to offer but to surrender to the will of the press.

Thus in USA, the media is protected to the extent that even violation by them is protected. Only in stray cases, do we find the Courts caring to protect individuals against privacy violation by media. US stand unique from UK and the European Union, where they possessively protect privacy. US with its media freedom in full swing may have to in the near future pay for the profits made in the past. With the revelation that *'News of the World'* tabloid has tapped into the phones of 9/11 victims makes the US government vulnerable to attacks and it might come up with new change in air after the UK Parliament's move to bombard Rupert Murdoch, the media emperor. There is no doubt, however important that media might be necessary for democracy. It can never be of more priority than an individual and his dignity of life. Society is for the individual and without individuals there can be no society. The foundation of a democracy is protection of human dignity. If that role is not foremost in the mind of media magnates, then they fail to fulfill their duty towards society and cannot claim right to media freedom as a democratic right.

.....ൠ.....

Chapter 5

PRESS FREEDOM AND THE RIGHT TO PRIVACY IN INDIA

5.1 Introduction

Even before India became Independent, it had already become party to the United Nations Declaration on Human Rights 1948. This was indicative of its future plans and visions for a free and democratic government. In furtherance of this, when it finally got independence the first strategy was to have its own Constitution. In 1950 India declared itself to be a fully democratic country, having adopted most of the basic principles of the UDHR. Indian government understood the importance of press and its impact on the people of India. Press had played a very important and productive role in the independence movement, through its strong support for the popular movement of Satyagraha and abdication of foreign goods and other similar forms of freedom struggle. Such was the impact of the print media that it frightened the British, as it gave a picture of a strong India, though the reality was a disintegrated India ruled by princely kings and people in deep poverty. The framers of our Constitution knew the immense power vested in the print media, therefore they imbibed the Freedom of Speech and Expression in Article 19(1) (a) of the Indian Constitution from Article 19 of the UDHR, and also reflected similarly in Article 19 of the International Covenant on Civil and

Political Rights 1966 (ICCPR).[1] But somewhere in their thought process it never came to light, about the consequences of an unbridled horse set free in a vast pasture called India. British India was not a free country like free India. There, the print media had to work under constraints, which forced them to be within rules. Originally enacted Article 19(2), provided that 'Nothing in sub clause (a) of clause (1) shall affect the operation of any existing law relating to libel, slander, defamation, contempt of court or any matter which offends against decency or morality or which undermines the security of or tends to overthrow, the state'. Although Article 19(1) (a) does not mention freedom of press. The Supreme Court in *Romesh Thapper* v. *State of Madras* [2] stated that freedom of speech and expression includes freedom of press. It stated 'Turning now to the merits there can be no doubt that freedom of speech and expression includes propagation of ideas, and that freedom is enshrined by the freedom of circulation'.[3] Here the Supreme Court further increased the ambit of the freedom of the press. After this came the First Amendment of the Constitution in 1951, amending Article 19(2). The new Article provided 'Nothing in sub clause (a) of clause (1)

---

1 Herein after referred as U.D.H.R. & I.C.C.P.R. respectively-Article 19-Everyone shall have the right to hold opinions without interference. Everyone shall have the right to freedom of expression ,this right shall include seek, receive and impart information and ideas of all kinds, regardless of frontier in writing or in print , in the form of art, or through any other media of his choice. This exercise of the rights provided for in paragraph 2 of this article carries with it duties and responsibilities. It may therefore be subject to certain restrictions, but be such as are provided by law and are necessary: (a) For respect of the rights or reputations of others; (b)For the protection of national security or of public order, or of morals.

Indian Constitution –Article 19(1)(a)- Every citizen shall have the Right to Freedom of Speech and Expression. Article 19(2) provides the reasonable restrictions .The Constitution provisions are in consensus with the above Conventions.

2 *Romesh Thapper* v. *State of Madras* 1950 S.C.R. 594.

3 *Id.* at p. 597.

shall affect the operation of any existing law or prevent the state from making any law, in so far as such law imposes reasonable restrictions on the exercise of the right conferred by the said sub clause in the interests of the security of the state, friendly relations with foreign states, public order, decency or morality or in relation to contempt of court, defamation or incitement to an offence.' This amendment further increases the ambit of freedom of press under the Constitution.

5.1.1 Definition of Freedom of Speech & expression

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 an active part of this right. In *Romesh Thappar* v. *State of Madras*[4], the Supreme Court has included press in the definition of freedom of speech or expression.

In *L.I.C.* v. *Manubhai Shah*[5], the Supreme Court reiterated as in *Indian Express Newspapers v. Union of India*[6] 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 circulation[7].

The press enjoys the privilege of sitting in the Courts on behalf of the general public to keep them informed on matters of public

---

4 *Ibid*.

5 *L.I.C.* v. *Manubhai Shah* (1992) 3 S.C.C. 637.

6 *Indian Express Newspapers* v. *Union of India* (1985) 1 S.C.C. 641.

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

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[8].

However this is not an absolute right. There are also other important considerations, for instance the reporting of names of rape victims, children, juvenile, woman should be prohibited. This restriction is placed because of their weak position in the society that makes them vulnerable to exploitation. Therefore in the interests of justice, the court may restrict the publicity of Court proceedings[9]. Under section 151 of the Civil Procedure Code, 1908, the Court has the inherent power to order a trial to be held in camera.

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 a 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[10].

---

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

9 *Naresh Shridhar Mirajkar* v. *State of Maharashtra*, A.I.R. 1967 S.C. 1.

10 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.

It also gives protection to true reporting of the proceedings of State Assemblies.[11] A similar protection is provided in the Parliamentary Proceedings (Protection of Publication) Act, 1977.

In *Tata Press Ltd* v. *Mahanagar Telephone Nigam Ltd*[12], 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 Dwakhana* v. *Union of India*[13] , 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 Times* v. *State of U.P.*[14], the Supreme Court again reiterated the importance of advertising and its connection with the circulation of paper.

5.1.2 The Right to Privacy – International obligations

UDHR 1948 in Article 12 and ICCPR 1966 in Article 17 give protection to the concept of privacy. Though freedom of speech and

[11] *Ibid*.

[12] *Tata Press Ltd* v. *Mahanagar Telephone Nigam Ltd* (1995) 5 S.C.C. 139.

[13] *Hamdard Dawakhana* v. *Union of India*, A.I.R. 1965 S.C. 1167.

[14] *Hindustan Times* v. *State of U.P.* (2003) 1 S.C.C. 591.

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[15] 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.*[16] 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 in UDHR 1948. This has failed to materialize in the same spirit as a fundamental right in the Indian Constitution, like the right to speech and expression and right to life.[17] 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

[15] *Nihal Chand* v. *Bhagwan Dei* A.I.R. 1935 All.1002.

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

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

Court in *Sharada v. Dharampal*[18]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.

5.1.3 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, India has also ratified the International Covenant on Civil and Political Rights, 1966[19].

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

---

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

[19] 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.

relation to matters concerning the private life of the individual, which includes the family, marriage, parent hood, children and his sexual life. Let us have a look at some of them.

5.1.4 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[20]. Apart from these provisions there are some judicial decisions also.

[20] 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 Performances 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: prohibits the transmission by post any material on the ground of decency or obscenity.

The Cinematograph Act, 1952 –section 5 B prohibits the certification of a film by the Censor Board for Public exhibition of the film or any part of it is against the interest of morality and decency.

The Young Persons (Harmful Publications), Act 1956 section 2 (a) 3-7, prohibits publications which could corrupt a child or young person and invite him to commit crimes of violence or cruelty etc. A contravention is punishable with imprisonment and fine.

The Customs Act 1962, section 11 (b) empowers the government to prohibit or improve conditions on the import or export of goods in the interest of decency and morality.

The Indecent Representation of Women (Prohibition), Act 1986 Section 3-6 prohibits the indecent representation of women through advertisements or other publications, writings, paintings, figures etc and makes the contravention punishable with imprisonment and fine.

The Cable Television Networks (Regulation), Act 1995 – section 5, 6, 16, 17, 19, 20 read with the Cable Television Network Rules, 1994 prohibits the telecast of programmes on cable television, which offend decency and morality and on contravention amounts 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.

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 Maharashtra*[21] 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 makes it very difficult to straight jacket these concepts.

5.1.5 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 repulsive[22].

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 *Samaresh Bose* v. *Amal Mitra*[23] the Supreme Court held that a vulgar writing is not necessarily obscene. Vulgarity arouses a feeling of disgust, revulsion and also boredom but does not have the effect of corrupting the morals of any reader, whereas obscenity has the tendency to corrupt those whose minds are open to such influences.

---

[21] *Chandrakant Kalayandas Kakodkar* v. *State of Maharashtra* (1969) 2 S.C.C. 687.

[22] *Ranjit D. Udeshi* v. *State of Maharashtra* (*Lady Chatterley's Lover*) A.I.R. 1965 S.C .881. at7. p. 885.

[23] *Samaresh Bose* v. *Amal Mitra* (1985) 4 S.C.C. 289. p. 318.

In *Lady Chatterley's Lover*[24], the 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 any writer of fiction today would escape the fate Lawrence had in his days'. Similarly in *Bobby Art International* v. *Ompal Singh Hoon*[25],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 womanhood 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 India*[26], 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

---

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

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

[26] *K.A. Abbas* v. *Union of India* (1970) 2 S.C.C. 780 pp. 802, 803.

from the obscene and indecent. It said that the law showed more concern for the depraved rather than the ordinary moral man.

In *R.* v. *Hecklin*[27], it was laid down that the effect of a publication on the most vulnerable members of the society is the determining factor and whether they were likely to read it or not is immaterial. Even if literary merit was there, the defense was not available.

Although, the *Hecklin 's test* was overruled in England by the enactment of the Obscene Publications Act 1959,[28] in India the Supreme Court of India adopted the *Hecklin's test* in *Ranjit D. Udeshi* v. *State of Maharashtra*[29]. 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 1860[30]. Here

---

27 *R.* v. *Hecklin* (1868) L.R. 3 Q.B. 360.

28 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 .'

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

30 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.

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*[31], 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 of our contemporary society cannot be overlooked'**.**[32]

Similarly, in *Samaresh Bose*[33] 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. \

5.1.6 Privacy under Article 21

Article 21 of the Indian Constitution clearly gives protection to life and personal liberty. In this perspective, though in different factual base, the Supreme Court for the first time recognized the '*Right to Privacy'*. It was in *Kharak Singh* v. *State of U.P.*[34], that majority of the Bench Struck down domiciliary visits as being unconstitutional. Though they were yet

---

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

[32] *Ibid*.

[33] *Samaresh Bose* v. *Amal Mitra* (1985) 4 S.C.C. 289.

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

unreceptive to the idea of privacy, the minority view by Justice Subha Rao held that Article 21's concept of liberty included privacy.[35] He stated:

> '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 his rampant against encroachment on his personal liberty.'[36]

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.*[37], 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

---

[35] *Id.* at p. 359.

[36] *Ibid.*

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

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 *Autoshanker* 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 tortuous 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'*, the[38] 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.

In an earlier case though in London[39], Ms Maneka Gandhi had won a libel suit against British writer Katharine 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

[38] *The Times of India*, Nov 10, 2001, p. 7.

[39] *Ibid*.

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*[40], 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* [41] 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*[42] 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

[40] *Kaleidoscope (India) (P) Ltd.* v. *Phoolan Devi* ,A.I.R. 1995 Del . 316.

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

[42] *People's Union for Civil Liberties* v. *Union of India* (1997) 1 S.C.C. 301.

ones' 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.

5.1.7 Tort – Protection of privacy

Following the common law system of adjudication India 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*[43], 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.

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.[44] This would not have been the course of action in UK. Such a case would come under the Defamation Act 1996[45] and now it

---

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

[44] *T.V Ramasabha* v. *A.M. Ahmad Mohideen* A.I.R. 1972 Mad. 398.

[45] 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.

would come under the Human Rights Act 1998[46] 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. [47]

5.1.8 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 complaint[48]. In *John Thomas* v *Dr. K. Jagdeesan*[49], 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. Chokkappa*[50] it was held that if a defined group is defamed, then each

---

[46] Human Rights Act 1998- object –'An Act to give further effect to rights and freedoms guaranteed under the European Convention on Human Rights.'

[47] *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 engagement , which was not so. The paper had to give damages.

[48] 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.

[49] *John Thomas* v. *Dr. K. Jagadeesan* (2001) 6 S.C.C. 30.

[50] *G. Narasimhan* v. *T.V. Chokkappa* (1972) 2 S.C.C. 680.

member of that group can file a complaint, even if it does not specifically mention his name.

5.1.9 Published or Broadcasted by the Defendant

The law of defamation comes into operation only when the statement is published to another person or persons other than the persons defamed. Where copies of such 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*[51], 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*[52], 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.

5.1.10 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.

---

[51] *Mahendar Ram* v. *Harnandan Prasad* A.I.R .1958 Pat. 445.

[52] *In Re. S.K. Sundaram* (2001) .2 S.C.C .171.

In case of criminal prosecutions under Indian Penal Code, this defense of truth has not been recognized.[53] It has to be proved that the publication was made in public faith and for the public good[54]. In *Sewakram Sobhani* v. *R.K.Karanjia*,[55] 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 be false and it is for the defendant to rebut this presumption[56].

---

[53] 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 having reason to believe that such imputation will harm, the reputation of such person , is said, except in the cases 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.**

[54] *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.

[55] *Ibid.*

[56] *Mitha Rustomji* v. *Nusservanji Nowroji*, A.I.R. 1941 Bom. 278.

5.1.11 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 established[57]. Even the contempt of court proceedings after the Contempt of Court (Amendment) Act, 2006, truth is maintained as a defense to contempt action[58].

5.1.12 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*[59] 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.

---

[57] *Harbajan Singh* v. *State of Punjab* A.I.R. 1966 S.C. 97.

[58] The Contempt of Courts (Amendment) Act, 2006, section 2, substitutes section 13 of the Contempt of Courts Act, 1971.

[59] *Saibal Kumar v. B.K. Sen* A.I.R. 1961 S .C 633.

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*[60], 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.

5.1.13 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 informations do not fall within the category of newsworthiness of the news. It was stated in *State of Punjab* v. *Gurmit Singh*[61], 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

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

[61] *State of Punjab* v. *Gurmit Singh,* (1976) 2 S .C .C. 384, pp. 404-05.

may not be in a position to provide if she is in public. In *People's Union for Civil Liberties* v. *Union of India*[62], 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[63]. So it is implicit in the Indian Law that

---

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

[63] **The Indian Penal Code 1860, section 228-A-** prohibits publication of the 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 thereunder , 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

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,[64] 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.

5.1.14 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 the 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*[65]. The Supreme Court warned the media against

person shall be punished with imprisonment for a term which may extent to 2 years or with fine which may extent 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 authority , as the case maybe , 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.

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

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

sensationalizing of the issues and stressed that the press needed a strong 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.[66] 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.[67]

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 1971[68], 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 justice[69]. Therefore, it may be contempt to publish an interview with the accused or a potential witness[70] 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 posted to a Court far away from that area. In India, it is very difficult to prove that the judge has been

---

66 *Ibid.*

67 *Ibid*.

68 The Contempt of Courts (Amendment) Act 2006 - Section 2 substituting section 13 of the Contempt of Courts Act, 1971.

69 *State of Maharashtra* v. *Rajendra Jawanmal Gandhi,* (1997) S.C.C. 386.

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

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 court[71]. The possibility of influence has to be considered and not the intention of the journalist.

5.1.15 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 offences[72].

The Law Commission in its one hundredth 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 decisions[73]. 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

---

[71] *S.K. Sundaram: Inre,* (2001) 2 S.C.C: A.I.R. 2001 S.C. 2374.

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

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

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.[74]

In the Law Commission's 200th report [75]Justice M. Jagannadha Rao stated that at present under section 3(2)[76] of the Contempt of Courts Act, 1971 read with the explanation there under, gives full immunity to publications even if they prejudicially interfere with the course of justice in a criminal case, if by the date of publication, a charge sheet, or challan

---

[74] *Id.* at p. 341.

[75] *Law Commission of India 200th Report on Trial by Media; Free speech and Fair Trial Under Criminal Procedure Code, 1973,* August 31st 2006 – Justice M. Jagannadha Rao http://Law Commission of India.nic.in/reports/rep200.pdf. p. 223. , retrieved on 4.6.09 .

[76] The Contempt of Courts Act ,1971- section 3- Innocent publication and distribution of matter not contempt.(1) A person shall not be guilty of contempt of court on the ground that he has published (whether by words spoken or written or by signs or by visible representations or otherwise) any matter which interferes or tends to interfere with, or obstructs or tends to obstruct, 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.(**2)Notwithstanding anything to the contrary contained in this Act or any other law for the time being in force, the publication of any such matter as is mentioned in sub-section (1) in connection with any civil or criminal proceeding which is not pending at the time of publication shall not be deemed to constitute contempt of court.**(3)A person shall not be guilty of contempt of court on the ground that he has distributed a publication containing any such matter as is mentioned in sub-section (1), if at the time of distribution he had no reasonable grounds for believing that it contained or was likely to contain any such matter as aforesaid …… **Explanation : For the purposes of this Section , a judicial proceeding is said to be pending – ……., (B) In the case of a criminal proceeding under the Code of Criminal Procedure or any other law- (i) where it relates to the commission of an offence , when the charge sheet or challan is filled , or when the court issues summons or warrant , as the case maybe, against the accused and (ii) in any other case, when the court takes cognizance of the matter to which the proceeding relates, ……**

is not filed or if summons or warrant are not issued.[77]. Such publications would be contempt only if a criminal proceeding is pending.[78]

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. Gopalan* [79] wherein the Supreme Court stated that it is from the point of arrest that contempt arises. This report also agrees with this decision. India is signatory to the *Madrid Principles*[80]*on the Relationship between the Media and Judicial independenc*e 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.

5.1.16 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

[77] *Supra n.* 71.

[78] *Ibid.*

[79] *A.K. Gopalan* v. *Noodeen* 1969 (2)S. C. C.734.

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

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.

5.1.17 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 unto 26% in print media, while in broadcasting, it is allowed unto 100%[81]. 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 experiment with the Indian youth, the government is taking no urgent steps to bring in a regulation to control the widespread electronic media.

Conclusion

A study of the development of privacy traces back to *Nihal Chand* v. *Bhagwan Dei*[82] in 1935, where the High Court recognized the independent existence of privacy from the customs and traditions of India. India even before independence became a member of UN and was signatory to the UDHR 1948. The UDHR was almost fully incorporated into the Indian Constitution. One of the exceptions to it was the giving no recognition to the concept of privacy. UDHR gave privacy a foremost

[81] 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.

[82] *Nihal Chand* v. *Bhagwan Dei* A.I.R. 1935 All.1002.

position in Article 12, while freedom of speech and expression found place only in Article 19. Article 19 was subject to conditions such as reputation, national security, and public order and of morals. In the Indian Constitution, the restrictions imposed on freedom of speech and expression in Article 19(2) was on the lines of libel, slander, defamation, contempt of court or any matter which offends against decency or morality or which undermines the security of or tends to overthrow the state. This clause was later amended by the1st Amendment Act of 1951, and a new clause was inserted instead of the above clause. The new clause brought reasonable restrictions on the lines of security of state, public order, decency or morality or in relation to contempt of court, defamation or incitement to an offence. This took away further, the grounds of restrictions in the earlier unamended clause i.e. libel and slander.

Freedom of press was included in this right to speech and expression by the Apex Court in *Romesh Thapper* v. *State of Madras*.[83] 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 the 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 a 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 UDHR1948 by neglecting to recognize the right to privacy as a fundamental right.

[83] *Romesh Thappar* v. *State of Madras* (1950) S.C.R. 594.

It was in *Kharak Singh*,[84] that the Apex Court had the opportunity to discuss privacy for the first time, wherein it struck down domiciliary visits on an accused under Article 21 of the Constitution. But it was only through the minority view of Justice Subha Rao, that privacy found a place in Article 21 of the Constitution. This was due to lack of an article on privacy. Article 21 of the Indian Constitution protects life and personal liberty which is on the lines of Article 3 of the UDHR. Therefore Article 21 is not the solution to the problem faced in the matter of privacy protection. Article 21 is only an interim relief till legislative weapons are put in action to bring in a parallel Article on the lines with Article 12 of the UDHR in the Indian Constitution to protect Privacy.

Due to lack of Constitutional and legislative measures to protect privacy, the victims of press abuse had to the take the help of tort law. Tort law did not refer to privacy but only other offences such as libel, slander, defamation, morality and decency. These different offences form part of the term 'Privacy' but individually these offences could never fulfill the need of protection of privacy faced by individuals. Even Indian penal code allowed punishment or penalty for the above offences but not for privacy.

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

[84] *Kharak Singh* v. *State of U.P. and Others* (1964)S.C.R.(I) 332.

has been a loophole since the time of independence. It is therefore recommended that the Constitution should be amended to 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 case[85], 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*.[86], Retd.Justice P.B.Sawant's photograph was flashed as Justice 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. Though the said channel stopped publishing the photograph, when the mistake was brought to their notice, no corrective or remedial steps to undo the damage were taken by the channel on their own. The plaintiff by his letter dated 15/9/2008 called the defendant to apologize publicly with damages of Rs 50 crores. By its reply the defendant apologized but no mention of damages was there. It was a belated action hence plaintiff demanded Rs 100 crores. The Court held that the defendant was entitled to pay Rs 100 crores to

[85] *Rajendra Sail* v. *M.P. High Court Bar Association* (2005) 6 S.C.C. 109. p.125.

[86] Special Civil Suit No. 1984/2008 in Pune trial court.

the plaintiff. The Bombay High Court ordered the Times to deposit 20 crores in cash and 80 crores in bank guarantee, before taking up its appeal against the Pune trial Court in the defamation case.[87] This was upheld by the Supreme Court.[88]This was very good move by the Court.

To conclude with, the former Chief Information Commissioner of India, Wajahat Habibullah[89]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[90]. Therefore the need for the Right of Privacy is inevitable.

.....ൠ.....

[87] 'S.C. Asks Times Now to deposit Rs 100 crores before H.C.takes up its Appeal in Defamation Case', times of india.indiatimes .com/india dated November 15, 2011. Retrieved on 27/02/2013.

[88] *Ibid.*

[89] KP Saikiran 'CLC for Law on Privacy' January 31, 2009, *The New Indian Express* p.11.

[90] *Ibid.*

Chapter 6

INVESTIGATIVE JOURNALISM AND PROTECTION OF PRIVACY

6.1 Introduction

Investigative Journalism is the act of the journalists which goes beyond simple reporting of events in the press. It involves newsgathering by taking an initiative to get the news. The information in these cases is not easily available. The extra effort taken for this type of newsgathering is termed investigative journalism. This is an act of press activism, which if conducted properly can do great help to any nation. This method of collection of news demands the journalist to be on his toes always and involves field work rather than seat work. It demands courage and knowledge of wide variety of things, support from the editor and the management and protection from antisocial elements. Today this is the mode of operation of most of the prominent newspapers and television channels all around the world[1].

In India we do not find such hardships undertaken by the journalists, most of the material is gained by the journalists sitting in their chair and through local agents. Similarly there is no pressure on the media to follow the code of ethics[2] as formulated by the Press Council of India in 2010. The code of ethics in Britain is strictly adhered to by the media. But in India there are no strong methods or agencies to make

---

1 To name a few are newspapers like *The Guardian* and the television channel like *British Broadcasting Corporation (*B.B.C.*)*.

2 Press Council.nic.in /Norms 2010 PDF, retrieved on 11/06/2010.

them comply with the norms. As a result of this media is given unrestricted freedom to use any method whatsoever to get news. This could be in the form of sting operations using phone tapping, prostitutes, trespass and similar methods. It somehow gives a feeling to the public that the press is above the law, and their offences are only to be neglected while a private person has to face the music. Many such issues are dealt in this chapter in comparison with the democratic countries such as Britain and United States of America. Recently in Britain in August 2011, the media magnate Rupert Murdoch was questioned by the parliament on the matter of phone tapping of people which formed the source of their news. As a result he and his editorial staff had to suffer shame and court cases. This case also involved police officers, and as a result of all this and the public outcry, he had to finally close his tabloid '*The News of the World'*.[3]

In a similar case in *Tehalka .com*[4] when they brought the Hawala matter into public, it was clear that they had these informations had been obtained through illegal matters by sting operations using prostitutes, phone tapping and other mechanisms. Though there may have been truth in the matter still action should have been taken against them. Truth has to be investigated through legal means and not by any other methods. The object and the method should both be legal. Investigative Journalism cannot be considered as a license to do wrong. Media men should be role models for the people of India as we progress towards greater goals.

---

[3] 'Lost our way, says disgraced tabloid', *Indian Express* (Cochin) dt. 11/7/2011p.11.

[4] Press Trust of India, 'What's the Bangaru Laxman Tehelka sting case?', Ibnlive.in.com/news.

It is time that the media does a lot of good work through investigative journalism and its activism. Activism is normally demanded from the press, but usually this is not limited to matters which demand social interest. They have transgressed many a private people's privacy on the pretext of investigative journalism. Ultimately in some cases they find nothing worthwhile but the privacy of the individuals stand violated. If the end result does no good to the public then some form of compensation must be made available to the victim.

Even in the US where usually press is given primacy the courts have been taking a different view when it comes to newsgathering and torts committed in that process It was stated in a *Dietemann*'s case[5], that the First Amendment gives the media no right to break laws with impunity, even if legitimate news is being published. This was a case against a reporter and a photographer. Jackie Metcalf the reporter and photographer William Ray went to house of a plumber, who was known as a doctor by the name *A.A Dietemann*. They rang the bell and Jackie Metcalf acted as if she had a lump in her breast and as the doctor was conducting the examination, William took the pictures. *Life* magazine later published all these details along with pictures. Material was collected to be used to convict Dietemann as Mrs. Metcalf relayed her conversation with Dietemann through her transmitter in her purse. The plumber sued *Time, Inc*. for US Dollars 300,000/- for invasion of privacy. The Jury recognizing that *Dietemann* was not having clean hands awarded the plumber only $1,000/- for invasion of privacy. This decision set the precedent that law breaking is not allowed in the process of news gathering.

[5] *Dietemann* v. *Time, Inc*., 449 F.2d 245, 246 (9th cir. 1971).

Journalists are supposed to collect information which they can obtain through proper channel. Photographers can take photos from a public spot without going through strange acrobatics such as climbing or trespassing or using disguises.

6.1.1 Value System

Values and morality need to be preserved in news gathering. Ethics are to be followed if people must trust the news media. They should win the confidence of people through the value and ethics that they follow.

In *Cape Publications* v. *Bridges*[6], Hilda Bridges Pate had been kidnapped by her estranged husband at gunpoint. He took her to their former apartment and forced her to undress to prevent her from escaping. Then he shot himself to death. Police heard the gunshot and came and rushed her partially clad across the parking lot as she clutched a dish towel to her body. At that time she was photographed by this paper's correspondent .She contended that taking her photographs in semi clad form and consequently publishing it, violated her privacy. The Court considered it a newsworthy story and awarded no damages for her. Here the public came in because of the gunshot and press did nothing damaging towards her or for the process of collecting news.

6.1.2 Princess Diana and Famous Personalities

The case of Princess Diana is a very good example of how press (paparazzi – Italian slang for a small annoying insect) can cause the death of a person. *Princess Diana* and her companion were chased by the press in France that caused the car crash in which both she and her

[6] *Cape Publications, Inc*. v. *Bridges*, 423 So. 2d 426 (Fla. App. 5th Dist. 1982), 8 Med. L.Rptr. 2535, 2536.

companion died.[7] This shows how desperate they were to get hold of some news of great commercial potential. The risk involved is immaterial for them and they are least bothered about the damage done to the person involved.

In US, similar was the case of *Jacqueline Kennedy Onassis*, former wife of John F.Kennedy, late president of America, who had trouble with *Ron Galella*, a paparazzi who build up his career by taking their photos. He troubled Mrs. *Jacqueline Onassis* by following her almost everywhere and taking photographs literally giving her no privacy in moment at all. It troubled her so much that finally an injunction was issued against him in 1975, protecting her privacy which forbade him from approaching her within an area of 25 feet or within 30 feet of her children[8].

6.1.3 Some Legislative Measures

Paparazzi have been causing undue interference in the lives of public figures and private individuals. There was lot of pressure for legislation in US to bring press under control to cut off the supply of freelance photographers supplying intrusive photos to the press[9].

California has passed a statute imposing punishment for using of audio or visual recording devices on private property for collecting news

---

7 U.K. Law Online – Princess Diana, Privacy Laws and press freedom in the United Kingdom, p. 4.http://www.leeds.ac.U.K./law/ hamlyn/diana.htm retrieved on June 12, 2000 .

8 *Galella* v. *Onassis*, 487 F.2d 986 (2d Cir. 1973), Also see Dwight L. Teeter Jr. and Bill Loving, *Laws of Mass Communication-Freedom and Control of Print and Broadcast Media,* Tenth Edition New York Foundation Press, (2001), p.385.

9 See the paired editorial page comments in *USA Today*, Sept. 3, (1997), p.14A, "Overview: More laws won't stop photographers run amok", and "opposing view" [by Security Consultant Gavin de Becker], "protect privacy with laws".

and also made it punishable for media houses to buy these privacy invading recordings or photographs , even if the journalist providing the material are not employees of a media company[10].

6.1.4 Certain Exclusions

Except for governmental purposes, media men are usually allowed to intrude into private places. Certain Exceptions have since followed. In *Ayeni* v *C.B.C.*[11], *Tawa Ayeni*, wife of a man suspected of involvement in a credit card fraud ring, was at home with her son Kayoda, a minor. At this time, a US Treasury Department agent came with a search warrant. Six federal agents went his residence about 6. 00 PM. *Mrs. Ayeni* clad in her dressing gown opened the door only slightly but they pushed their way in. Later at 8.15 PM, the Treasury agent entered with a CBS news crew from "Street Stories". *Mrs. Ayeni* thought that they were part of the warrant team and never knew they were CBS employees. Later when she came to know that along with government officials, were press people, she brought a suit against CBS. CBS claimed immunity as they had the permission of the government agents. The Court allowed her lawsuit and declared that CBS had no greater right than that of a thief to be in the home to take pictures.

6.1.5 Technological Advances

Hidden cameras, wireless microphones and two way mirrors are just a few technologies for an investigative journalist to track down people in their private place. In *Bartnicki* v. *Vopper*[12], the U.S. Supreme

---

[10] California Civil Code, 1998, section 1708.8.

[11] *Ayen*i v. *C.B.S., Inc*; 848 F.Supp. 362, 364, Also see 22 *Media Law Reporter* 1466, 1467(1994).

[12] *Bartnicki v. Vooper (*U.S. S. Ct. 2001).

Court held that the reporters who were actively participating in illegal interceptions of electronically transmitted conversations were liable.

6.1.6 Fraud and disguise

When the Court finds a news agency guilty of fraud and trespass, it has not hesitated in awarding high amount as punitive damages. Such was the case of *Food Lion* v. *Capital Cities* [13] which happened in America. Here Dale and Susan were working for *Prime Time Live* and had made false statements that they wanted employment, to get hired by *Food Lion*. They worked using tiny 'Jacket cam' or 'Lipstick' hidden cameras and recorders to gather information about the working of the organization. In the process they found some defects in the functioning, concerning hygiene. This matter was broadcasted and in response to the broadcast , *Food Lion* brought a suit against *ABC –TV* alleging defamation, mail and wire fraud and trespass and also action against 'employees' Dale and Susan for breach of duty of loyalty. Court held that they agreed there is breach of duty of loyalty by the two employees and awarded damages for fraud but apart from that there were no punitive damages for fraud, as it was a social need that there should be cleanliness in a food setup.

It was generally felt that clean food is essential for the society. As the government does not act to protect citizens on its own, it is felt in these cases that the reporters have to use such methods to get information from underground. Many legal scholars argue that liability in such cases can be overridden when a public good is served[14]. However, such a relaxation is to be considered with utmost care, otherwise this privilege which is allowed

[13] *Food Lion* v. *Capital Cities/A.B.C.,* Inc., 984 F. Supp. 923 , 25 Med. L.Rptr. 2185 (1997).

[14] "Self- Censorship at C.B.S.", editorial in *The New York Times*, Nov. 12, 1996, p.14.

in some exceptional case can become the general code of conduct for press and on the pretext of public good they can force all privacy barriers open.

Here in the above case the court found that the damage had already been done but at the same time it was a genuine need of the society. The tort committed was not forgiven and therefore the journalists who entered as employees were made to pay damages for breach of duty of loyalty towards the employer. It was a commendable decision especially because it happened in a country which is strongly in support of the press.

6.1.7 Overenthusiastic Approach

In an award winning series of Huston Chronicle articles, reporter Nancy Stancill conducted a three month undercover investigation of Texas nursing homes. The photos showed the subhuman treatment rendered to elderly residents. This reporting gave rise to state investigation[15] into the issue. So things do happen if press is vigilant and investigative. But the press, many a times, oversteps in every direction, crossing the obvious boundaries of propriety and decency.

6.1.8 Investigation – Dangers in Law

Investigation precedes dissemination of news. In the process of newsgathering, the journalist should be well aware of the legal frontiers. He should not be allowed to take the law in his own hands. He cannot break the law concerning privacy, trespass and others. US Supreme Court has provided no immunity to press from liability for torts in the process of newsgathering. The Court has agreed [16]that the Press need

[15] Nancy Stancill, 'Deadly Neglect: Texas and its Nursing Homes', *Houston Chronicle,* July 22-26, (1990), retrieved on 6/9/09 .

[16] *Branzburg* v. *Hayes* 408 U.S. 665 (1972).

some protection during the process. Keeping in view the Constitutional right to gather news, the Court went on to strictly limit its application by stating that the press has no 'Constitutional right of special access to information not available to the public generally'[17]. In this case, the Court held that a journalist has no privilege under the Constitution to withhold from jury, information which he has received in confidence from some source.[18] The Court rejected the argument that the First Amendment would immunize news gatherers from criminal liability. This case of *Branzburg was* reinstatement of the decision in *Dietemann*.[19]

In *Galella* v. *Onassis*[20], the Court took strong objection to the act of *Galella,* a paparazzi that used unconventional means to photograph *Jacqueline Onassis* and her children. Court held that though she was a public figure and had public activities, the reporter's constant surveillance was unreasonable as it affected her activities, mentally and emotionally.[21] The court also stated that the First Amendment did not provide a 'wall of immunity protecting newsman from any liability for their conduct while gathering news.'[22] Therefore it is established that press just like the general public will be liable for torts or crimes committed in the process of newsgathering. In *Cohen* v. *Cowles Media Co.*[23], the Supreme Court denied that there is any Constitutional right to gather news.

---

17 *Ibid.*

18 *Ibid.*

19 *Dietemann* v. *Time.,Inc.*,449F.2d245,246.

20 *Galella* v. *Onassis*, 487 F. 2d 986, 995 (2d Cir, 1973).

21 *Ibid*.

22 *Ibid*.

23 *Cohen* v. *Cowles Media Co.* 501 U.S. 663, 669 (1991).

6.1.9 The News Gathering Privilege

Though news gatherers get some privilege, that is however limited in nature. Therefore it is to be understood from the above decisions that the most probable standard that a news gatherer should have is to establish that he had a reasonable belief that the plaintiff was engaged in illegal, fraudulent or potentially harmful activities before he decides to conduct the undercover fishing expedition. This privilege should not permit the press to employ subterfuge to pry into private lives or allow access to private homes. At the same time the reporter should not be allowed to employ this privilege for a purpose other than that for which it was intended. Finally, the investigation and the reporting should clearly serve common interest of the society that is to find the truth for which this privilege was exercised.

This qualified nature of the privilege seeks to protect individual's privacy as well as freedom of the press. We need investigative reporters as they are watchdogs of the society. But the trouble with these watchdogs is that they sometimes attack innocent people also. Though not much fancied by people, an investigative reporter plays a valuable role in exposing societal ills and advancing reforms. The success lies to a large extent on the use of new newsgathering techniques, which does not pose a great threat to individual privacy.

6.1.10 Methods Employed for Investigation

The tools used in the process of newsgathering are many such as spying, phone tapping, prying, video and camera usage, disguise, lying pretense and persistence.

One such case was of *Nellie Bly*[24], a journalist, who gained notoriety as one of the earliest reporters in this field. In 1905, she acting insane managed to get access to the women's asylum at Black wells Island. During her investigation she exposed the human rat trap found there, because people were trapped inside this asylum in such a way that they could not come out of it, just like a rat trap[25]. This being a matter of public evoking, it deserved merit. Today intrusive methods of news gathering threaten privacy more than ever before. New technologies make intrusion easier. The increase in media intrusion is the result of increasing competitions for ratings and profits rather than an increasing desire to serve public. Hidden cameras are used as an excellent tool for uncovering serious misconduct but they can also be used for attacking a person's private life for the purpose of simply providing entertainment to the public.

A very good example of competition is the incident following Princess Diana's death, where a *CBS* executive was demoted because he did not immediately break a regular program, to report the news of her demise[26]. Similarly in President Clinton's case although *Newsweek* had early access to tapes of conversation between Linda Tripp and Monica Lewinsky, its editors did not make it public for need of additional verification. But within hours of their restraint, it was on the internet, by the Drudge Report, a source of unedited scandal mongering[27]. It affected

---

[24] Lyrissa Barnett Lidsky, 'Prying, Spying and Lying: Intrusive News Gathering and what the law should do about it' 73 Tul. L. Rev.173 (1998- 1999), retrieved from *Westlaw* on 6/9/09.

[25] *Ibid.*

[26] Bill Carter T.V. notes; 'A Month late, the Fallout Hits', *N.Y Times,* Oct. 8, *1997.*

[27] Roger Bull, ' Online and Loving it'*, Fla. Times Union,* Feb 27, (1998)*,* at D1 (www.drudgereport.com).

the rating of the *Newsweek,* showing the degree of competition in this field. The above incidents prove that concern shown for individual privacy by press does not receive much reward for them.

6.1.11 Comparison –USA and UK and India

Intrusive newsgathering is another name for gathering news through the most innovative technology , where the gadgets used are very minute therefore difficult to find out whether you are under scrutiny of a camera or video or not.

Most of this intrusive news gathering is done through ingenious surveillance technologies. Tiny cameras just larger than a lipstick case can be worn inside the dress and miniature recorders which can be concealed in a pocket are used for transmission of a news item to millions of people[28]. There are instances where the reporter is absent while eavesdropping is taking place .For example the shotgun mike can pick up sounds as far as sixty yards away[29]. No wonder there is growing consensus among people to do something about intrusive news gathering. Thus investigative journalism has now being addressed as intrusive news gathering.

A 1996 poll conducted by the Center for Media and Public affairs in the US indicated that 80% of respondents thought the media invaded individual privacy and 52% thought the media abused their First Amendment freedom[30]. Any law designed to protect privacy must strike a proper balance between both First Amendment rights and realities as to

---

[28] *Supra n. 13*.

[29] *Wolfson* v. *Lewis*, 924 F.Supp. 1413, 1424 (E.D. Pa . 1996).

[30] See John Hughes, 'Solving the Media's Credibility Problem,' *Christian Science Monitor,* Apr.16, (1997), at p.19.

how and in what instances the press exercise these rights. The question many a times arises in the life of an individual, when under scrutiny, is whether he or she had a reasonable right to privacy.

There are two principles governing expectancy of privacy. The first principle of video intrusion comes to play .When the individual does not make an attempt nor has taken some voluntary step to expose himself or herself in public. Cases such as of *Flora Bell* [31] fall in this category. Here while in a fair with her kids, her dress just blew up in the wind. Her body was exposed from waist down and this happened to be photographed and published in the front page of the daily. She did not make any voluntary act to expose herself in public. It was simply by accident that it happened, and this caused embarrassment to her. Therefore, the Court held that she had reasonable expectancy of privacy, even in public places. *Flora* felt 'embarrassed, self-conscious, upset and was known to cry on occasions'. Just because an incident happens in public, it does not forfeit the right to privacy of a person.

The Second Principle is applied when the object focused to be published cannot be seen ordinarily. It can only be seen by the use of visual enhancement device such as a video or spy camera placed in a portion where a person would not normally or reasonably be expected to be standing or sitting. In those cases, there is definitely an expectation of

[31] *Daily Times Democrat* v. *Graham* 276 Ala. 380 (1964). Flora Bell Graham, then a 44 year old housewife was attending the Cullman County Fair in Alabama in October 1961. As she was leaving the Farmhouse with her two young children, air jets blew up underneath her dress and 'her body was exposed from the waist down, with the exception of that portion covered by her panties. It just happened at that moment a photographer for the *Daily Times Democrat* snapped a picture of her and the newspaper in bad taste published the photo on its front page. Here it is evident that publishing of that photograph in the front page had no public interest attached to it. So there was no newsworthiness in that photo.

privacy. People, who want to take photographs, do not normally lie down on shopping mall floors to take pictures of women under their skirt. This cannot be achieved by ordinary process. It can only be done by using miniature video cameras attached to baskets which women carry for shopping, provided by malls. This has become a big problem in the U.S. as their ordinary dress is skirts and frocks. In this case also, these women have expectancy of privacy as they cannot reasonably expect such intrusions to happen in public. This creates a great degree of insecurity to woman folk, if left unconcerned and unprotected by Courts.

Richard Brown of Gillett[32], Wisconsin was alleged by police to be up skirt voyeur. In 1998, police alleged Brown of "hiding a video camera in a back pack, cutting a hole to expose the camera lens and then aiming it at the skirts of half a dozen female clerks who sat at tables while helping him. These women were working in a public location but still have a reasonable expectation of privacy that their private parts would not be videotaped.

A series of such cases have been reported[33]. Technology has become so easily accessible and cheap. For as little as $100, one can possess a dime sized camera, hide it and connect it to a video cassette

[32] Clay Calvert, 'Video voyeurism, privacy, and the Internet: Exposing peeping Toms in Cyberspace ', Justin Brown 18 Cardozo Arts Ent. L.J. 469, p. 9, retrieved on 6/9/09.

[33] *Id.* at p.4, A Weymouth, Massachusetts man was indicted in July, 1999, for allegedly making videotapes of three babysitters when they undressed. He had a video camera in the bathroom. A man was arrested for using a video camera concealed in a gym. bag to shoot up the skirts of the ten women at Jacob's field home of the Cleveland Indians baseball team. A collection of male student athletes from eight universities who claim they were secretly videotaped, filed a lawsuit in July 1999 – they were videotaped at urinals, in showers etc.

recorder and become an anonymous gazer. For a few hundred dollars, voyeur may go wireless, transmitting undetected images to either a monitor or recorder[34]. In most of these images, the victim's face and identity are readily discernible. e.g. video images taken in a locker room, bedroom or bathroom . When these images are published or posted on the wide web, these constitute violations of privacy[35]. These can be posted on news web sites by reporters or by private individuals. These types of offences are yet to be seen rampant in India. However, we need to keep pace with the problems of technology in other developed countries to be vigilant in the area of law making.

In United Kingdom, such offensive newsgathering is not entertained by the Courts. In *British Radio DJ Sara Cox's* case in 2003**[36],** she was photographed naked in her Jacuzzi on her honeymoon. The photograph was taken by a long lens from a boat offshore and then published in the *People* newspaper. The Court awarded her an amount of 50000/- pounds[37]. Similarly, *Sienna Miller* was also given 37500/- pounds in 2008 for the unauthorized photograph in *The Sun* wearing a costume in a closet set of the film *Hippie Hippie Shake*[38].

A most interesting case was of *Mosely* v. *News Group Newspapers*[39]. Here *Max Mosely* was president of the governing body of Motor Sport

---

34 *Id. at* p. 5.

35 *Id*. at p. 13.

36 Melville Brown, Amber 'Camera shy – the Interaction between the camera and the law of privacy in the UK',*InternationalReviewofLaw,ComputersandTechnology,*vol.22, Number3,November2008,p.209.http://dx.doi.org/10.1080/13600860802496400. Retrieved on 12/6/09.

37 *Ibid.*

38 *Ibid.*

39 *Mosely* v. *News Group Newspapers* (2008) E.W.C.H. 687 (Q.B.).

Worldwide. He had been filmed using a secret camera, while he was engaged in a sexual activity with five dominatrixes in the basement of a private flat. Later an article along with the photograph was published on 20th March 2008 on the *Newsgroup Newspaper* website. He sought injunction but within days there had been 435000 hit on that website. Therefore the Court stated that injunction would no more help, though damages were given. Just because a celebrity shows bad behaviour gives no excuse to reporters to go ahead with intrusive search into the very private parts of their lives. This decision shows that UK is stricter towards reporters when it comes to intrusive news gathering. They are running in consensus with the European Union, which is strongly in favor of privacy, given protection through Article 8 of the European Convention 1950, and simultaneously by the UK in the Human Rights Act, 1998 in the United Kingdom.

6.1.12 Video in Courts

The US faced the television and video problem in the Court in *Estes* v. *Texas*[40] for the first time. In this the Court declared the purpose of the Sixth Amendment's provision for public trial. While analyzing the right of the press to televise Court proceedings, the Court determined that the press has the same privilege as the general public to access the Court room[41]. The Court told that the concept of public trial guarantees that the defendant is "fairly dealt with and not unjustly condemned"[42]. Later in *Sheppard's* case[43] the Court looking at the circumstances including the

[40] *Estes* v. *Texas*, 381 U.S. 532 (1965) .

[41] *Id.at* p. 540.

[42] *Id.at* p. 538-39.

[43] *Sheppard* v. *Maxwell*, 384 U.S. 333, 335 (1966).

failure of the trial Judge to take care against the influence of pretrial publicity, held that the defendant's due process right for fair justice was violated. Pretrial publicity is trial by the media even before the case comes up for hearing, through its analysis of the case. In the US as the cases are tried by jury, it is likely to influence the mind of these ordinary people of society who form the jury. They have no basic training in judicial process, thus they might give their decision under a preconceived notion emulated through media analysis of the case .This would affect the criminal defendant's right to a fair trial consequent to influential public opinion generated by media , thereby affecting the mind of Jurors[44].

In USA law of Contempt of Court is not so strong and stringent as in UK and India. This is because of the First Amendment, which guarantees freedom of information and the Sixth Amendment, which projects public trial of cases. These provisions if read together gives rise to a confusion in the mind of Judges, whether to protect pretrial reporting or not. This right of presence of media at a Criminal trial is not expressly articulated in the Constitution, but there is some constitutional protection given to it[45]. But this right is subject to reasonable restrictions. As the constitution is silent on restrictions on media therefore in some cases of impairment of justice the courts are forced to either terminate the proceedings or pass gagging orders.[46] These gagging orders ban the media from reporting the case till the order is removed by the court.

---

[44] *Gannett Co., Inc*. v. *Depasquale,* 443 U.S. 368, 378 (1979).

[45] *Richmond Newspapers, Inc*. v. *Virginia*, 448 U.S. 579–80 (1980).

[46] *Nebraska Press Association* v. *Stuart,* 427 U.S.539 (1976), it involved a debate over whether or not the press may be prevented from releasing through publication information which was seen to be 'implicative of guilt' related to the defendant. These were referred as gag orders. In this case it was ruled that it was inappropriate to bar media reporting on a criminal case prior to the trial itself, except in matters where a 'clear and present danger' existed that would impede the process of a fair trial.

6.1.13 The Federal Rules

One of the earliest in this line is the 1946 Federal Rule of Criminal Procedure[47], which prohibits Courtroom photographing and broadcasting in the Federal District Courts[48].However the judicial conference of the United States in 1990 did resolve to permit televising civil proceedings at the trial and appellate levels.

The English Courts however have been very strict about media interference through video or otherwise during the trial stage. The Criminal Justice Act of 1925, made publication of any portrait of any person, in a court an offence.[49] The act provides in section 41(1) –

No person shall:-

a) Take or attempt to take in any Court any photograph or with a view to publication make or attempt to make in any Court any portrait or sketch, of any person, being a Judge of the Court or a Juror or a witness in or a party to any proceedings before the Court, whether Civil or Criminal or

b) Publish any photograph, portrait or sketch taken or made in contravention of the forgoing provisions of this section or any reproduction thereof.

---

[47] Daniel H.Erskine, Esq. 'An analysis of the legality of Television Cameras Broadcasting Juror deliberations in a Criminal case', *Akron Law Review*, vol.39, p.701, 2006 retrieved on 7/9/09.

[48] *Id*. Fed. R. Crim. p.53. "Except or otherwise provided by a statute or these rules, the Court must not permit the taking of photographs in the Courtroom during judicial proceedings or the broadcasting of judicial proceedings from the Courtrooms".

[49] Criminal Justice Act of 1925, s. 41 (1).

The Contempt of Court Act, 1981, in England also permits criminal prosecution if any information divulged at trial is published.[50] In India we do not go to this extend as will find in detail in the next chapter. Here in India fair reporting of information is allowed but in England no reporting of information is permitted. One would virtually remember the case of *toddler Baby P.,* who was brutally killed by his own mother and her lover[51]. The Court did not release the names of the couple and their background till final decision came in. This was in keeping pace with the protection afforded to their identity. In *R.* v. *Loveridge*[52], the Court of Appeal did not allow the filming which took place at the Court, as it contravened statutory law. Thus it can be clearly stated that English Courts are against videos being used in Court.

The situation in the USA is fundamentally different, where the fight between fair trial and press still continues. The *O.J. Simpson*[53] trial is a very explicit example in which press over seeded the right to have a fair trial. While in USA, there are no deterrent sanctions to prevent prejudicial publicity, in England and other Commonwealth countries like Canada, Australia and New Zealand there are heavy penal sanctions for the Publishers of materials that may interfere with the due course of justice[54]. The judgment of the European Court of Human Right[55] led to the 1981 enactment of the Contempt of Court Act.

---

[50] Contempt of Court Act 1981, s. 6 (c).

[51] 'Woman, Boyfriend who Tortured Baby Named' , *The New Indian Express*, August 12, 2009 (Cochin),p 11.

[52] *R*. v. *Loveridge.* 2 Crim.App. R. 29 (2001).

[53] http://en.wikipedia.org/wiki/O.J. *Simpson murder case*, retrieved on 24th June 2010 at 10.30 am.

[54] Kathryn Webb Bradley, 'The Court of Public opinion: The practice and ethics of trying cases in the Media' Bradley. Cite as (71 – Fall Law & Contempt Probs.31), p. 3 retrieved from *Westlaw* on 7/9/09.

It seems that in countries with adversarial systems of trial it is based on the idea of openness of the judicial proceedings. They believe that justice should not only be done but should appear to have been done. Therefore, they do not like secrecy. While in the inquisitorial system of trial, they cannot get rid of some sort of secrecy. This is so regarding the preliminary stage while the main hearing is open to the public[56].

6.1.14 Indian System of News Gathering

Indian journalists have been keeping pace with the press around the world. They have been instrumental in bringing many matters into public. Many corruption cases have been reported and brought to the forefront. But in the process of news gathering it can be seen that many laws have been violated by journalists. Enthusiasm is good, but it should not hurt the private borders of any person until it is of social importance. This barrier can only be crossed only if the mass media shows valid grounds for breaking it, for reasons considered by public and government as justified. This justification can only be allowed in terms of social

---

[55] *Sunday Times* v. *United Kingdom*. App.No. 6538/74, 2 Eur. H.R. Rep. 245 (1979). It was a case in which a drug was responsible for damage to many unborn children, and while this case was pending in the court, the Sunday Times came with an article, which accused the manufacturers of the drug of negligence. The case went on to the European Court. The Court concluded that the interference did not correspond to a social need sufficiently pressing to outweigh the public interest in freedom of expression. And therefore, the article was protected. The U.K. Government responded to this decision by the enactment of the Contempt of Court Act 1981. This Act took account of the ruling of the European Court in the *Sunday Times* case and was also influenced by the 'prejudgment test'.

[56] See European Convention, Article 6(1), which states the principle that "judgment shall be pronounced publicly" but admits that the press and the public may be excluded from all or part of the trial in the interest of moral, public order or material security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the Court in special circumstances where publicity would prejudice the interests of justice.

interests such as security, anti-corruption, peace, harmony and respecting the ethics and sentiments of people.

Sting journalism which works on the principle of obtaining information by deceit – involves impersonation, lying and cheating, not to mention risk. It also requires clever marketing for example in *Tehelka case*[57]. Bangaru Laxman was the president of Bharatiya Janata Party; he was caught in camera allegedly taking bribe from fake arms dealers for facilitating a fictious defense deal case. He was caught on camera accepting money in a 2001 sting operation conducted by newsportaal *Tehelka com*. The journalists posed as representatives of a fictious UK based company West End International and were seeking his recommendations to the ministry for supply of hand –held thermal images for the Indian Army. The CBI had alleged that he had accepted rupees 1 lakh from the fictious company. This sparked political storm following which he resigned as B.J.P. chief.[58] One of the main accusations against *Tehelka.com* was that the organization used deceptive means to make a quick name for it. It succeeded also. But many did not approve of the methods used. Sting journalists should be made to understand that it is not easy to always justify violation of law. A hidden camera or microphone used to surreptitiously record information is violation of privacy. Use of drugs or call girls to take out information or trap officials is a crime[59].

---

[57] Press Trust of India ,'What's the Bangaru Laxman Tehelka sting case? Ibnlive.in. com/news. Retrieved on 28/03/2013.

[58] *Ibid.*

[59] Sunil Saxena ' Candid Cameras , Call girls , Bribery : Is Sting Operation Crossing the Lakshman Rekha ?' *New Sunday Express*, March 14, (2004), p. 17.

Similarly, in Bofors *case*[60], Justice J.D. Kapoor observed while pronouncing the verdict that the case at hand is a good and nefarious example which manifestly demonstrates how the trial and justice by media can cause irreparable, irreversible and incalculable harm to the reputation of a person and shunning of his family, relatives and friends by the society.[61] The Court said such a person is ostracized, humiliated and convicted without trial. The Court cited the case of Punjabi pop singer Daler Mehndi whose discharge was sought in a human trafficking case after his humiliation and pseudo trial through media as they (police) have not been able to find the evidence sufficient even for filing the charge sheet.[62]

6.1.15 Disturbing Realities

There have been many instances of media reporting which has resulted into nothing positive except cause pain and hardship to the media focused person. In 1980 Lindy Chamberlain, in Australia, was tried for the murder of her baby. She was convicted and later released on fresh evidence that a dingo (a wild dog) had committed the act. In fact she had stated that in her case. Later a motion picture by the name 'A cry in the Dark' depicting her story was made enacted by actress Meryl Streep[63]. This public depiction of her case by the media caused her agony .One can imagine the pain and agony undergone by a mother who lost her baby, got accused for it and finally given a public exposure to

---

[60] *The Hindu*, Thursday, 5th Feb 2004. http://www.hindu.com/2004/02/05 stories/ 2004020 5 to 951100htm, retrieved on 30/609.

[61] *Ibid.*

[62] *Ibid*.

[63] Trial by Media – wikipedia.org http://en.wikipedia.org/wiki/Trial by media - retrieved on 3/6/09.

world for no fault of hers. This was an act of great irresponsibility on the part of media.

In USA, investigations were made into biologist Steven Hat fill, for allegedly sending anthrax through the US mail, as a terrorist attack. The media gave this publicity. Though these investigations brought no concrete evidence against him, the media exposure resulted in causing severe imputation to his name and caused destruction to his career[64].

The *ISRO espionage*[65] case in Kerala in which the media falsely framed two scientists in an espionage scandal was finally laid to rest by the Supreme Court of India on April 29 1998. The CBI found nothing genuine in the case. This was looked at by the court in bad taste and media generated, and projected the press as very irresponsible. This is another way of investigative journalism used by the media, to excite the people by giving them some spicy information, to think and imagine by which they malign the persons focused and at the same time increase the circulation of the paper.

Statement was made by the media regarding lawyer Ram Jethmalani when he decided to defend Manu Sharma, a prime accused in a murder case. He was subjected to severe criticism for defending the accused. A senior editor of the television channel, CNN-IBN called that

---

64 *Ibid*.

65 R.Krishanakumar *'ISRO* Spy case. Requiem for a Scandal', *Frontline* vol. 15, No 10: May 09-22, (1998). http://www.hinduonnet.com/fine/f11510/15101140.htm retrieved on 1/3/2010at 6.30 pm. This was a case involving two scientists working in Indian Space Research Organization, Thiruvanandapuram, who were accused of espionage with official documents. This case was completely framed by the media. Finally investigations found no evidence to prove their involvement in any espionage activity.

decision of Jethmalani, an attempt to "defend the indefensible"[66]. The press complained that it was not fair that a prominent lawyer like Jethmalani should appear for the accused and that only an average lawyer should argue for the state[67]. Again this is bypassing the private right of an advocate, as to, for whom he should argue.

Similarly, in *Mohammed Afzal*, (the Parliament attack case of December 2001), the media started its own trial shortly after his arrest. The opinion of the media was already fixed, that he is a terrorist and needs death sentence. This sort of discussions shown on the small screen can definitely prejudice the mind of an ordinary person. Along with *Mohammed Afsal* his co-defendant S.A.R. Geelani was also sentenced to death despite lack of evidence and the media portrayed him as a dangerous and trained terrorist. But later the Delhi High Court overturned his conviction, which was a blow to the impression given by media. The court described the prosecution's case as 'absurd and tragic'[68]. This gives a very clear idea of the preconceived notion that the media projects to the people of this country long before the process of law in court is over. Therefore when the decision comes in contradiction of the view given by the media, public tends to think that judges are corrupt and biased.

6.1.16 Disturbing Photographs

Similarly the carelessness of press is not just evident in writings alone, this is also seen depicted through photographs, etchings etc.

---

[66] S. Devesh Tripathi 'Trial by Media: Prejudicing the Subjudice', http://www.rminlu.ac.in/content/devesh retrieved on 5/6/09.

[67] *Ibid.*

[68] *Id.* at p. 51.

Morphing is a technique whereby a person's face is put on the body of someone else. It is a process which leaves behind no tell-tale mark, especially if transferred to another computer, which reads it as an original file. This is a malpractice done by the media houses. This method is a clear violation of the identity and individuality of the victim, which forms an integral part of their privacy.

The photograph of south Indian film star, *khusboo,* was morphed in such manner, then the Rajya Sabha member and CPM leader *Brinda Karat*'s face was morphed. In both the cases, morphing was done by *Maxim,* the top selling international men's magazine that was given license to start publication in 2005.[69]In such cases, people do not even think of filing a case, as the end result of a court case is mostly courts asking the media to give in their apology for the wrong committed by them, the loss of reputation and the cost of litigation underwent by the victim, does not seem a hardship to the courts.

No media house shall be allowed to change or replace parts of a photograph. This is a moral wrong, especially if it demeans a public figure. In 2006, the discussions came in *Mumbai Mirror* of former Kerala minister, P.J. Joseph[70]. It was concerning the allegation of a co-traveler who is a lady, regarding some physical contact on her body by the minister while traveling in a flight. But the picture shown was of another Minister *K.M. Mani* and not of *P.J. Joseph*. Transmission of wrong pictures in this way can cause stigma for an innocent person and is not good for press reporting. This behavior of the media is in bad taste, but unfortunately all this just goes on with no remedy been taken.

---

[69] Sunil Saxena 'Picture Imperfect' , *Indian Express* dated 19/03/2006

[70] *Mumbai Mirror* dated 20/8/06.

In *Parshuram Babaram Sawant* v. *Times Global Broadcasting Co. Ltd*.[71], Retd.Justice P.B.Sawant's photograph was flashed as Justice 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. Though the said channel stopped publishing the photograph, when the mistake was brought to their notice, no corrective or remedial steps to undo the damage were taken by the channel on their own. The plaintiff by his letter dated 15/9/2008 called the defendant to apologize publicly with damages of Rs 50 crores. By its reply the defendant apologized but no mention of damages was there. It was a belated action hence plaintiff demanded Rs 100 crores. The Court held that the defendant was entitled to pay Rs 100 crores to the plaintiff. The Bombay High Court ordered the Times to deposit 20 crores in cash and 80 crores in bank guarantee, before taking up its appeal against the Pune trial Court in the defamation case.[72] This was upheld by the Supreme Court.[73] This was very good move by the Court.

6.1.17 Press Council of India[74]

This body established in 1978, has been given a responsibility to prevent adverse remarks against the press. The PCI provides for rules for scrutinizing the work of Journalists. These rules include provisions that

[71] Special Civil Suit No. 1984/2008 in Pune trial court.

[72] 'S.C asks Times Now to deposit Rs 100 crores before H.C.takes up its appeal in defamation case', times of india.indiatimes .com/india dated November 15, 2011, retrieved on 27/02/2013.

[73] *Ibid.*

[74] Herein after referred to as PCI.

reporting shall maintain accuracy and fairness.[75] It shall be subject to prepublication verification[76]. The press has been asked not to intrude or invade the privacy of an individual unless outweighed by genuine overriding public interest.[77] Though the PCI rules for maintaining the equilibrium between public needs and private privileges, it is not found to be doing its job effectively. They normally end up asking the newspaper to apologize or retract the damage causing article or publish a rectification. The wrong doers are not made to give any compensation or damages to the victims. The newspapers do not suffer any damage as there is no element of deterrence in the punishment given for violating the rules/orders of PCI. Hence, these wrong doers, instead of becoming more vigilant in future, perhaps become more comfortable as they know the extent to which PCI would go in punishing them. In the case of an article in *Indian Observer*[78], named 'Tragedy of the Chastity Belt', the PCI upheld the complaint against it. The article was regarding discussion of the need and use of chastity belts for women to preserve their chastity. The complaint was that the article was grossly obscene and was likely to arouse desires and sexually deprave the reader's thoughts. This complaint was raised by the Delhi Administration. The PCI simply warned the editor against such writings, which clearly reflect the extent to which the PCI can exert pressure on the press. Mere warning by PCI will have no deterrent effect on the *Indian Observer*. Apart from warning, admonishing and censuring, PCI also has criminal contempt

[75] Swati Deshpande, '*Media and Law –A Reporter's Handbook',* AMIC India and UNESCO (2006), p.190.

[76] *Ibid*.

[77] *Ibid.*

[78] *Report of Press Council of India* (1969), p. 10.

powers. These powers are used to restrict the publication of prejudicial media reports but this is very rarely used. PCI can only exercise its contempt powers with respect to pending civil or criminal cases[79].

6.1.18 Recent Cases

The regression of ethics through the process of investigative journalism is so evident in recent times. It seems that the press reporters and publishers have taken their freedom for granted. If no space is given for putting reins on them, then it is definitely a lapse on the part of the legislature. *Sr. Sephy's* petition in the Kerala High Court demanding an inquiry into the incident of leakage of visuals of narco analysis test tapes was elaborative of this government lapse. These visuals were telecasted by Malayalam news channels. Such incidents proved the need for Courts to issue directions to CBI not to divulge details of an enquiry to the public or press. Therefore as a result Justice Hema of the High Court of Kerala stated that the courts should not be carried by the 'media trial' and that courts should and can, act only on the basis of case records. She said that the

> ''Media has pronounced the verdict already without looking into any of the facts. The public has joined hands, being carried away by the various publications effected through media, which do not contain the bare true facts which are revealed by the case records. A democian sword of a threat of ill repute is held over the head of any Judge who may dare to lift his/ her pen and write or speak anything contrary to the 'media public verdict' which is already

[79] "Trial by Media – Human Rights Features", http://www.hrde.net/sahrde/hr features, retrieved on 9/6/09.

pronounced .The Courts can go only on the basis of the facts covered by the case records.''[80]

The *Ambani's* issue also needs to be mentioned,where they were indicted by a website as being behind the death of former Chief Minister of Andhra Pradesh, late Y.S. Rajasekhara Reddy[81].This simply made front news on the basis of vague reports in a couple of vernacular channels that a Russian online biweekly *tabloid – exiledonline.com* carried a report that the death of YSR was not an accident but a result of a conspiracy hatched by the 'Ambani brothers'[82]. This news ultimately held no ground as they could not substantiate its conclusions. This shows the audacity in broadcasting news without any verification regarding its truth and authenticity. Less than 24 hours after the vernacular channel TV5 put out this report, the police arrested its Senior Executive Editor and input Editor. But the damage was already done as large scale disturbance[83] took place in the night causing loss to Reliance Ltd. and State Government of Andhra Pradesh.

T.P. Nandakumar, chief editor of *Crime magazine* was arrested on charges of defamation , for publishing a defamatory article in the online edition of the magazine. It was stated that Nandakumar demanded money for not publishing the article.[84]

---

[80] *Sr. Sephy and others* v. *Union of India and Another* 2009 (1) K.H.C. 121.

[81] 'Ambanis behind YSR Death?' *The New Indian Express ,(Cochin)* dt. 8/1/2010, p. 1.

[82] *Ibid.*

[83] 'Report that Came to Bite them', *The New Indian Express ,(Cochin)* dt. 9/1/2010, p. 1.

[84] 'Crime Editor Arrested', *The New Indian Express, (Cochin)* dt. 4/7/ 2010, p.9.

Jammu & Kashmir witnessed a media gag in fear of terrorist attacks; as a result there was a total 'blackout of news in the local newspapers.'[85]This was to maintain peace in the valley.

Three photo journalists were summoned by the police for taking photographs of President Pratibha Patil on a Goa beach. The media had been asked to keep away from her. This was countered by the president of the Photo Journalists Association Goa, who stated that beach is a 'public –place' and they have every right to be there.[86] If this is the guarantee of privacy for the President of a nation, who was simply relaxing and not on any duty on the seaside, then the status of privacy would be really pathetic for a common man. It was really sad to hear Jammu & Kashmir Chief Minister Omar Abdullah lamenting about the press report of his separation from his wife and his future plans. He was really aggrieved while stating that 'I believe my family and I are entitled to that privacy. At this point my concern has to and will remain my young sons who do not deserve to see themselves splashed across the news channels and pages of newspapers in this manner.' [87]

6.1.19 Comments

Media Trial has now become the focus of many discussions. It is often conducted in two different realms. First by the traditional publishing media houses, which disburse news items through newspapers and magazines. The second by the more elaborate, quick and effective means; through the electronic media.

---

[85] 'PDP Condemns Media Gag', *The New Indian Express, (Cochin)* dt. 11/7/2010, p.9.

[86] 'Photo Journalists Summoned for Snapping President', *The New Indian Express, (Cochin)* dt. 6/1/2011, p.10.

[87] 'Stories About Remarriage are False: Omar', *The New Indian express,* (Cochin) dt . 16/9/ 2011, p. 7.

Faster the technique of transmission of news, faster the damage it can possibly do in the process. Therefore, transmission through electronic media demands a greater need of caution. Unfortunately, unlike the print media, electronic media has no regulatory body[88], was stated by former Justice G.N. Ray. He tried to bring it under the Press Council of India, and brought it to the notice of the government, but nothing materialized. In his lecture he states that the mechanism available against Electronic media is only through Contempt of Court Act 1981 regarding subjudice cases and secondly through Article 21 of the Constitution of India regarding other matters. Justice Ray observed that it will be appropriate if the electronic media is regulated without any loss of time. He recommended the constitution of a Media Commission for in-depth study of various aspects of functioning of both electronic and print media[89].

Presently, we have only the mechanism of restricting the channel or prohibiting it under the Cable Television Networks (Regulation Act) 1995, by the Central government. The reasons for regulation would be in the interest of public order, decency or morality and this is only a general restriction; no private remedy is available for any particular victim[90]. Later the Ministry of Information and Broadcasting banned Fashion TV (FTV) for 10 days from March 10 till 21, 2010. This has been for showing bare breasted women in September 2009[91]. This punitive action is not at all found effective.

---

88 Law Lecture by Chairman, Press Council of India on August 31, 2008 at Bhubaneswar, organized by Gora Chand Patnaik Memorial Trust.

89 *Ibid.*

90 The Cable Television Network (Regulation) Act ,1995, ss. 19 and 20.

91 'Fashion TV Bares all, Gets Banned.' *The New Indian Express, (Cochin)* dt. 12/3/2010, p.1.

The situation that we are encountering in India is similar to the statement made in *Dennis* v. *U.S.*[92] by Justice Black in his dissenting judgment. The Lordship said-

> "There comes a time when even speech looses its constitutional immunity. Speech innocuous one year may at another time fan such destructive flames that it must be halted in the interests of the safety of the Republic. When conditions are so critical that there will be no time to avoid the evil that the speech threatens, it is time to call a halt otherwise free speech which is the strength of the nation will be the cause of its destruction ……."

This is what is happening in the sphere of media freedom. Since the press has been using this freedom in an irresponsible manner, it has been gradually loosing its authenticity and along with it the trust that people have had in them through the years. Over and above, they are abusing their right to freedom of speech and expression, invariably, and this needs to come under a check otherwise this freedom will cause destruction as visualized by Justice Black in his above dissenting judgment.

The new Chairman of the Press Council of India Justice Markandey Katju, stated that the argument that media was also a business and must give the people what they want 'is degrading the media. The media is not an ordinary business that deals with commodities, it deals with ideas.'[93] He also added that the intellectual level of our people is very low. The media should not go down to that level. He said that a large section of the media

[92] *Dennis* v. *U.S.* (1951) 341 U.S.

[93] 'Katju , 'Media Must Provide Leadership to Society' , *The Hindu, (Cochin)* dt. 6/12/2011, p. 10.

was diverting, the attention from the real issues, and giving more importance to entertainment news and superstitions rather than dealing with genuine issues of social development, which is the actual role to be played by the media[94].

6.1.20 Press in Subjudice Matters

It is very important that the press does not lose the confidence of the society. Thus the Fourth Estate in a democracy operates along with legislature, executive and the judiciary within the framework of the constitution. In the wake of the amendment of the Contempt of Court Act in 2006, wherein truth has been accepted as a defense in Contempt proceedings[95], for subjudice matters, precaution has to be taken by the investigating agencies that matters are not revealed to the media. Truth being a defense, the media is bound to further exploit the information received if it is the truth, unconcerned by the damage it can cause to the privacy aspect of an individual. The judges have to yet to fix the parameters of the 'truth' in each and every case. Every truth cannot be a defense if it runs the risk of destroying a person's life though he might have repented of it. Unless and until, it serves a public interest to reveal the truth, truth as a mere defense is calling forth controversies.

The Courts should decide which truth should be entertained and the qualification of truth which can be allowed as a defense in case of contempt of court proceedings. The media involvement in criminal justice administration had received in-depth consideration by the

---

94 *Ibid.*

95 The Contempt of Court (Amendment) Act, 2006 - section 2 substituting section 13 of the Act.

"Committee on National Policy of Criminal Justice" in the wake of the sting operations and trial by the media[96]. The Committee opined that unless there is substantial risk of serious prejudice to the course of justice, there should not be restriction or prohibition on the coverage of criminal proceedings[97].

6.1.21 Responsibilities of the Press

Courts at large give protection to a free press. Right to freedom of information is the password of these times. The role of media is widely recognized today. The responsibility of the press however is yet to be appreciated by the press. People have started wondering as to whether the press today operates just like any other business. Ownership of media has increasingly caused apprehension as to whether this commercial aspect may influence the opinion and ethics of the editorial board. Still amidst all these concerns, law and judiciary still continues to protect freedom of press and consider it as an important part of freedom of speech and expression enshrined in the Constitution. Lately, the issue of 'paid news' was reported in the Rajya Sabha[98]. This rumour about paid news has been there for some time, but it came to limelight when during last elections advertisement in the form of regular news was given in newspapers. This is bound to confuse the readers as they believe these campaign news items as genuine news. These 'paid news' has been paid for in terms of huge money just like an advertisement, while the regular news is genuine information for which no payment has been made. The

---

96 *Annual Report of the Press Council of India ,* April 1 , 2007- March 31, 2008, New Delhi, p. 20.

97 *Ibid.*

98 'Govt. Urged to Crack down on 'paid news', *The New Indian Express*, (Cochin) dt.6/3/2010, p.7.

opposition asked the government to take stringent action against any media house or politicians indulging in paid news. Leader of the opposition in Rajya Sabha, Arun Jaitley, advocated appointment of a regulator to deal with these matters. He described the Press Council of India as a toothless wonder.[99] He emphasized that "the reader or viewer has the right to honest, unadulterated news, which is being denied to him. He is not even being informed that the news is motivated by monetary considerations"[100]. CPM leader Sitaram Yechury said that corporatization of media houses had led to this menace and it was against parliamentary democracy[101].

Conclusion

We in India cannot have a press uncurbed and free. The Courts are still being liberal with the press so as to develop a strong freedom of information system in India. Today, along with all this, we also have the Right to Information Act 2005, which gives right not just to the press but to each and every individual to break through the veil to get information of persons in power, institution and government. When the right to information is raised to a high pedestal then it is time that the corresponding duty to protect the privacy of its citizens is also given a position equal to that. Today media freedom cannot be mistaken for a world without privacy. In fact this is a dais; commercially manipulated to bring out man woven stories, which is constitutionally protected.

It was a routine affair to distribute pens, notepads and folders during press conferences. Then it jumped from these free samples to

[99] *Ibid*.

[100] *Ibid.*

[101] *Ibid.*

bigger presents like gold, vouchers and holidays. Political reporting was paid in covers having rupees 2000 or more. As this kind of political reporting increased in journalism, the lines of separation became blurred. Niira Radia , the popular lobbyist was simply doing this, the journalists involved in the Radia tapes were passing messages between corporates and the government to get certain people into the cabinet and for other reasons.[102]

The elements of public interest in contradistinction to privacy should be the test for deciding a case in favor or against a media reporting. The Courts in India must be able to determine the parameters of both these rights. The media houses should be asked to open its doors to give information to the public under the RTI Act to ascertain whether the proper process of verification has been followed to prove the truth in the reported matter. Media houses should have an active *Ombudsman* which accepts complaints from the public, adjudicates over it, resulting in rendering apology, penalization and awarding compensation to the victims of their reporting. The object of *Ombudsman* should be targeted towards winning the confidence of the victims and the public.

Investigative journalism shall be encouraged only through the legal frame work and shall be incorporated in the training courses offered by these media houses. The Press Council of India must be provided with more teeth when it comes to decision making and sanctions. The penalties and punishments that the Press Council of India imposes shall have a deterrent effect on the journalists. Without fear of law and the public the media might stride ahead into forbidden areas of national

[102] Zubeda Hamid, 'News for hire', *The New Indian Express*, (Cochin),dt. 4/12/2010, p.8.

security on the pretext of freedom of press. A strong legislation is the need of the time which will make the boundaries of press freedom and privacy. In this world of increasing technology and lobbying by media houses, an individual is left all alone and helpless with no means to protect him. In this position, he cannot even defend himself. He is left all open and alone to abuses and shame for the sake of public interest, which the media claims as the freedom of information/ press.

.....ഓർ.....

Chapter 7

CONTEMPT OF COURT IN INDIA: BALANCE BETWEEN MEDIA FREEDOM AND PRIVACY IN SUBJUDICE- MATTERS

7.1 Introduction

The object of conferring power to punish for its contempt on courts under Contempt of Courts Act 1971 is to ensure that rendering justice shall be free from forces outside and nobody shall interfere with the administration of justice. Contempt action is a tool to be used to uphold the dignity of the courts. Judiciary has been given the function of being a guardian of the Constitution. In this process of adjudication many questions of law flow onto the Court of law for its consideration and decision. During this subjudice period the administration of justice should be allowed to take its own independent stand. Interference into this process is limited only to cases of fair comment of the case in Court.

Every case is determined by its merit. Investigation by press has changed the course of law in many cases and the Courts have appreciated the role of the fourth pillar – the press. There are however many cases where the Courts have passed adverse comments against undue interference by the media. In this chapter an examination of cases where damages are caused to private persons due to interference by media in subjudice matters are made.

7.1.1 Early Stages – Constitutional Protection

The Supreme Court has long back had established[1] that freedom of speech of the press is not without limitations. It stated that it does not confer an absolute right to say anything. In the opinion of the court it is a right with responsibility. The limitations stated in Article 19(2) over this right are public order, decency or morality, contempt of Court, defamation, among other grounds.[2]

Contempt of Court proceedings, apart from the above restrictions, is also protected under Article 129[3] and 215[4] of the Indian Constitution. Under these Articles, Supreme Court and High Court can respectively punish persons for contempt of Court. As late as in *Delhi Judicial Service Association* v. *State of Gujarat*[5], the apex Court held that it can impose punishment even in cases of contempt of subordinate[6] Courts. This power of the Courts being provided under the Constitution cannot be curtailed by provisions of the Contempt of Court Act 1971. The most contended argument against action for contempt of Court is truth. However this defense was not allowed to sustain in *Perspective*

---

1 *Romesh Thappar* v. *State of Madras*, A.I.R. 1950 S.C. 124.

2 Constitution of India: Article 19(2) -The State can put restrictions on the right to freedom of speech and expression on the ground of sovereignty and integrity of India, 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. (These restrictions imply the fact that the press freedom was never intended to be an absolute freedom).

3 Article 129: The Supreme Court shall be a Court of record and shall have all the powers of such a Court including the power to punish for Contempt of itself.

4 Article 215: Every High Court shall be a Court of record and shall have all the powers of such a Court including the power to punish for Contempt of itself.

5 *Delhi Judicial Service Association* v. *State of Gujarat*, (1989) 2 *Scale* 748.

6 The Contempt of Court Act, 1971, section 10- empowers High Court to do this.

Publications v. *State of Maharashtra*[7]. Here it stated that this defense can be allowed in case of libel but not in Contempt.[8]

However with the Contempt of Court amendment Act 2006, 'Truth' has been made expressly a defense for any contempt proceedings[9]. The court in cases where truth is pleaded as a defense would have to look into the facts and determine as to whether this publication of truth has any public interest connected to it or is it simply for commercial gain of the press and as to whether this exposure of the truth was done with bonofide interest to expose something which the public have a right to be informed of in the public interest.[10] Only if truth is qualified with public interest and is bonofide, can it be invoked as a defense in contempt proceedings.[11]

At the same time there is difference between truth as a defense and fair & accurate report of judicial proceedings. Fair criticism of judicial proceedings and fair reporting does not constitute contempt of Court**.**

7.1.2 US and UK Position on Contempt of Court

Article 6 of the US Constitution favors public trial. The object being to protect the accused and bring transparency in the proceedings. To illustrate one would like to elaborate upon O.J. Simpson's trial.[12] Orenthal James Simpson was a black American football player, who was

---

7 *Perspective Publications* v. *State of Maharashtra*, A.I.R. 1971 S.C. 221.

8 *Ibid.*

9 The Contempt of Courts (Amendment) Act, 2006 section 13 ((substituted) (3). The Court may permit in any proceeding for Contempt of Court, justification by truth as a valid defense if it satisfied that it is in public interest and the request for invoking the said defense is bonafide.

10 *Ibid.*

11 *Ibid.*

12 http://en .wikipedia.org/wiki/O. J. Simpson, retrieved on 25/11/2010.

accused of murdering his separated wife and her friend. In 1995, after a lengthy internationally criminal trial, publicized though television, he was acquitted. Though he was acquitted in the criminal case but in the civil case in 1997 which was not a public trial, based on the same facts, he was found liable for the wrongful death of his wife and her friend by a unanimous jury.[13] This verdict raised eyebrows as to whether criminal public trial did actually bring justice or helped the convict go free. The public trial, therefore possibly cannot guarantee fair justice as more the exposure to media, more will be the interference into administration of justice.

Under public exposure of camera, witness, accused, lawyers and judges may act differently as exposure to media makes them over conscious and their thinking process becomes distracted and corrupted. This handicaps the ordinary procedure of examination and cross examination of witnesses, study of evidences and arguments of the advocated. Eventually, all these give a dramatic expression to an ordinary court proceeding, which is definitely not the object of these courts.

In UK the Criminal Justice Act of 1925, strictly prohibits media intrusion in court proceedings. It provides in section 41(1) that no person shall:

a) Take or attempt to take in any Court any photograph or with a view to publication make or attempt to make in any Court any portrait or sketch, of any person, being a judge of the Court or a juror or a witness in or a party to any proceedings before the Court, whether Civil or Criminal or

[13] *Ibid*.

b) Publish any photograph, portrait or sketch taken or made in contravention of the forgoing provisions of this section or any reproduction thereof.

A person, who contravenes the above provision, is liable on summary conviction in respect of each offence to a fine not exceeding fifty pounds.[14] The difference in law between the two countries is so drastic and different and still both happen to be strong democracies. Though we are a democracy we have more in common with UK in terms of social, culture and history.

7.1.3 Contempt of Court Act 1971

In India the first Contempt of Court Act was in 1926 and later amended by the Contempt of Court (Amendment) Act 1937. After independence the parliament enacted the Contempt of Courts Act 1952. This was later modified into the present Contempt of Courts Act 1971.

Contempt proceedings are in the form of a normal criminal proceeding. The only difference is as the Supreme Court and the High Courts are Courts of record, the power to take proceedings under the Contempt of Court is in its inherent power. So in cases where the courts feel contempt is, there they can take up a case on its own.

Under section 3, a person is not guilty of Contempt of Court if he has published any matter which interferes or tends to interfere or obstructs or tends to obstruct the course of justice in connection with any civil or criminal procedure pending at the time of publication, if at that time he had no reasonable grounds for believing that the proceeding was

[14] The Criminal Justice Act, 1925, section 41(1).

pending.[15] Thus it protects a person from contempt of court proceedings if it is done in ignorance of a pending suit .The section further explains that judicial proceeding shall be deemed to be pending, where appeal or revision in the case is possible in future[16]. All the same, it is not deemed to be pending if proceedings for the execution of the decree, order, or sentence passed therein are pending.[17]

Courts do not bar fair production of facts. The object of the court is always to prevent disturbance in the administration of justice and not hamper freedom of speech and expression.

The Law Commission of India in its 200th report in 2006[18], compared section 3 on the Indian Act with the UK position, where arrest is the starting point of pendency of a criminal proceeding under the UK Contempt of Court Act, 1981. Australia also follows similar practice. Therefore the report stated that the explanation to section 3 in the Contempt of Court Act 1971 needs to be amended, by adding a clause 'arrest' in the explanation below section 3 as being the starting point of pendency of a criminal proceeding. If this was incorporated then the protection against the press under the Contempt of Court Act 1971 will commence at the arrest stage itself rather than the present protection from the stage of pending judicial proceeding.

---

15 The Contempt of Court Act, 1971, section 3.

16 *Ibid.*

17 *Ibid.*

18 *200th Law Commission Report on Trial By Media, Free Speech and Fair Trial under Cr.P.C. 1973*, http://Law Commission of India.nic.in/register/rep200.pdf retrieved on 4th June 2009.

7.1.4 Fair and Accurate Report

Section 4 of the Act states that there is no Contempt of Court when the press or media publish a fair and accurate report of a judicial proceeding but subject to the provisions contained in section 7[19]. But when the editor and / or publisher do not verify the correctness of the news item before publication and if it is found to be false, then they are guilty[20].

The press freedom is further extended to fair comment on the merits of any case which has been heard and finally decided.[21] However, if this criticism is likely to interfere with administration of justice or affect the dignity of the Courts, then it would cease to a fair criticism[22]. The benefit of section 5 would be given even if the case was not finally decided[23].

The punishment that can be imposed by the Court is simple imprisonment for a term which may extend to six months or with fine which may extend to two thousand rupees or both.[24] The accused may be discharged on an apology being made to the satisfaction of Court.[25] The

---

[19] The Contempt of Court Act, 1971 , section 7- deals with in camera proceedings which should not be published – (a) where the publication is contrary to the provisions of any enactment for the time being in force. (b) Where the court on grounds of public policy expressly prohibits the publication. (c) Where the Court sits in chambers or in camera for reasons connected with public order or security of the state. (d) Where the information relates to a secret process, discovery or invention.

[20] *Inre, Harijai Singh*, 1997 Cri. L.J. 58 (S.C.).

[21] The Contempt of Court Act, 1971, section 5.

[22] *Rama Dayal Markarha* v. *State of Madhya Pradesh*, A.I.R. 1978 S.C. 921 at p. 928.

[23] *Id.* at p. 926.

[24] The Contempt of Court Act 1971, section 12.

[25] *Ibid.*

ambit of Contempt of Court Act 1971 is wide and is in addition to the unfettered power of the High Courts and Supreme Court under Article 215 and 129 of the Constitution[26].

The influx of the visual media has done more damage than good. They take up issues which involve elite people and on the pretext of discussion elevate the matter to a national debate. For instance small issues like Sania Mirza[27] and her marriage became the talk of the town with her having no say in the matter – the decision having been already made by the media. She might be a star but her private life is for her to decide.

To top it all, on May 3rd[28] the judgment day of Kasab, the terrorist accused in 26/11 Mumbai blasts, the *Times Now* channel had a debate in the morning hour itself and declared that it would be a death sentence. They went a step ahead discussing whether it would be a public hanging or not. This sort of discussions hampers the administration of justice as it can definitely, to some extent, affect the thinking process of judges and lawyers dealing with that matter.

These are not matters which the media should not be discussion and pronouncing judgments, which affect the final outcome of the case. They are equated to a fact finding agency putting across the matter to the respective authorities. Apart from that developing their own opinion and directing the discussion towards a preconceived goal distracts them from their responsibilities towards the public. The decisions have to be taken

---

[26] The Contempt of Court Act, 1971, section 22.

[27] *The New Indian Express*, (Cochin) dt. 8,/4/2010, p.1.

[28] *The Times Now* Channel, May 3rd 2010 at 10.00 a.m.

by the Courts and the authorities concerned. Media as the fourth pillar of democracy should demarcate its limitation and not encroach into the territory of justice administration. As was stated in the final decision of Jessica Lal[29], the Supreme Court observed that there is danger of serious risk of prejudice if media publishes statements which manifestly hold the suspect or the accused guilty even before such an order has been passed by the court.[30] In this case Ram Jethmalani, counsel for *Manu Sharma* stated that the media before and during the proceedings proclaimed *Manu* as guilty even before he was acquitted by the trial Court though later he was found guilty by the Supreme Court.

Media interferences in this manner can lower the role of the Courts in the eye of the society. Contempt of Court is a weapon which the Courts can use but it is seen rarely used by the Courts. A Bench of the Supreme Court stated in *R.K. Anand* v. *Registrar, Delhi High Court*[31] that,

> "It would be a sad day for the Court to employ the media for setting its own house in order and the media too would not relish the role of being the snoopers for the Court. Media should perform the acts of journalism and act as a special agency for the Court".

Sister Sephy ,the third accused in the *Sister Abhayaa*[32] *murder case* filed a petition before the Chief Judicial Magistrate court demanding an

---

[29] *Manu Sharma* v. *State (NCT of Delhi)* 2010 (6) S.C.C.1.

[30] *Ibid.*

[31] *Ibid.*

[32] 'Sister Sephy moves Court against CD Telecast', *The New Indian Express, (Cochin)* dt. 16th September 2009 p.5.

enquiry in to the leakage of visuals of narco analysis tests. These tapes were telecasted by the Malayalam news channels. The Courts issued a directive following of which the telecasting was stopped. This is a perfect example of subjudice matters not being protected from media discussion.

Rathore's case[33] was a good example in which the media interfered only after the verdict of the Court. The act of the media was appreciated for moving in favour of Ruchika Girhotra, who he molested in 1990. In a discussion in *Times Now channel,* leading criminal lawyer Mahesh Jethmalani stated that in Rathore's case there was no media trial[34]. In a similar programme on NDTV, the Chief Justice of India, Justice K.G. Balakrishnan reflected his views on Media Trial.[35] He stated that media is only selecting some cases and neglecting the cases of poor people. He stated that this should not be the way the media should function.[36]

7.1.5 Police Interference

The main source of information for the media is police. This could however be misleading in many cases. The Delhi High court stated in one case[37] that the latest trend of police, CBI or any investigating agency is to encourage publicity by holding press conference and accompanying journalists and TV crews during investigation of a crime. The Court stated that this needs to be stopped as it creates risk of prejudice to the accused. After giving publicity and holding the person guilty in the eyes

---

33 *The New Indian Express*, (Cochin) 6th January 2010, p.1

34 'News Hour' at 9.30 P.M. on Times Now Channel, dated 8th January 2010.

35 N.D.T.V. at 9.05 P.M.dt.11/1/2010.

36 *Ibid*.

37 *Kartongen Kemi Och Forvaltning AB* v. *State*, 2004 C.C.R.285.

of the public, the police or the CBI go into soporific slumber and take several years for the trial. In the mean time the person caught moves under the shadow of guilt, which goes contrary to the law that is man is not guilty till his act is found guilty by the Court of Law. Media's argument is that this pseudo trial is done in public interest.

Chief Justice Lord Taylor made a statement as to the impact upon a victim of a press campaign**.** His Lordship said:

> "we would like to stress that, whilst the press are the guardians of public interest to pursue a campaign of vilification of someone who has been before the Court in a way which causes hate mail to be sent, which causes his family to be under the need to move house which causes his children to be shunned by other children in the neighborhood is no public service. Further more if it is intended to bring pressure on the Courts then it is wholly misguided." [38]

As early as in 1959, Kerala High Court had observed in *Shivarajan* v. *The State*[39] that in this case the Police showed indifference. The investigating officers had been freely giving out the progress made in the investigation to the press. It expressed concern over the undue interest shown by some newspapers in this case. The Court expressed concern and hoped that the authorities will take notice of this matter and of the provisions of the Criminal Procedure Code and the Evidence Act. Information obtained during the course of police investigation has to be

[38] *Attorney General's Reference* (1995) 16 Cr. App. R (5) 785.

[39] *Shivarajan* v. *The State* I.L.R. 1959 ,Ker. 319.

kept confidential and Police officers are not entitled to give this away for the benefit of the public or the press.[40]

Later this issue was again the concern in 2006, in *State of Kerala* v. *Aboobacker*[41]. This was regarding the undue media publicity where the Malayalam daily was giving their own stories about the disappearance of a girl and the investigation conducted by the police. Sustenance is seen drawn from sources within the police in order to boost those garbled versions. The Court expressed strong displeasure at the trial by media in respect of matters which are subjudice. It said that it did more harm than good to the society.

7.1.6 Apex Court on Media and Contempt

The Apex Court has always been propagating the right to information and freedom of speech and expression. Contempt of Courts Act 1971, though at the disposal of judges is rarely used by them. In normal situations it is used only when an order or direction of the Court is not complied with. It is however rarely used against the media. This is really unfortunate. To the move the hand of contempt of court except in cases of open insulations is very difficult. The Courts have to use this potential power vested in them when administration of justice becomes difficult due to media interference.

In *Ajai Kumar Goyal* v. *Anil Kumar Sharma*[42] the Supreme Court observed that the right of media to make fair criticism on the functioning of subordinate judiciary is allowed so long as it does not undermine the

---

[40] *Ibid.*

[41] *State of Kerala* v. *Aboobacker*, 2006 K.H.C. 1026: I.L.R. 2006 (3) Ker. 672: 2006 (3) K.L.J.165: 2006(4) K.L.T. S.N. 49.

[42] *Ajai Kumar Goyal* v. *Anil Kumar Sharma* 1994 Supp. (2) S.C.C. 523.

integrity and dignity of the judiciary. Later in the case about a girl where a rape attempt was made on her,[43] the Court agreed that a great harm has been caused to the girl by unnecessary publicity and taking out a march by the public. As a result the case had to be transferred from Kolhapur to Satara under the orders of Supreme Court. The Apex Court said that the trial by press, electronic media is the very antithesis of the rule of law[44]. It can well lead to miscarriage of justice. The court stated a judge has to guard himself against any such pressure and be guided strictly by rule of law".[45]

Again in *M.P. Lohia* v. *State of West Bengal*[46], where it was a disputed dowry death case, the Court was disturbed by the fact that when Special Leave Petition was pending before the Supreme Court, an article titled "doomed by dowry" was published in the magazine called '*Saga*'. This was written by Kakoli Poddar based on her interview of the family of the deceased. All these materials were to be used in the forthcoming trial. The Court felt that these types of articles appearing in the media would certainly interfere with the administration of justice. The Court stated that they depreciated this practice and cautioned the publisher, editor and the journalist who were responsible for the said article against indulging in such trial by media when the matter is subjudice.[47] However, to prevent any further issue being raised in this matter they treated this matter as closed and hoped that the others concerned in journalism would take note of this displeasure expressed by them, for

[43] *State of Maharashtra* v. *Rajendra Jawanmal Gandhi* A.I.R. 1997 S.C. 3986.

[44] *Ibid.*

[45] *Ibid*.

[46] *M.P. Lohia* v. *State of West Bengal*, 2005 (2) S.C.C. 686.

[47] *Ibid*.

interfering with the administration of justice.[48] It appears that the Court instead of using its potential power under Contempt law has been wasting away its power by begging the journalist to cater to its advice. This attitude of the courts should undergo a great shift, as the demand of the society changes

7.1.7 The Law Commission Report[49]

Law Commission of India has exclusively dealt with trial by media, free speech and fair trial. Its 200th report in 2006 elaborated upon the change from print media to electronic media and that the media as a whole has prejudiced subjudice cases. It stated the importance of an accused being presumed innocent till proved otherwise in a court of law and the role played by the media to hamper the course of justice by pronouncing judgment during its discussions . It has been stated that this behavior of the media comes under criminal contempt and it needs to be regulated. Presently under the Contempt of Court Act 1971 in section 3, the protection against the media for an accused starts from the stage of pending judicial proceedings only. The report explained the decision taken by the Supreme Court way back in 1969 in *A.K. Gopalan* v. *Noordeen*[50] that publication made after an arrest of a person could be contempt if it was prejudicial to the suspect or accused under Article 19 (1) (a), 19 (2) and 21 of the Constitution. This aspect had already been accepted by the Sanyal Committee in 1963,[51] when it said that 'arrest'

---

48 *Ibid.*

49 *200th Law Commission Report on Trial By Media, Free Speech and Fair Trial under CrPC 1973*, http://Law Commission of India.nic.in/register/rep200.pdf retrieved on 4th June 2009.

50 *A.K. Gopalan* v. *Noordeen* 1969 (2) S.C.C.734.

51 *Supra n*.49.

should be the starting point of investigation but this was dropped by the Joint Committee of the Parliament[52].

The Law Commission report further compared the UK position, where arrest is the starting point of pendency of a criminal proceeding under the UK Contempt of Court Act, 1981. Australia also follows similar practice. Therefore the report stated that the explanation to section 3 in the Contempt of Court Act 1971 needs to be amended, by adding a clause 'arrest' in the explanation below section 3 as being the starting point of pendency of a criminal proceeding. The report proposed section 10 A under which any criminal contempt of court at the subordinate court level could directly come before the High Court.[53]

The proposal of the Law Commission is specifically targeted to make arrest the starting point of pendency of a criminal proceeding. Once the 'arrest' is brought on record then any publication prejudicial to the case could be considered contempt of court from the point of arrest.

7.1.8 Madrid Principles

An expert group of legal luminaries and media experts assembled together at Madrid[54] under the aegis of the International Commission of Jurists from 18-20 January 1994.The object of the meeting was to bring a balance between the freedom of speech and expression and the judicial independence. Here the Committee formulated the *Basic Principle* of

[52] *Ibid.*

[53] *Ibid.*

[54] *The Madrid Principles on the Relationship between the Media and Judicial Independence 1994*.www.unhchr.ch /Huridocda , retrieved on 11/8/2010.

presumption of innocence of an accused in a case. It stated that the freedom of media for gathering and conveying information to the public and discussion of case before and after trial should in no way detrimentally affect the rights of an accused to get justice from the court. This is in violation of the above stated *Basic Principle.* The *Basic Principle* simply states the legal concept that no man is guilty till declared so by a court of law. This puts responsibility on the media to be cautious and at the same time responsibility is vested in the judges also to take care that an accused is protected from the hands of the media, in regard to administration of justice. India is a party to this Convention. This Convention emphasis on three main concepts: (a) secrecy of trial should be strictly adhered to by the courts, (b) in camera proceedings should be allowed in deserving cases, (c) the signatory nations need not allow right to broadcast or record trials in court.

7.1.9 Restrictions by Press Council of India – Subjudice Matters

Press Council Act of 1978[55] has made norms and ethical code intended to regulate matters that are subjudice. If someone believes that a news agency has committed any professional misconduct, the PCI can, if they agree with the complainant, 'warn, admonish or censure the newspaper' or direct the newspaper to 'publish the contradiction of the complainant in its forthcoming issue'[56].

These measures are seen used only after the publication of news material. Such a course is not stringent and thus limited in their

[55] Hereinafter referred to as PCI.

[56] The Press Council of India Act , 1978, section 14.

effectiveness. The norms of PCI cannot be legally enforced and thereafter is seen observed in its breach[57].

7.1.10 Review of Contempt of Court Act 1971

Justice G.N. Ray in a seminar on media made some observations[58]. He being the former Chairman of PCI and being a former Judge of the Supreme Court could give a legal insight into the role of PCI. During the discussions for amendment of Contempt of Court Act , 1971 , to include ‘’Truth’ and ‘Public Interest’ as defenses for media in regard to contempt of court by them, he had supported these defenses , as Chairman of the PCI. These defenses have been incorporated into the amendment in the Contempt of courts Act, 1971[59]. The media involvement in criminal justice administration had received in-depth consideration by the “Committee on National Policy of Criminal Justice” in the wake of the sting operations and trial by the media[60]. The Committee opined that unless there is substantial risk of serious prejudice to the course of

---

[57] *Ibid*

[58] Workshop on Reporting of Court proceedings by Media and Administration of Justice – Addressed by Mr. Justice G.N. Ray, Chairman – Press Council of India at Vigayan Bhavan New Delhi, on 29th & 30th march 2008 on the inauguration of 2 day workshop – organized by Supreme Court Legal Services Committee, PCI and Others.

[59] The Contempt of Courts (Amendment) Act 2006 – substituted a new section for section 13. Contempt not punishable in certain cases – notwithstanding anything contained in any law for the time being in force – a) no court shall impose a sentence under this act for a contempt of court unless it is satisfied that the content is of such a nature that it substantially interferes or tends substantially to interfere with due course of justice. b) The Court may permit in any proceeding for contempt of court, justification by truth as a valid defense if it is satisfied that it is in public interest and the request for invoking the said defense is bonafide.

[60] *Annual Report of the Press Council of India ,* April 1 , 2007- March 31, 2008, New Delhi, p. 20.

justice, there should not be restriction or prohibition on the coverage of criminal proceedings[61].

In yet another lecture Justice Ray further elaborated upon the media and its transgressions[62]. He stated that '*Aarushi Murder* Case' is a glaring example of media's overdoing and unethical practice. Privilege of presumption of innocence to which an accused is entitled to is blatantly discarded by the media in presenting facts, often distorted and unverified and presented with angularity pointing to the involvement of the person indicted in the commission of crime. He stated that it is a common experience that a newspaper or a channel often picks up one case of crime as a special subject of its choice and vigorously goes on reporting on that incident on a day to day basis for a long time. If ultimately such person is not charge sheeted for want of materials or ultimately acquitted by Court of Law for want of unimpeachable evidence, people start entertaining a belief that there must have been some manipulation by police or other agencies and a fair trial had not been done in the case. The end result is loss of public faith in the functioning of police and investigating agency and even appropriate functioning of law courts, although in a given case, there might have been a fair investigation but the commission of crime by the accused could not be established by convincing evidence. Media plays a crucial role in ensuring that justice is seen done and transparency is not affected. The role of media is really laudable, but the aspect of over enthusiasm

---

61 *Ibid.*

62 Law Lecture by Mr. Justice G.N. Ray, former chairman, Press Council of India on 'Reasonableness of Restrictions on Reporting of Subjudice Matters' on August 31, 2008 at Bhuwaneshwar, organized by Gora Chand Pattnaik Memorial Trust. www.Presscouncil.nic.in/speechpdf/Bhubaneshwar, retrieved on 10/5/2010.

and adopting of unethical practices by them should be controlled and regulated.[63]

The comments of Justice R.S. Sarkaria[64] former judge of the Supreme Court and former chairman of PCI were referred to by Justice Ray as to when a matter becomes *subjudice* in the Court of law. This is important not only for the purpose of ascertaining whether the bar of PCI jurisdiction under subsection (3) of section 14 of the PCI Act 1978[65], is attracted or not, but also in the context of Contempt of Courts Act. The term '*subjudice'* is a Latin expression for 'under a judge'. A case in session before a competent Court of law is treated as *subjudice*. The case retains such status till the judgment in the case is delivered[66]. Though civil contempt is not of much relevance, criminal contempt as defined in section 2 (c) is very wide. It includes publication whether by words spoken or written or even by signs or by visible representations, which

---

[63] *Ibid.*

[64] *Id. at* p.7.

[65] The Press Council Act 1978, sub-section (3) of section 14 reads as follows: 'Nothing in sub-section (1) shall be deemed to empower the counsel to hold an inquiry into any matter in respect of which any proceeding in the Court of Law'.

[66] The Contempt of Courts Act 1971, section 3 in its Explanation defines when a judicial proceeding is said to be pending. It provides : a judicial proceeding is –

(a) said to be pending – (A) in the case of a civil proceeding when it is instituted by the filing of a plaint or otherwise, (B) in the case of a criminal proceeding under the Criminal Procedure Code 1898 or any other law – (i) where it relates to the commission of an offence, when the charge sheet or challan is filed or when the Court summons or warrant as the case may be, against the accused, and (ii) in any other case, when the court takes cognizance of the matter to which the proceeding relates, and in the case of a civil or criminal proceeding, shall be deemed to continue to be pending until it is heard and finally decided that is to say, in a case where an appeal or revision is competent, until the appeal or revision is heard and finally decided or, where no appeal or revision is preferred, until the period of limitation prescribed for such appeal or revision has expired;

(b) Which has been heard and finally decided shall not be deemed to be pending merely by reason of the fact that proceedings for the execution of the decree, order or sentence passed therein are pending".

scandalizes or tends to scandalize or lowers or tends to lower the authority of any Court or prejudices or interferes with any judicial proceedings or interferes or tends to interfere or obstruct the administration of justice.

There is some sort of confusion between section 2 sub clause (c) and section 3 of the Contempt of Court Act. Whereas section 3 is limited to pending proceeding only, section 2 sub-clause (c) is wide enough to include all other acts which interferes or obstructs administration of justice and it includes pending proceedings also. Therefore, the question of 'pendency' becomes irrelevant when the contempt is by way of scandalizing the Courts or constitutes an attempt to lower their authority so as to obstruct administration of justice. The Supreme Court in *Subarao*[67] held that from the explanation to sub section (2) of section 3, it is clear that there will be no criminal liability for contempt of court unless the publication is made at the time when the proceeding is 'pending' before the court. This opinion of the court does not hold good when section 2(c) is read along with section 3, 4, and 5 of the Contempt of Courts Act, 1971[68]. The defense given by sub section (3) of section 3[69] is not allowed in the case of distribution of any publication otherwise

---

[67] *Subarao* v. *Advocate General* A.I.R. 1981 S.C. 755.

[68] The Contempt of Court Act ,1971, section 4– *Fair and Accurate Report of Judicial Proceeding not Contempt*: Subject to the provisions contained in Section 7, a person shall not be guilty of Contempt of Court for publishing a fair and accurate report of a judicial proceeding or any stage thereof.

Section 5, *Fair Criticism of Judicial Act not Contempt*- A person shall not be guilty of Contempt of Court for publishing any fair comment on the merits of any case which has been heard and finally decided.

[69] The Contempt of Court Act of 1971, sub-section (3) of section 3- states: 'a person shall not be guilty of contempt of court on the ground that he has distributed a publication containing any such matter as mentioned in sub-section (1), if at the time of distribution he had no reasonable grounds for believing that it contained or was likely to contain any such matter as aforesaid:

than in conformity with the provisions of section 3 & 5 of the Press and Registration of Books Act, 1867[70].

The next element which is relevant is regarding the starting point of the pendency of the matter in a criminal case. The expression 'Challan' or 'charge sheet' means a final report submitted by the police to the magistrate in a case. Thus the submission of the report or filing of challan in a criminal proceeding is the starting point of the pendency of the matter in a criminal case. This is the area of conflict between the Contempt of Court Act 1971 and the 200th Law Commission Report. The report stressed on an extension of this period from the point of arrest, instead of challan or charge sheet. The main reason for the want of extension is to protect the arrested person from the public eye and also to bar the police from making a public spectacle of the arrest.

Apart from this, section 4 & 5 protect fair and accurate report and protects fair criticism of a judicial decision. The plea of fair comment will not be available under section 5, if the comment on the judgment is made before the case is heard and finally decided by the court. The apex court categorically held that any one has right to express fair, reasonable and legitimate criticism on any decision given by a judge[71]. At the same time it also held that if criticism is likely to interfere with due administration of justice, then it would seize to be fair and reasonable criticism under section 5 and would scandalize the courts.

---

[70] The Press and Registration of Books Act 1867, sections 3 and 5-

section 3: *Particulars to be Printed on Books and Papers* – Every book or paper printed shall be printed legibly on it the name of the printer and the place of printing and the name of the publisher and the place of publication.

section 5: *Rules as to Publication of News Papers*.

[71] *Perspective Publications* v. *State of Maharashtra* , A.I.R. 1971 S.C. 221,230.

Later in a case taken *suomotu* by the Kerala High Court, it took exception to the statement made by *M.V.Jayarajan*, a politician belonging to the Marxist party, that judges are fools and their verdicts having only the value of grass was not only objectionable but also that the message conveyed to the public was that the judges had no respect, amounted to criminal contempt[72]. Here the Court did not proceed against the media for publishing the comment as they were entitled to publish the factum of contempt committed by the respondent. By doing so, they were not committing any contempt of court especially when they were not justifying the conduct of the respondent[73].

Section 13(a) of the Contempt of Courts Act, 1971 states that no court shall impose a sentence unless it is satisfied that it substantially interferes or tends substantially to interfere with the due course of justice. Justification of truth can be a valid defense under section 13(b) if it is satisfied that – (a) it is in the public interest & (b) the request for the defense is bonafide. This sub section has come by way of an amendment which the PCI submitted in writing to the Parliamentary Committee.

To conclude, regarding the present view of the Supreme Court with reference to contempt, the case of *Sahara India Real Estate Corporation Ltd. and Ors* v. *Securities and Exchange Board of India and Anr.,*[74] would be the most appropriate one. Here the Court evolved the technique of '*postponement orders'*, which meant postponing the reporting by the media of trial court hearings for a short period if an accused proved that earlier reports had harmed his right to fair trial. However these orders

---

[72] *In Re M.V.Jayarajan* , 2011(4)K.H.C. 437 (DB) .

[73] *Id.* at p.486.

[74] Civil Appeal No. 9613 of 2011 and C.A. No. 9833.

can be challenged by the media. The Court stated that the purpose of contempt law is not only to punish, but to preserve the sanctity of administration of justice and the integrity of the pending proceedings. Therefore the five judge Constitution bench stated such orders of postponement, in the absence of any other alternative measures such as change of venue or postponement of trial, satisfy the requirement and also help the courts to balance conflicting societal interests of right to know and fair administration of justice.

Conclusion

In conclusion, it can be stated that *subjudice* matters should be reported with caution. Normally courts are slow to use their power under the Contempt of Courts Act, 1971. It is suggested that the recommendation of the Law Commission 200th report of 2006 is incorporated in the Contempt of Court Act 1971, so as to enable the Court to start contempt proceedings at the arrest stage rather than the present position enabling the contempt proceeding to start only when there is a pending judicial proceeding. This would create more fear in the minds of the media. As any publication regarding the accused at the time of arrest would become contempt of court.

It is advisable that Courts use these powers more effectively so that some degree of fear and respect is invoked in the media. American Bar Association sponsors awards to persons who are good at legal journalism. The Indian Bar Association can also initiate such methods to develop a healthy relationship with the press. Together they can initiate programmes for journalists so that the press would know how to function within the legal frame work. As explained in the *International Convention*

on Media and Judiciary 1994,[75] the judges have the main responsibility to see that justice is given and to protect the accused from publicity which will hamper a fair trial of the case. The judge is the only person who has the authority and the reasoning power to analyze the extent of damage done by the press even though it is a true fact, which the media has stated. In those cases the court may pass gagging orders forbidding the media from discussing the case till further orders. In other cases, where damage has already being done, the case may be posted for a later date and the media be strictly kept out. In such cases, the judge may brief the journalists on the case. In all other cases, except where *in camera* trial is the right of the accused, the journalists may be informed by a judge or an authorized person about the developments in a case, and they may be told as to what and how to be reported. A close relationship between the judiciary and the media would bring in healthy reporting. Training programs for journalists on behalf of the judiciary would be a good move in this direction.

.....ൠ.....

[75] www.unhchr.ch / Huridocda.

Chapter 8

THE RIGHT TO PRIVACY AND PRESS COUNCIL OF INDIA

8.1 Broadcasting in India

Indian Broadcasting Company came into being in 1926[1]. In 1930 it went into liquidation. The morale of the public who had been excited about broadcasting went down. On their appeal to the government it was taken over in 1931 and renamed it as the Indian Broadcasting Service.[2] In 1936 it was developed into the All India Radio. The 'vividh bharati' came into being in 1957 providing light music programmes. With the advent of television, radio has taken a back seat. Now it is getting revived by FM radio[3].

8.2 Television

New Delhi hosted in 1956 the General Conference of the United Nations Educational, Scientific, and Cultural Organization (UNESCO). As a result, UNESCO decided to give a grant $ 20,000/- to India to set up a "Pilot Project" to study television in India.[4] United States also gave help and on September 15th 1959, the then President Rajendra Prasad inaugurated the first experimental TV center in India. The spurt of TV stations all over India took place in the 70's under SITE (Satellite Instructional Television Experiment). Under SITE, India used the ATS-6

---

1 Vidisha Barua, *Universal's Press and Media Law Manual,* Universal Law Publishing Co. Pvt. Ltd. (2002) pp. 26 -34.

2 *Ibid.*

3 *Ibid*.

4 *Ibid.*

a very sophisticated and powerful satellite to beam instructional programmes in four languages to 2400 villages.[5] Gradually, Doordarshan was delinked form All India Radio in April 1976 and was established as a separate department.[6]

The Varghese Committee[7] has recommended for a single National Broadcast Trust under which would function both Akashvani and Doordarshan. The result was the Prasar Bharathi (Broadcasting Corporation of India) Bill, which was introduced in the Loksabha in 1979. This became the Prasar Bharathi (Broadcasting Corporation of India Act 1990)[8]. But in May 1990 it lapsed. In March 2000, the Minister of State for Information & Broadcasting, Mr. Arun Jaitely, stated that the draft for the Bill was ready. He said that the Cable TV Networks (Regulation) Act 1995 will be repealed and merged with the proposed Broadcast Bill. Cable TV came to India in the early 90's. This happened when people wanted to watch the Iran-Iraq war over CNN & BBC, then the private network operators took over urban India without any sanction of law as there was no law at that time. Thus, in a moment of urgency, in 1995 The Cable Networks Act was enacted.[9]

8.3 Cinema

In 1896, a representative of the Lumiere brothers, for the first time showed films at the Watson Hotel in Mumbai. This was the beginning of

---

5 *Ibid.*

6 *Ibid.*

7 *Ibid.*

8 It was enforced vide the Amendment Ordinance of 1997.

9 Vidisha Barua, *Universal's Press and Media Law Manual*, Universal Law Publishing Co.Pvt.Ltd. (2002) pp.26-30.

Indian Cinema. Very soon Harishchandra Sawe Bhatvadekar in Bombay and Hiralal Sen in Calcutta got movie cameras and began making films. The first feature film was shown in 1913. It was 'Harishchandra' produced by Dhundiraj Govind, popularly known as Dada Shaeb Phalke. He was the father of Indian cinema.[10] Ardeshir Irani produced India's first sound film "Alam-Ara" in 1931. As cinema started growing in India the need to bring in regulations also became important. The Cinematograph Act of 1918 was passed for regulating examination and certification of films. This was for the purpose of public exhibition and therefore regulation of cinemas was included in their licensing[11]. This Act remained in force till 1952. In 1952 a new act called the Cinematograph Act of 1952 came into force. It provided separate provisions relating to the sanctioning of films for exhibition under the Union list, certifying films for adults and non-adults and separate provisions relating to licensing and regulation of cinemas under the state list, to bring in rules for tax and other purposes.This Act was further amended in 1984.

8.4 The Press and the Press Council of India

The Press Council of India was constituted in 1966 under the Press Council Act 1965. This was made to preserve the freedom of the press and to maintain and improve the standards thereof. This Act was repealed with the promulgation of the publication of 'objectionable matter ordinance' of 1975. This then became the prevention of Publication of Objectionable Matter Act in 1976. Simultaneously was

[10] *Ibid.*

[11] Sanctioning of Cinematograph Films for exhibition comes in the 7th Schedule of the constitution – entry 60 of the Union list and under entry 33 of the State list.

passed the Press Council (Repeal) Act 1976 and the Parliamentary Proceedings (Protection of Publication) Repeal Act 1976. The Prevention of Publication of Objectionable Matter Act was repealed in 1977 and the Parliamentary Proceeding (Protection of Publication) Act 1977 was passed. This was supported by the 44th Amendment 1978, which inserted Article 361A into the constitution.

The Press Council Act 1978 was enacted reestablishing the Press Council. The Press Council Act 1965 that was repealed got replaced by the above said Act. The object of this enactment (i) is to preserve the freedom of the Press (ii) to maintain and improve the standards of newspaper and news agencies in the country. [12]

8.4.1 Composition of the Press Council

Press Council as contemplated in the Act is a 'body corporate'[13]. It consists of one chairman and 28 other members.[14] The Chairman is nominated by a committee consisting of the Speakers of Rajya and Lok Sabha and a person elected by the members of the council.[15] Of the other 28 members, 13 are working journalists of whom 6 are editors of newspapers and the remaining 7 are working journalists.[16] Six of them are nominated from among persons who own or carry on the business of management of newspapers.[17] One member is nominated from among

[12] The Press Council of India Act, 1978, s.13.

[13] *Id*.s.4.

[14] *Id*.s.5(1).

[15] *Id*.s.5(2).

[16] *Id*.s.5(3).

[17] *Ibid.*

persons who manage news agencies[18]. Three are persons having special knowledge or practical experience in respect of education or science, law and literature and culture of which respectively one each is nominated by UGC, Bar Council of India and Sahitya Academy.[19] Five are MPs of whom 3 are nominated by the Speaker from among the members of the Lok Sabha and 2 are nominated by the Chairman of the Rajya Sabha among its members.[20] In practice, since the Council performs quasi-judicial functions, it was considered desirable to appoint a person with legal background as its chairman. Justice A.N. Grover was the first Chairman of the Council appointed in April 1979. The term of the Chairman is three years and he can be re-nominated for one more term[21].

An analysis of the constitution of the Council which is heavily loaded with journalists shows that it is dominated by media professionals. Therefore, looking into its structure, it can be easily predicted that PCI cannot balance the interests of the public and the press. Having a law man as the chairman one cannot believe that it will decide cases in favour of public. The objective of the council is not reflected in the composition of the council.[22] Apart from these, the members of parliament in the Council by their presence may give political overtones to the decisions of the council. Justice Madholkar, the first chairman of the Press Commission in his Tagore Law Lectures[23] rightly expressed doubts about the political influence of these MPs in the Press Council.

---

[18] *Ibid.*

[19] *Ibid.*

[20] *Ibid.*

[21] *Id*.s.6 .

[22] Sita Bhatia, *Freedom of Press,* Nice Printing Press ,New Delhi. (1997), p. 255.

[23] *Ibid.*

8.4.2 Objects and Functions of the Council

The Act has laid down various responsibilities and duties of the Council. In order to maintain independence of press, as categorically stated in the Act[24]. In pursuance of this, the PCI has evolved a code of ethics to ensure the maintenance of high standards of public taste and to have a due sense of freedom and to encourage the growth of a sense of responsibility and public service.[25]

8.4.3 Powers of the Press Council

Section 14 gives the PCI power to warn, admonish and censure[26] the press. These are the only weapons available with the PCI for enforcement purposes. Therefore, the PCI Act limits the PCI from taking

---

[24] The P.C.I. Act 1978, s.13.

[25] Press Council.nic.in/Norms 2010 pdf, retrieved on June 11, 2010 .

[26] The P.C.I .Act 1978, s.14:

1.Where on receipt of a complaint made to it or otherwise the Council has reason to believe that a newspaper or news agency has offended against the standards of journalistic ethics or public taste or that an editor or a working journalist has committed any professional misconduct, the council after giving the newspaper or news agency, the editor or journalist concerned an opportunity of being heard, hold an enquiry in such a manner as may be provided by the regulations made under this act and it satisfied that it is necessary so to do it may for reasons to be recorded in writing warn, admonish or censure the newspaper, news agency, the editor or the journalist or disapprove conduct of the editor or the journalist as the case may be: provided that the Council may not take cognizance of a complaint if in the opinion of the Chairman there is no sufficient ground for holding and enquiry.

2. If the Council is of the opinion that it is necessary or expedient in the public interest so to do, it may require any news paper to publish therein in such manner as the Council thinks fit, any particulars relating to any enquiry under this section against a newspaper or news agency, an editor or a journalist working therein, including the name of such newspaper, news agency, editor or journalist.

3.Nothing in subsection (1) shall be deemed to empower the council to hold an enquiry into any matter in respect of which any proceeding is pending in the Court of law.

4.The decision of the Council under subsection (1) or (2) as the case may be shall be final and shall not be questioned in any Court of Law.

stringent actions. It is supposed to be only a self-regulatory organ as the government always felt that freedom of press should be protected.

For performing its functions, under section 14, the Council has been given the same powers as vested in a Civil Court while trying a case under the CPC[27]. Along with this the PCI (Procedure for enquiry) Regulations, 1979 deal with the procedure for conducting enquiry. Any complaint under section 14 (1) and section 13 or the complaint taken up by the PCI Chairman *suo motu* have to follow the procedures stated in the above rules.

Under the rules an enquiry committee is to be constituted by the Council under section 8 (1) of the Act. Going through the bare

---

[27] *Id.* s.15:

1.For the purpose of performing its functions or holding an enquiry under this Act, the Council shall have the same powers throughout India as are vested in a Civil Court while trying a suit under C.P.C. 1908 in respect of the following matters, namely:

a.Summoning and enforcing the attendance of persons and examining them on oath.

b.Requiring the discovery and inspection of documents.

c.Receiving evidence on affidavits.

d.Requisitioning any public record or copies thereof from any Court or office.

e.Issuing commissions for the examination of witnesses or documents and

f.Any other matter which may be prescribed.

2.Nothing in Subsection (1) shall be deemed to be compel any newspaper, news agency, editor or journalist to disclose the source of any news or information published by that newspaper or received or reported by that news agency, editor or journalist.

3.Every inquiry held by the Council shall be deemed to be a Judicial Proceeding within the meaning of Indian Penal Code, sections 193 and 228.

4.The Council may, if it considers it necessary, for the purpose of carrying out its objects or the performance of any of its functions under this Act, make such observations, as it may think fit, in any of its decisions or reports , respecting the conduct of any authority, including government.

provisions, it is clear that the Chairman does not have much of discretion. Even in the case of decisions, it is the majority's opinion that forms the judgment. And as the majority of the enquiry committee consists of members of the media itself, the decision of the committee is bound to be dominated by them. This shifts the balance towards the press rather than forming any independent view. Therefore, it can be stated that PCI was never intended to control the press rather it is only a form of self regulatory system. Therefore, the PCI procedures are more of an advisory rather than a judicial proceeding, though the Act states under section 15 (3) that every enquiry held by the Council shall be deemed to be a judicial proceeding.

8.4.4 Revealing the Source

The PCI Act clearly states in section 15 (2) that no newspaper, news agency, editor or journalist shall be deemed to be compelled to disclose the source of any news. When we study this theory of protection of source of news, it would be useful to look into the US position. Referring to the dissenting judgment of Justice Douglas in *Branzburg* case[28], it gives the picture that the judge was not convinced with the argument by the press, in favour of protection of confidential news sources.

The American Newspapers Guild[29] has adopted a Code of Ethics, which in Canon 5 states[30] that newspaper men shall refuse to reveal

[28] *Branzburg* v. *Hayes*, (1972) 408 U.S. 663. Dissenting Judgment of Justice Douglas 'The function of the Press is and to explore the harmful as well as the good influences at work'.

[29] Dr. Sebastian Paul, *Forbidden Zone – Essays on Journalism* , Pranatha Books, (2005) , p.74.

[30] *Id. at* p.75.

confidences or disclose sources of confidential information in Court or before Judicial or investigating bodies.

Even in UK the House of Lords held in *British Steel Corporation*[31] that there is no absolute immunity for journalists from disclosing their sources of information and if the judge needs it for justice, journalists cannot claim immunity.

In India there are not many reported cases on this issue. The Law Commission of India in its 93rd report on *Protection of Mass Media* in respect of confidential information has recommended that an absolute immunity be given to reporters in respect of sources of information obtained by them in confidence.[32] However, it recommended an amendment to the Evidence Act whereby the Courts are to be vested with the discretion not to compel a reporter to make such disclosure.[33]

In India, the PCI follows the procedure under the Civil Procedure Code 1908 and the Indian Evidence Act 1872, which gives no immunity to journalists, when it comes to evidence taking. They are treated on par with any other witness or accused. The *Second Press Commission Report* in 1982 rightly opined that there is no absolute immunity for journalists from disclosing their sources of information. The reason given is that this provision could be used by the Press to keep secret its own confidential sources while at the same time trying to break the confidentiality of

---

[31] *British Steel Corporation* v. *Granada Television Ltd (1980*)as quoted in Sita Bhatia, *Freedom of Press* ,Rowat Publications Jaipur and New Delhi,(1997), p.104.

[32] Law Commission of India, *93rd Report on Disclosure of Sources of Information by Mass Media,* September, 1983.www lawcommissionofindia.nic.in ,retrieved on 10/10/2011.

[33] *Ibid.*

others. Presently in India the journalists are not normally asked to reveal their sources. While at the same time if circumstances demand, the court can ask for it. As such there is no law prohibiting the Court from asking the press to divulge the sources. Public interest demands that truth should be revealed in some cases but at the same time it is also in public interest that individual privacy and confidence should be protected in the society.

8.4.5 Code of Ethics

Until recently PCI had not formulated any code of ethics for journalists. It is only in 2010 after its inception in 1978; PCI has come up with a code of ethics. Absence of code of ethics was justified by the former Chairman of the Council, Justice A.N. Sen in the 1986 Annual Report 2, in the following words:

> "I feel that defining a code of conduct in clear terms may be impractical and in my view seeking to lay down the code of conduct which must necessarily be in broad an general terms may have the effect of interference with the freedom of press.'' [34]

The Press Council while deciding a complaint filed by Government of Tamilnadu against the *Illustrated Weekly of India*[35], alleged that an article written by Cho Ramaswamy making various allegations of corruption against Chief Minister – M.G. Ramachandran and his government was defamatory. In this case the PCI made certain observations on the defense pleas taken by the press against impugned publications. The press pleaded that it was done in good faith. At the same time it does not protect untrue

[34] Foreword by the Chairman, 1986 Annual Report 2.

[35] *The Illustrated Weekly of India*/*Government of Tamilnadu*, 1984 *Annual Press Council Report*, p. 96.

statements of facts even if it is of public interest. In *Blade* [36] case in regard to government servants of Goa, PCI held that it won't constitute libel if the Press comes with evidence and in good faith. It held that constant publication of certain indecent or defamatory writings with the object of extracting money by blackmail by the editor will result in censure[37].

The Second Press Commission suggested in its report in 1982[38] that Section 13 (1) (c) of the PCI Act 1978 should be amended by adding after the words "the maintenance of high standards of public taste" the words including "respect for privacy". In the case regarding the murder of two nuns belonging to the Snehasadan in Mumbai[39],while reporting the murders *the Indian Express, Times of India*, The *Free Press Journal* and *Samna* had stated that on the basis of postmortem and police reports, both had regular sexual intercourse and one of them had sexually transmitted disease. The council found that these impugned reports were manifestly injurious not only to the reputation, personal dignity and privacy of the murdered nuns but also had a tendency to affect the reputation of Snehasadan, an institution for the care of destitute children. The Council was disturbed by the media 's irresponsibility and warned the papers for reporting unauthenticated news as these papers had given their own opinion on facts stated in the postmortem report which did not find mention in the postmortem examination report.

---

[36] *Government of Goa v. Blade*, 1969 *Annual Press Council Report* ,p.12. (Exception to section 499 IPC).

[37] *Case of Bharti Leader*, Jan. 1983 *P.C.I. Review*, p.55; Case of Yg Mandal, 1973 *Annual Report*, p.84.

[38] *Second Press Commission Report* (1982) Vol.1, Chapter 6, PP 67 -77, para 41 -44.

[39] *Sister Cyrilla, Superior, Franciscans of St Mary of the Angels, Snehasadan, Bombay v. Indian Express, Times of India, Free Press Journal and Samna,* (1991-92) *Annual Report* ,p.92.

8.4.6 Norms of Journalist Conduct of PCI [40]

Press Council of India has now in 2010 come up with its norms of Journalistic conduct. The Code of Ethics elaborates upon right to privacy and privacy of public figures[41]. It talks about taking caution against defamatory writings. The press is not allowed to intrude into the privacy unless outweighed by genuine overriding public interest not being a prurient or morbid curiosity. Special caution is essential in reports likely to stigmatize women. Matters concerning a person's home, family, religion, health, sexuality, personal life and private affairs are covered by the concept of privacy except where any of these impinges upon the public or public interest. Caution is required to be taken against revealing the identity of victims while reporting crime involving rape, abduction or kidnaping of females or sexual assault on children and raising questions touching their chastity, privacy, names and publication of photographs of the victims. It is the duty of Press that when it concerns privacy of public figures that it should be confirmed that it is of public interests through fair means, verified and then reported.

The families of public figures are generally not journalistic subjects. There are certain restrictions regarding recording of interviews and phone conversations.[42] In cases of criticizing judicial acts, except in camera or if the Court directs otherwise, the Court proceedings are open to Press. Caution is to be taken to ensure that the publication in any form

[40] Press Council.nic.in/Norms 2010 pdf, retrieved on 11th June 2010.

[41] P.C.I., norms 6 and 7.

[42] P.C.I., norm 8.

does not obstruct, impede or prejudice seriously the administration of justice or the personal character of the accused standing trial.[43]

Newspapers shall not publish or comment on evidence collected as a result of investigative journalism, when after the accused is arrested and charged the Court becomes seized of the case.[44] Under the rules, obscenity and vulgarity is to be eschewed even if it serves any social or public purpose in relation to art, painting, medicine or reform of sex because the press is not the appropriate place for it[45]. The Indian reader is mature and to copy the west by promoting the so called popular permissiveness may defeat the very aim of the press, to create awareness rather than to boost circulation.

The rules also state the basic elements of investigative journalism: it states that it has to be the work of the reporter and that public importance should be served through it and the reporter should prove that an attempt has been made to hide the truth from the people which the reporter has brought to public notice.[46]

The reporter in such cases must not act as a prosecutor; the principle that a person is innocent unless the offence is proved should not be forgotten**.**[47]

On the basis of a writ petition no CMP 52/2008 filed by the National Network of Positive People in the juvenile court

[43] P.C.I., norms 12 and 41.

[44] P.C.I., norms 26 and 41.

[45] P.C.I., norm 17.

[46] P.C.I., norm 26.

[47] *Ibid.*

Thiruvanathpuram; the Court came heavily on the media for visually screening of two children, Bency and Benson, who were children of HIV parents. As a result the PCI framed rules prohibiting reporting of HIV/Aids connected children[48].

8.4.7 Review by PCI

The workload of the present PCI has increased considerably. To analyze the effectiveness, the survey of the Annual Reports from 2005 to 2009 is undertaken. The Council has two enquiry committees, and these proceedings are open to the public. The parties are allowed to be represented by lawyers, and government also makes its own representations. To highlight a few cases discussed in the above reports, one such case was of "*Gudiya*"[49]**,** a perfect example of channel interrogation. Here '*Gudiya'* was the name of a muslim woman who became a widow within a month of her marriage and got married to another person. But her first husband had actually not died but was behind bars in Pakistan, of which she was unaware. He later returned from the Pakistani jail. But by then she was already pregnant through her second husband. At that juncture the media took over this matter. It organized a 'live panchayat' on the channel, where the families concerned and some clerics were brought together. The program was titled "*Kiski Gudiya*?" with the sub title "*yeh Kaissa Bandhan*?". It was a live telecast and the panchayat was conducted under the Shariat law. The object of the channel was clear when the anchor announced "*isi majilis mein faisla hoga" (this case will be settled here itself*). In this case what mattered to the channel was not

[48] C.M.P. 52/2008.

[49] *The Tribune*, Chandigarh dated 4th January 2006. (Report of P.C.I. 2005-06).

*Gudiya'*s life but viewer ship rating[50]**.** But this matter is outside the purview of PCI as it has not been given control over channels and cables. The government had evolved the Cable Television Networks (Regulation) Act in 1995 to give the government power to initiate action against cable television operators and broadcasting channels. Now the government is coming up with another system of setting up district level surveillance committees under the Cable Television Networks (Regulation) Act. It will consist of District Police Superintendent, Principal of a Women's College and the District Public Relation Officer, headed by District Magistrate. If the committee detects a violation, the District Magistrate can under Section 20 of the above Act confiscate the equipment or initiate action under Indian Penal Code[51]**.** Other than this Act, there is no other legislation to regulate these sorts of offences by the electronic media. Government is considering bringing a law to regulate the content on television[52], but nothing concrete has yet come out.

8.4.8 Adjudication by PCI

PCI has been given the power to adjudicate on complaints received by it. It can in this process censure, warn or admonish the paper concerned.[53] Defamation cases constituted 32 complaints in 2004-05 of which the Press was found guilty in 10 cases.[54] The complaints against the press have been on the rise, and in the year 2007-08 this has risen up

---

50 *Ibid.*

51 *The Indian Express*, New Delhi, dated 29th October 2005. (*Report of P.C.I.* 2005-06).

52 *The Hindustan Times,* New Delhi, dated 29th November 2005. (*Report of P.C.I.* 2005-06).

53 See the Press Council of India, Act 1978, section 14.

54 *Report of the P.C.I.* 2004-05, p. 73.

to 60%.[55] Of these complaints, 70% constituted defamation cases[56] and in 28 cases, the press was found guilty. The Report stated that certain sections of the Press have been imitating western culture by publishing vulgar photographs, which boast of no public interests. In such cases, the Council took *suo motu* action in 5 cases of obscenity, of which 2 were upheld.[57] The number of complaints has further risen in 2008-09, with defamation cases itself amounting to 73[58]. As already stated, the ambit of the power of PCI is limited to warning and censure. These tools of punishment are very ineffective to regulate the behavior of the Press. The PCI has stated, that the Press should , work within its limits and remember its responsibility under the rule of law that it should not behave like a prosecutor and should be guided by the paramount principle that a person is innocent till proved guilty by the Court of Law[59].

8.4.9 Mechanisms to Control Press & Electronic Media

The PCI does not contain any strong provision to ensure compliance to the ethics and guidelines formulated by it. The reason being, the Parliament expected that the code of ethics framed by the PCI will be followed in letter and spirit by the media. The danger of free media is still enhanced with the broadcasting through electronic media. There is no regulatory mechanism to supervise its working, except the

---

55 *Report of the P.C.I.* 2007-08, p.89.

56 *Id.* at p.90.

57 *Ibid*.

58 *Annual Report of P.C.I.*2008-09, p.53.

59 In *Smt. Hemambika R. Priya, official spokesperson, Central Board of Excise & Customs, Ministry of Finance, Government of India, New Delhi* v. *The Editor, The Pioner*, New Delhi, Complaint No 44, PCI Review, October 2007, (Annual Report of PCI 2007-08, p.173).

one under the Cable Television Networks (Regulation) Act of 1995. The ministry of Information and Broadcasting was keen to bring a Broadcast Services Regulation Bill[60], but the Editor's Guild of India stated in September 2007, that it did not accept the proposed bill, the reason being that this would give immense power to government over news and current affair channels.[61] As a result the Bill did not become an Act. The Bill was to be introduced during the monsoon session of Parliament in 2007. It was withheld following protests by media who accused the government of trying to curb its freedom of expression[62]. Later the Ministry issued guidelines to build up a local mechanism that would enforce the programme code of the Cable Television Networks (Regulation) Act[63] . Just like Film certification[64] the programmes will have to be certified as Universal (U), which can be shown anytime, universally Adult (U/A), that can be telecast only between 8 PM and 4 PM and Adult (A) to be shown only between 11 PM to 4 AM.

The PCI has stated that to honor the views of the readers, the newspapers should appoint a Readers' Editor.[65] In the present scenario, Readers' Editors are termed also as Ombudsman. Following the practice in the *Guardian, The Hindu* has a Readers' Editor. It is operational since March 2006. Ian Meyes, Readers' Editor of the *Guardian* said in his January 2006 Lecture that it made the paper more responsive to their

---

60 *Annual Report of the P.C.I.* 2007-08. p.29.

61 *Ibid.*

62 *The Asian Age*, New Delhi dated 20th September 2007 (*Report of P.C.I.* 2007-08).

63 *The Tribune*, Chandigarh dated 4 January 2006 (*Annual Report of P.C.I* .2005-06).

64 *Annual Report of the P.C.I* .2007-08 p.31.

65 *Ibid.*

complaints[66]. Recently, the newspaper gave some figures from March 06 to September 06 regarding public response. In the first two months the responses exceeded one thousand per month. E-mails formed the main channel of communication.[67] The system of having a Content Auditor in broadcasting and Readers' Editor in written press is limited to its object. The object is to pacify the complainants by rectifying the errors and straightening the relationship. But in cases of grave errors, these should not be the course of action. Pacifying grave mistakes on the part of journalist and press, especially if it is done purposefully is a wrong practice. These matters are not compensated even by the Ombudsman of the Paper, i.e. the Readers' Editor or by the PCI (The Chief Ombudsman for all papers). The bruises made and the agony caused is left untreated by one and all. This continuous act of defiance by the media is bound to cause deterioration of faith in the Press and can cause negative emotions to boil up. Any bruise left untreated will cause further harm if left unattended for long.

8.4.10 Actions Taken by the Ministry of Information & Broadcasting

The Ministry has been active in taking action against visual media, for violating the Cable Networks (Regulation) Act. It banned FTV for two months for showing "Midnight Hot". This program showed scantily clad models walk the ramp; similarly the AXN was also proscribed for showing 'bikini destination'[68]. The Ministry has also issued two show cause notices to the TV channel "Live India", as it showed the fake sting operation conducted on a mathematics teacher named *Uma Khuranna*.

[66] B.P. Sanjay, 'Growing on the Reader', *The Hoot,* Nov.21, 2006 (www.The hoot.org) retrieved on 27.4.2010 .

[67] *Ibid* .

[68] *The Tribune*, Chandigarh dated 4 January 2006. (*Annual Report of P.C.I*. 2005-06).

These notices were issued following submission of the Delhi Police status report, which stated "*Uma Khuranna* has not been found to be involved in any organized prostitution racket of school girls as shown in the sting operation and it also stated that, that part of the sting operation which showed her in the wrong was stage managed". Later the Government on 20th September 2007 banned *Live India News Channel* from airing programmes for one month for its alleged fake sting operations[69]. This was the first news channel to be banned[70]. Later in the *Aarushi Talwar* case the Ministry is considering issuing show cause notices to some Television Channels for reported character assignation of *Aarushi* and her parents. Many organizations have triggered the ministry to take a move in this matter as a result, the Government directed star TV to withhold telecast of an episode of TV serial '*Kahanni Ghar Ghar ki'* in which *Aarushi* murder case was proposed to be dramatized.[71]

8.4.11 Court on Media Control

From the Apex Court down to its hierarchy, there has been continuous pressure on media regulation. Gone are the days when media was in fact free in expressing its views and therefore had to struggle to get to the people. Today media is very powerful and is entangled in a series of interests. It could be in the nature of politics, advertisement, lobbying, and competition, commercialization, paid news or duplicating and copying the foreign media. Today the Press can no more argue that it is free and independent and public interest oriented. Today more than the news it is the motive behind the news and its estimated outcome, which

[69] *Id.at* p.34.

[70] *The Statesman*, (New Delhi), dated 21st September 2007.

[71] *The Hindustan Times*,(New Delhi), dated 13th July 2008 (*Annual Report of P.C.I.* 2007-08).

prompts it to be published in the newspapers or broadcasted through the channels. The Courts have also therefore developed a stand to regulate media which was unheard of a few decades back. In 2008, a Magistrate Court in Egmore sentenced the Editor and the Publisher of '*Dinamaler'* to undergo three months simple imprisonment in a defamation case.[72] This case was filed by a retired Headmaster of a Government School.[73] ,the allegation being that "*Dinamaler"* published on 16th March 2001 that he had helped students to engage in copying in the Public examination. This resulted in his suspension and later this news item was found to be wrong, malicious and baseless[74].

A lower Court in Lucknow has awarded jail term to three journalists and two publisher printers for publishing a defamatory article and interview[75]. The reason being that the leading newspaper (*Pioneer)* in October 1994 in its Delhi Edition had published a defamatory interview quoting Mr. *Anant Kumar Singh*, the then District Magistrate of Muzzafarnagar, as saying "any man will rape a woman in a secluded spot". He denied having made that statement and demanded an apology from the newspaper which it refused[76].

In the case of former Samajwadi party General Secretary, *Mr. Amar Singh*, the Supreme Court declined to vacate its interim order, banning the media from publishing contents of controversial private conversation,

---

72 *The Hindu*, (New Delhi), dated 28 March 2008.

73 *Ibid.*

74 *Id*. at p.42.

75 *Annual report of P.C.I* .2007-08, p.41.

76 *Ibid*.

Amar Singh and his friends[77] had made. In another case, the Honorable Juvenile Court of[78], Thiruvanathapuram, objected to publication of an incident relating to two children with HIV/Aids. As a result PCI updated its guidelines on October 13th – 14th, 2008 on HIV/Aids. Even in the case of *Aarushi Talwar*, the Supreme Court directed the media to show restraint.[79]

The PIL was seeking to protect the reputation of *Aarushi'*s family and requested to direct the Director General of Police of all states to ensure that no information is leaked to the media regarding a criminal case pending investigation[80].

In 2008, due to the delay in framing a Broadcasting Act, the Supreme Court upheld a Delhi High Court order maintaining that Telecom Regulatory Authority of India can regulate the Broadcast Services till a Broadcasting Act comes into being[81].

8.4.12 Comparison with United States and United Kingdom

Indian Courts do not go generally beyond warnings and imposition of punishment is very rare. US and UK Courts believes in monetary compensation to the victim from the press. A former *US Today* reporter, *Toni Locy* has been ordered to pay a fine up to 5000 $ per day until she reveals the sources in her stories about 2001 anthrax attacks, which

---

77 *The Hindu*, (New Delhi), dated 3rd April 2007, (From the *Annual Report of P.C.I.* 2007-08, p. 41).

78 C.M.P. 52 / 2008.

79 *The Hindustan Times*, (New Delhi), dated 13th July 2008 (*Annual Report of P.C.I.* 2007-08).

80 *Ibid*.

81 *The Indian Express*, (New Delhi), dated 4th January 2008 (*Annual Report of P.C.I.* 2007-08).

named former Army Scientist- *Steven Hatfill* as a possible suspect[82]. Two British tabloid Newspapers made a front page apology on 19th March 2008 to the parents of a missing girl. *Madeline McCann*. They had suggested that the parents might have killed their daughter and covered up her death. *Daily Express* and *Daily Star* agreed to pay 'substantial damages' as the paper's allegation against both parents were fake[83]. Later the Court ordered 11 British tabloids including *The Sun, The Daily Mail* and *The News of the World* to apologize and pay Pounds 60,000/- in damages to a man they had falsely accused of being involved in the disappearance of Madeline[84].

In another case of an Indian Captain, *Ashwini Kumar*, who was the Regional Director of Air India, in charge of UK and Ireland was stated in the front page article in *The Evening Standard* headlined "sex shame of airline chief". He was accused of sexually harassing a female colleague and was called a 'serial sex pest'. He won the libel case and was awarded Pounds 85,000/- in damages and Pounds 500,000/- in costs[85]. The British Court did not reveal the names of the couple and details of their background in the Baby P abuse case. It was released only after the High Court order protecting their anonymity expired at the midnight of 10th August 2009[86].

The Courts abroad have a better and effective way of media regulation, which is highly lacking in India. In the case of media trial on

---

82 *The Statesman* – New Delhi dated 11th March 2008 (*Report of P.C.I.* 2007-08 p. 47).

83 *The Annual Report of P.C.I.* 2007-08, p.12.

84 *Id.* at p. 53.

85 *Ibid.*

86 'Couple named in Baby P abuse case' website: agence France- presse, London, retrieved 20th August, 2009 .

Dr. J.V. Vilanilam, the former Vice-Chancellor of Kerala University during the period 1992 -96 ,the papers falsely gave propaganda[87] that he had obtained a Professorship in 1992 on the basis of a false certificate. This was found to be wrong. He was physically prevented from entering the university and his house, car and other personal properties were attacked by the agitators. There were threats posted on the front door of his house and his life was in danger. The agitators approached the High Court of Kerala with a '*Qua Warranto* petition' but were disappointed when the High Court ruled that he had the right to continue as Vice-Chancellor. An enquiry committee appointed by the Government of Kerala also found no merit in the allegations. Finally the agitators withdrew. However, much damage was done to him. The newspapers involved were not at all punished or made to give compensation. They gave him bad publicity, but today they are scot-free.

Another instance is the case of Senior Scientist *S. Nambi Narayanan* who was falsely accused in 1994 with leaking vital defense secrets to two alleged Maldivian intelligent officers, *Mariam Rasheeda* and *Fauzia Hassan*[88]. He spent 50 days in jail as a result of media, police and government accusations. He said, despite Supreme Courts favorable verdict in April 1998, the officials who had tortured him were far from conceding their guilt. He said that the espionage case against him and three others was malicious, without jurisdiction or sanction.

Another case is of *Sunanda Pushkar* who was involved in the IPL Franchise issue. Her name was badly tainted in the '*Outlook'* April 26th 2010 issue in article titled '*Got a girl, named Sue'* and this was written

[87] www.vilanilam.com retrieved on 4th June 2010.

[88] expressindia.com/news/ie/daily. , retrieved on 24th June 2010.

by *Ms. Gopinath*. In a later issue dated May 24th 2010, the *Outlook* magazine was good enough to publish a letter from her friend*, Colleen Lobo*, from Toronto. She gives the good and positive side of *Sunanda* and defies what has been written about her in the earlier issue. Ironically, the earlier issue would have gained more momentum than the letter in the latter issue of "*Outlook*". The damage was already done to her through that article and the magazine was allowed to go Scott free.

Recently in *The New Indian Express,* dated 9th June 2010, it had an article '*Lover's suicide traps – hi-tech Casanova'*, which referred to a suicide by a girl. In violation of the law and rules of the PCI, the newspaper published the name of the girl. The damage done to the dead girl and the family is of less concern to the press in comparison with the publicity they achieve for in competition with other media houses. This is the need of the time – to make the press compensate for the damage they cause to private individuals. A new legislation should be brought in to protect private people against this power block 'The Media'.

8.4.13 Paid News

Paid news is an issue which has been affecting General Elections. This became prominent in India during the last general elections. Expressing deep concern on this in the Rajya Sabha, the Minister for Information & Broadcasting, Ambika Soni said that the PCI and the Election Commission would submit a report on this, which would be tabled in the House. It is interesting to note that the Leader of the Opposition, in the Rajya Sabha, Arun Jaitley described the PCI as a toothless wonder and wondered whether it could find solution to this

problem[89]. Though the PCI did come with its announcement of bringing a white paper on paid news very soon[90], it is yet to be seen, how it can be solved as this involves a number of issues such as commercial validity of newspaper, monitoring processes, corporatization of media houses etc. If these issues are not dealt with properly, it would lead to a negation of parliamentary democracy. The reason being that there were reports that some media houses received money for publishing or broadcasting news in favor of particular individuals during elections[91]. This affects the readers thinking as the reader or the viewer has the right to harvest, unadulterated news, which is being denied to him. He is not even being informed that the news is motivated by 'monetary considerations' said Arun Jaitley[92]. CPM leader, Sitaram Yechury suggested that the government should stop advertisements to these newspapers[93]. These are only suggestions put forward by parliamentarians. These methods of stopping advertisements or asking the PCI to act upon this are not going to gain ground. Effective mechanism by amending the Peoples' Representation Act and bringing in an enactment for the press and visual media to regulate these practices should be considered seriously. A comprehensive enactment balancing the rights of media and rights of private individuals should be considered and debated.

---

89 *The New Indian Express,* (Cochin) 6th March 2010, p.10.

90 *The New Indian Express* , (Cochin) 2nd April 2010, p.7.

91 *Ibid.*

92 *Ibid.*

93 *Ibid*.

8.4.14 Foreign Direct Investment and Media

May 2003 saw the Indian Government liberalize the policy on Foreign Direct Investment[94] in media. In print media, FDI up to 26% is allowed in publishing Newspapers and periodicals dealing in news and current affairs. Permission has been granted only to Indian Companies with the largest Indian shareholder holding at least 51% of the paid up capital. It is conditional that at least 3/4th of the Directors on the Board of Directors of the applicant Indian Company and all key executives and editorial staff should be resident Indians[95].

Similarly in the field of Broadcasting, 100% FDI is allowed subject to government approval. This has given rise to fear and repercussions from the political parties. Leading editors and opinion makers who feel that this would undermine the media's right to freedom of expression as enshrined in the Constitution and will be detrimental for the Indian Media[96].

Recently, the papers reported about 3G Spectrum auction fetching the Government Rs. 68,000 crores[97]. This opened a new level of technology and competitors like *Vodafone, Idea*, and *Reliance* have got their slot in their business. These companies expect to make money through technology which makes cable, news channel all available on Mobile phones. Telecommunications being already allowed 100%

---

94 *Manual on Foreign Direct Investment in India, Policy and Procedures,* May 2003, Secretariat of Industrial Assistance, Department of Industrial Policy (Annexure IV). http://depp.nic.in/manual/manual 0403 PDF retrieved 10th May 2010.

95 *The Indian Express*, New Delhi, dated 10th June 2008. (*Annual Report of the P.C.I.* 2008-09, p.20).

96 *The Times of India*, New Delhi, dated 27th June 2008. (*Annual Report of the P.C.I.* 2008-09 p.21).

97 *The New Indian Express*, 21st May 2010, p.1.

foreign equity after *Fema* 2000, the Indian soil is open for foreign exploitation. This makes Indians prone to foreign invasion in terms of technology and thinking process.

All this coupled with international Media Magnate, Rupert Murdoch having entered India through *Star Television* is now planning to take over *Asainet* Channel. Rupert Murdoch's *the News Corporation* is trying to influence Indian news. His *Wall Street Journal* is the first foreign paper to get the official nod of the Indian Government[98]. Today after seven years, a large number of 154 facsimile editions of foreign journals on health alone are published from the country out of the total 375, since doors were opened for such publication in 2003 according to government data[99].

It is true that after the liberalization policy of the government, we have to open our gateways to other nations, under WTO. This does not mean that we should expose our people to foreign media with their own ideas without giving due protection and safeguards against unwanted thinking to our people. The concept of Paparazzi is not the trend in India neither do we encourage the tabloid news much. With exposure to foreign concepts of newsgathering and journalism, the serious aspect of disbursement of news, which is the culture of news media in India, may deteriorate. To prevent such ill effects, the Indian Government should come up with a legislation to balance the individual rights of privacy with media freedom. When one side of the society 'media freedom'

[98] On 18/9/2008 the Government of India allowed Indian Editions of Foreign Magazines with news and current affairs content with 26% FDI. *The Wall Street Journal* being the first foreign paper to get the nod. (Annual Report of the P.C.I. 2008-09, p.21).

[99] *The New Indian Express,*(Cochin) dated 21st June 2010, p.9.

becomes stronger then it starts dictating terms, then it is the right time for the government to uplift the weaker part i.e. 'personal privacy' to a higher pedestal so as to balance social Interest with individual interest. This balancing of interests is the main role of the government of any democratic nation.

The BBC poll result released on 9th December 2007, as reported in the Report of PCI 2007-08 regarding public faith in the press show the following[100]:

a) Around 61% Indian believe that news is reported honestly in the country.

b) Around 72% Indians think Press and Media is free in India as compared to only 56% in UK.

c) 56% feel all over the world that free press is needed for free society, which in USA is 70% and in UK 67%. While in India it is only 41%, while 48% feel social harmony is more important for a free society.

d) Indians top the table in rating Government Controlled news organizations for good performance.

The survey shows that Indian public has faith in the press. If this faith has to continue going strong, then Press has a corollary duty towards the public to give it the right and proper information. Today, the Americans and the British do not rely completely on the paper and visual media. They track down the news item to find the truth. In UK, BBC has

[100] The survey, which polled 11344 people across 14 countries, was conducted in India, Brazil, Egypt, Germany, Great Britain, Kenya, Mexico, Nigeria, Russia, Singapore, South Africa, UAE, US and Venezuela by the International Polling Firms Globescan and synovate.

always kept its high standards and so have the CNN, to a great extent, in USA. Indian print media and visual media have yet to reach these high standards. They find it hard to get news and lack the system of news reporting from all over the world. They should either have their reporters stationed in those places or have tie up with International Reporting Agencies. The lack of these systems, keep the Indian media, revolving around its own spicy domestic news. This does not help generate knowledge and important information to the public, but only acts as a gossip generating agency.

Public confidence is the foundation of the Press. If that confidence is lost, then it is only a piece of paper which carries the views of the editor, after the reading of which, it is simply thrown in the garbage box. It is therefore the confidence and faith of the people that has to be retained in the Indian media, without which democracy is difficult to be visualized in its pure sense.

.....ൠ.....

Chapter 9
CONCLUSION

Media the responsible fourth pillar of democracy, which is considered to be an ardent protector of democracy in the past decades, has today come under severe criticism. The fundamental reason for this change is their irresponsibility towards the interest of the public. Democracies want people to work towards achieving its goal of government of the people, by the people and for the people. It does not want the focus to go from the prime topics like difficulties in repayment of loans, female foeticide and move to tabloid items like Sania getting married to a Pakistani, suicide of Nafisa Joseph, Viveka Babaji and such other matters. There are so many murders and suicides taking place in India, among the general population. Do they all get reported? Then why alone these tabloid beauties? Why spend a whole day on news channel discussing the least important subject of the day? Is this an attitude expected of from a responsible media? Does these types of news items add anything to the growth and development of an Indian, if not, then how does it contribute to democracy? These are some of the pertinent questions that are being asked about the media nowadays.

The American and British media, except a few tabloids, are into more serious and mature journalism. They do not waste ink and paper or visuals on suicide and murder reports. They are more into informative journalism and would like to be out of controversies. The reason being, that these controversies may cause very heavily for the press in monetary terms. The American lawyers are on the lookout for such cases to mint money for

themselves and the unaware victims. Contempt of Court proceedings are rarely used by the American and British Courts against media.

In India, in cases of subjudice matters, Contempt of Court Act 1971 is used and that also sparingly and the media is more than excused often from severe punishment and given only mere warnings. Indian Courts are be more aggressive to protect the weak victims from the strong and powerful media. They should use their potential energy lying in Contempt of Court Act for the benefit of protecting privacy and public interest. These are the two interests about which the press is not much bothered. They as they claim are only interested in public interest. So the Courts and government should come forward to protect the private rights and public interest. What is public interest is a long disputed question as far as the media is concerned.

Views of eminent people

Having received an opportunity to interview several people in the media, this gave the privilege of getting some good exposure for this thesis. One of the persons interviewed was Dr. J.V. Velanilam, the former Vice-Chancellor of Kerala University. He had a terrible encounter with media during the tenure of his Vice Chancellorship. Ironically, he was the Head of the Department of Journalism and later became a victim of media trial. Following are the excerpts of some of his views which he divulged through telephonic conversation:

- Media decides what is important for the people, and what they should read and hear.
- Media in India are copying the west. The main objective in India should be educative being a growing democracy, which is not the objective in UK or US being developed economies.

- People in UK and US are more interested in entertainment and sports. In India we cannot afford this at this stage.
- Government is also helpless to some extent in India as they also need the support of media.
- Judges can do a lot, but exhibit restraint in present times.
- People should form organizations to move against such cases since individually it is difficult and expensive. It was emphasized that these organizations should have no political affiliations.

The above views were supplemented and discussed by his colleague, Jyotindra Kumar, now faculty of MASCOM run by *Malayala Manorama***.** He wanted that organizations without political affiliations should come up to fight against these matters as media trial is leading to media terrorism. Lack of money is a big handicap in this matter. He was very apprehensive of the Ministry of Information and Broadcasting bringing in Foreign Direct Investment into press and visual media. He was afraid that media tycoon Rupert Murdoch of the Star TV by taking over Asianet Channel would mean a very dangerous encroachment by foreign media houses into Indian culture. This would have far reaching effect on our private lives and make tabloid method of news gathering the press code. It was opined that the Courts are to be very vigilant in these matters.

On the other hand this issue of FDI was strongly favored by senior journalist and media consultant K.M. Roy. He pointed out that if India can send its magazines abroad then we should also be open to outside view. Though he vehemently supported that the visual media needs to be

regulated, he opined that press should work within its boundaries. Through his experience as a journalist and editor of '*Mangalam'* he argued that press can definitely work within its limit as it has been proved for the last 30 years. As far as privacy is concerned, he felt people are not yet aware of it. They should come out and fight out their rights. He felt the dire need of a Privacy Act on the basis of a proverb he quoted "every thief has a family".

Another important aspect he explained was the handicap of not having press investigative detectives. The people in the press depended on the police and mofussil journalist, who are not qualified to give news or to gather information. The ultimate result is that in India we have manufactured news and not proper news. While channels like BBC, CNN spend time on informative news, we in India spend time on gossip and manufactured news. He emphasized the need of investigative journalism to carry on its own investigation parallel to police investigation. He also opined that press should have an ombudsman, though its function is to be limited. The victim of media trial should be compensated in terms of money like in US and UK. He pointed out that the biggest victim of technological revolution in media industry is media ethics. The deterioration of media ethics emanates from several reasons, one of which is the crores of rupees involved in starting a news paper or news channel, which naturally make the investors focused on financial prospects. In his opinion there is a strong need for regulation and he would like the media to agree with it. He is very clear that the media people should be controlled to maintain the balance between a single man against the collective power of press. He agrees that it can be done only through law by bringing the offender to shame. He would like

organization of lawyers to bring these cases to Court. He opined that if nothing is done, the faith of people in press, which is already low will gradually get lost. He wants a consumer resistance to come to India like in the UK, where people stop the newspaper from entering the homes if they find that it is giving them wrong news, as an act of defiance. There is an urgent need to create awareness of privacy among Indians, which if developed will act as a deterrent against press harassment.

Another important personality interviewed was Dr. Sebastian Paul. He has been the member of the enquiry committee of the Press Council of India and is also practicing at the Supreme Court of India. His opinion was to regulate the press by the system of self regulation, which is done by the PCI. He felt that the PCI is a form of ombudsman for the press. He is for the press as he feels though it may seem to be a paradox but in a democracy the press should be allowed to function like this. He did not feel the need for a specific legislation for privacy as he felt it is already embedded in the Indian Constitution. His concept was that Contempt of Court Act 1971 should not be strictly enforced and free expression of opinion should be allowed. It is only because of the vigil of the media that many criminal cases remain alive till the conviction of the accused. Though he agreed that illegal methods like sting operations are been adopted by the media, he feels they are justified because it serves the public interest. Therefore, he is of the opinion that media should only be regulated not restrained. For this he advises that the overall charge of the visual media should be given either to the PCI or to constitute a separate broadcast council. When asked about the question of paid news he opined that it is a dirty game and felt that the Election Commission of India should take up this matter to prevent this phenomenon from

spoiling the electoral system. Though he was in favor of the press, but when countered with the incidents of victimization of innocent people at the hands of the media, he agreed that in such cases ,the media never regrets on its errors and victims are never compensated. In such cases the media is subject to the laws of the land and can be made accountable if the general public is vigilant.

Talking about Foreign Direct Investment into press – he opined against it and stated that this along with the principles and practices associated with the western media will intrude into Indian press i.e. tabloid journalism and paparazzi. This he said will cause erosion of ethics and thereby credibility of the media will suffer. He stated that the credibility of the media is the corner stone of the media. As people are becoming more literate, more channels and newspapers should be allowed to give public a right to choose. Concerning privacy, he states that it is still in its infancy. He points out that when technology and interests of national security are invading the private lives, then the law should find ways and means to protect individual privacy. In cases of a public person, he feels privacy will decrease at the cost of public interest.

International Obligations

India is a member of the United Nations and therefore under international obligation to follow it. Article 3 of the *Universal Declaration of Human Rights,* 1948 enumerates that every one has the right to life, liberty and security of person. Article 12 states strongly that no one shall be subjected to arbitrary interference neither with his privacy, home or correspondence nor to attack upon his honor and reputation. It further states that everyone has a right to the protection of the law against such interference or attacks. Our constitution came into

effect in 1950, when we were already members of the UN. Still the framers of our constitution failed to give space for privacy, family and home. They failed to realize that it is the privacy of a secure home which gives the support to a person in public. It is this privacy which provides man his place of solace in times of need for rest and retrospection. It is from this rest that he regains the strength to go and face the public once again. If he is deprived of the above privacy in home and family, then it would drive a man crazy.

Tragically, that lapse in law has misfired as now the biggest danger is loss of privacy. The United Nations declaration gives prime importance to privacy while it is only later in Article 19 it talks about right to freedom of opinion and expression. UN therefore gave privacy and family far greater importance than freedom of press. In contrast to this our constitution gives prime importance to freedom of press than to privacy and home. This runs in contradiction to our international obligations.

The second covenant of which India is a partner is the *International Covenant on Civil and Political Rights* 1966 , which also states similarly in Article 17 that 'no one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence nor to unlawful attacks on his honor and reputation. Every one has a right to the protection of the law against such interference or attacks. Here also right to hold opinions are enshrined only in Article 19. Through these covenants the object of the UN is clear that privacy and family is more important and it is over and above the freedom of press. The importance of privacy of an individual lies in the fact that if his privacy is shattered then his very individuality can be lost and the press or state may not be

able to rehabilitate that person. In Article 19, paragraph 3 of this covenant it states clearly that this right to freedom of expression carries with it special duties and responsibilities viz:

a) For respect of the rights or reputation of others.

b) For the protection of national security or of public order or of public health or morals.

Respect for the rights and reputation of others is very explicit in its terminology. However, it can be stated that this aspect of the Convention, also does not find a place in the Indian Constitution. The reasonable restrictions elaborated in Article 19(2) on the ground of decency or morality and defamation on Freedom of Press is very limited and gives no space for privacy as a distinct right among the restrictions mentioned. The impact of these Conventions have been nullified by not mentioning the term 'privacy' in Article 19(2) of the Indian Constitution and by not giving an independent status to privacy as given to press. This can be stated as in violation of the International obligations, and therefore it creates imbalances in our Constitution. As of today the Indian Constitution is prejudicially tilted towards press rather than the individual right to privacy. The provisions of these Conventions ought to have been a source for a Constitutional amendment giving primacy to privacy over and above press freedom.

The British Experience

UK being party to the European Convention on Human Rights[1] 1950 has now enacted the Human Rights Act, 1998 which came into

[1] Hereinafter referred to as E.C.H.R.

force on 2nd October 2000. This Act incorporates the privacy concept articulated in Article 8 of the ECHR along with Article 10 dealing with freedom of press. Article 8 states that 'everyone has a right to respect for his private and family life, his home and his correspondence' and 'that there shall be no interference by a public authority with the exercise of this right except such as in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the right and freedoms of others'.

The question as to whether this Article of ECHR incorporates only infringement by public authority or does it comprehend press also was impliedly answered in *Peck* v. *United Kingdom.*[2] Here, Peck had been caught on Council CCTV cameras, moving through the street carrying a knife, immediately after he had attempted to commit suicide by cutting his wrists. This footage was passed by the local authority on to a news broadcast and a popular Television programme 'Crime Beat' both of which show this abstract from which he was identifiable by hundreds of thousands of people. Though this coverage forbid him from committing suicide , still here in this case, the European Court found fault with the public authority for passing the extract to the media as It resulted in violation of his right to privacy in article 8.

This question was finally put to rest in *Von Hannover* v. *Germany.*[3] The case was concerning a long fight by Princes Caroline of Monaco in the German Courts to stop pictures of herself and her kids taken by

2 *Peck* v. *United Kingdom* (2003)36 E.H.R.R. 41.

3 *Von Hannover* v.*Germany* (2005) 40 E.H.R.R. I.

paparazzi appearing in many papers and magazines all across Europe. These included scenes like horse riding, at the restaurant, shopping etc. She was not given a proper remedy by German Courts though the German Supreme Court agreed that she had right to privacy in semi-public places. The object being that a person should be left alone which is indicative of the fact of seclusion act in a way that she would not have done in public. Finally the European Court found and decided that German courts and government have failed to provide her with her right to privacy. She was found to have been not acting in her public capacity but as a private individual. The Court found that there is a zone of interaction of a person with others, even in a public context, which falls in the definition of 'private life'. Therefore it was found to be a duty of the German government to protect her from paparazzi. This decision was very enlightening as Article 8 was seen in a new light. It now envisage even action against media. Now this is the law and interpretation of Article 8 given in UK. Such a position is to be adopted by us in India also.

Constitutional Framework in India

Indian Constitution was adopted long after the American constitution was formulated. Our basic framework was different compared to that of Americans. Indians were never uprooted from their origin and transplanted elsewhere like the Americans. Though during the Indo-Pak separation, there was some degree of migration but that was limited and its effects were minimal. The Indian society had a very strong base in its family ties, which was very far stretched and tight. At the same time Americans had migrated from the Europe, Africa and Asia. They had no ties with the present American continent and on

coming to the US they lost their family and cultural ties and gradually lost their culture. It was a new life and a new place and a new beginning for many. They did not have much of their original identity and did not even know each other. This brought in a sense of insecurity. Above all they were told that they were free with lots of rights with no queries and questions from their family members, society and the government. This was a new found freedom with not much responsibility. This paved the way for development of an attitude towards the society which meant "please no queries" which meant no interference into their lives. So private lives became just their lives and no one had any say in their life.

When media came into the realm of democracy, it was accepted with wide arms as it was a self declared protector of democracy. But when this self declared protector started invading the privacy of people, it was taken as big offense, especially during the early nineties by eminent jurists like Samuel Warren.[4] The American Constitution gave freedom of speech a clear mandate, while there was no express protection of privacy. As the Constitution was silent regarding privacy, the Courts had to devise some mechanism to protect this inalienable right. This was brought in through the concept of 'newsworthiness' as a ground for justifying publication. If this justification failed, the Press could not exercise their freedom of Press and the cost of invasion into privacy was compensated in terms of money.

The American courts hardly ever punished the press with imprisonment because the object was always to make good for the victim the cost of privacy lost. This was the position in American courts, and

[4] Warren and Brandeis, "The Right to Privacy", 4 Harv.L .Rev. 193. (1890).

therefore it had a strong effect on the attitude of media. Though it did not affect the freedom of media, but in case of distraction from its social responsibility, they had to pay the damages. It was like the victim is paid for being a commercial object in the media. This compensation was calculated in terms of shame, agony and any other kind of loss involved in that particular case. At the same time, if the victim is purposefully showing off in the public, then that person losses his right for compensation. The principle is simple - the press cannot win always. If they win from the publicity of the article then they loose money to the victim for the measure of privacy lost.

India had a completely different social fabric. It is a closely knit society where privacy is part and parcel of the society. Even in the midst of joint family system people retain their private moments, as the understanding of the family members is evident by the fact that they give them the required space at the appropriate time. Thus privacy is so embedded in Indian lifestyle that we do not feel a specific need to emphasize it. Indians as a result of this close knit society hardly feel insecure or act indifferently towards others peeping into their lives. Such being the general outlook, it is difficult to make the Indians realize that their privacy is at stake. The support by the family and friends were always there at any time of crisis and so they did not feel the need to fight against the media. The law suit is something which Indians generally like to distance themselves with, due to the high cost and time lost and further publicity and shame. So the cost of privacy lost is great but it is made to look minimal compared to the future cost and shame involved.

The foreign media is speedily getting into the Indian veins. They are moving in with their own ideas of sex, live-in relationships, homosexuality, children born outside the wedlock, single parent concept, pornography, sex with objects and such varied concepts which were foreign to a common Indian mind. Today many youngsters, attracted by these fanciful ideas and for money and fame, give up their privacy or part of the privacy through the internet or mobile. Indian people have to be made aware of what this exposure cost them. They are too immature and vulnerable at the hands of these new technologies and the foreign media. This social awareness of having 'right to be let alone' should be taught to a child from very early stage itself so that the child is aware as to which part of the child's life is private and which is public. In India this intermingling of private and public aspects of an individual's life is the crux of all the confusion in the minds of people. This confusion is manipulated by the media in India. Everyone wants to have a space in news but this happens not at the choice of the individual but at the choice of the media. Journalists have tactful mechanism to extract news and put a person in picture, whether for right or wrong reasons. Once the news comes in to the hands of a journalist, it is molded and twisted according to their needs. Today, many victims have realized that their statement and pictures have been wrongly used for the advantage of the press. This makes it all the more important that Indians need to be taught about their privacy rights and to be beware of the press and to express their right to be left alone.

The Indian constitution in its very inception incorporated the freedom of speech and expression in Article 19. The Supreme Court in

Romesh Thapper v. *State of Madras* [5] stated that freedom of speech and expression includes freedom of press. It stated 'Turning now to the merits there can be no doubt that freedom of speech and expression includes propagation of ideas, and that freedom is enshrined by the freedom of circulation'.[6] Here the Supreme Court further increased the ambit of the freedom of the press. Though the Constitution came into effect in 1950, the originally enacted Article 19(2), provided that 'Nothing in sub clause (a) of clause (1) shall affect the operation of any existing law relating to libel, slander, defamation, contempt of court or any matter which offends against decency or morality or which undermines the security of or tends to overthrow, the state'. After this came the First Amendment of the Constitution in 1951, amending Article 19(2). The new Article provided 'Nothing in sub clause (a) of clause (1) shall affect the operation of any existing law or prevent the state from making any law, in so far as such law imposes reasonable restrictions on the exercise of the right conferred by the said sub clause in the interests of the security of the state, friendly relations with foreign states, public order, decency or morality or in relation to contempt of court, defamation or incitement to an offence.' This amendment further increased the ambit of freedom of press under the Constitution.

Article 21 declares right to life and personal liberty. This right can be exercised only against the state. The Article does not mention privacy. Personal liberty cannot be equated to personal privacy. Privacy can only be taken as a far stretched extension of liberty – i.e. a person has a liberty to have private life. It is only one of the various dimensions of Article 21.

---

5 *Romesh Thapper* v. *State of Madras* 1950 S.C.R. 594.

6 *Id.* at p. 597.

This raises the question as to whether privacy finds a place in the constitution. On elaboration of Article 21, it is difficult to comprehend privacy as a right. In fact, it is only due to the mercy of the courts that privacy is read into in Article 21. Article 21 visualizes a victimizing state and not a victimizing private body like press. Press has nothing to do with the government except for a few state channels. Apart from that it is neither a state nor an instrumentality of the state. Thus it is exclusively a private body and therefore Article 21 in legal terms does not apply to it. Though the Supreme Court in *M.C. Mehta* case[7] has extended this right against private organizations but it is limited only to cases of companies undertaking essential services, which should normally be undertaken by the state. Press has never been stated by courts to be a state function or essential service to be carried exclusively by the state so it only remains at the mercy of the courts with no legislative incorporation. So technically, there is no privacy right of individuals against the media, under the Constitution. This right exists only against the state.

The only available protection is in the shape of decency, morality, defamation, as found in Article 19 (2). Again in this Article, there is no express term 'privacy'. It only incorporates certain attributes of privacy. Therefore, it is very clear that the Indian constitution does not give protection to privacy as a fundamental right. Therefore, it is advocated that in this scenario where Indian media no more carries the flag of truth but instead carry the goal of market realization, the government should make an effort to create privacy as an important right of an individual. Hence it is suggested that Article 21 and 19 (2) should be amended suitably to incorporate right to privacy.

---

7 *M.C.Mehta* v.*Union of India* , A.I.R. 1987 S.C. 965.

The present Article 21 states 'no person shall be deprived of his life and personal liberty except by procedure established by law'. This Article can be remodeled as: 'no person shall be deprived of his life, personal liberty *and privacy* by the State except by procedure established by law '.

The present Article 19(2) states that 'nothing in sub clause (a) of clause (1) shall affect the operation of any existing law or prevent the state from making any law in so far as such law imposes reasonable restrictions on the exercise of the right conferred by the said sub clause in the interests of the sovereignty and integrity of India, the security of the state, friendly relations with foreign states, public order, decency or morality or in relation to contempt of court, defamation or incitement to an offense'. It is suggested that Article 19(2) instead should state 'nothing in sub clause (a) of clause (1) shall affect the operation of any existing law or prevent the state from making any law in so far as such law imposes reasonable restrictions on the exercise of the right conferred by the said sub clause in the interests if the sovereignty and integrity of India, the security of the state, friendly relations with foreign states, public order, decency or morality or ***privacy*** or in relation to contempt of court, defamation or incitement to an offense'.

These amendments if made would surely uplift the morale of an ordinary citizen of a country instead of living in fear of anytime being pulled out of their secured homes to be scandalized in the open public by the media.

Statutory Protection

As the mandate of Privacy is nowhere incorporated in the Constitution, there is no express responsibility on the state to bring law

to protect privacy. But as Article 19(2) allows the state to bring reasonable restrictions to protect public order, decency or morality or in relation to contempt of court or defamation. In pursuance of this Constitutional provision ,the government has brought in several legislations like the Indecent Representation of Women (Prohibition) Act 1986, the Young Persons (Harmful Publications) Act 1956, the Children's Act 1960, the Juvenile Justice (Care and Protection of Children) Act 2000, the Cable Television Networks (Regulation) Act 1995, Protection of Human Rights Act 1993 apart from section 293, 294, 499, 500, 501, 502, 509 of the Indian Penal Code 1860 dealing with obscene publications, defamation and outraging the modesty of women. These legislations have no terminology synonymous to privacy.

A careful examination of these enactments would show defects which prove the inadequacy of these legislations to in any way substitute the concept of privacy. They can be enumerated as follows:-

1) These Acts do not expressly refer to privacy; they are only referring to some attributes of privacy such as defamation, morality, modesty and obscenity. This makes the ambit very restricted and confined to defined meaning under law. There is no term as privacy therefore these provisions serve no purpose in safeguarding privacy.

2) These Acts are all penal in nature. Imprisonment is the ultimate object and this punishment is not very severe running only up to a period of six months or more with penalty up to Rs.1000/- or more. This penalty amount goes into the Government exchequer and the victim gets no compensation

for the moral, physical and emotional damage done to his or her image in society.

3) In these cases, the state appoints authorized officers under a statute, who books the offenders under the respective enactment. The deciding authorities are these officers and only appeals go to the court of law. The result of this administrative act is normally confiscation, penalizing or simple imprisonment. The victim does not get compensated.

4) The PCI is a toothless tiger, as the PCI Act 1978 gives it only the power to censure, warning and admonition the Press. This is not at all effective on the Media as they keep repeating the same act again and again.

As a conclusion of the study, it is suggested that the effective way to bring protection for privacy is to bring in the above suggested Constitutional amendments and to also enact an exclusive legislation on privacy. Press very rarely listens to their inner voice; rather the market rules the show. Therefore when ethics starts deteriorating, protection has to come up in the shape of Right to Privacy Act. A draft model of The Right to Privacy Act is appended to the thesis .This Act should envisage the protection of Privacy. 'Privacy' as suggested to be codified, includes private life, self-respect, dignity, status of an individual in the society.

The Law Commission in its 200th report in 2006 compared the Indian position in the Contempt of Court Act, 1971 with the UK position. In India the protection against publication, for an accused comes only at the stage of pending judicial proceeding under section 3 of the Contempt of Court Act 1971, while arrest is the starting point of

pendency of a criminal proceeding under the UK Contempt of Court Act, 1981. Australia also follows similar practice. Therefore the report stated that the explanation to section 3 in the Contempt of Court Act 1971 needs to be amended, by adding a clause 'arrest' in the explanation below section 3 as being the starting point of pendency of a criminal proceeding. If this is incorporated any publication after arrest would come under the Contempt of Court Act 1971.The report also proposed section 10 A under which any criminal contempt of court at the subordinate court level could directly come before the High Court. If these recommendations are accepted by the government, then it would give more teeth to the above Act, for the court to act at the earliest.

The fourth pillar of democracy comes under little scrutiny while at the same time the other three pillars, judiciary, legislative and executive, are all governed by stringent rules. Therefore, in this perspective an Act is necessary to control the media when it disturbs the inalienable right of the individual viz. the right to privacy.

To conclude, it is difficult to understand the concept of privacy unless and until one is deprived of it and made a commercial product marketed at the whims and fancies of a third party, which is the media. Media having lost its first loyalty, the responsibility towards people to build a mature nation- to market politics and lobbying objected towards commercial gains and power has no right to claim absolute immunity from its wrongs. Even when the legislature, executive and judiciary are kept under a scanner, the media cannot plead immunity. The government should think independently, keeping itself distanced from the pressure tactics of the media and bring an Act to protect privacy just as it did in the case of Right to Information Act 2005, which has shaken the

foundation of deception and corruption. As stated by the former Chief Information Commissioner of India, Mr. Wajahat Habibullah,[8] that when there is a right to information Act, then it is a must that we should have a right to privacy Act. The government has a responsibility to stand for the weak and to uplift the weaker sections of the society. Today the press needs no support from the government as they are strong and powerful. Now the government should give attention to the individual in the society and make him feel more secure and uplift his morale to live a life of dignity and self respect.

.....ഠ൹.....

[8] KP Saikiran 'CLC for law on Privacy' , *The New Indian Express* , January 31, 2009, p.11.

Bibliography

List of International legal materials

[1] The American Constitution.

[2] The American Convention on Human Rights 1969.

[3] The Human Rights Act 1998.

[4] The International Covenant on Civil and Political Rights ,1966.

[5] The Madrid Principles on the Relationship between the Media and Judicial Independence 1994.

[6] The United Nation‘s Convention on the Right of the Child 1989.

[7] United Nations Declaration of Human Rights 1948.

List of Legislations and Reports

Indian Legislations

[1] The Cable Television Networks (Regulation) Act, 1995.

[2] The Cable Television Network Rules, 1994.

[3] The Children Act, 1960.

[4] The Cinematograph Act, 1952.

[5] The Contempt of Courts Act, 1971.

[6] The Contempt of Courts (Amendment) Act, 2006.

[7] The Customs Act, 1962.

[8] The Criminal Procedure Code, 1973.

[9] The Dramatic Performances Act, 1876.

[10] The Hindu Marriage Act, 1955.

[11] The Indecent Representation of Women (Prohibition) Act, 1986.

[12] The Indian Constitution 1950.

[13] Indian Divorce Act, 1869.

[14] The Indian Penal Code, 1860.

[15] The Information Technology Act, 2000.

[16] The Juvenile Justice (care and protection of children) Act, 2000.

[17] The Obscene Publications Act, 1959.

[18] The Official Secrets Act, 1923.

[19] The Post Office Act, 1898.

[20] The Press and Registration of Books Act, 1867.

[21] The Press Council of India Act, 1978.

[22] The Special Marriages Act, 1954.

[23] The Young Persons (Harmful Publications) Act, 1956.

Indian Reports

[1] *Annual Report of Press Council of India*,(1969).

[2] *Annual Press Council Report*s 1996.

[3] *Annual Report of Press Council of India*, 2004-05.

[4] *Annual Report of Press Council of India 2006-07.*

[5] *Annual Report of the Press Council of India,* 2007- 2008.

[6] *Annual Report of Press Council of India 2008-09.*

[7] *Law Commission of India forty second Report on the Indian Penal Code*, 1971.

[8] *Law Commission of India one hundred and fifty sixth Report on the Indian Penal Code* vol.1 August, 1997.

[9] *200th Law Commission Report on Trial by Media, Free Speech and Fair Trial under CrPC 1973*, http://Law Commission of India.nic.in/ register/rep200.pdf retrieved on 4th June 2009.

[10] *Manual on Foreign Direct Investment in India, Policy and Procedures,* May 2003, Secretariat of Industrial Assistance, Department of Industrial Policy (Annexure IV).

[11] Workshop on Reporting of Court proceedings by Media and Administration of Justice – Addressed by Mr. Justice G.N. Ray, Chairman – Press Council of India at VigayanBhavan New Delhi, on 29th& 30th march 2008 on the inauguration of 2 day workshop – organized by Supreme Court Legal Services Committee, PCI and Others.

Others

[1] *California Civil Code* (1998).

[2] Defamation Act 1996, (U.K.).

[3] New York Civil Rights law.

[4] Privacy Act of 1974.

[5] Sexual Offences (Amendment) Act, 1976 (U.K.).

[6] The Children and Young Persons Act, 1933(U.K.).

[7] The Children and Young Persons Act, 1993(U.K.).

[8] The Criminal Justice Act 1925, (U.K.)

[9] The Criminal Justice Act, 1988, (U.K.).

[10] The Contempt of Court Act.1981, (U.K.).

[11] The Criminal Justice Act 1991, (U.K.).

[12] The Criminal Justice and the Public Order Act, 1994 (U.K.).

[13] The Human Rights Act 1998, (U.K.).

[14] The Youth Justice and Criminal Evidence Act, 1999 (U.K.).

List of Books

[1] Barry .S. Engel "*United States Contempt of Court Principles as applied in the Asset Protection Planning Context"* Esq., F.O.1. http:/www.offshoreinstitute.com/contempt.html.

[2] Don R. Pember, *Mass Media Law,* University of Washington- Seattle – Wm.C. Brown Publishers, Dubuque, Iowa, (1987).

[3] Dr. Sebastian Paul, *Forbidden Zone – Essays on Journalism* ,Pranatha Books, (2005) , p.74.

[4] Dwight L. Teeter.Jr and Bill Loving, *Law of Mass Communication – Freedom and Control of Print and Broadcasting Media*, Tenth Edition, New York Foundation Press (2001*)*.

[5] Helen Fenwick,*Civil liberties and humanrights*,T.J.International ,Padstow , Cornwall (2002).

[6] J.S. Mill, *Principles of Political Economy*, Penguin, 1970.

[7] Norman 1. Rosenberg, *Protecting the Best Men: An Interpretive History of the Law of Libel,*(University of North Caroline Press, Chapel Hill , 1986).

[8] Peter Carey & Jo Sanders, *Media law*, Sweet& Maxwell, *3rd Edition 2004*.

[9] Sita Bhatia, *Freedom of Press*, Nice Printing Press, New Delhi, (1997).

[10] Swati Deshpande, '*Media and Law –A Reporter's Handbook',* AMIC India and UNESCO (2006).

[11] Theodore F.T. Plucknett, *A Concise History of the Common Law*, Butterworth, London, (1948).

[12] VidishaBarua ,*Universal 's Press & Media Law Manual*, Universal Law Publishing Co.Pvt.Ltd. (2002).

[13] Winston S. Churchill, '*A History of the English Speaking Peoples, The Birth of Britain'* Bar nes and Noble,New York (1993) .

[14] William A. Hachten, *The Supreme Court on Freedom of the Press: Decisions and Dissents* Ames, Iowa: Iowa State University Press, (*1968*).

List of Articles

[1] Clari E. Gorman, Publicity and Privacy Rights: Evening out, the Playing Field for Celebrities and Private Citizens in the Modern Game of Mass Media, 53 DePaul L.Rev. 1247, (2004).

[2] Clay Calvert, 'Video voyeurism, privacy, and the Internet: Exposing peeping Toms in Cyberspace ', Justin Brown 18 Cardozo Arts Ent. L.J. 469, p. 9.

[3] Daniel H.Erskine, Esq. 'An analysis of the legality of Television Cameras Broadcasting Juror deliberations in a Criminal case', *Akron Law Review*, vol.39, p.701.

[4] John Hughes, 'Solving the Media's credibility problem,' *Christian Science Monitor,* Apr.16, 1997, at p.19.

[5] Joseph Elford, Trafficking in stolen information: A"hierarchy of Rights''- Approach to the private Facts Tort'', 105 *Yale Law Journal*, p. 729(1995).

[6] *Journalism Ethics for the Global Citizen*, p.1-4, available at http://www.journalismethics.ca/medialaw/history of free press htm.

[7] Kathryn Webb Bradley, 'The Court of Public opinion: The practice and ethics of trying cases in the Media' Bradley. Cite as (71 – Fall Law & Contempt Probs.31).

[8] Lyrissa Barnett Lidsky, 'Prying, spying and Lying: Intrusive news gathering and what the law should do about it' 73 Tul. L. Rev.173 1998-1999.

[9] Melville Brown, Amber "Camera Shy – the Interaction between the Camera and the Law of Privacy in the UK", *International Review of Law, Computers & Technology*,2008 p.214.http://dx.doi.org/10.1080/13600860802496400.

[10] NeetiTandon , ' Secondary victimization of Children by the Media; An analysis of perceptions of victims and journalists', *International Journal of Criminal Justice Sciences*, Vol 2 issue 2 July – December 2007. http://creativecommons.org/licenses/by-nc-sa/2.5/in.

[11] 'Princess Diana , Privacy law and press freedom in the United Kingdom-UK Law online', p. 4, http//www.leeds.ac.uk/law/hamlyn/princess.htm.

[12] Restatement of the Law,(second) , Torts 1977, The American Law Institute @cyber. law.harvard. edu /privacy/privacyR2dTorts.

[13] Roger Bull, 'Online and Loving it', Fla. Times Union, Feb 27, *1998,* at D1 (www.drudgereport.com).

[14] Ruth Gavison, 'Privacy and the limits of law', 89 Yale L.J.421, 426 (1980).

[15] Samuel D. Warren and Louis D. Brandeis, "The Right to Privacy", 4 Harv. L.Rev.193(1890).

[16] Sarkaria ,"Should the Press be given Special Dispensation?" 12 P.C.I. Rev. 1, 32 (1991).

[17] U.K. Law Online – Princess Diana, Privacy Laws and press freedom in the United Kingdom, p. 4.http://www.leeds.ac.U.K./law/ hamlyn/ diana.htm retrieved on June 12, 2000 at 10.3

[18] William L. Prosser, 'Privacy', 48 *California Law Review* 383 1960.

List of Websites

[1] http://creativecommons.org/licenses/by-nc-sa/2.5/in/. (victimization of children by press).

[2] The American Law Institute @cyber.law.harvard. edu /privacy/privacyR2d Torts.(Restatement of Laws (second) of U.S.A.).

[3] http://depp.nic.in/manual/manual 0403 PDF retrieved 10th May 2010 .

[4] www.drudgereport.com.(online violations by media).

[5] http://dx.doi.org/10.1080/13600860802496400 .(interaction between camera and privacy in U.K.).

[6] expressindia.com/news/ie/daily. , retrieved on 24th June 2010. (ISRO espionage case).

[7] http://www.hindu.com/2004/02/05 stories/2004020 5 to 951100htm.(trial by media).

[8] http://www.hrde.net/sahrde/hr(human rights- trial by media). (ISRO espionage case).

[9] Ibnlive.in. com/news.(Hawala case).

[10] http://www.journalismethics.ca/medialaw/history of free press htm.(journalism ethics).

[11] http://Law Commission of India.nic.in/register/rep200.pdf. (trial by media report).

[12] http//www.leeds.ac.uk/law/hamlyn/princess.htm.(Princess Diana case).

[13] http://www.legalserviceindia.com/articles/pri-r.html (Griswold v. Connecticut case 1965 U.S.).

[14] http:/www.offshoreinstitute.com/contempt.html.(contempt of court).

[15] http://www.rminlu.ac.in/content/devesh .(trial by media).

[16] times of india.indiatimes .com/india dated November 15, 2011. (defamation case of justice Sawant0.

[17] www.Unesco.org/new/en.(May 3, declared freedom of press day).

[18] www.unhchr.ch / Huridocda.(The Madrid Principles on the Relationship between the Media and Judicial Independence 1994).

[19] www.vilanilam.com.(former Vice Chancellor of Kerala University - Dr. Vilanilam's media trial by media).

[20] http://en.wikipedia.org/wiki/Trial(trial by media).

[21] http://en.wikipedia.org/wiki/united (U.S.A- amendments).

[22] http://en.wikipedia.org/wiki/O.J. (O.J.Simpson case).

List of Reportings

[1] 'Ambanis behind YSR Death?',*The New Indian Express ,(Cochin)*dt. 8/1/2010, p. 1.

[2] B.P. Sanjay, Growing on the reader,*The Hoot*, Nov.21, 2006 (www.The hoot.org).

[3] Bill Carter T.V. notes; 'A Month late, the Fallout Hits', *N.Y Times,* Oct. 8, *1997*.

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

[5] 'Crimeeditor arrested', *The New Indian Express,*dt.4/7/ 2010, p.9.

[6] 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.

[7] 'Fashion TV bares all, gets banned.' *The New Indian Express, dt.*12/3/2010, p.1.

[8] 'Govt. urged to crack down on 'paid news' – *The New Indian Express*, dt.6/3/2010, p.7.

[9] 'Times heroes hailed by the S.C., say they just stuck to their duty', *The Times of India,* Kochi, Sept. 8, 2002, p.9.

[10] Trial by Media – Human Rights Features, http://www.hrde.net/sahrde/hr features, retrieved on 9/6/09.

[11] Trial by media – wikipedia.org http://en.wikipedia.org/wiki/Trial by media - retrieved on 3/6/09.

[12] R.Krishanakumar ' ISRO Spy case. Requiem for a Scandal', *Frontline* vol. 15, No 10:May 09-22, 1998 . http://www.hinduonnet.com/fine/f11510/ 15101140.htmretrieved on 1/3/2010.

[13] ' Katju , 'Media must provide leadership to society' , *The Hindu*, dt. 6/12/2011, p. 10.

[14] KP Saikiran 'CLC for Law on Privacy' January 31, 2009, *The New IndianExpress* p.11.

[15] 'Lost our way, says disgraced tabloid', *Indian Express*dt. 11/7/2011p.11.

[16] Press Trust of India, 'What's the BangaruLaxmanTehelka sting case?', Ibnlive.in.com/news.

[17] Law Lecture by Chairman, Press Council of India on August 31, 2008 at Bhubaneswar, organized by Gora Chand Patnaik Memorial Trust.

[18] Law Lecture by Mr. Justice G.N. Ray, former chairman, Press Council of India on 'Reasonableness of restrictions on reporting of subjudice matters on August 31,2008 at Bhuwaneshwar, organized by Gora Chand Pattnaik Memorial Trust. www.Presscouncil.nic.in/speechpdf/ Bhubaneshwar, retrieved on 10/5/2010.

[19] *News Desk – UK*; Law update Contempt of Court http://www.newsdesk-uk.com/law/contempt.html retrieved on 25/7/09 .

[20] http://en.wikipedia.org/wiki/O.J. *Simpson murder case*, retrieved on 24th June 2010.

[21] Press Trust of India 'What's the BangaruLaxmanTehelka sting case? Ibnlive.in. com/news.Retrieved on 28/03/2013.

[22] 'PDP condemns media gag', *The New Indian Express,* dt.11/7/2010, p.9.

[23] 'Photo journalists summoned for snapping President',*The New Indian Express*, dt.6/1/2011, p.10.

[24] Report that came to bite them, *The New Indian Express* ,dt. 9/1/2010, p. 1.

[25] 'S.C asks Times Now to deposit Rs 100 crores before H.C.takes up its appeal in defamation case', times of india.indiatimes .com/india dated November 15, 2011. Retrieved on 27/02/2013.

[26] S. DeveshTripathi 'Trial by media: prejudicing the subjudice', http://www.rminlu.ac.in/content/devesh retrieved on 5/6/09 .

[27] "Self- Censorship at CBS", editorial in *The New York Times*, Nov. 12, 1996, p.14.

[28] Nancy Stancill, 'Deadly Neglect: Texas and its Nursing Homes ', *Houston Chronicle,* July 22-26, 1990, retrieved on 6/9/09.

[29] 'Sister Sephy moves Court against CD Telecast'*, The New Indian Express* dated 16th September 2009 p.5.

[30] 'Stories about Remarriage are false: Omar', *The New Indian express*dt . 16/9/ 2011, p. 7.

[31] Sunil Saxena 'Picture Imperfect', *Indian Express* dated 19/03/2006 *Mumbai Mirror* dated 20/8/06.

[32] Sunil Saxena' Candid Cameras , call girls , bribery : Is sting operation crossing the LakshmanRekha ?' *New Sunday Express*, March 14, 2004, p. 17.

[33] *USA Today*, Sept. 3, 1997, p.14A, "Overview: More laws won't stop photographers run amok", and "opposing view" [by Security Consultant Gavin de Becker], "protect privacy with laws".

[34] 'Woman, boyfriend who tortured baby named' *, The New Indian Express*, August 12, 2009 Cochin ,p 11.

[35] *R*. v. *Loveridge*.2 Crim.App. R. 29 (2001).

[36] Zubeda Hamid, 'News for hire', *The New Indian Express*, (Cochin),dt. 4/12/2010, p.8.

.....ഭാഗം.....

APPENDICES

Appendix -I

Questionnaire on Media trial

Name of Respondent:

Designation:

Place of Work:

1. Freedom of information is protected under Article 19, while privacy is not explicitly protected in the Constitution, is there a need for amendment?

2. There is an enactment 'Right to Information Act' to provide information, while there is no Privacy Act, is there a need for a Privacy Act?

3. Press encroaches the private rights of individuals, while the press does not allow their territory to be encroached. They are not ready to reveal the source of their information. Should they be brought under RTI Act and at the same time should they have an Ombudsman to satisfy the public and gain their confidence?

4. What are the limits to be set to prevent media from invading into private rights?

   a) In ordinary matters

   b) In subjudice matters

   c) Should limit be set through:-

      (i) Constitution

      (ii) Statute

      (iii) Press Council of India

5. At what point of investigation the press should step in and at what point should it step out?

6. How should victimization of a person by media be compensated?
   a) Civil
   b) Criminal
7. Visual media is not regulated by law. The trend is only to take up high profile cases connected to public figures. How can this be regulated?
8. Media is getting commercialized. How do we deal with cases like paid news?
9. How do we regulate the balance between one man versus the power block – press? What is your suggestion?
10. According to the law on Foreign Direct Investment – FDI is allowed up to 100% in broadcasting and up to 26% in publishing news in print media. How safe is the Indian public. Will the trend of 'paparazzi' come into India? E.g. Shashi Tharoor's case.
11. Do the public have faith in the press?
12. What is the future of privacy in India?
13. Any other suggestions.

Date: Signature

.....ଉତ୍ତର.....

Appendix -II

Draft Legislation -The Right to Privacy Act

An Act to protect the privacy of an individual, wherein the private life, self-respect, dignity, status is affected by the act of others.

Chapter I

PRELIMINARY

1. Short title, extent and commencement.

1). This Act may be called the Right to Privacy Act.

2). It extends to the whole of India.

3). It shall come into force on such date as the Central Government may by notification in the official gazette, appoint.

2. Definitions. -In this Act unless the context otherwise requires:-

a) **"**Media" includes press, television, cable, radio, notices, publications, advertisements, books and seminars.

b) **"**Privacy" includes private life, self-respect, dignity, status of an individual.

c) "Others" include government and related bodies, private bodies and persons.

d) "Public person" include public servant, famed personalities, publicly known due to some act or case.

e) "Public function" means any meeting, seminar, party or anything in the nature of getting together which is accessible to the public or the section of public.

f) "Public job" means and includes any job or duty or act done in the public as part of the public person's job or duty.

g) "Public interest" means and includes any matter or act which the people need to know, the not knowing of which would detrimentally affect the right to have a good government.

h) "Newsworthiness" means and includes any matter which imparts knowledge and information for the growth of mature citizens. This also includes art, science, skills and expertise if it does not exhibit obscenity, porno and abuse related items.

i) "Private" means and includes the realm of life of a person which is out of coverage of the public and others.

j) "Public duty" means any duty done or imposed by the government on a public servant as part of government machinery.

k) "Public servant" includes any person under pay or duty to the public.

Chapter II

OFFENCES

3. **Invasion of privacy in public interest**.-No person or media or others shall interfere in the privacy of an individual except when public interests demand it.

4. **Invasion of privacy of a public person when doing as part of duty**.- No person or media or others shall interfere into the privacy of an individual who is a public person except when it is done as part of the job or duty of the public person in public.

5. **Invasion of privacy of a public servant when on duty.-** No person or media or others shall interfere into the privacy of an individual who is a public servant except when it is part of the job or duty of the public servant.

6. **Legal means to be used to extract information.-**No person or media or others shall use illegal means to extract information. This includes sting operations, wiretapping and extracting information without the consent of the giver.

7. **Newsworthiness as public interest. -**Any news or programme which is not newsworthy will fail to fall under the definition of public interest.

Chapter III

REMEDIES

8. **Monetary compensation.-**The person aggrieved shall be awarded monetary damages in terms of the physical, mental and psychological agony suffered at the hands of the offender. For every new offence conducted by the offender the victim shall be compensated in double of the above damage awarded. This would also include any monetary loss suffered by the aggrieved during this process. The above damages awarded would also include the cost incurred for the litigation.

9. **Written apology.-**The offender should also in addition to the monetary compensation ,make good the stigma suffered by the victim ,through the media by means of apology which is accessible to the maximum number of people in the locality where the offence was committed.

10. **Non-availability of funds of the offender.-**In case of non-availability of funds with the offender, his property, assets, job, business or source of income should be attached till the damages in full are dispersed to the aggrieved.

Chapter IV

MISCELLANEOUS

11. Power of the High Courts to make rules.-The High Courts may make rules consistent with this Act as to the conduct and procedure in respect of all proceedings before it under this Act.

12. Power of the Central Government to make rules.-The Central Government may by notification in the Official Gazette, make rules for carrying out the purposes of this Act.

Appendix -III

Research Articles published

1). Topic – '*Privacy as a concept of Law*' published in peer reviewed journal - Global Research Analysis - in Volume 1, issue 5, in October, 2012.

2). Topic - '*Investigative Journalism'* published in HNLU Journal of Law and Social Sciences 2013 January-May.