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MEDIA INTRUDING RIGHT TO PRIVACY - A REALITY

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Introduction:

"Press is the watchdog to see that every trial is conducted fairly, openly and above board, but the watchdog may sometimes break loose and has to be punished for misbehavior."

-Lord Denning[3]

Intrusion upon privacy is gradually becoming the order of the day. It has therefore become a matter of great concern. Innovation has overwhelmed us. Industry has overcome us. We find ourselves helpless by latent invasions of our privacy and overt intrusion of our personhood. The law of privacy is recognition of the individual's natural right which is to be let alone and to have his personal space inviolate. The need for privacy and its recognition as a right is a modern phenomenon. Human urge is to keep things, which are private, away from the public gage. *Edward Coke* long ago recognized that "a man's house is his castle." 'Thus, with the passage of time, 'right to privacy' or 'right to be let alone' has emerged as a cherished natural right.

Concept of Privacy:

The concept of privacy is relatively a new development in realm of law, and the stream of its development is still flowing. In 1890, two Boston lawyers ***Samuel Warren and Louis D. Brandies*** who later went on to become Justice Brandies of the United State Supreme Court wrote an article entitled "Right to Privacy." They argued in their article that privacy ought not to be dependent on private property entirely. Instead, they wrote, it should be grounded on the concept of the "inviolate personality-right to be let alone." Today privacy is first and foremost, a

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3 Book *'Road to Justice'*

'natural', 'human' or personal right. It is difficult to give an exhaustive definition of what 'privacy' means in law. The best definition of the 'right to privacy' is:

"*The right of privacy is the right of individual to decide for him how much he will share with other his thoughts, his feelings and the facts of his personal life…*"[4]

Recognition of Right to Privacy in India:

Privacy arises in different circumstances. It is concerned with the publication of private affairs, e.g., details of illness or disease of a person, affairs of a couple on honeymoons, true account of private life of an individuals and his wife, photographs of a film actress taking sun bath, bedroom conversation etc. The grievance here is ***'injury to feelings and not an injury to reputation'***.

In India, the Constitution does not explicitly guarantee this right as a fundamental right. But earlier by numerous judicial pronouncements, 'the right to privacy' or, 'the right to be left alone' is accepted as a natural individual right implied under right to life under Article 21 of our Constitution.

Lord Denning has forcefully argued for the recognition of 'right to privacy' in following words:[5]

"English law should recognise a 'right to privacy'. Any infringement of it should give rise to a cause of action for damages or an injunction as the case may require. It should also recognise a right of confidence for all correspondence and communications which expressly or impliedly are given in confidence. None of these rights is absolute. Each is subject to exceptions. These exceptions are to be allowed whenever the public interest in openness outweighs the public interest in privacy or confidentiality. In every instance, it is a balancing exercise for the courts. As each case is decided, it will form a precedent for others. So a body of case – law will be established."

In 1963, right to privacy has been protected by the supreme court of India as penumbra of personal liberty as guaranteed in Article 21 of the Constitution of India. In ***Kharak Singh*** v. ***State of U.P***.[6], the supreme court held that "domiciliary visits by police in the night to a private

4 Report (1967) to the U.S. President's Office of Science and Technology
5 Lord Denning "What next in Law?"
6 AIR 1963 S.C. 1395

house were an invasion on the part of police in the night to a private house were an invasion by the police on the sanctity of a man's home and an intrusion in his personal privacy'. Similarly, in ***Govind*** v. ***State of M.P*** [7] Mathew J. asserted that "the right to privacy deserves to be examined with case by case and to be denied only when an important countervailing interest is shown to be superior." He, further, observed that "this right will have to go through a process of case-by-case development."

Privacy was given wider and wider field of operation including therein matters pertaining to health, personal communication, family, personal relations and a right to be free from harassment and molestation. The scope and ambit of 'the right of privacy' or 'right to be left alone' came up for consideration before the Supreme Court in ***R. Rajgopal*** **v.** ***State of T.N.***[8] In this case, Justice B.P. Jeevan Reddy, J. on an interpretation of the relevant articles of the Constitution and in the context of an analysis of case – law from other common law countries like UK and U.S.A held that though the right to privacy is not enumerated as a fundamental right it can certainly be inferred from Article 21 of the Constitution. The court in conclusion held as follows:[9]

(1) The right to privacy is implicit in the right to life and liberty guaranteed to the citizens of this country by Article 21. It is a "right to be left alone". A citizen has a right to safeguard the privacy of his own, his family, marriage, procreation, motherhood, childbearing and education among other matters. None can publish anything concerning the above matters without consent – whether truthful or otherwise and whether laudatory or critical. If he does so, he would be violating the right to privacy of the person concerned and would be liable in an action for damages. Position may, however, be different, if a person voluntarily thrusts himself into controversy or voluntary invites or raises a controversy.

(2) The rule aforesaid is subject to the exception, that is, any publication concerning the aforesaid aspects becomes unobjectionable if such publication is based upon public records including court records. This is for the reason that once a matter becomes a matter of public record, the right to privacy no longer subsists and it becomes a legitimate subject for comment by press and media among others. We are, however, of the opinion that in the interests of decency (Article 19(2), an exception must be carved out to this rule, viz., a female who is the

7 AIR 1975 S.C. 1378 : (1975) 2 SCC 148
8 (1994) 6 SCC 632
9 Supra SCC PP. 649-51, para26

victim of a sexual assault, kidnapping, abduction or alike offence should not further be subjected to the indignity of her name and the incident being publicized in the press/media.

(3) There is yet another exception to the rule in (1) above. Indeed, this is not an exception but an independent rule. In the case of public officials, it is obvious, right to privacy, or for the matter, the remedy of action for damages is simply not available with respect to their acts and conduct relevant to the discharge of their official duties. This is so even where the publication is based upon facts and statements, which are not true, unless the official established that the publication was made (by the defendant) with reckless disregard for truth. In such a case, it would be enough for the defendant (member of the press or media) to prove that he acted after a reasonable verification of the facts; it is not necessary for him to prove that what he has written is true. Of course, where the publication is proved to be false and actuated by malice or personal animosity, the defendant would have no defences and would be liable for damages. It is equally obvious that in matter not relevant to the discharge of his duties, the public official enjoys the same protection as any other citizen, as explained in (1) & (2) above. It needs no reiteration that judiciary, which is protected by the power to punish for contempt of court and the parliament and legislatures an protected by their privileges under Article 105 and 104 respectively of the Constitution of India. These cases represent exceptions to this rule.

(4) So far as the government, local authority and other organs and institutions exercising governmental power are concerned, they cannot maintain a suit for damages for defaming them.

(5) Rules 3 and 4 do not, however, mean that Official Secret Act, 1923, or any similar enactment or provision having the force of law does not bind the press or media.

(6) There is no law empowering the state or its official to prohibit, or to impose a prior restraint upon the press/media.

It may be noted that the court has cautioned that the above principles are not exhaustive. The court has also not examined the impact of Article 19(1)(d) read with sections 499(2) and 500 of I.P.C., and again the court has preferred to leave the contours of this right to develop though a case- by-case method.

Nine Judges Bench of the Supreme Court of India in Justice K S Puttaswamy (RETD.) and Anr v. Union of India on August 24, 2017[10] has held that the right to privacy is protected as an intrinsic part of the right to life and personal liberty under Article 21 and as a part of the freedoms guaranteed by Part III of the Constitution, hence Right to Privacy is a part of fundamental right guaranteed by the Constitution of India it is not an absolute but subject to the restrictions.

Evaluating Media/Press in the Light of Right to Speech & Expression:

It is wrong to consider that the concept of the supervening spirit of justice manifesting in different forms to cure the evils of a new age is unknown to Indian history. Lord Shri Krishna declared in ***Chapter 4 Text 8 of The Bhagavad Gita*** thus:

“ – –◌ – –◌ ◌

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The meaning of this profound statement, when viewed after a thousand generations is this: That each age and each generation brings with it the challenges and tribulations of the times. But that Supreme spirit of Justice manifests itself in different eras, in different continents and in different social situations, as different values to ensure that there always exists the protection and preservation of certain eternally cherished rights and ideals. It is a reflection of this divine ‘Brooding spirit of the law’, ‘the collective conscience’, ‘the intelligence of a future day’ that has found mention in the ideals enshrined in *inter- alia*, Article 14 and 21, which together serve as the heart stones of the Constitution. The spirit that finds enshrinement in these articles manifests and reincarnates itself in ways and forms that protect the needs of the society in various ages, as the values of liberty, equality, fraternity, dignity, and various other Constitutional values, Constitutional principles. It always grows stronger and covers within its sweep the great needs of the times. This spirit can neither remain dormant nor static and can never be allowed to fossilize.

Unlike U.S.A., the freedom of press has not been expressly mentioned in Article 19 of the Constitution of India. Article 19(1)(a) of the Constitution secure to every citizen of India the freedom of speech and expression which refers to the right to express one’s ideas and opinions freely, either by word of mouth, writing, printing, illustration or in any other way (including electronic media). In India, this right broadly includes the freedom of the press.

10 Judgment pounced on August 24, 2017 by the Supreme Court

In ***Sakal Papers (P) Ltd.*** v. ***Union of India***[11] the Supreme Court held that, "it is settled law that the right to freedom of speech and expression in Article 19(1) (a) includes the liberty of the press."

In ***Romesh Thapper*** v. ***State of Madras***,[12] Justice Patanjali Shastri C.J., observed, "Freedom of speech and the press lay at the foundation of all democratic organizations, for, without free political discussion, 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 (Constitution of U.S.A.), that it is better to leave a few of its noxious branches to their luxuriant growth than by pruning them away, to injure the vigor of those yielding the proper fruits."

In ***Brij Bhushan*** v. ***State of Delhi***,[13] the Supreme Court observed, "There can be little doubt that the imposition of pre-censorship on a journal is a restriction on the liberty of the press which is an essential part of the freedom of speech and expression declared by Article 19(1)(a)."

In ***Maneka Gandhi*** v. ***Union of India***,[14] the Supreme Court has broadened the scope of the freedom of press. In this case, Justice P.N. Bhagwati held that "There are no geographic limitations to the freedom of speech and expression guaranteed under Article 19(1)(a).

In ***Indian Express Newspaper*** v. ***Union of India***[15], the court held that freedom of press must be considered as the "basic structure" of the Constitution.

In ***K. K. Birla*** v. ***The Press Council***,[16] Justice S.S. Chadha, J. said that "The concept of freedom of press cannot be put in any narrow straitjacket. It is a living concept and cannot be confined in any narrow limits, which restricts its growth".

In ***New York Times*** v. ***U.S.,***[17] the court held that "It is a right to have free access to sources of information".

11 AIR 1962 SC 305 : 1962(3) SCR 842
12 AIR 1950 SC 124
13 AIR 1950 SC 129
14 AIR 1978 SC 597
15 AIR 1986 SC 515
16 ILR 1976 Delhi 753
17 (1971) 403 US 713

In ***Ramesh Thapper's*** case[18], the court held that "The printer, publisher or editor of a newspaper may bring a petition for appropriate relief to quash a law which imposes a ban on the entry of their journal in a state or other local area".

Freedom of Press– Areas of Reasonable Restrictions

"*The freedom of the press is extolled as one of the great bulwarks of liberty. It is entrenched in the constitutions of the world. But it is often misunderstood...It does not mean that the press is free to ruin a reputation or to break a confidence or to pollute the course of justice or to do anything that is unlawful.....It can publish whatever it chooses to publish. But it does so at its own risk... Afterwards, after the publication, if the press has done anything unlawful they can be dealt with by the courts. If they should offend by interfering with the course of justice they can be punished in proceedings for contempt of court. If they should damage the reputation of innocent people.... they may be made liable in damages...*"[19]

Beg, J. in the case of ***Bennett Coleman*** v. ***Union of India***[20] observed that; "The power to impose restriction on fundamental rights is essentially a power to 'regulate' the exercise of these rights. In fact, 'regulation', and not extinction of that which is to be regulated, is, generally speaking, the extent to which permissible restrictions may go in order to satisfy the test of reasonableness".

The Hon'ble Supreme Court in ***Ajay Goswami*** v**.** ***Union of India***[21] has considered the view taken in ***Virendra*** v**.** ***State of Punjab***,[22] in which the Judge of this court observed:

"*It is certainly a serious encroachment on the valuable and cherished right to freedom of speech and expression if a newspaper is prevented from publishing its own views or the views of its correspondents relating to or concerning what may be the burning topic of the day.*

Our social interest ordinarily demands the free propagation and interchange of views but circumstances may arise when the 'social interest in public order' may require a reasonable subordination of the 'social interest in free speech and expression' to the needs of our social interest in public order. Our Constitution recognises this necessity and has attempted to strike a

18 Supra, 16
19 Schering Chemicals v. Falkman, 1981 (2) All E R 321 (330,347) CA.
20 AIR 1973 SC 106 (Para 160)
21 (2007) 1 SCC 143,p.165 para 56
22 AIR 1957 SC 896, p.900 para 10

balance between the two social interests. It permits the imposition of reasonable restrictions on the freedom of carrying on trade or business in the interest of the general public.

Therefore, the crucial question must always be: Are the restrictions imposed on the exercise of the rights under Articles 19(1)(a) and 19(1)(g) reasonable in view of all the surrounding circumstances? Or the restrictions reasonably necessary in the interest of public order under Article 19(2) or in the interest of the general public under Article 19(6)?"

It is necessary to maintain and preserve freedom of speech and expression in a democracy, so also it is necessary to place some restrictions on this freedom for the maintenance of social order, because no freedom can be absolute or completely unrestricted. Accordingly, under Article 19(2) of the Constitution of India[23], the state may make a law imposing "reasonable restrictions" on the exercise of the right to freedom of speech and expression (**pro bono publico**) in the interest of the public on the following grounds:

(a) Security of the state,
(b) Friendly relations with foreign States,
(c) Public order,
(d) Decency and morality,
(e) Contempt of Court,
(f) Defamation,
(g) Incitement to an offence, and
(h) Sovereignty and integrity of India.

Grounds contained in Art. 19(2) show that they are all concerned with the national interest or in the interest of the society. The first set of grounds i.e. the sovereignty and integrity of India, the security of the State, friendly relations with foreign States and public order are all grounds referable to national interest, whereas, the second set of grounds i.e. decency, morality, contempt of court, defamation and incitement to an offence are all concerned with the interest of the society.

As we are concerned with the restrictions imposed upon the media, it is clear that a court evaluating the reasonableness of a restriction imposed on a fundamental right guaranteed by Art. 19 enjoy a lot of discretion in the matter. It is the constitutional obligation of all courts to ensure

23 J.N. Pandey, 'Constitution of India'

that the restrictions imposed by a law on the media are reasonable and relate to the purposes specified in Art. 19(2).

In ***Papnasam Labour Union*** v**. *Madura Coats Ltd.,***[24] the Hon'ble Supreme Court has laid down some principles and guidelines to be kept in view while considering the constitutionality of a statutory provision imposing restrictions on fundamental rights guaranteed by Art. 19 (1) (a) to (g)

In ***Arundhati Roy, In Re*** [25] the Hon'ble Supreme Court has considered the view taken by Frankfurter J. in ***Pennekamp*** v**. *Florida,***[26] in which the Judge of the United States observed:

"If men, including Judges and journalists, were angels, there would be no problem of contempt of court. Angelic Judges would be undisturbed by extraneous influences and angelic journalists would not seek to influence them. The power to punish for contempt, as a means of safeguarding judges, in deciding on behalf of the community as impartially as is given to the lot of men to decide, is not a privilege accorded to judges. The power to punish for contempt of court is a safeguard not for judges as person but for the function which they exercise."

Relationship between "Right to Privacy" and "Freedom of Press"

One of the deplorable acts which media is, advertently or inadvertently doing relates to unnecessary invasion in the private life of celebrities. This misadventure on the part of this fourth state of democracy has compelled the life of such people full of hardship & challenges. In this back drop the tragic death of **Princess of Wales Miss Lady Diana**[27] can be a burning example. The death of Diana connotes the deterioration crept in the field of journalism. Actually in this case some **paparazzi** chased the poor lady when she was with her boy friend in France. The way, the paparazzi acted to take some photographs just for commercial purpose of Lady Diana, reveals the high level of degradation and degeneration in professional ethics of media personal world over.

News was published[28] relating to the **Queen of Pop Madonna** who was hospitalized after being thrown off a horse while riding. This accident occurred when a **paparazzo** hiding in the bushes, jumped out to click a picture of the star but startled the horse, which threw off the star & ran off.

24 AIR 1995 SC 2000: (1995) 1 SCC 501
25 2002 (3) SCC 343
26 328 US 331 (1946)
27 httpen.wikipedia.orgwikiDiana,_Princess_of_Wales...htm dated 26 March 2009.
28 The Hindu, on 20th April, 2009 (Monday), at page 14

One of the most infamous issues on this subject was the 'Clinton- Lewinsky scandal'. Here the media, on the pretext of informing the public, transgressed all degrees of broadcasting ethics by transmitting the most aspects of the parties to gain commercial mileage.

Another example is a programme that was aired on most of the popular television news channels. The facts that formed the unfortunate story was of a woman from the rural part of India who was asked to choose between the man she hadn't heard from (her husband, a soldier, who was declared missing, a deserter by the army in the Kargil conflict) and the man she was subsequently married to, whose child she was carrying. It transpired that her husband was not a deserter but was, in fact, languishing in the jails of Pakistan and by a cruel twist of fate returned to India after five years. Upon the broadcast of the programme, she became a "public personality," but would that mean she had no right in preventing the media from dramatizing the entire incident? The entire nation was privy to this show but the only voices of protest of the media's "altruistic" role came from the South Asia Citizens Web (SACW), a web-based organisation and an article written by noted columnist Kalpan Sharma. Both slapped the media for making a public mockery out of the entire episode.[29]

The latest scandal includes the alleged "Kareena Kapoor-Shahid Kapoor" in which a Mumbai paper published a photograph of these woe celebrities caught in a moment of intimacy and the newspaper made this news at front page. Another latest scandal is of Delhi School MMS scandal in which a school boy and a girl filmed explicit sexual acts on a camera mobile phone belonging to the boy and clip was passed on through the electronic technology of the phone, which was later converted into a CD and put up of sale by an individual on a website. The boy, the seller of the CD and the website owner, has been arrested for various offences.

In MMS case the Juvenile Justice Board Principle Magistrate Santosh Snehi Mann in its order dated 20.12.2004 observed that,

"I deem it just and proper to seek the indulgency of Press Council of India in the matter for necessary direction to the media in general that Section 21 of the Act makes it obligatory for the media not to disclose the name, address or school or any other particulars calculated to lead to

29 Subhashini Narasimhan and Thriyambak J. Kannan, "Right of Publicity : Is it encompassed in the Right Of Privacy?" (2005) 5 SCC (J)

the identification of the juvenile, including his picture, shall not be disclosed in any report. ------"

The text of the report per se contravenes provisions under Section 21 of the Press Council of India Act.

Same scandal as was in *Eastwood case,* happened in Noida (Delhi) popularly known as Aarushi's murder case,[30] in which media had declared the father of the Aarushi as an accused alleging that "because he is having a illicit relationship with the wife of his friend and that was known to Aarushi by his servant, that is why father (Dr. Talwar) has killed his daughter and also with this reason that deceased was also having an illicit relationship with her servant". This "sensational" main news was regularly broadcast by the media on television, news paper, magazines for around more than 3-4 months but, at last, whole story which was prepared by the media was declared false. But by this act of the media (press), Dr. Talwar has lost his and his family entire goodwill and reputation by this mis act, media also defamed the deceased Aarushi.

One of the worst cases of sting operations which labelled an innocent woman Uma Khurana[31] as a prostitute and a pimp is perhaps the darkest hour in the history of Indian journalism. A TV channel did a sting operation in which, mathematics teacher in a Delhi Government School, was allegedly forcing her own students into prostitution. The sting operation conducted by a correspondent of a TV channel and an aspiring journalist, cost Uma Khurana her job and reputation. Consequently, she was sacked for the job and was badly abused and assaulted by a mob near the school. Later she was arrested and remanded in judicial custody for her alleged involvement in the prostitution racket. Police investigations, however, revealed that the sting operation which had been carried out by the reporter of a particular news channel was fake and done with a dubious motive to defame Uma Khurana, who had some financial disputes with his friend.

By this we can say that today media is no more remained as mirror of truth but just a money making business. The law should give severe punishment to such wrong doers and make it public. Many a times it has been seen in news, where small poor children who do some mistake by stealing things, they are getting punished by the public in public places and these shameless camera men and media reporters just go on showing the pity scenes but non of the report stops

30 httpwww.merinews.comcatFull.jsparticleID=134551.htm dated 23 March, 2009
31 httpwww.merinews.comcatFull.jsparticleID=126283...htm dated 24 March, 2009

the public. Shame on these reporters… let the similar time come on them also and let the public be the reporter.

Conclusion and Suggestions:

'Human privacy' and 'Freedom of press' appear to be antagonistic but they both are most valuable right in any society which cares for 'rule of law' and 'democracy'. While right to privacy is essential for free and full enjoyment of individual's life, the freedom of press is necessary for dissemination of information. To maintain a balance between right to privacy and freedom of press, following suggestions are given,

(1) Human privacy i.e. Right of privacy must be included into the penumbra of personal liberty enshrined in Article 21 of the constitution of India.

(2) On prior broadcasting on any scandals or on any news relating to human privacy, The Press Council of India must ensure that there is no encroachment on the right of privacy of an individual (s).

(3) Direct legislation may be enacted to protect right of privacy.

(4) Punitive punishment and heavy cost should be imposed upon the accused including press in case of violation of right of privacy.

(5) The term 'privacy' may also be added in the Article 19(2) as a ground for imposing reasonable restriction under Constitution of India.

(6) A Central/State Committee may be constituted for controlling upon the press and to protect the right of privacy of an individual under the supervision of the Supreme Court or the High Courts.

Thus, privacy is that sphere of the life of an individual into which the government cannot interfere with. It may, at times, be a pure right that is the right literally to be left alone in the confines of one's house, so long as no unlawful activity is not carried out. It may also be the right to an unhindered exercise of some or the other constitutional right, so long as the right is exercised in a private or personal arena. It is a protection of the basic inviolable nature of the human personality.[32] Thus it is necessary to preserve the tenuous balance between the right of the individual to be let alone and the fundamental right to free speech, expression and information including freedom of Press.

32 Abhinav Chandrachud, "The Substantive Right to Privacy : Tracing the Doctrinal Shadows of The Indian Constitution, (2006) 3 SCC (J)

Finally, I would like to end my piece of writing with the following sensible words:

"Let us request the Media to bring forth the real issue,

Let us convey the Media that someone is watching,

Let us convince Media to introspect its way of going,

Let us disclose to Media that Privacy do matters,

Let us take a vow to become the champion of democratic values,

Let us make the hapless people's voice audible to world at large,

Let us endeavour our best to safeguard the people's right at any cost,

Let us consolidate ourselves to confront any sort of oppression,

Let us re-give to ourselves the supreme law of the land."