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# Freedom of Expression & Privacy

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# Introduction

Freedom of expression is guaranteed under Article 19(1) (a) of the Indian Constitution. Restrictions on the exercise of the freedom of expression are found in Article 19(2) that can be enforced by the State and are in the interests of sovereignty and integrity of the State, the security of the state, friendly relations with foreign states, public order, decency or morality, or in relation to contempt of court, defamation or incitement to an offense.<sup>1</sup> When considering the right of freedom of expression and the right to privacy, traditionally there has always been a fundamental question about the relative weight of privacy and expression. An open democracy values a person's right to express opinions even when it conflicts with another's right to privacy. For example, who donated to whose campaign to which celebrity is getting married where. At the same time, restrictions like national security or public interest can detract from both expression and privacy. The freedom of expression has been seen by certain people as a counter to the right to privacy of the person whose information is being disclosed (expressed) by the other party, it is interesting to note that the right to privacy was actually derived in part from the right to freedom of speech. In the case of *Kharak Singh v. The State of U.P.*,<sup>2</sup> the Supreme Court for the first time recognized that citizens of India had a fundamental right to privacy which was part of the right to liberty in Article 21 as well as the right to freedom of speech and expression in Article 19(1)(a), and also of the right of movement in Article 19(1)(d). This line of thought has recently been approved again by the Supreme Court in *District Registrar and Collector, Hyderabad and another v. Canara Bank and another*.<sup>3</sup>

Internationally speaking the right to freedom of expression includes within it the right to anonymous speech, i.e. the right to express oneself without identifying oneself as the source of such expression. Another aspect of this is the right to pseudonymous speech where again the author of the information does not give his correct identity. In order for a person to express his/her thoughts and ideas, political, ethical, or otherwise a person requires a safe private sphere free from State or private interference. Therefore the right to privacy which would protect one's privacy actually goes hand in hand with the right to freedom of information and transparency.<sup>4</sup> Thus the relationship between the freedom of expression and privacy does not have to be a zero sum game but rather can be a positive sum game where both rights exist not only to not diminish each other but actively support and enhance each other.<sup>5</sup>

It has already been established earlier that the right to privacy is a fundamental right under the Indian Constitution and we have discussed the multiple tests that have been laid down by the Supreme Court to determine whether the right to privacy can be violated. In *Govind v. State of M.P.*<sup>6</sup> the Supreme Court laid down the (i) superior important countervailing interest test, (ii) compelling state interest test, and (iii) compelling public interest test. On the other the case of *R. Rajagopal* (discussed in detail in this chapter) has also laid down certain tests regarding when private information can be published.

Broadly, the right to the freedom of expression impacts the right to privacy in negotiating:

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<sup>1</sup> The Constitution of India Article 19 (2)

<sup>2</sup> Available at <http://indiankanoon.org/doc/619152/>.

<sup>3</sup> <http://www.judis.nic.in/supremecourt/imgs1.aspx?filename=26571>

<sup>4</sup> <https://www.privacyinternational.org/issues/freedom-of-expression>

<sup>5</sup> It must be noted here that there is a significant school of thought which considers the law of defamation as a part of privacy law, however while acknowledging this point, we disagree with this point and hence shall not deal with the law of defamation as part of privacy law in this work.

<sup>6</sup> <http://www.judis.nic.in/supremecourt/imgs1.aspx?filename=6014>

- 1.) To what categories of data should the freedom of expression be limited in order to protect privacy.
- 2.) In which context will freedom of expression impinge on privacy.
- 3.) In what circumstances is it necessary that an individual be provided the right to privacy in order to protect the freedom of speech.

Violations of privacy that can result because of an expression are most commonly understood as privacy torts and include: (a) intrusion into an individual's personal affairs including public disclosure of a person's private life (b) publicity which places an individual in false light in public, and (c) use of an individual's own name for commercial purposes – commonly understood as the right to publicity.

Examples of circumstances in which the freedom of expression needs to be negotiated with the right to privacy include:

- a) **Public Interest:** In what circumstances does disclosure of information in the public interest outweigh an individual's right to privacy. The term public interest however has deliberately been left anomalous by the Courts in India although it has been described as something 'more than mere idle curiosity'.<sup>7</sup> The fact that the term public interest has not been clearly and strictly defined acts as a serious threat to the right to privacy since the bogey of public interest can be raised anytime to attack this right. The Courts have however tried to find an optimal balance between the two issues and by not defining the term 'public interest' the Courts have eliminated the need for frequent amendments to keep it in line with the changing norms and perceptions of society.
- b) **Public Persons:** In what circumstances should expression be limited in order to protect the privacy of persons in the public sphere. In India this question has been partially defined by the Right to Information Act under section 8, but the Act does not bring under its scope public figures who are not government employees such as cricket stars, actors/actresses, and other celebrities. Although the commercial exploitation of the images and celebrity of such public persons can be protected to some extent under the existing intellectual property regime such as trademark law as well as copyright law,<sup>8</sup> the Delhi High Court has recognized that the right to publicity has evolved from the right to privacy.<sup>9</sup>
- c) **Privacy of Minors:** In what circumstances should technologies and legislation be used to restrict the ability of minors to post content on the internet.
- d) **Media:** In what circumstances and to what types of data would coverage by the media amount to an invasion of privacy.
- e) **Victims of Sexual violence:** Do victims of sexual violence have any specific rights to protect their privacy due to the stigma that society attaches to them.

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<sup>7</sup> Indu Jain v. Forbes Inc., Delhi High Court, (2007), <http://lobis.nic.in/dhc/GM/judgement/25-01-2010/GM12102007S21722006.pdf>.

<sup>8</sup> Thomas George, Celebrity-focussed culture highlights need for statutory right to publicity, World Trademark Review, October/November, 2010, <http://www.worldtrademarkreview.com/issues/article.ashx?q=1596958f-55a7-4b2b-a93c-66f887027801>

<sup>9</sup> *ICC Development (International) Ltd v. Arvee Enterprises*, ((CS) OS 1710/2002).

## Online Speech

The above framework of privacy has mostly been developed in the background of the real world however this framework is being constantly challenged and tested in the modern world with the high pervasiveness of the internet and social networking websites. For example, in what circumstances does a comment online or a picture posted online violate the privacy of another individual.

Today the internet has made privacy an integral part of realizing the right to free expression. For example, governments are putting in place censorship regimes that do not only restrict online speech, but also seek to identify the source of the speech. In this way, the right to anonymous speech has become a contested issue globally. The internet is also making the line between speech expressed in the private sphere vs. speech expressed in the public sphere more difficult to define.

Some of the major issues that the internet throws up with regard to the right to privacy are:

- **Public and Private Sphere.** It is unclear if statements made on the social media should be considered public or private, and if private individuals posting pictures need consent from all individuals before posting the picture or video on social media sites. Further even if a picture has been posted without the consent of the person, should it not be required that people 'tagged' in a picture first have to give their consent before the picture is tagged. Whether online speech on a social networking site be treated in the same manner as the conversation in a restaurant or even over the phone, or will it get treated as speech on a television. For example, governments are putting in place censorship regimes that do not only restrict online speech, but also seek to identify the source of the speech. In this way, the right to anonymous speech has become a contested issue globally. The internet is also making the line between speech expressed in the private sphere vs. speech expressed in the public sphere more difficult to define. For example, In India in November 2012 a business man in Pondicherry was arrested for tweeting offensive messages about Karti Chidambaram,<sup>1</sup> and also in 2012 two girls were arrested for comments made on Facebook relating to the passing away of Bal Thackeray.<sup>2</sup>
- **Privatisation of Enforcement:** With the fast moving nature of the internet and the democratization of online speech, the regulatory authorities have found it difficult to maintain the same amount of supervision and control over the public's freedom of speech as they did under traditional media. As a way to counter that, the authorities have delegated the power to enforce fetters on free speech to private parties viz. the intermediaries, through the Intermediary Guidelines<sup>10</sup> which give the power to remove objectionable material, traditionally a power of the executive or the judiciary, to the intermediaries which in most cases are private parties.
- **Data Retention:** A large number of online actions require individuals to give details about their identity and other personal information, eg. domain name registration, getting mobile connections, public wifi, etc. This requirement of the individual users coupled with data retention obligations of the intermediaries (especially if a take-down notice has been sent for objectionable material)<sup>11</sup> affects the right to privacy. The KYC norms themselves limit

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<sup>10</sup> Information Technology (Intermediary Guidelines) Rules, 2011

<sup>11</sup> Information Technology (Intermediary Guidelines) Rules, 2011, Rule 3 (4).

the right to anonymous and pseudonymous speech, as has been explained above, are very important for a vibrant society. Further, KYC requirements are quite pervasive as well, such as when asking for a landline connection, cellphones, internet, etc. In all these instances, users are required to give identification proof and even verification of such proof is done by the counterparty in many instances. Although we are not like North Korea where any speech (even online) has to be linked back to your real identity.

- **Right to be Forgotten:** The internet never forgets! This single line encapsulates one of the gravest concerns for privacy advocates vis-à-vis the internet and the online world. In what circumstances can an individual require the deletion of information pertaining to them that has been circulated in the public domain. Although the right to privacy in the non online world has been described as the ‘right to be left alone’ that may not exactly translate into a right to be forgotten. In Spain there was a case where a person was arrested and the fact that he had a criminal record was publicized on the internet as well. In this case the court ruled that he had a right to be forgotten. The new draft EU Regulations have expressly talked about the right to be forgotten by including a right to demand the deletion of data no longer required for the purpose for which it was collected. However in India, the debate on data retention and the right to privacy has not yet reached such a level and data retention and verification requirements are still governed more by national security requirements rather than privacy issues.
- **Calculation of Harm:** Another issue regarding privacy and the online world is how do you calculate harm being done by breach. If a slanderous comment is left on your facebook page, assuming it is a public space, how would you calculate the harm done by such a comment. If your data retained by a data controller is lost or leaked to some other party, can this loss be quantified to be compensated in terms of money? Or does the person have to wait till some financial loss is caused to him/her to file a claim against the data controller.

Now that we have discussed the principle issues dealing with privacy and the freedom of expression let us see how the major legislations in these spheres that touch upon the right to privacy and see if any of the above issues are addressed to any extent.

## Legislation

### The Press Council Act, 1978

This Act establishes the Press Council of India for the purpose of preserving the freedom of the press and of maintaining and improving the standards of news agencies in India. The Press Council created the Norms of Journalistic Conduct.<sup>3</sup> The Norms prescribe guidelines that practicing journalists are required to follow. The Press Council Act and the norms incorporate the privacy principles as well as exceptions to the right to privacy, as instances of when disclosure is and is not allowed. Traditionally the Press Council Act has only regulated offline media, but in 2012 the Press Council of India publicly announced the need to amend the Press Council Act to include electronic media. Citing the incident of a viral SMS threat to individuals from the North East in Bangalore, which resulted in a mass exodus from the city, the Press Council recognized that “unregulated electronic media is playing havoc with the lives of the people.”<sup>4</sup> Public figures who hold public

office, and by their own conduct give scope to criticism from the media, cannot issue complaints against such criticism.<sup>5</sup> This provision does not specify if the same standard would be extended to all public figures or if it is limited to public figures that hold public office. A public person cannot expect to be afforded the same degree of privacy as a private individual. Despite this, the family of public figures are not considered to be legitimate journalistic subjects, especially if children are concerned. If there is a situation where ‘public interest’ could outweigh the child’s right to privacy, the journalist must first seek consent from the parents.<sup>6</sup> In this sense, it is necessary that the press understand and adhere to the distinction between matters of ‘public interest’ and matters ‘in public interest.’<sup>7</sup>

The following provisions of the Norms of Journalistic Conduct speak to the privacy principles:

### **Press Council of India - Norms of Journalistic Conduct, 2010<sup>8</sup>:**

#### **Choice and Consent:**

- The Press shall not tape record anyone’s conversation without the person’s knowledge or consent, except where the recording is necessary to protect the journalist in a legal action, or for other compelling good reasons.<sup>9</sup>

Though this provision ensures that consent is taken – it only speaks to circumstances where the individual is being tape recorded. Further the exception “for other compelling good reasons” could be interpreted broadly.

#### **Collection Limitation:**

- The Press cannot intrude or invade the privacy of an individual, unless the invasion is outweighed by genuine overriding public interest. Once the matter becomes a matter of public record, the right to privacy no longer exists. Special attention must be given to reports that would stigmatize women. Things 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 impinge upon the public or public interest.<sup>10</sup>
- For obtaining information in respect of private acts done or conducted away from the public gaze, the press should not use surveillance technologies.<sup>11</sup>
- Intrusion through photography into moments of personal grief should be avoided. Photography of victims of accidents or natural calamity may be in the larger public interest.<sup>12</sup>
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#### **Disclosure of Information:**

- The provisions in the Official Secrets Act, 1923 which speak to what material is protected from disclosure are binding to the press.<sup>13</sup>
- While reporting a crime such as rape or abduction, the name and photographs of the victims or other particulars related to their identity should not be published.<sup>14</sup> Minor children and infants who are the offspring of sexual abuse or forcible marriage should not be identified or photographed.<sup>15</sup>

- Newspapers should not publish or comment on evidence collected through investigative journalism when, after the accused is arrested and charged, the court takes up the case.<sup>16</sup> This in affect gives a blessing to sting operations which would infringe the privacy of individuals in the public interest.
- Caste identification of a person or a particular class should be avoided.<sup>17</sup>
- If information is received from a confidential source, the confidence should be respected. The journalist cannot be compelled by the Press Council to disclose the source, but he/she will not penalized if they choose to voluntarily disclose the source.<sup>18</sup>
- Newspapers should exercise caution in representing news, comments, or information which has the potential to jeopardize, endanger, or harm the interests of the state, society, or the individual in order to ensure that reasonable restrictions may be imposed by law on the right to freedom of speech and expression are adhered to.<sup>19</sup>

#### *Verification and Quality*

- Any report or article that is of public interest and benefit, but that contains comments against a citizen should be checked by the editor of the publication for factual accuracy. If inaccuracies are found, they should be corrected by the editor. Any document that forms the basis of a news report, should be preserved at least for six months in order to allow for facts to be checked.<sup>20</sup> Newspapers should not publish anything that is manifestly defamatory or libelous unless the publication will be for the public good<sup>21</sup>. Personal remarks which can be construed to be derogatory against a dead person should not be published.<sup>22</sup>

Although these Norms provide for a number of guidelines, not all of them are followed by the media on most occasions, for example the norms provide that particulars relating to the identity of rape victims should not be revealed by the media. However in the gang rape case now popularly referred to as the “Nirbhay Rape Case” the media revealed a large amount of personal details of the victim such as the college she was studying in, her course, which semester she was in. Similarly in the rape case of an NLSIU student in Bangalore, the media released details such as her nationality, her college, which year she was studying in, etc. Such details are more than enough for any person acquainted with the women in present or future to identify them which is clearly a violation of the Norms of Journalistic Conduct as well as the intent of the laws protecting the identity of rape victims.

### **Cable Television Networks (Regulation) Act, 1995**

This Act regulates the operation of Indian cable television networks. The Act is aimed at regulating content and operation of cable networks. It also establishes the responsibilities and obligations in respect of the quality of service both technically as well content wise, use of materials protected under the copyright law, exhibition of uncertified films, and protection of subscribers from anti-national broadcasts from sources inimical to national interests.

The Act empowers the government to prohibit the operation of any cable television network in such areas as are notified in the official gazette<sup>23</sup>, and restrict the transmission of any channel it thinks is necessary or expedient to do so in the interest of the sovereignty or integrity of India, security of India, friendly relations of India with any foreign states, or for public order, decency, or morality.<sup>24</sup> Thus, apart from the grounds such as “interest of the sovereignty or integrity of India, security of India, friendly relations of India with any foreign states, or public order” which are also found in various other legislations (such as Telegraph Act, Information Technology Act, etc.) this Act also adds ground such as decency or morality for actions.



## Cable Television Network Rules, 1994

### Disclosure of Information:

- No program should be carried by the cable service which contains material that is obscene, defamatory, or deliberately false.<sup>25</sup> No program should be carried in the cable service which criticizes, maligns, or slanders any individual in person or certain groups, segments of social, public, and moral life of the country.<sup>26</sup>
- No program should be carried by the cable service which contains content that is against the integrity of the President and Judiciary.<sup>27</sup>
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### Penalty/ Redress:

<i>Offence</i>	<i>Fine</i>	<i>Imprisonment</i>
<i>Any contravention of the provisions found in the Act.<sup>28</sup></i>	<i>Rs. 1,000</i>	<i>Two years</i>
Any person aggrieved by a decision of the court adjudicating on the confiscation of equipment, may appeal the decision. <sup>29</sup>		

## Justice (Care and Protection of Children) Act, 2000

This Act addresses juvenile justice in India and works to provide protection of children in the juvenile justice system. The following provisions speak to privacy:

### Disclosure of Information:

- It is an offense for the media or other such person to disclose the names, addresses or schools, or pictures of juveniles who are involved in a legal proceeding under the Act which would lead to their identification, unless permitted by the authority in charge of the inquiry.

### Penalty:

Offense	Fine
Disclosing the names, addresses or schools, or pictures of juveniles who are involved in a legal proceeding under the Act which would lead to their identification without authorization.	Rs.25,000 <sup>30</sup>

## Contempt of Courts Act, 1971

This Act defines the circumstances in which it is not acceptable for the media to report on active legal hearings. In doing so, the Act places a limit on the freedom of expression and inadvertently protects the privacy of those undergoing trial and the privacy of the court. Though this Act addresses circumstances of when the courts can prohibit the publication of material – it does not address the issue of a double injunction or super injunction – that is – the situation of when an individual requests that the court ban the media from reporting on the proceedings of a court trial and ban the media from reporting the fact that such a ban even exists. Provisions of the Act that speak to the privacy principles include:

### Disclosure of Information:

Publications relating to the proceedings of a court in chambers or in camera is considered contempt of court when the court has prohibited the publication of all information relating to the proceedings, where the court hears a case that is connected to public order or the security of the state, or where the information relates to a secret process, discovery or invention.<sup>31</sup>

### Penalties:

Penalty	Fine	Imprisonment
The publication, (whether by words, spoken or written or by signs, or by visible representations, or otherwise), of any matter or the doing of any other act whatsoever which (i) scandalize or tends to scandalize or lowers or tends to lower the authority of, any court, or (ii) prejudices or interferes or tends to interfere with the due course of any judicial proceedings; or (iii) interferes or tends to interfere with or obstructs or tends to obstruct, the administration of justice in any manner” <sup>32</sup> .	Six months	Rs. 2,000 <sup>33</sup> .

### Information Technology (Intermediaries Guidelines) Rules, 2011 (Due Diligence Rules)

An intermediary liability or intermediary safe-harbor provision provides intermediaries with immunity from liability for what users do on their platforms. This immunity is valid only when the intermediary can demonstrate that i) they have no actual knowledge, ii) that they have undertaken due diligence, iii) they have responded to take down notices. Unfortunately the Indian guidelines also prescribe terms of service which lists what content is and is not permissible and holds intermediaries responsible for implementation of these terms of service.<sup>34</sup>

The guidelines impact both privacy and freedom of expression as on one hand the guidelines seek to prohibit the posting of content including content that violates individual privacy, and at the same time the guidelines require intermediaries to hand over information, including personal information, to law enforcement agencies when requested. Since it makes intermediaries liable to hold information to help law enforcement agencies after a takedown notice, it will encourage them to place restrictions on anonymous and pseudonymous speech.

Among other content, individuals are not allowed to host, display, upload, modify, publish, transmit, update or share information that:

1. “Belongs to another person or to which the user does not have any rights”; -This protects the privacy of persons whose information may have been taken by a third party and uploaded without the consent of the owner of the information.
2. “Is harassing; defamatory or libellous; pornographic; pedophilic; invasive of another's privacy; disparaging.” This specifically prohibits sharing of information which is invasive of someone’s privacy. On top of that defamatory or libellous acts have also been considered by certain people as violations of the right to privacy.
3. “Is deceptive or misleading; impersonates another;”<sup>35</sup> Information which impersonates someone else can be seen to invade the privacy of the person who is being impersonated since it is his/her identity which is being utilised without his/her consent.

Aspects of the guidelines that are relevant to privacy include:

**Openness:**

All intermediaries are required to publish a mandatory privacy policy and user agreements.<sup>36</sup> The intermediary must inform its users that in the case of non-compliance with the established rules and regulations, the intermediary has the right to terminate the access or usage rights of the user and remove non-compliant information.<sup>37</sup>

**Collection of Information:**

Any information as well as ‘associated records’ removed by the intermediary upon notice will be preserved for a period of 90 days for the purposes of investigation.<sup>38</sup> This provision violates privacy because of the potentially large amount of (sensitive) information that could be taken down, stored by the intermediaries, and used by law enforcement agencies.

**Accountability:**

The intermediary must publish the name and contact details of the grievance officer as well as mechanism by which users can notify their complaints to. The grievance officer must redress the complaints within one month of the date the complaint was received.<sup>39</sup>

Though the provision of a grievance mechanism protects privacy it is unclear from the provisions if any remedy will be provided to aggrieved individuals.

Though the provision of a grievance mechanism protects privacy it does not provide for any compensation to be paid to the aggrieved individuals whose privacy was infringed for before the information was taken down, unless this provision can be brought within the confines of section which

deals with sensitive personal data.<sup>12</sup>

### **Disclosure of Information:**

Intermediaries are required to provide any authorised governmental agency with information that is requested in writing for the purpose of: verification of identity; the prevention, detection, investigation, and prosecution of cyber security incidents; and punishment under any law currently in force.<sup>40</sup> This requirement of requesting information for the purpose of verification of identity or punishment under any law in force in the country is much wider than the conditions for which the Central or State governments can intercept communications under the ITA. This begs the question whether these provisions are *ultra vires* the parent Act and can therefore be struck down. It is an argument to be made but one which has not yet been tested in a court of law. The Guidelines also do not clarify what is meant by “requested in writing”, does it mean that the order has to be given by a specific authority in writing or can it be made by any government agency in writing. It also does not clarify what an “authorised government agency” would mean or would and under what section would authorise the government agency. Although it could be argued that since the interception provision of the Act talks about Central or State governments or officers authorised by them therefore it would mean the agencies or officers who have been specifically authorised under this provision only can make such requests under the Guidelines.

### **Security:**

The intermediary must take all reasonable measures to secure its computer resources and the information contained therein.<sup>41</sup> The intermediary must report cyber security incidents and share all related information with the Computer Emergency Response Team.<sup>42</sup> The intermediary will not knowingly deploy or install or modify the technical configuration of a computer resource, unless the change is meant to secure the computer resource.<sup>43</sup>

These security measures could be read as prohibiting ISPs from installing backdoors or malware into their systems, hence ensuring greater privacy protection.

### **Notice:**

The intermediary must notify users that in the case of non-compliance with the provisions of the Rules, user agreement and privacy policy, the intermediary has the right to take down non-compliant information and prevent access to the information.<sup>44</sup>

This provision of notice is limited in many ways. Most importantly, ISPs are not required to provide notice that content has been taken down, thus individuals are unable to appeal decisions to take down content and cannot seek remedy.

### **IT Guidelines for Cybercafe Rules, 2011<sup>45</sup>**

The IT (Guidelines for Cybercafés) Rules, 2011 provide regulations for the maintenance of user records by cyber cafes. Critical information under the rules includes forms of identification and user browsing information. In effect the requirements found under the Guidelinse take away Cyber Café users ability to browse anonymously without having their online activity monitored, stored, and retained.

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<sup>12</sup> Section 43 of the IT Act, 2000.

Aspects of the Guidelines that are relevant to privacy include:

- **Collection of information:** The rule requires that users of cyber cafes must establish their identity before using the resources and may do so through any means including any of the seven acceptable forms of identification provided in the Rules.<sup>13</sup> In addition to the above, he/she may be photographed. All children must also carry a proof of identity or be accompanied by an adult when using a cybercafé.<sup>46</sup>

Cybercafés must record, maintain and prepare four types of records:

- Copies of identity documents which have either been scanned or photocopied are to be maintained securely for a period of one year.<sup>47</sup>
- A log register containing the required information<sup>14</sup> for a period of one year.<sup>48</sup> Online copies of the log register are to be maintained and must be authenticated with an electronic or digital signature.<sup>49</sup>
- Cybercafés must also prepare a monthly report of the log register showing dated details on the usage of their computer systems that is to be submitted to the person or agency as directed by the registration agency<sup>50</sup>
- The cybercafé owner must store and maintain backup register logs for at least one year. These logs must include:
  - history of websites accessed using computer resource at cyber café
  - logs of proxy servers installed at cyber café.<sup>51</sup>

The extensive data retention regime created by the Rules serves to dilute privacy. The Rules should minimize the amount of information collected and create a deletion policy for retained information.

- **Security:** Cybercafés must take all precautions necessary to ensure that their computer systems are not used for illegal activities.<sup>52</sup> This includes having in place safety/filtering software so as to prevent access to web sites relating to pornography, obscenity, terrorism, and other objectionable materials.<sup>53</sup>

This protects privacy by ensuring that software that could record keystrokes, passwords, etc. is not deployed on cyber café computers and individuals sharing personal information do not have that information compromised.

- **Disclosure of Information:** The cybercafé must submit hard and soft copies of the monthly report of the log register by the 5<sup>th</sup> day of every month to the person or agency specified by the Department of Telecommunications.<sup>54</sup>

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<sup>13</sup> Acceptable forms of identity include: 1. Identity card issued by any School or College, 2. Photo Credit Card or debit card issued by a Bank or Post Office 3. Passport 4. Voter identity card 5. Permanent Account Number (PAN), Photo Identity Card issued by the employer or any Government Agency 6. Driving license issued by the Appropriate Government 7. UID number issued by UIDAI

<sup>14</sup> Required information includes: Name, address, gender, contact number, type and detail of identification document, date, computer terminal identification, log in time, log out time.

Any officer authorised by the registration agency may check and inspect any cybercafé and the computer resource or established network at any point of time for the purpose of ensuring compliance. The cybercafé owner must provide every related document, register, and necessary information to the inspecting officer on demand.<sup>55</sup>

This provision dilutes individual privacy as there are no safeguards such as court order, official rank, and specified circumstance to protect against undue access to information by law enforcement.

- ✦ **Invasive physical layout:** Cybercafés must install partitions that are no higher than four and half feet and all screens must be installed to face outward. Additionally, the screens of all computers other than those situated in partitions or cubicles, must face outward into the common open space of the cybercafé.<sup>56</sup>

From our understanding this provision was placed in the Rules as a way to stop and control “inappropriate” behaviour at cybercafés. Ironically, the impact of the provision has been to make women more self conscious using cyber cafes, as they can no longer do so in private.

## **Self Regulating Bodies and Guidelines**

### **The Electronic Media Monitoring Centre**

The Electronic Media Monitoring Centre was established by the Ministry of Information and Broadcasting for the purpose of monitoring satellite channels in India for compliance with the program codes established under the Cable Television Networks Regulation Act. The Centre has established a self regulatory regime known as the Content Certification Rules, 2008 as referred to above.

### **National Broadcasting Standards Authority**

In India, a number of sting operations have violated the privacy of individuals. For example, in 2009 the news channel TV9 broadcasted a program on the gay culture in Hyderabad. Among other things, the program showed unmorphed visuals and featured telephonic conversations between the TV9 reporter and individuals speaking about their sexual preferences. TV9 claimed that it was simply conducting undercover investigative journalism. Eventually the channel was fined and penalized for violating clause 5 (sex and nudity), clause 6 (privacy), and clause 9 (sting operations) of the Code of Ethics & Broadcasting Standards, which are issued by the News Broadcasters Association.<sup>57</sup>

The News Broadcasters Association (NBA) was established in 2008 as a self-regulatory body. The NBA is a community formed by private television & current affairs broadcasters. The Association created the Code of Ethics that provides principles relating to privacy that broadcasters are required to follow. Principles laid down in the code that news channels must adhere to include: ensure discretion while reporting on violence and crime against women and children, ensure privacy, and ensure responsible sting operations. Individual viewers may file complaints with the board when they feel that news channels are in violation of these codes. The board, if it has reason to believe it is necessary, may consider requests from the complainant for anonymity/confidentiality.<sup>58</sup> As was done in the case of the program aired by TV9, complaints can be filed against any of the broadcasters that are members of NBA on whom the Code of Ethics is binding.

## Case Laws

### **R. Rajagopal v. State of T.N.<sup>15</sup> (1975)**

This case looks at the tension between the freedom of the press and the right to privacy. Central to the case is a question about the boundaries of the right of the press to criticize the behavior and actions of public officials. The petitioners in the case were a printer and associate editor of a Tamil magazine from Madras. The case revolves around the publishing of the autobiography written by the prisoner Auto Shankar, who had been placed in jail for committing multiple murders. The autobiography contained proof of involvement of many IAS, IPS officers in the crimes that he committed. Shankar had initially requested that the magazine print his autobiography, but after being tortured by police officers who had read that the magazine will be carrying the piece, he requested that his story not be published. The publishers held that it was their right to publish the autobiography. The IPS and IAS officers on the other hand claimed that Auto Shankar was trying to defame the officers.

When making its decision, the court was faced with a number of questions including:

- 1) Whether an individual can prevent another individual/press/media organisation from writing his life story? Does writing the story without consent violate the individual's right to privacy?
- 2) Does the freedom of press guaranteed by Article 19(1) (a) entitle the press to publish an account of an individual's life and activities without consent, and if so to what extent and in what circumstances?
- 3) What remedies can a citizen of India claim in case of infringement of his right to privacy and further if such writing amounts to defamation?
- 4) Does the Government have the legal authority to restrict the press from printing defamatory material about its officials?
- 5) Can prison officials prevent the publication of the life story of a prisoner on the ground that the prisoner is guilty and thus is not in a position to adopt legal remedies to protect his rights, they are entitled to act on his behalf?<sup>16</sup>

Although the principles laid down by this case have already been discussed in the chapter on constitutional law and the right to privacy, they are being repeated here for easy reference:

“(1) A citizen has a right to safeguard the privacy of his own, his family, marriage, procreation, motherhood, child-bearing and education among other matters. None can publish anything concerning the above matters without his 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.”

There are three exceptions to the above Rule:

- “Position may, however, be different, if a person voluntarily thrusts himself into controversy or voluntarily invites or raises a controversy.”
- “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

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<sup>15</sup> <http://www.judis.nic.in/supremecourt/imgs1.aspx?filename=11212>

<sup>16</sup> The Court also asked a number of other questions regarding issues such as defamation, etc. but we have not discussed those here as they do not directly affect privacy.

it becomes a legitimate subject for comment by press and media among others.” This exception itself has an exception for victims of sexual assault, kidnap, abduction. While carving out this exception to the exception, the Court has referred to the restriction on freedom of speech<sup>17</sup> which beckons the question that although the Court has placed the right to privacy only within the right to life and personal liberty, does it still in some way think that the right also arises out of the freedom of movement and speech?

- “In the case of public officials, it is obvious, right to privacy, or for that 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.”

Based on discussion of the case law and the principles as enunciated above, let us see if the Court has answered all the questions it initially set out in the judgment.

- 1) Whether an individual can prevent another individual/press/media organization from writing his life story? Does writing the story without consent violate the individual’s right to privacy?

The Court does not mention that the person whose information is sought to be published has a right to prevent the publication, especially when it uses the phrase “But if they go beyond that and publish his life story, they may be invading his right to privacy and will be liable for the consequences in accordance with law.” The Court says that writing the story of somebody’s personal matters without his/her consent would violate his/her right to privacy (unless the information has been taken from public records) but seems to suggest that whatever remedy the individual has with regard to his privacy in such circumstances arises after the event has occurred.

- 2) Does the freedom of press guaranteed by Article 19(1) (a) entitle the press to publish an account of an individual's life and activities without consent, and if so to what extent and in what circumstances?

The case seems to suggest that the press has the right to publish the stories about individuals as long as the information published has been obtained from public records.

- 3) What remedies can a citizen of India claim in case of infringement of his right to privacy and further if such writing amounts to defamation?

With regard to this issue the Court held:

“The right to privacy as an independent and distinctive concept originated in the field of Tort law, under which a new cause of action for damages resulting from unlawful invasion of privacy was recognised. This right has two aspects which are but two faces of the same coin (1) the general law of privacy which affords a tort action for damages resulting from an unlawful invasion of privacy and (2) the constitutional recognition given to the right to privacy which protects personal privacy against unlawful governmental invasion. The first aspect of this right must be said to have been violated where, for example, a person’s name or likeness is used, without his consent, for advertising or non-advertising purposes or for that matter, his life story is written whether laudatory or otherwise and published without his consent as explained hereinafter.”

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<sup>17</sup> Article 19(2) of the Constitution of India, 1950.



Since the right to privacy has its origins in tort law and would still reside there independent of the constitutional status of the right, the remedy of an aggrieved party would be to get damages under tort law. If such writing amounts to defamation then the aggrieved person can ask for both damages as well as file a criminal case under the Indian Penal Code.

- 4) Does the Government have the legal authority to restrict the press from printing defamatory material about its officials?

Regarding this the Court held that:

“We may now consider whether the State or its officials have the authority in law to impose a prior restraint upon publication of material defamatory of the State or of the officials, as the case may be? We think not. No law empowering them to do so is brought to our notice. As observed in *New York Times v. United States*, (1971) 403 US 713: 29 L Ed 2d 822 (1971) 649, popularly known as the Pentagon papers case, "any system of prior restraints of (freedom of) expression comes to this Court bearing a heavy presumption against its constitutional validity" and that in such cases, the Government "carries a heavy burden of showing justification for the imposition of such a restraint". We must accordingly hold that no such prior restraint or prohibition of publication can be imposed by the respondents upon the proposed publication of the alleged autobiography of "Auto Shankar" by the petitioners. This cannot be done either by the State or by its officials. In other words, neither the Government nor the officials who apprehend that they may be defamed, have the right to impose a prior restraint upon the publication of the alleged autobiography of Auto Shankar. The remedy of public officials/public figures, if any, will arise only after the publication and will be governed by the principles indicated herein.”

Thus it is pretty clear that the government does not have the authority to apply ‘prior restraint’ on publication of material even if it is defamatory.

- 5) Can prison officials prevent the publication of the life story of a prisoner on the ground that the prisoner is guilty and thus is not in a position to adopt legal remedies to protect his rights, they are entitled to act on his behalf?<sup>18</sup>

Regarding this issue, the court held that:

“It is not stated in the counter-affidavit that Auto Shankar had requested or authorised the prison officials or the Inspector General of Prisons, as the case may be, to adopt appropriate proceedings to protect his right to privacy. If so, the respondents cannot take upon themselves the obligation of protecting his right to privacy. No prison rule is brought to our notice which empowers the prison officials to do so. Moreover, the occasion for any such action arises only after the publication and not before, as indicated hereinabove.”

Thus the Court held that unless the prison officials are authorized either by law or by the specific consent of the prisoner, they cannot assume the mantle of protecting the right to privacy of the prisoner vis-à-vis third parties.

### **Case Highlights**

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<sup>18</sup> The Court also asked other questions regarding issues such as defamation, etc. but we have not discussed those here as they do not directly affect privacy.

- A citizen has a right to safeguard the privacy of his own, his family, marriage, procreation, motherhood, child-bearing and education among other matters. None can publish anything concerning the above matters without his consent
- The exception to the above rule is that any publication concerning the aforesaid aspects becomes unobjectionable if such publication is based upon public records including court records
- In the case of public officials, it is obvious, right to privacy, or for that 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
- Government, local authority and other organs and institutions exercising governmental power cannot maintain a suit for damages for defaming them
- There is no law empowering the State or its officials to prohibit, or to impose a prior restraint upon the press/media

### **Phoolan Devi v. Shekhar Kapoor and Ors.,<sup>19</sup> (1994)**

In 1994 an injunction was sought to prevent the screening of the film “Bandit Queen” from public and private viewings. The film was made as a true story based on the life of Phoolan Devi. The counsel for the petitioner, argued that the showing of the film would amount to a violation of her privacy as the facts in the book are twisted and misrepresented – thus creating a film based on the book would result in violating privacy. One of the arguments presented on behalf of Phoolan Devi that showing of the film would endanger the life and liberty of the plaintiff as individuals from an upper caste may attempt to seek revenge on the life of the plaintiff after viewing the film. Although the Court did not address this argument, in hindsight this argument seems almost prophetic since Ms. Phoolan Devi was subsequently murdered by a person of the higher caste allegedly as revenge for the massacre being referred to in this argument. Although arguments were made that the depiction of the incidents in the film were prohibited by virtue of the Copyright Act, these arguments, although mentioned, were not dealt with by the Court in its judgment.

After a discussion of the contentions of both sides and the facts involved in the case the Court held that:

“After holding that, may be, for her famous or infamous deed the plaintiff had thrust herself in the arena of publicity, she cannot escape publicity, criticism and exposure by media, audio and video, may be, of ' her liking or disliking. But the question before me is whether such person like the plaintiff has no right to defend when someone enlarges the terrible facts, enters the realm of her private life, depicts in graphic details rape, sexual intercourse, exhibits nudity, portrays the living person which brings shame, humiliation and memories of events which haunts and will go on haunting the plaintiff, more so the person is still living. Whether the plaintiff has no right and her life can become an excuse for film makers and audience to participate in an exercise of legitimate violence with putting all inhibitions aside. The question is whether the defendants have a right to show a woman being raped and gang raped, if the concerned woman is alive and does not wish this to be made public. Moreover, when the author of the book defendant no.4 itself has repeatedly written that the plaintiff would not even talk about being raped even in front of her own family and plaintiff has not mentioned the word 'rape' in the writings that she smuggled out of prison to defendant no.4. Individuals need a place of sanctuary where they can be free from societal control. The importance of such a sanctuary is that individuals can drop the mask, desist for a while from projecting on the world the image they want to be accepted as themselves, an image that may reflect the values of their peers

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<sup>19</sup> <http://indiankanoon.org/doc/793946/>

rather than the realities of their natures and that is the content and meaning of privacy and right to privacy must encompass and protect the personal intimacies of the home, the family, marriage, motherhood, procreation and child rearing.

In view of the observations above, I need not go into other questions raised by learned counsel for the parties and I hold that the defendants, have no right to exhibit the film as produced as has been filed in this Court violating the privacy of plaintiff's body and person. Balance of convenience is also in favor of restraining the defendants from exhibiting the film any further, if defendants are allowed to exhibit the film further it would cause further injury to the plaintiff. No amount of money can compensate the indignities, torture, feeling of guilt and shame which has been ascribed to the plaintiff in the film. Therefore, I restrain the defendants from exhibiting the film in its censored or uncensored version till the final decision of the suit. I.A. stands disposed of. Suit and other I.As. be listed for 14th February, 1995."

Although cases such as *R. Rajagopal* and others thereafter have clearly held that the constitutional scheme of our country does not countenance a prior injunction on the basis of violation of the right to privacy, they did not specifically address whether such an injunction could be granted under tort law, however the fact that the Court in this case has entertained and allowed the application for a pre publication injunction makes it clear that such an injunction can be sustained in the realm of tort law.

#### **Case Highlights**

- A Pre-publication injunction may be granted on the basis of invasion of the right to privacy under tort law

#### **Khushwant Singh v. Maneka Gandhi,<sup>20</sup> (2001)**

In this case Ms. Maneka Gandhi tried to stop the publication of certain sections of a book by Mr. Khushwant Singh which she claimed were derogatory towards her and violated her right to privacy. The Court in this case, relied heavily on the decision of *R. Rajagopal* discussed above and held in favour of the author saying that there is no case for granting an injunction before the publication while leaving the door open for Ms. Maneka Gandhi to file and make out a a case for defamation after the publication of the book. The Court held:

"63. .... The question thus to be considered is the effect of such prior publications on the claim made by the respondent in respect of these publications. There is force in the submissions of the learned counsel for the appellants that not only was there wide publicity about these aspects in view of the same relating to the then first family of the nation but the respondent possibly drew strength from the media to put forth her point of view against what she claimed was the injustice meted out to her by her late mother-in-law. Thus the controversy in question which is being commented upon did not really remain in the four walls of the house but drew wide publicity and comments even to the extent of poll surveys being carried out in respect of the controversy in question. No grievance was made at that stage of time. It is not a case of prevention of repeated defamatory statements as is sought to be made out be learned counsel for the respondent. The reliance placed by learned counsel for the respondent on the judgment of the Madhya Pradesh High Court in Harishankar's case (supra) and of the Andhra Pradesh High Court in K V Ramanaiah's case (supra) is thus misplaced. The controversy in question related to the dispute between the respondent and her late mother-in-law, the then Prime Minister Mrs.

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<sup>20</sup> <http://indiankanoon.org/doc/1203848/>

Indira Gandhi. The respondent did not make grievance about the reporting of their disputes in the press. The nature of controversy was more or less the same as is now sought to be published by appellant No.1 in his autobiography and thus the respondent cannot make a grievance of the same matter now being published so as to seek prevention of the publication itself. The silence of the respondent and her not making a grievance against the prior publication prima facie amounts to her acquiescence or at least lack of grievance in respect of publication of the material. Needless to add that the remedy of damages against the appellant is still not precluded in so far the respondent is concerned.....

69..... Issue of public record is not material in the present case because the controversy does not relate to the fact whether prior reporting of a matter becomes public records, which in law it does not, but that wide publicity and reporting having already been given to the matter in issue at the relevant stage of time.”

These paragraphs read with the principle laid down in *R. Rajagopal's case* which says that the right to privacy cannot be extended to information that is a matter of public record seems to suggest that, if not completely absent, the claim to assert privacy does get considerably weakened if the information has already become available in the public domain and the claimant has not raised a prior objection with regard to it. Although this principle is fairly significant, it does lose its import somewhat in the post internet era where information may get leaked into the public domain through individual users of various websites and the claimant may not know how or against whom to lodge an objection.

“70. Be that as it may the respondent has already chosen to claim damages and her claim is yet to be adjudicated upon. She will have remedy if the statements are held to be vulgar and defamatory of her and if the appellants fail to establish the defense of truth.

71. We are unable to accept the contention advanced on behalf of the respondent by Mr. Raj Panjwani that if the statements relate to private lives of persons, nothing more is to be said and the material must be enjoined from being published unless it is with the consent of the person whom the subject matter relates to. Such pre-censorship cannot be countenanced in the Scheme of our constitutional framework.”

This case also seems to indicated that there is a trend amongst claimants to argue both on privacy and defamation. This is only a matter of common sense since if one wants to attach a particular mode of disclosure, one would like to attack it with as many arguments as possible. However this approach leads to a slight problem in the sense that while delivering their judgments the Courts use the two issues to buttress each other thereby causing a little confusion and blurring the delineation between the circumstances under which these issues should be applied.

### **Case Highlights**

- If your privacy is being infringed upon the remedy of injunction is not available to you but you could file a tortuous claim for damages.

#### **Indu Jain v. Forbes Incorporated,<sup>21</sup> (2007)**

In this case Indu Jain filed a case with the courts to stop Forbes magazine from featuring her family in

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<sup>21</sup> <http://lobis.nic.in/dhc/GM/judgement/25-01-2010/GM12102007S21722006.pdf>

the Forbes List of Indian Billionaires. The court ruled against Indu Jain and allowed the publication. After a detailed discussion of the authorities on this issue the Court culled out the following principles:

“(V) Public or general interest in the matter published has to be more than mere idle curiosity.

(VI) Public figures like public officials play an influential role in ordering society. They have access to mass media communication both to influence the policy and to counter-criticism of their views and activities. The citizen has a legitimate and substantial interest in the conduct of such persons and the freedom of press extends to engaging in uninhibited debate about the involvement of public figures in public issues and events. (Ref. (1994) 6 SCC 632 R. Rajagopal & Anr. Vs. State of Tamil Nadu & Others Para 18).

(VII) Right to privacy that rests in an individual may be waived by him by express or implied consent or lost by a course of conduct which estops its assertions. Such implication may be deduced from the conduct of the parties and the surrounding circumstances.

(VIII) A public person or personage is one who by his standing, accomplishment, fame, mode of life or by adopting a profession or calling which gives the public a legitimate interest in his doings, affairs and character has so become a public figure and thereby relinquishes at least a part of his privacy.

(IX) The standard to be adopted for assessing as to whether the published material infracts the right to privacy of any individual is that of an ordinary man of common sense and prudence and not an out of ordinary or hyper-sensitive man. (Ref. (2007) 1 SCC 143 *Ajay Goswami v. UOI & Ors.*).

(X) Even though in this country, the freedom of press does not have presumptive priority as in some other jurisdictions including the United States of America, however the importance of a free media of communication to a healthy democracy has to receive sufficient importance and emphasis.

(XI) In evaluating a relief to be granted in respect of a complaint against infraction of the right to privacy, the court has to balance the rights of the persons complaining of infraction of right to privacy against freedom of press and the right of public to disclosure of newsworthy information. Such consideration may entail the interest of the community and the court has to balance the proportionality of interfering with one right against the proportionality of impact by infraction of the other.

(XII) The publication has to be judged as a whole and news items, advertisements and published matter cannot be read without the accompanying message that is purported to be conveyed to public. Pre-publication censorship may not be countenanced in the scheme of the constitutional framework unless it is established that the publication has been made with reckless disregard for truth, publication shall not be normally prohibited. (Ref.: (2007) 1 SCC 143 *Ajay Goswami Vs. UOI & Ors.*; (1994) 6 SCC 632 R. Rajagopal & Anr. Vs. State of Tamil Nadu & Others and AIR 2002 Delhi 58 *Khushwant Singh & Anr. Vs. Maneka Gandhi*).

.....In the instant case, the plaintiff has sought an imperative relief of injunction against the defendants on the plea that the defendants are effectuating a publication shortly which would

infract upon the right to privacy of the plaintiff.

In this background, the fact that the defendants had earlier published similar articles is certainly a material fact which would impact grant or denial of relief to the plaintiff on its present application.

In the facts noticed above, in my view the plaintiff has failed to make out a case that publication effected by the defendants would be covered within the protection which is afforded to a person's right to privacy.”

The principles laid down above clarify a number of issues regarding the right to privacy and the invasion of it by individuals in the Press. It says that the court has to balance the rights of the person whose privacy has been invaded against the freedom of press and the right of public to disclosure of newsworthy information and in doing so the court has to balance the “proportionality of interfering with one right against the proportionality of impact by infraction of the other.”

The case also tries to shed some light on what a public person is and says that it's a or personage who by his standing, accomplishment, fame, mode of life or by adopting a profession or calling gives the public a legitimate interest in his doings, affairs and character. Thus this case establishes to clearly distinct categories of “public figure” as well as “public official”, both of whom have reduced privacy rights when compared to ordinary individuals.

The case also lays down the standard to determine whether material published would cause violation of somebody's privacy and says that the standard to be adopted in such circumstances is that of an ordinary person of common sense and prudence and not an out of ordinary or hyper-sensitive person. This is what is known in tort law as the “common man” test. The Court also clarifies that the term “public interest” with regard to the issue of privacy has to be something more than just idle curiosity.

This case also goes further than a few other cases on privacy law such as *Khuswant Singh v. Maneka Gandhi* by saying that although a pre publication injunction is not countenanced in our constitutional scheme however such an injunction may be granted in case the publication has been made with reckless disregard for truth. However since the Court later does examine the plea of the plaintiff with regard to an injunction due to an invasion of the right to privacy, it seems clear that a pre-publication injunction on the basis of invasion of privacy may be granted under Indian law.

### **Case Highlights**

- The court has to balance the rights of the person whose privacy has been invaded against the freedom of press and the right of public to disclosure of newsworthy information.
- A public figure is one who by his standing, accomplishment, fame, mode of life or by adopting a profession or calling gives the public a legitimate interest in his doings, affairs and character
- The standard to be adopted for assessing as to whether the published material infracts the right to privacy of any individual is that of an ordinary man of common sense and prudence and not an out of ordinary or hyper-sensitive man.
- Public or general interest in the matter published has to be more than mere idle curiosity.
- Right to privacy that rests in an individual may be waived by him by express or implied consent or lost by a course of conduct which estops its assertions

- Pre-publication censorship may not be countenanced in the scheme of the constitutional framework unless it is established that the publication has been made with reckless disregard for truth

## **Implementation**

### **The Bofors pay-off case**

The Bofors pay-off case was centered on charges of criminal conspiracy and corruption between several public servants including Rajiv Gandhi and S.K Bhatnagar, which involved the cheating and fraudulent representation. Rajiv Gandhi and S.K.Bhatnagar were also charged for having taken illegal bribes for awarding the contract in favor of Bofors (Gun Company). The CBI investigated the case for many years, and in the process of the investigation held many press conferences revealing facts and opinions about the case. Though the case was not focused on whether the privacy of the public servants was violated by these press conferences, the High Court of Delhi, observed that, “The fairness of trial is of paramount importance as without such protection there would be trial by media which no civilized society can and should tolerate. The functions of the court in the civilized society cannot be usurped by any other authority.” The Court agreed that media awareness creates awareness of the crime, but the right to fair trial is as valuable as the right to information and freedom of communication. It noted how the case was an example of how trial by media can cause irreversible harm to the reputation of an individual and his family, and criticized the trend of the police or CBI of holding press conferences for the media when the investigation of a crime is still ongoing.<sup>59</sup>

### **Conclusion:**

The freedom of expression and privacy in many ways support each other, as the right to express an opinion or thought freely often is protected by providing the individual the privacy to do so. In the context of the media, the right to privacy can be violated by press coverage both online and offline. There are many new ways in which the right to privacy and the freedom of expression relate to each other which have not been addressed strongly in Indian legislation, policy, or case law. For example the taking of photographs by individuals (not the press) has not been addressed, the ability for individuals to issue comments anonymously offline, and the ‘right to be forgotten’ online and offline have not been addressed. These issues are being addressed by many countries and at an international level. For example, the EU has proposed an amendment to the EU directive that would require companies holding data to allow users to withdraw the information from websites. The amendment, known as the “Right to be forgotten” would give users the power to tell websites to permanently delete all personal data held about them. Websites would be held legally accountable and would face sanctions if they did not comply. Additionally, users would also have to explicitly “opt-in” before companies could use or process their personal data.<sup>60</sup> The right to anonymous speech is also being fought for at an international level. Frank La Rue, special rapporteur to the UN, has issued a report on Freedom of Expression and Privacy, where he specifically promotes the ability of individuals to speak anonymously online and offline as a key to protecting the right to free expression and the right to privacy. In his report he points out that when states do not allow anonymous speech and censor material online, the privacy of the

individual is often violated as the state not only want to take down the content that was posted, but wants to identify the person that posted the content.<sup>61</sup> Anonymous speech is clearly prohibited in India in the context of online speech, but anonymous speech is not regulated in the media, as sources are often not identified in news coverage.

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- <sup>1</sup> Times of India. Outrage on Twitter over businessman arrest. November 2012. Available at: [http://articles.timesofindia.indiatimes.com/2012-11-01/india/34856819\\_1\\_tweets-free-speech-computer-resource](http://articles.timesofindia.indiatimes.com/2012-11-01/india/34856819_1_tweets-free-speech-computer-resource). Last accessed: March 4th 2013.
- <sup>2</sup> Mahapatra, D. Explain Facebook arrests, Supreme Court tells Maharashtra govt. November 2012. Times of India. Available at: [http://articles.timesofindia.indiatimes.com/2012-11-30/india/35484450\\_1\\_arrests-ambikesh-mahapatra-social-network-site](http://articles.timesofindia.indiatimes.com/2012-11-30/india/35484450_1_arrests-ambikesh-mahapatra-social-network-site). Last accessed: March 4th 2013.
- <sup>3</sup> Norms of Journalistic Conduct 2005. Available at: <http://www.presscouncil.nic.in/home.htm>.
- <sup>4</sup> Press Council of India. Press Release: PCI resolves for more powers and conversion to Media Council of India. August 2012. Available at: <http://www.presscouncil.nic.in/home.htm>. Last accessed: March 5th 2012.
- <sup>5</sup> Press Council Regulations 2010 section 4(v)
- <sup>6</sup> Id Section 7 (iv)
- <sup>7</sup> Id. Section 3 (ix)
- <sup>8</sup> Press Council Norms of Journalistic Conduct: 2010. Available at: <http://presscouncil.nic.in/NORMS-2010.pdf>
- <sup>9</sup> Press Council Norms of Journalistic Conduct 2010 section 8: <http://presscouncil.nic.in/NORMS-2010.pdf>
- <sup>10</sup> Press Council Norms of Journalistic Conduct 2010 section 6(i)
- <sup>11</sup> Id. Section 7(i)
- <sup>12</sup> Id. Section 6(iv)
- <sup>13</sup> Id. Section 4(iv)
- <sup>14</sup> Id. Section 6(ii)
- <sup>15</sup> Id. Section 6(iii)
- <sup>16</sup> Id. Section 12(a)(ii)
- <sup>17</sup> Id. Section 22(i)
- <sup>18</sup> Id. Section 27
- <sup>19</sup> Id Section 23
- <sup>20</sup> Press Council Regulations 2010 section 2 (i,ii,iii)
- <sup>21</sup> Id. Section 3(i)
- <sup>22</sup> Id Section 3 (iii)
- <sup>23</sup> Cable Television Networks Regulation Act 1995 s.20(1)
- <sup>24</sup> Cable Television Networks Regulation Act 1995 s. 20(2)
- <sup>25</sup> Cable Television Network Rules 1994: Rule 6(d)
- <sup>26</sup> Cable Television Network Rules 1994: Rule 6(i)
- <sup>27</sup> Cable Television Network Rules 1994: Rule 6(g)
- <sup>28</sup> Cable Television Networks Regulation Act 1995 s. 16
- <sup>29</sup> Id. s. 15(1)
- <sup>30</sup> The Juvenile Justice (Care and Protection of Children) Act, 2000 s. 21
- <sup>31</sup> The Contempt of Court Act 1971 s.7(b)(c)
- <sup>32</sup> The Contempt of Court Act 1971 s. 2(c)
- <sup>33</sup> The Contempt of Court Act 1971 s.12
- <sup>34</sup> The term “Intermediary” has been defined in the Information Technology Act, 2000 as follows:  
““intermediary” with respect to any particular electronic records, means any person who on behalf of another person, receives, stores, or transmits that record or provides any service with respect to that record and includes telecom service providers, network service providers, internet service providers, web-hosting service providers, search engines, online payment sites, online auction sites, online market places and cyber cafes”.
- <sup>35</sup> Information Technology (Intermediary Guidelines) Rules, 2011, Rule 3(2) (a-i)
- <sup>36</sup> Information Technology (Intermediary Guidelines) Rules, 2011, Rule 3(1)
- <sup>37</sup> Information Technology (Intermediary Guidelines) Rules, 2011, Rule 3 (5)
- <sup>38</sup> Information Technology (Intermediary Guidelines) Rules, 2011, Rule 3 (4)
- <sup>39</sup> Information Technology (Intermediary Guidelines) Rules, 2011, Rule 3 (11)
- <sup>40</sup> Information Technology (Intermediary Guidelines) Rules, 2011, Rule 3 (7)
- <sup>41</sup> Information Technology (Intermediary Guidelines) Rules, 2011, Rule 3(8)



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- <sup>42</sup> Information Technology (Intermediary Guidelines) Rules, 2011, Rule 3(9)
- <sup>43</sup> Information Technology (Intermediary Guidelines) Rules, 2011, Rule 3(10)
- <sup>44</sup> Id. Section 3(5)
- <sup>45</sup> Information Technology (Guidelines for Cyber Café) Rules, 2011
- <sup>46</sup> Information Technology (Guidelines for Cyber Cafe) Rules, 2011Rule 4(1)-(4)
- <sup>47</sup> Information Technology (Guidelines for Cyber Cafe) Rules, 2011Rule Rule 4(2)
- <sup>48</sup> Information Technology (Guidelines for Cyber Cafe) Rules, 2011Rule 5(1)
- <sup>49</sup> Information Technology (Guidelines for Cyber Cafe) Rules, 2011Rule 5(2)
- <sup>50</sup> Information Technology (Guidelines for Cyber Cafe) Rules, 2011Rule 5(3)
- <sup>51</sup> Information Technology (Guidelines for Cyber Cafe) Rules, 2011Rule 5(4)
- <sup>52</sup> Information Technology (Guidelines for Cyber Cafe) Rules, 2011Rule 6(6)
- <sup>53</sup> Information Technology (Guidelines for Cyber Cafe) Rules, 2011Rule 5 (6)
- <sup>54</sup> Information Technology (Guidelines for Cyber Cafe) Rules, 2011Rule 5(3)
- <sup>55</sup> Information Technology (Guidelines for Cyber Cafe) Rules, 2011 Rule 7(1)
- <sup>56</sup> Information Technology (Guidelines for Cyber Cafe) Rules, 2011 Rule 6(1)&(2)
- <sup>57</sup> <http://www.nbanewdelhi.com/images/Upload/tv9.pdf>
- <sup>58</sup>. A Guide to the Complaints Process of News Broadcasting Standards Authority pg. 6
- <sup>59</sup>. CrI.Misc.(Main) 3938/2003
- <sup>60</sup> Warman, M. Digital 'right to be forgotten' will be made EU law. January 25<sup>th</sup> 2012. Available at: <http://www.telegraph.co.uk/technology/news/9038589/Digital-right-to-be-forgotten-will-be-made-EU-law.html>. Last Accessed: October 25th 2012.
- <sup>61</sup> Frank La Rue. Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression. May 2011. Available at: [http://www2.ohchr.org/english/bodies/hrcouncil/docs/17session/a.hrc.17.27\\_en.pdf](http://www2.ohchr.org/english/bodies/hrcouncil/docs/17session/a.hrc.17.27_en.pdf)