Volume 11, July 2020 ISSN 2581-5504

"Law Relating to Right of Privacy and Freedom of Press in India - An Analysis"

Shefali Parashar,
Raksha Shakti University,
Lavad, Gandhinagar,
Gujarat

****Adhikansh Parashar***
K.L.E Society's Law College
Bangalore

I think that there is fundamental right to privacy and the philosophy that government should not be intrusive.
-Tim Cook

ABSTRACT

In this paper the researcher wants to emphasis upon the laws relating to right to privacy and the role of press in India. Under Indian Constitution the Article 19(1)(a) deals with the freedom of press, Article 21 deals with No person shall be deprived of his life or personal liberty except according to procedure established by law, and how UDHR and International Covenant on Civil and Political Rights contributes in right to privacy and freedom of press. In simple words we can say that the right to privacy and freedom of press are those two fundamental right with can taken away from the person but in the case of emergency Article 14 is stuck down automatically to protect the national harmony, tranquility, and public order to avoid riots among the people of various religion because India is a secular country. In this paper we collaborated various cases which will help us to understand the why privacy and freedom of press goes hand to hand.

KEY WORDS- Article 19(1)(a), Article 21, Privacy, and Press.

INTRODUCTION

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

Volume 11, July 2020 ISSN 2581-5504

Article 19 of the UDHR, and also reflected similarly in Article 19 of the International Covenant on Civil and Political Rights 1966 (ICCPR). But somewhere in their thought process it never came to light, about the consequences of an unbridled horse set free in a vast pasture called India. British India was not a free country like free India. There, the print media had to work under constraints, which forced them to be within rules. Originally enacted Article 19(2), provided that 'Nothing in sub clause (a) of clause (1) shall affect the operation of any existing law relating to libel, slander, defamation, contempt of court or any matter which offends against decency or morality or which undermines the security of or tends to overthrow, the state'. Although Article 19(1) (a) does not mention freedom of press. The Supreme Court in *Romesh Thapper* v. *State of Madras*[1] *case* stated that freedom of speech and expression includes freedom of press. It stated 'Turning now to the merits, there can be no doubt that freedom of speech and expression includes propagation of ideas, and that freedom is enshrined by the freedom of circulation'. Here the Supreme Court further increased the ambit of the freedom of the press. After this came the First Amendment of the Constitution in 1951, amending Article 19(2). The new Article provided 'Nothing in sub clause (a) of clause (1) shall affect the operation of any existing law or prevent the state from making any law, in so far as such law imposes reasonable restrictions on the exercise of the right conferred by the said sub clause in the interests of the security of the state, friendly relations with foreign states, public order, decency or morality or in relation to contempt of court, defamation or incitement to an offence.' This amendment further increases the ambit of freedom of press under the Constitution.

MEANING AND DEFINITION OF PRIVACY

The word "privacy" is arrived in Black's Law Dictionary as "the condition or state of being free from public attention to intrusion into or interference with one's acts or decisions"[2].The word media means Attention, Coverage, Hype and Reports.[3]

Freedom of speech and expression[4] in the context of public interest is, Press - the print media and the broadcast media. It has taken the responsibility to inform the public about the functioning of the elected government. This includes all other matters in which public have a right to know, Right to discussion and right to criticize the formed government . In *Romesh Thappar* v. *State of Madras*[5] *case*, the Supreme Court has included press in the definition of freedom of speech or expression. In *L.I.C.* v. *Manubhai Shah*[6] *case*, the Supreme Court reiterated as in *Indian Express Newspapers v. Union of India*[7] *case* that freedom to circulate ones views can be by word of mouth or in writing or through audio visual media. This right

[1] Available At https://indiankanoon.org/doc/217501/ visited on 15 March 2019 at 10 A.M
[2] Bryan A. Garner, *Black Law Dictionary* 1315(WEST A Thomson Reuters business,U.S.A,9th edn. 2009)
[3] Cambridge*; Cambridge Advanced Learner's Dictionary*,888 (Cambridge University Press,U.K,3rd edn, 2011)
[4] Dr.S.R.Myneni, *Media Law(with Right To Information Act)* 39*(*Asia Law House Hyderabad, 2nd Edn, 2016).
[5] *Id.* at p. 597.
[6] *L.I.C.* v. *Manubhai Shah* (1992) 3 S.C.C. 637
[7] *Indian Express Newspapers* v. *Union of India* (1985) 1 S.C.C. 641

to circulate also includes the right to determine the volume of circulation[8]. The press enjoys the privilege of sitting in the Courts on behalf of the general public to keep them informed on matters of public importance. The journalist therefore has the right to attend proceedings in Court and publish fair reports. This right is available in respect of Judicial and Quasi-Judicial tribunals[9]. However this is not an absolute right. There are also other important considerations, for instance the reporting of names of rape victims, children, juvenile, woman should be prohibited. This restriction is placed because of their weak position in the society that makes them vulnerable to exploitation. Therefore in the interests of justice, the court may restrict the publicity of Court proceedings[10]. Under section 151 of the Civil Procedure Code, 1908, the Court has the inherent power to order a trial to be held in camera. The right to report legislative proceedings is also a part of the press freedom. In a democratic society it is necessary that the society shall be a part of the discussions on policy matters. They need to know the details of debates, as the transparency in governance is a must for the proper functioning of a democratic society. This right of the press to true reporting of parliamentary proceedings is protected by the Constitution. It also gives protection to the true reporting of the proceedings of State Assemblies.[11]A similar protection is provided in the Parliamentary Proceedings (Protection of Publication) Act, 1977. In *Tata Press Ltd* v. *Mahanagar Telephone Nigam Ltd*[11] *case,* the Supreme Court also included into freedom of speech and expression the right to advertise or the right of commercial speech. Before this decision, advertisements were not considered as part of the definition of free speech. This decision reflects the dilution in the already wide freedom of speech and expression. It was in variance to the earlier limitation on this freedom, which was enunciated in *Hamdard Dwakhana* v. *Union of India*[12] *case* , in which the apex court observed that commercial advertisement does not fall within the protection of speech and expression as there is an element of trade and commerce in them. But in *Tata* case, Supreme Court stated that advertising pays a large portion of the costs of supplying the public with newspaper. So for a democratic press the advertising subsidy is crucial. The court further observed that without advertising, the resources available for expenditure on reporting the 'news' would decline, which may lead to an erosion of its quality and quantity. In *Hindustan Times* v. *State of U.P.*[13]*case,* the Supreme Court again reiterated the importance of advertising and its connection with the circulation of paper.

Privacy is a difficult notion to define in part because rituals of association and disassociation are cultural and species-relative. For example, opening a door without knocking might be considered a serious privacy violation in one culture and yet permitted in another.

[8] *Sakal Papers* v. *Union of India,* A.I.R. 1962 S.C. 305.
[9] *Saroj Iyer* v. *Maharashtra Medical (Council),* A.I.R. 2002 Bom .95.
[10] *Naresh Shridhar Mirajkar* v. *State of Maharashtra,* A.I.R. 1967 S.C. 1.
[11] *Tata Press Ltd* v. *Mahanagar Telephone Nigam Ltd* (1995) 5 S.C.C. 139
[12] *Hamdard Dawakhana* v. *Union of India,* A.I.R. 1965 S.C. 1167.
[13] *Hindustan Times* v. *State of U.P.* (2003) 1 S.C.C. 591

Volume 11, July 2020 ISSN 2581-5504

Definitions of privacy can be couched in descriptive or normative terms. We can view privacy as a condition or as a moral claim on others to refrain from certain activities. Furthermore, some view privacy as a derivative notion that rests upon more basic rights such as liberty or property. As highlighted below, there is little agreement on how to define privacy. But like other contested concepts for example, liberty or justice this conceptual difficulty does not undermine its importance.

Definitions

Plato was correct and we could gaze upon the forms and determine the necessary and sufficient conditions for each of these concepts. But we can't, and neither intuition nor natural language analysis offer much help. Not doing violence to the language and cohering with our intuitions may be good features of an account of privacy. Nevertheless, these features, individually or jointly, do not suffice to provide adequate grounds for a definition—the language and the intuitions may be hopelessly muddled. Moreover, as indicated by the analysis of examples offered throughout this article, there are central cases of privacy and peripheral ones.

Aristotle discussed this idea of central and peripheral cases in talking about "friendship". People won't find themselves to be able to do justice to all the phenomena of friendship. Since one definition will not suit all, they think there are no other friendships; but the others also come under the ambit of friendships in some ways. The same may be said of privacy. Some of the core features of the central cases of privacy may not be present in the outlying cases. One of the ways a conception is illuminated is to trace the similarities and differences between these examples. Evaluation is further a tool that aids in arriving at a defensible conception of privacy. A perfectly coherent definition of privacy that accords faultlessly with some group's intuitions may be totally useless. In the most general terms, we are asking "what this or that way of classifying privacy is good for." At the most abstract level the evaluation may be moral—we ask "does this way of carving up the world promote, hinder, or leave unaffected, human well-being or flourishing?"

John Finnis echoes this sentiment, There is a mutual interdependence between the project of describing human affairs by way of theory and the project of evaluating them reasonably well in practical terms. The evaluations are in no way deduced from the descriptions; but one whose knowledge of the facts of the human situation is very limited is unlikely to judge well in discerning the practical implications of the basic values. Equally, the descriptions are not deduced from the evaluations; but without the evaluations one cannot determine what descriptions are really illuminating and significant.

Privacy has been defined in many ways over the last few hundred years. **Warren and Brandeis**, following Judge Thomas Cooley, called it "the right to be let alone." **Pound and Freund** have defined privacy in terms of an extension personality or personhood.

Volume 11, July 2020 ISSN 2581-5504

Legal scholar **William Prosser** separated privacy cases into four distinct but related torts. "Intrusion: Intruding (physically or otherwise) upon the solitude of another in a highly offensive manner. Private facts: Publicizing highly offensive private information about someone which is not of legitimate concern to the public. False light: Publicizing a highly offensive and false impression of another. Appropriation: Using another's name or likeness for some advantage without the other's consent."

Alan Westin and others have described privacy in terms of information control. Still others have insisted that privacy consists of a form of autonomy over personal matters. William Parent argued that privacy is the condition of not having undocumented personal knowledge about one possessed by others," while Julie Inness defined privacy as "the state of possessing control over a realm of intimate decisions, which include decisions about intimate access, intimate information, and intimate actions."

a) Normative and Non-Normative approach of Privacy

There are two distinctions that have been widely discussed related to defining privacy. The first is the distinction between descriptive and normative conceptions of privacy. A descriptive or non-normative account describes a state or condition.

According to Adam D.Moore, "privacy is the condition of not having undocumented personal knowledge about one possessed by others." A normative account, on the other hand, makes references to moral obligations or claims. For example, when DeCew talks about what is of "legitimate concern of others," she includes ethical considerations. One way to clarify this distinction is to think of a case where the term "privacy" is used in a non-normative way such as someone saying, "When I was getting dressed at the doctor's office the other day had some measure of privacy." Here it seems that the meaning is non-normative—the person is reporting that a condition is obtained. Had someone breached this zone the person may have said: "You should not be here, please respect my privacy" In this latter case, normative aspects are stressed.[14]

b) **Reductionist and Non-Reductionist Approach of Privacy;**

Reductionists, such as Judith Jarvis Thomson, argue that privacy is derived from other rights such as life, liberty, and property rights—there is no overarching concept of privacy but rather several distinct core notions that have been lumped together. Viewing privacy in this fashion might mean jettisoning the idea altogether and focusing on more fundamental concepts.

[14] Adam D. Moore, *Privacy Rights:moral and legal foundations412(* Penn State University Press, 1st edn. 2010)

Volume 11, July 2020 ISSN 2581-5504

For example,

Frederick Davis has argued that, "if truly fundamental interests are accorded the protection they deserve, no need to champion a right to privacy arises. Invasion of privacy is, in reality, a complex of more fundamental wrongs. Similarly, the individual's interest in privacy itself, however real, is derivative and a state better vouchsafed by protecting more immediate rights."Unlike Davis, the non-reductionist view privacy as related to, but distinct from, other rights or moral concepts. It is my view that the normative and non-normative distinction is important and crucial for conceptual coherence and it is very much possible to define privacy along normative and descriptive dimensions. Liberty is also defined descriptively and normatively. We may, for example, define liberty without making any essential references to normative claims.

Thomas Hobbes defines liberty as "the absence of external impediment." In this example, as with Hobbes's conception of the state of nature, there are no moral "oughts" or "shoulds" present.

J. S. Mill defends a normatively loaded account of liberty opening his classic work On Liberty with "The subject of this essay as . . . civil or social liberty: the nature and limits of the power which can be legitimately exercised by society over the individual." Privacy may also be defined descriptively or normatively. Secondly, assuming a normative definition, without considering the justification of the rights involved it is unclear if privacy is reducible to other rights or the other way around. This point has been made by Parent and others. Moreover, given the arguments that I offer elsewhere, it is not surprising that there are close connections between privacy, liberty, and self-ownership rights. The very same sort of justification that is offered for privacy rights could be offered for property rights or life rights. It is also true that the kind of rights involved will be intimately tied to the form of justification—it would be surprising to find hard-line Kantians and crude consequentiality arriving at the same conception of "rights." And even if the reductionist is correct, it does not follow that we should do away with the category of privacy rights. The cluster of rights that comprise privacy may find their roots in property or liberty yet still mark out a distinct kind. Finally, if all the rights are nothing more than the complex sets of obligations, powers, duties, and immunities, it would not automatically follow that we should dispense with talk of rights and frame our moral discourse in these more basic terms.[15]

c) Privacy ;A Control- and Use-Based Definition of Rights

I favor what has been called a "control"-based definition of privacy rights. A privacy right is an access control right over oneself and to information about oneself. Privacy rights also include a use or control feature—that is, privacy rights allow me exclusive use and control over personal information and specific bodies or locations. The term "control" may also be

[15] *Id* at 413

Volume 11, July 2020 ISSN 2581-5504

given a descriptive or normative treatment.[16] A descriptive account of "control" would likely highlight the power to physically manipulate an object or intangible good. A normative account of "control" would focus on moral claims that should hold independent of the condition. As with the notion of a state or condition of privacy, I think that purely descriptive accounts of control are largely uninteresting. One feature of the account that I defend is that it can incorporate many of the features found in the aforementioned definitions. Controlling access to ourselves affords individuals the space to develop themselves as they see fit. Such control yields room to grow personally while maintaining autonomy over the course and direction of one's life. Moreover, each of Prosser's torts contains elements of access control. While there are interesting connections between privacy and autonomy, I do not think that either is more fundamental than the other or that privacy is valuable simply because it is connected to autonomy. In any case, there are numerous competing theories of autonomy and it would be uninteresting to simply assume that one of these views is correct and then note that privacy falls out of the view. William Parent has attacked non-normative control-based definitions of privacy arguing that all of these definitions should be jettisoned. To see why, consider the example of a person who voluntarily divulges all sorts of intimate, personal, and undocumented information.

Parent maintains that it is implausible to exercise control by giving up control. But why should we say that someone who does this is "preserving or protecting privacy" rather than "giving up" privacy? In this case, by yielding control to others the condition of privacy is diminished. Similarly, someone may freely limit their own liberty. An exercise of liberty may limit liberty while an exercise of control may limit control. Moreover, yielding control over access does not automatically yield control over use. For example, Ginger may allow Fred access to sensitive personal information, yet still have the power to stop him from broadcasting this information. Thus, non-normative views of access and use are not undermined by Parent's worries. Moving to normative accounts, Parent is quick to add in a footnote that those who defend a control definition of privacy might be worried about a right to privacy rather than the condition of privacy. He charged that if so they should have made this explicit and in any case are confusing a liberty right with a privacy right. Parent's argument, however, is anemic. On these grounds we could complain that control definitions of property rights or life rights are similarly confused with liberty rights.

This broad characterization holds of both moral rights and legal rights. For example, property is a bundle of rights associated with an owner's relation to a thing where each right in the bundle is distinct. Given this, it should be clear that Parent's attack on normative control-based definitions is based on an overly simplistic account of rights. Ginger's property right to a Louisville Slugger yields her a particular sort of control right over the base ball batin question. It also justifiably limits the liberty of everyone else—they cannot interfere with Ginger's control of the bat without her consent. A liberty right is not a freedom to do whatever one likes—it is not a license. Liberty rights, like property rights, are limited by the

[16] Adam D. Moore, *Privacy Rights:moral and legal foundations414(* Penn State University Press, 1st edn. 2010)

Volume 11, July 2020 ISSN 2581-5504

rights of others. In the most basic terms, rights, liberty, and control come bundled together. When one gives up control and yields access in an intimate relationship, one is giving up privacy within a limited domain. Parent's attack thus misses the mark—he assumes, without argument, that liberty, property, and control rights are conceptually distinct.[17] As noted earlier, without some account of the justification of these rights it is quite contentious to claim that they must be conceptually distinct. Parent offers the following definition for privacy: "Privacy is the condition of not having undocumented personal knowledge about one possessed by others." Documented information is information that is found in the public record or is publicly available. For example, information found in newspapers, court proceedings, and other official documents open to public inspection would be considered publicly available according to Parent. There are several problems with this conception of privacy. First, this definition leaves the notion of privacy dependent upon what a society or culture takes as documentation and what information is available via the public record. Parent acts as if undocumented information is private while documented information is not, and this is the end of the matter. But surely the secrets shared between lovers is private in one sense and not in another. This secret is private in the sense of being held in confidence between two individuals and not known by others; it is not private in the sense of being known by a second person. To take another case, consider someone walking in a public park. There is almost no limit to the kinds of information that can be acquired from this public display. One's image, height, weight, eye color, approximate age, and general physical abilities are all readily available. Moreover, biological matter will also be left in the public domain and the information contained within, is publicly available. It would seem that all of one's genetic profile is not private information. Furthermore, the availability of information is dependent upon technology. Telescopes, listening devices, heat imaging sensors, and the like, open up what most would consider private domains for public consumption. What we are worried about is that what should be considered a "private affair" -something that is no one else's business. Parent's conception of privacy is not sensitive to these concerns. Parent could counter, by claiming that he is presenting a definition that is not normatively loaded. For Parent, the state or condition of not having undocumented personal information about oneself possessed by others is a state of privacy. Similarly, liberty might be described as the state or condition of not having restraints on what one may do or think. Insisting on this way of defining privacy falls prey to what I call the "so what" objection. In general, we are not worried about whether a state of privacy obtains or not we are concerned about the normative aspects of disassociation or leave taking. When can I justifiably restrict access to myself? When are others morally permitted to cross into private domains? So what does it matter if a state or condition of privacy exists given Parent's definition? What we want to know is if the state or condition in question is morally justified. Finally, Parent's view of privacy completely ignores what might be called "physical" or "locational" privacy. Suppose someone with severe amnesia wanders into your room while you are sleeping and proceeds to pet your head. Independent of documented or undocumented information, many would argue

[17] Id at 416

Volume 11, July 2020 ISSN 2581-5504

that this is an egregious violation of privacy. Given that no information is involved, it would fall outside of Parent's non-normative account. Furthermore, this deficiency along with Parent's failure to include such dimension is also an important point to an even deeper failing. Having the capacity and right to regulate access and use of bodies, locations, and personal information is essential for human well-being. In this way, the account of privacy being offered links nicely with value theory and drives home what I have called the "so what" objection. The distinction between documented and undocumented personal information does not usefully capture the relevant value-based concerns. Like Parent, Judith Jarvis Thomson finds control-based definitions of privacy puzzling. She argues that a loss of control does not always mean that we have lost privacy.[18]

If my neighbor invents an X-ray device which enables him to look through walls, I should imagine myself thereby losing control over who can look at me: going home and closing the doors no longer suffices to prevent others from doing so. But my right to privacy is not violated until my neighbor actually does train the device on the wall of my house.

First, it is important to note how Thomson slides between non-normative and normative control-based accounts of privacy in this case. At the start of the case control is lost, but privacy is maintained because the individual who now has control does not exercise it. A control-based condition of privacy no longer obtains, yet a privacy right has not been violated. Sure enough this sounds odd but it is odd because I do not think that control-based privacy theorists actually intend to support a purely non-normative conception of privacy. To put the point another way, if we sprinkle normativity throughout the definition, privacy is an access control and use right to places, bodies, or personal information then Thomson's attack loses its force. Simply put, a condition of privacy obtains when others do not have access while a right to privacy affords control over access and use. Thomson continues with a second example. "Suppose a more efficient bugging device is invented: instead of tapes, it produces neatly typed transcripts (thereby eliminating the middlemen). One who reads those transcripts does not hear you, but your right to privacy is violated just as if he does.". Information may take many forms and thus it may be accessed in many different ways. If an individual has a right to control the access to an information source and uses some bits of information, then it does not matter how the information was accessed, what matters is that it was accessed. Thomson claims, while "you may violate a man's right to privacy by looking at him or listening to him; the invasion of Privacy in this case is no such thing as that of violating a man's right to privacy by simply knowing something about him." This seems true enough. However, by looking or listening you may be violating his right to control the access to information that provides the foundation for "knowing." Moreover and more importantly, you may be violating a use control right. If correct, it would seem that Thomson's critique of control-based definitions of privacy fails.

[18] Adam D. Moore, *Privacy Rights:moral and legal foundations418(* Penn State University Press 1st edn.2010)

Volume 11, July 2020 ISSN 2581-5504

d) Privacy Rights and Property Rights

If property rights and privacy rights are both essentially about control, then maybe privacy rights are simply a special form of property rights. Thomson tends to agree, "the right to privacy is itself a cluster of rights, and it is not a distinct cluster of rights but itself intersects with the cluster of rights which owning property consists in." Thomson is a reductionist about privacy. It is obvious that property may come in several forms. Intellectual property is generally characterized as non-physical property where owner's rights surrounds the control of physical manifestations. Intellectual property rights surround control of physical items, and this control protects rights to ideas for example, no matter how specific a poem is instantiated (written, performed orally, or saved on a website), copyright would apply. Rights to control physical goods, on the other hand, allow control over one physical object. Privacy may be understood as a right to control access to places and ideas independent of instantiation. In terms of location, privacy yields control over access to one's body, capacities and powers .A privacy right in this sense is a right to control access to a specific object or place. In Prosser's terminology, intrusions would violate rights to control access to a specific object but we may also control access to sensitive personal information about ourselves. In this sense, a privacy right affords control over ideas no matter how these ideas are instantiated. For example, when a rape victim suppresses the dissemination of sensitive personal information about herself, she is exercising a right to control a set of ideas no matter what form they take. It matters not if the information in question is written, recorded, spoken, or fixed in some other fashion. More importantly, even if someone has justifiably accessed sensitive personal information about another, it does not follow that any use of this information is permitted. Again, taking up Prosser's categories, publishing private facts, putting someone in a false light, or appropriating someone's image or style would violate a right to control an entire class of ideas. While there may be substantial overlap between the notions of property and privacy, it is advantageous to retain the category as we do with intellectual property. If I am correct, privacy claims include claims to control access to places and ideas. This fact alone marks a significant category even if it is a category that falls under the umbrella of property rights. Consider the following worry raised by Thomas Scanlon: "Suppose someone used an X-ray device to examine an object in my safe. It seems clear to me that the right which is violated in such a case does not depend on the fact that I own the object in question. Suppose it is your object; suppose it is someone else's; suppose there is no object in the safe at all. None of these possibilities removes the wrongfulness of the intrusion." Scanlon concludes that ownership and privacy pull apart in this case. Scanlon adds:

Suppose, for example, that each person was assigned a plot in the common field to use it as a place to bury valuables. Then anyone who X-rayed my plot without special authority would violate a right of mine. For us, ownership is relevant in determining the boundaries of our

Volume 11, July 2020 ISSN 2581-5504

zone of privacy, but its relevance is determined by norms whose basis lies in our interest in privacy, not in the notion of ownership.[19]

Assuming, however, that privacy rights are the rights to control access and use of the locations and ideas, these examples do not undermine a control-based view of privacy or the view that the concepts of privacy and ownership have significant overlap. If the object or objects were unknown, assuming that the safe and the plot of land are owned by nobody, then there would be no privacy invasion. Imagine that the object was a painting of a sunset painted by some long dead artist who gave the work to all of humankind. On the other hand, if we assume that the safe and the plot are owned then wrongness can be found in interfering with the control conferred by ownership. Scanlon may reply by arguing that the wrongness is found when someone unjustifiably intrudes and obtains knowledge about someone else say Crusoe finds out, by using an X-ray device, that Friday is keeping an unowned item in a safe. Such a reply, however, would seem to support a control-based definition of privacy. The wrongness in this case lies in the fact that Friday has a right to control access to certain kind of information and Crusoe has violated this control—in this case, the item examined may not be yours but the information in possession may be or consider another case provided by Thomson and discussed by Scanlon. In this case, suppose that you steal a subway map owned by the public and put it in your pocket or briefcase. Scanlon contends that if I were to view the map with my X-ray device I would violate your privacy rights independent of ownership. I am not entitled to look into your pocket or briefcase even if I do not interfere with your property rights for these items. I would agree with Scanlon fin acquiring the information on the subway map as I also acquired, inadvertently or not, personal information that belongs to you. But if my device were calibrated to only acquire the information found on the publicly owned subway map, then I would not agree that this acquisition includes a privacy violation. One of the problems with both Scanlon's and Thomson's analysis of privacy is that they provide few arguments. They both offer numerous examples that test and sometimes strain our intuitions about privacy. But perhaps our intuitions about these cases are unclear. If privacy is understood as having accessibility and control over use dimensions, then it is not surprising that there would be an overlap with the notion of the property.

Richard B. Parker writes:

Privacy is control over when and by whom the various parts of us can be sensed by others. By "sensed," is meant simply seen, heard, touched, smelled, or tasted. By "parts of us," is meant the part of our bodies, our voices, and the products of our bodies. "Partsofus" also includes objects very closely associated with us. By "closely associated" is meant primarily what is spatially associated. The objects which are "parts of us" are objects we usually keep with us or locked up in a place accessible only to us.[20]

[19] *Ibid*
[20] *Id* at 420

Volume 11, July 2020 ISSN 2581-5504

A right to privacy can be understood as a right to maintain a certain level of control over the inner spheres of personal information and access to one's body, capacities, and powers. It is a right to limit public access to oneself and to information about oneself. For example, suppose that I wear a glove because I am ashamed of a scar on my hand. If you were to snatch the glove away, you would not only be violating my right to property (the glove is mine to control), you would also violate my right to privacy—a right to restrict access to information about the scar on my hand. Similarly, if you were to focus your X-ray camera on my hand, take a picture of the scar through the glove, and then publish the photograph widely, you would violate a right to privacy. While your X-ray camera may diminish my ability to control the information in question, it does not undermine my right to control access. Privacy also includes a right over the use of bodies, locations, and personal information. If access is granted accidentally or otherwise, it does not follow that any subsequent use, manipulation, or sale of the good in question is justified. In this way, privacy is both a shield that affords control over access or inaccessibility and a kind of use and control right that yields justified authority over specific items—like a room or personal information. The normative claims surrounding control over access and use are relative to culture and species. Judith Wagner DeCew argues that this sort of definition fails because "if a police officer pushes one out of the way of an ambulance, one has lost control of what is done to one, but we would not say that privacy has been invaded. Not just any touching is a privacy intrusion." I think this sort of attack is too quick. First, whether or not a privacy invasion will have occurred in a case of "touching" will depend on the privacy norms found within the culture in question. A right to control access and use may take many forms. Thus, one cannot refute this definition by finding a single example where a loss of control over bodily access does not include a loss of privacy. Second, the case that DeCew presents may simply be an example of a slight privacy invasion being overridden by other more weighty considerations.

The right to privacy may also be helpful in defining a condition of privacy. In defining a condition of privacy we are trying to be descriptive rather than normative. My contention is that a plausible non-normative account of privacy begins with accessibility that is, the condition of privacy obtains when an individual, place, or personal information is inaccessible. More often than not, individuals voluntarily seek this condition. Weinstein notes, "if the condition is entered involuntarily, it is isolation while it becomes a matter of circumstance and ostracism when resulted by the choice of others. Either isolation or ostracism may become loneliness when accompanied by a desire for communication."[21] In many instances privacy is a condition of voluntary seclusion or walling off—individuals seek situations where they are inaccessible. The condition of privacy obtains when an individual freely separates himself from his peers and restricts the access. For those entities that lack free will, we may talk of separation rather than privacy. When an individual restricts access to himself and to personal information, we may say that a condition of privacy obtains. But there is more to a condition of privacy than voluntary seclusion—for example; one may have a measure of privacy simply by not being noticed. James Moor and Herman Tavani note that

[21] *Id* at p.421

Volume 11, July 2020 ISSN 2581-5504

a condition of privacy obtains "in a situation in which one is naturally protected or shielded from intrusion and access by others." I would add that artificial protections and shielding would establish a condition of privacy as well. In any event, if my earlier critique of Parent's non-normative conception of privacy is compelling, we should not be overly worried about defining a state or condition precisely. We are, and should be therefor concerned with the normative aspects of privacy. A right to privacy is a right to control access to and uses of places, bodies, and personal information.

Test Cases and Illustrations

Aside from the examples already mentioned, there are numerous other cases that may be helpful in illustrating and clarifying the account of privacy being defended. Another function of the cases already discussed and the ones that follow is to present a series of "on pain of rationality" arguments. If you agree with me on this or that case, and there are no relevant dissimilarities in some further case, then on pain of rationality you should agree with me in the latter case. This would be a powerful way to argue even if in the process we run afoul of some intuition or use of language. The overall goal is to aim at coherence as well as the completion. To begin, consider the following two cases.

The Loud Fight: Suppose that Fred and Ginger are having a fight shouting at each other with the windows open so that anyone on the street can hear.

The Quiet Fight: Suppose that Fred and Ginger are having a fight shouting at each other although the windows are closed and they have taken precautions to make sure that others cannot hear them. Suppose someone installs an amplifier on Fred and Ginger's house and listens to them.

In the loud fight case it would seem that Fred and Ginger have waived the right to privacy as they have via their actions allowed others who are in a public space to hear the fight. In fact, one might say that Fred and Ginger have imposed or foisted sound waves on others. In the typical case there is nothing wrong with speaking or being in public—or behaving in such a way that those in public spaces can hear or see us. Light waves and sound waves bounce around and the typical human is conditioned to perceive and interpret these inputs. Moreover, to condition ourselves otherwise would be dangerous and there are good reasons for passive reception and interpretations of sensory inputs. In these sorts of cases, privacy rights have been waived. A variation on the loud fight case is where Fred and Ginger use a sound and light encryption device to scramble their words and images. In this example, the person on the street can hear and see something but cannot understand these inputs. Here Fred and Ginger are not waiving their privacy rights. If someone were to decrypt the words and images, then there would be a privacy violation. This is similar to the quiet fight case where technology is used to peer into a private zone. Notice that part of what determines the boundary or scope of a right are the capacities of the individuals involved. For example, consider a case where everyone has superman ears that cannot be turned off. In this instance,

Volume 11, July 2020 ISSN 2581-5504

any utterance will be noticed by others. If we apply the "ought implies can" principle that is, you can only have a moral obligation to do or refrain from doing something if it is within your capacities to do or refrain from what is required then we cannot have an obligation not to notice the words of others. Similarly, if humans were inherently clumsy and lost control of their bodies frequently, the boundary or force of property rights would have to be modified. If individuals could not help but to fall onto the property of others, then they could not have an obligation to refrain from doing so. Developing a full account of when and how rights are waived and the extent or boundary of rights is beyond the scope of this work. Nevertheless, it seems that two tentative points can be offered. First, the boundary or extent of rights is dependent, in part, on the capacities of the agents in question. Second, rights, in part, are waived given general expectations regarding the capacities of individuals and the behavior of the right-holder. Consider a case that helps to illustrate these points.

The Loud Fight: Just like the first version although this time a deaf person is walking nearby and turns up his hearing aid and listens to Fred and Ginger.

While an individual uses technology in this example to hear what Fred and Ginger are saying, we should not conclude that privacy has been violated. As in the loud Adam Moore fight example, Fred and Ginger have certain expectations related to the sensory inputs of their fellows and knowingly or negligently engage in behavior that places personal information into a public space. Thus, they have waived their right to privacy in this case. But if Fred and Ginger were to use a sound and light encryption device and the deaf person in question were to decrypt the words and images via technology, then we would have a violation. Consider a different sort of this case.

The Accidentally Amplified Quiet Fight: A married couple, X and Y, are having another quiet fight behind closed doors but this time an unanticipated gust of winds weeps through the house, knocking down the front door, carrying and amplifying the couple's voices so that Stuart, who is washing his car in his driveway across the street, hears at least some of what X and Y have been saying.

In the accidentally amplified quiet fight case the right to privacy is not waived and it also appears not to be violated. A similar case is one where an innocent is forcibly picked up by a freak gust of wind and placed in your car. You have not waived your property right and at the same time it would seem quite odd to maintain that your rights have been violated. It could be argued that a right has been violated and that there are mitigating factors. But if we also say that rights violations sanction compensation for losses, then we would have a case where an innocent could be forced to pay damages to a right-holder where suppose the mere violation of a right causes a loss. I would rather say that the right has not been violated, it has just been innocently crossed and no compensation is required. To be sure, the person in your car must leave and your neighbour who has learned certain facts about you should refrain from broadcasting this information that these innocent individuals have come to acquire something

Volume 11, July 2020 ISSN 2581-5504

of yours. The aspect of privacy related to boundary crossings privacy as control over access is highlighted in cases where certain zones are penetrated.[22]

Zone Intrusion: Suppose you look in my safe with your X-ray device to see what it holds there could be a stolen photo, a borrowed photo, or nothing.... Mere Zone Intrusion: Just like the first zone intrusion case although the person looking has no short-term memory and will forget any fact learned immediately.

In the case of zone intrusion a right to control access has been violated even though nothing except a bare fact has been seized. This is further illustrated by the example of mere zone intrusion. In the second case, nothing has been taken, no facts have been learned, all that has happened is at a zone or boundary and has been unjustifiably crossed. A variation of the mere zone intrusion case is one where someone with no short-term memory completes a body cavity search of an individual who is temporarily unconscious. While no information is obtained or used, it seems clear that a zone or boundary has been violated.

In the given example physical or locational privacy rights have been infringed. Perhaps it is this sort of case where privacy and property begin to pull apart.

Consider the following two examples:

Gossip: Two friends of yours engage in gossip about you without breaking any confidences etc. Gossip Case: Smith is recently divorced because he became impotent shortly after the wedding. He shares this information with his closest friend Jones, also a friend of Smith, innocently overhears Smith telling his friend and begins to gossip with other friends.

In the first gossip case, given that you have granted access via the relationship with your friends and no agreement or trust has been broken, there is no worry on the account of privacy being offered. In the second case, however, we have A violation but not a violation in access as Jones innocently overhears Smith. But just because there was no infringement related to access does not mean that Jones can use, manipulate, or broadcast the information in question. Thus the account being defended can offer a defensible answer to the worry being posed in these gossip cases. Finally, there are several examples that trade on the overlap between solitude, nuisance, coercion, and privacy.

Loud Stinky Neighbours: Your neighbours make a terrible racket all the time or they cook foul smelling meals....

Easy Listening Everywhere: Suppose after a vote the city where you live puts up loud speakers everywhere and play easy listening music in all public places.

Sensitive Information Assault: Suppose a stranger stops you at a party and begins telling about intimate personal information and problems he is having.

[22] Adam D. Moore, *Privacy Rights: moral and legal foundations422(* Penn State University Press 1st edn.2010)

In each of these cases there is an intrusion, a placement of unwanted information, smells, sounds, and images into an area of access to control. As examples of mere access violations, it may be granted that there is an aspect of privacy involved. Nevertheless, the typical privacy violation on the account being offered contains both access and use violations; there is not a placement of unwelcome information, smells, sounds, and images but rather an unjustified taking of information or use of some physical item. Thus, there may be other, more important, aspects to these cases than privacy considerations. For example, in cases of sensitive information assault there is a kind of coercion involved in hijacking of someone's time and consideration. Loud, stinky neighbours and invasive music in public places intrude on individual solitude, and in the worst cases violate peaceful sanctuaries of contemplation. Thus these cases may not primarily focus on privacy interests[23].

THE RIGHT TO PRIVACY – INTERNATIONAL OBLIGATIONS

UDHR 1948 in Article 12 and ICCPR 1966 in Article 17 give protection to the concept of privacy. Though freedom of speech and expression given in Article 19 of the UDHR 1948 and ICCPR 1966 was enshrined in Article 19(1)(a) of the Indian Constitution[24] We do not find such constitutional recognition given to privacy in India. Here, privacy is not given any separate constitutional status. Right to life, liberty and security of person is enshrined in Article 3 of the UDHR 1948. This is recognized in Article 21 of the Indian Constitution. Privacy was not included in this Article. In *Nihal Chand* v. *Bhagwan Dei case* during the colonial period, as early as in 1935, the High Court recognized the independent existence of privacy from the customs and traditions of India. But privacy got recognition in free India for the first time in *Kharak Singh case*[25]. In *Kharak Singh* v. *State of U.P.case*, the Supreme Court struck down domiciliary visits by the police as it violates Article 21. But it was in the minority view given in this case by justice Subha Rao that privacy got a recognition as a right included in Article 21 of the Constitution. In this case the apex court recognized privacy as part of right to life and personal liberty. Privacy was recognized as a separate right in UDHR 1948. This has failed to materialize in the same spirit as a fundamental right in the Indian Constitution, like the right to speech and expression and right to life[26]. Article 3 of the UDHR 1948, protects life and personal liberty, not privacy. In India privacy is described as part of right to life and personal liberty in Article 21 of the Constitution as there is no separate provision for privacy in the Constitution. Privacy has been defined by Supreme Court in *Sharada v. Dharampal*[27] *case* as 'the state of being free from intrusion or disturbance in one's private life or affairs'. This is different and distinct from the life and liberty in Article 21 of the Constitution.

[23] *Id at p.423*
[24] Dr. Rajiv Jain And Mr. Mukesh Shukla , *Media Law 24* (university Book House Pvt. Lmt., Jaipur, 1st edn, 2011)
[25] *Kharak Singh* v. *State of U.P. and Others* 1964 S.C.R. (1) 332.
[26]Dr. H.O.Agarwal, *International and Human Rights*785 (Central Law Publication, Allahabad, 21st edn. 2016). U.D.H.R. 1948- Article 3- Everyone has the right to life, liberty and security of person.
[27] *Sharada* v. *Dharampal*, (2003) 4 S.C.C. 493.

Volume 11, July 2020 ISSN 2581-5504

INDIAN VIEW

India is member of the United Nations Organizations, so it is bound by Article 12 of the Universal Declaration of Human Rights 1948 to bring in statutory enactments to keep itself in tune with the International Commitment. Further, India has also ratified the International Covenant on Civil and Political Rights, 1966. India does not give privacy a fundamental right status, while freedom of speech and expression is given protection under Article 19(1).

(a) Privacy is not even enumerated among the reasonable restrictions to the right to freedom of speech and expression enlisted under Article 19(2). Nevertheless the Courts have protected this right to privacy to some extent not just under tort law but also under article 21 and under the reasonable restrictions enumerated in Article 19(2) of the Constitution. Under the tort law, a personal action for damages would be possible for unlawful invasion of privacy. In these cases, the publisher and printer of Journal, magazine or book or the broadcaster and producer of a broadcast would be liable in damages. These would arise basically in relation to matters concerning the private life of the individual, which includes the family, marriage, parenthood, children and his sexual life. Let us have a look at some of them[28].

RESTRICTIONS/LIMITATION TO RIGHT TO PRIVACY IN FREEDOM OF PRESS I.E ARTICLE 19(2)

- **Morality and Decency**

One of the restrictions imposed on right to free speech and expression is in the interest of 'morality' and 'decency'. There are several legislative provisions governing these two elements[29]. Apart from these provisions there are some judicial decisions also. These two

[28] Dr.Sunil Deshta And Dr. Pratab Singh, *Human Right In India* 67 (Allahabad Law Agency, Haryana,Ist edn. 2004)

[29] The Indian Penal Code, 1860, section 292 – 294 makes the sale, letting to hire, distribution, public exhibition, circulation, import, export and advertisement of obscene material an offence punishable with imprisonment and fine.
The Dramatic Performances Act, 1876, Preamble Section 3 (c): section 6 gives the government the power to prohibit public dramatic performances on the ground of obscenity and in case of violation imprisonment and fine follows. The Post Office Act 1898, Section 20: prohibits the transmission by post any material on the ground of decency or obscenity.
The Cinematograph Act, 1952 –section 5 B prohibits the certification of a film by the Censor Board for Public exhibition of the film or any part of it is against the interest of morality and decency.
The Young Persons (Harmful Publications), Act 1956 section 2 (a) 3-7, prohibits publications which could corrupt a child or young person and invite him to commit crimes of violence or cruelty etc. A contravention is punishable with imprisonment and fine.
The Customs Act 1962, section 11 (b) empowers the government to prohibit or improve conditions on the import or export of goods in the interest of decency and morality.
The Indecent Representation of Women (Prohibition), Act 1986 Section 3-6 prohibits the indecent representation of women through advertisements or other publications, writings, paintings, figures etc and makes the contravention punishable with imprisonment and fine.
The Cable Television Networks (Regulation), Act 1995 – section 5, 6, 16, 17, 19, 20 read with the Cable Television Network Rules, 1994 prohibits the telecast of programmes on cable television, which offend decency and morality and on contravention amounts to imprisonment and fine.

terms have no specific meanings. These change according to the value system of a given society. It changes from one generation to another; and also from one Judge's perspective to another[30].

In *Chandra Kant Kalayandas Kakodkar* v. *State of Maharashtra*[31] *case* the Supreme Court observed that such notions vary from country to country depending on their moral standard. But even within the same country, like India as you cross a few hundred kilometers, morality changes at varying lengths. This makes it very difficult to straight jacket these concepts.

- **Obscenity**

The definition of obscenity has been given by the Supreme Court as the quality of being obscene which means offensive to modesty or decency; lewd, filthy and repulsive[32]. Distinction between obscenity and indecency is that while everything obscene is indecent, everything indecent is not obscene. Obscenity is quiet repulsive and provocative. Vulgarity is another aspect of it. In *Samaresh Bose* v. *Amal Mitra*[33] *case*, the Supreme Court held that a vulgar writing is not necessarily obscene. Vulgarity arouses a feeling of disgust, revulsion and also boredom but does not have the effect of corrupting the morals of any reader, whereas obscenity has the tendency to corrupt those whose minds are open to such influences. In *Lady Chatterley's Lover*[34], the Supreme Court stated that:

Sex and nudity in art and literature cannot be regarded as evidence of obscenity without something more. If the rigid test of treating sex as the minimum ingredient were accepted, then hardly any writer of fiction today would escape the fate Lawrence had in his days'[35]. Similarly in *Bobby Art International* v. *Ompal Singh Hoon*[36] *case*, where a member of the Gujjar community filed a petition seeking to restrain the exhibition of the film '*Bandit Queen'* on the ground that it was a slur on the womanhood in India and that the rape scene in the film was suggestive of the moral depravity of the Gujjar Community. Here the Supreme Court drew distinction between nudity amounting to obscenity and nudity which does not amount to obscenity. The Court stated that frontal nudity which the petitioner contended amounted to indecency within Article 19(2) and section 5-B of the Cinematograph Act and was not to arouse prurient feelings but revulsion for the perpetrators. Thus the Court rejected the petitioner's contention.

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

[30] Prof. Narender Kumar, *Constitutional Law Of India* 267 (Allahabad Law Agency ,Haryana,(th ed,2016).

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

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

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

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

[35] Rajiv Jain And Mukesk Shukla, *Media And Law* 46 (University Book House Pvt. Lmt., Jaipur 1st 2018)

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

Volume 11, July 2020 ISSN 2581-5504

All sex or sex connected matters are therefore not obscenity amounting to indecency. In *K.A. Abbas* v. *Union of India*[37] *case,* the Supreme Court observed that it was wrong to classify sex as essentially obscene or even indecent or immoral. The Court criticized the failure of parliament and the central government to separate the artistic and socially valuable from the obscene and indecent. It said that the law showed more concern for the depraved rather than the ordinary moral man. In *R.* v. *Hecklin*[38] *case*, it was laid down that the effect of a publication on the most vulnerable members of the society is the determining factor and whether they were likely to read it or not is immaterial. Even if literary merit was there, the defense was not available. Although, the *Hecklin 's test* was overruled in England by the enactment of the Obscene Publications Act 1959, in India the Supreme Court of India adopted the *Hecklin's test* in *Ranjit D. Udeshi* v. *State of Maharashtra case*[39]. This case was concerning the conviction of a bookseller and his partners for being in possession of a book containing 'obscene' material. Lawrence's' *Lady Chatterley's lover* was the book in question. The court relied on *Hecklin*'s test and interpreted the word 'obscene' to mean a thing which is 'offensive to modesty or decency; lewd, filthy and repulsive. *Hecklin*'s test was later replaced by the likely readers test recognized under section 292 (1) of the Indian Penal Code 1860[40]. Here the question was whether it was possible that those who are likely to read it may get access to it. The test was based on the '*target audience'*. Thus in *Chandrakant Kalyandas Kakodkar* v. *State of Maharashtra*[41] *case,* the Supreme Court laid this new test. It stated that: 'it is duty of the Court to consider the article, story or book by taking an overall view of the entire work and to determine whether the obscene passages are so likely to deprave and corrupt those whose minds are open to such influences and in whose hands the book is likely to fall; and in doing so the influences of the book on the social morality of our contemporary society cannot be overlooked'[42].Similarly, in *Samaresh Bose*[43] *case* the Supreme Court held that while judging whether there is obscenity the Judge should place himself in the position of a reader of every group in whose hands the book is likely to fall and should try to appreciate what kind of possible influence the book is likely to have on the minds of the readers.

[37] *K.A. Abbas* v. *Union of India* (1970) 2 S.C.C. 780.
[38] *R.* v. *Hecklin* (1868) L.R. 3 Q.B. 360
[39] *Ranjit D. Udeshi* v. *State of Maharashtra* A.I.R. 1956 S.C. 881.
[40] Prof. S.N. Misra,Indian Penal Code440(Central Law Publication, Allahabad 19th edn. 2013)
Section 292(1) of Indian Penal Code, 1860-For the purposes of subsection (2) a book, pamphlet, paper , writing , drawing , painting , representation, figure or any other object shall be deemed to be obscene if it is lascivious or appeals to the prurient interest or if its effect, or (where it comprises two or more distinct terms) persons who are likely , having regard to all relevant circumstances to read, see or hear the matter contained or embodied in it.
[41] *Chandrakant Kalyandas Kakodkar* v. *State of Maharashtra* (1969) 2 S.C.C. 687.
[42] *Ibid*
[43] *Samaresh Bose* v. *Amal Mitra* (1985) 4 S.C.C. 289.

Volume 11, July 2020 ISSN 2581-5504

PRIVACY UNDER ARTICLE 21

Article 21 of the Indian Constitution clearly gives protection to life and personal liberty[44]. In this perspective, though in different factual base, the Supreme Court for the first time recognized the '*Right to Privacy'*. It was in *Kharak Singh* v. *State of U.P.*[45] *case*, that majority of the Bench Struck down domiciliary visits as being unconstitutional. Though they were yet unreceptive to the idea of privacy, the minority view by Justice Subha Rao held that Article 21's concept of liberty included privacy[46].

He stated: 'It is true that our Constitution does not expressly declare a right to privacy as a fundamental right, but the said right is an essential ingredient of personal liberty. Every democratic country sanctifies domestic life; it is expected to give him rest, physical happiness, peace of mind and security. In the last resort, a person's house, where he lives with his family, is his 'Castle'.

Later the Supreme Court continued to elaborate on this issue of privacy. In a series of cases concerning journalists seeking permission from the court to interview and photograph prisoners, the Court held that the press had no absolute right to interview or photograph a prisoner unless he consented to it. Though right to privacy was not the question, the Court impliedly acknowledged the right to privacy. In *R. Rajagopal* v. *State of T.N.*[47] *case*, which is the watershed in the field of privacy, the Supreme Court discussed the right to privacy in the reference to Media. It was concerning the right of the publisher of a magazine to publish the autobiography of '*Auto shanker'* who was a condemned prisoner. The State contended that it exposed same sensational links between the police authorities and the criminal, so it was likely to amount to defamation and therefore should be restrained. It was in this context that privacy came up. The Supreme Court held that the press had every right to publish the autobiography of *Auto shanker* to the extent, as it appeared from the public records, without any permission. In case the publication went beyond the public record and published his life story, then it would amount to an invasion of his right to privacy. Here the Court regarded privacy in two aspects – firstly as a tortuous liability, which gives an action for damages for invasion of privacy. Secondly – 'a right to be left alone' implicitly read into the right to life and liberty in Article 21.In another similar case regarding Khushwant Singh's book '*Truth, Love and a Little Malice'*, the then Union Minister for Animal Welfare, Ms. Maneka Gandhi, gave a petition in the Supreme Court stating that certain contents of his book, even if true, violated her right to privacy. The High Court held that 'well established principles' weigh in favor of the right of publication and there was no question of any irreparable loss or injury since respondent herself has also claimed damages which will be the remedy in case she is able to establish defamation and the appellant is unable to defend the same as per law. In an

[44] Narender Kumar, *Constitutional Law Of India* 341 (Allahabad law Agency,Haryana ,19th edn, 2016)
[45] *Kharak Singh* v. *State of U. P. and Others* 1964 S.C.R. (1) 332
[46] *Id.* at p. 359
[47] *R. Rajagopal* v. *State of T.N.* (1994) 6 S.C.C. 632.

earlier case though in London[48], Ms Maneka Gandhi had won a libel suit against British writer Katharine Frank and her publishers, who had written Indira Gandhi's biography. She won an apology and damages along with deletion from the book of the offending passage referring to Sanjay and Maneka Gandhi's alleged involvement in the cover-up of a murder in 1976. In India this case failed as India had no law to protect the privacy and family of a person. In *Kaleidoscope (India) Pvt. Ltd.* v. *Phoolan Devi*[49] *case,* where Phoolan Devi, one of India's most dreaded dacoit at one time, sought an injunction to restrain the exhibition of the controversial biographical film "Bandit Queen" in India and abroad. The Court stated that the film infringed her right to privacy. Though she was a public figure, whose private life was exposed to the press and though she had assigned her copyright in her writings to the film producers, still private matters relating to rape or the alleged murders committed by her could not be commercially exploited as news items or as matters of public interest.

But in *Bobby Art International* v. *Om Pal Singh Hoon* [50] case when the Supreme Court was confronted with the contention that Bandit Queen was a slur on the womanhood of India , the Court rejected the petitioner's contention that the frontal nudity was indecent within Article 19(2) and section 5-B of the Cinematograph Act 1952. The object of the scene, the Court said was to bring revulsion for the perpetrators, so there is no indecency in the scene. Here the result of the decision was that even rape scenes can be shown, as public interest outweighs privacy in India. Right to privacy was read into Section 5(2) of the Telegraph Act, 1885 by the Supreme Court in *People's Union for Civil Liberties* v. *Union of* I*ndia*[51] *case* which allowed interception of messages in cases of public emergency or in the interest of public safety. The Court held that the right to privacy included the right to hold a telephone conversation in the privacy of one's home or office and that telephone tapping infringed this right to privacy. The government had failed to establish proper procedure under section 7(2) (b) of the Act to ensure procedural safeguards.

TORT – PROTECTION OF PRIVACY

Following the common law system of adjudication India has adopted the principle of precedent system of adjudication. In this context, the Courts in India have recognized the tort law as a tool for preserving the individual's honor and esteem. The main offence prohibited by common law is defamation. Every person has the right to be respected. Reputation is an integral aspect of the dignity of an individual. As stated in *State of Bihar* v. *Lal Krishna Advani*[52] case, right to reputation is a facet of the right to life. Where any authority, in discharge of its duties traverses into the realm of personal reputation, it must provide a chance to the person concerned to have a say in the matter. Indian Courts have come to give protection to reputation but at the same time they have defended the press also. Where the

[48] *Ibid*
[49] *Kaleidoscope (India) (P) Ltd.* v. *Phoolan Devi* ,A.I.R. 1995 Del . 316
[50] *Bobby Art International* v. *Om Pal Singh Hoon* (1996) 4 S.C.C.1.
[51] *People's Union for Civil Liberties* v. *Union of India* (1997) 1 S.C.C. 301.
[52] *State of Bihar* v. *Lal Krishna Advani* (2003) 8 S.C.C. 361

publisher, when he published the news item did not know of the existence of the plaintiff and later had published a correction in his paper, the Court held that he was not liable for the defamation[53]. This would not have been the course of action in UK. Such a case would come under the Defamation Act 1996[54] and now it would come under the Human Rights Act 1998 in UK. In UK, for a similar error would cost the press heavily in terms of money despite giving apology in the next issue. That would have a deterrent effect[55].

REFERENCE TO THE PLAINTIFF

Defamation requires that the plaintiff should be identified by name or description or position or photograph or by anything which would enable the reader or viewer to know or recognize him, which would consequently cause defamation. Even if the libel statements are not made directly against a person but he is aggrieved by them, he has the right to maintain a complaint[56]. In *John Thomas* v *Dr. K. Jagdeesan*[57] *case*, it was held that, the words 'by some person aggrieved' indicates that the complainant need not be the defamed person himself. Here therefore it was held that the director of an organization against which defamatory statements are made could be the aggrieved person. In *G. Narasimhan* v. *T.V. Chokkappa* [58] *case* it was held that if a defined group is defamed, then under Criminal Procedure Code (1973), section 199- No Court shall take cognizance of an offence under chapter XXI of the Indian Penal Code except on a complaint made by *some person aggrieved by the offence.* Chapter XXI of the Indian Penal Code 1860 deals with defamation, having sections 499- 502. Member of that group can file a complaint, even if it does not specifically mentions his name.

PUBLISHED OR BROADCASTED BY THE DEFENDANT

The law of defamation comes into operation only when the statement is published to another person or persons other than the persons defamed. Where copies of such statement are sent to others it amounts to defamation. It is enough if it is told to just one person. In *Mahendar Ram* v. *Harnandan Prasad*[59]*case*, the defendant had sent a registered notice to the plaintiff containing defamatory allegations against him. It was written in Urdu with which the plaintiff was not conversant so he got another person to read it in the presence of some other persons. In this case, the Court does not take it as publication because there was no evidence to show

[53] *T.V Ramasabha* v. *A.M. Ahmad Mohideen* A.I.R. 1972 Mad. 398.
[54] The Defamation Act 1996, section 2(4) - An offer to make amends under the section is an offer- (a) to make a suitable correction of the statement complained of and a sufficient apology to the aggrieved party.(b)- to publish the correction and apology in a manner that is reasonable and practicable in the circumstances and
(c)- to pay to the aggrieved party such compensation (if any) and such costs , as may be agreed or determined to be payable
[55] *Hulton* v. *Jones*. [1910]A.C.20- *Artemus Jones* described as a church Warden, accused of living with a mistress in France. It was a fictional figure, but court awarded the person of that name damages
[56] *Cassidy* v. *Daily Mirror Newspapers Ltd.* [1929]2 K .B.331-paper published photographs of the plaintiff 's husband with an unnamed lady, announcing their engagement , which was not so. The paper had to give damages.
[57] *John Thomas* v. *Dr. K. Jagadeesan* (2001) 6 S.C.C. 30.
[58] *G. Narasimhan* v. *T.V. Chokkappa* (1972) 2 S.C.C. 680
[59] *Mahendar Ram* v. *Harnandan Prasad* A.I.R .1958 Pat. 445.

that the defendant knew that the plaintiff did not know the Urdu script. In *Re. S.K. Sundaram*[60] *case*, where an advocate sent a telegram to the then Chief Justice of India, containing contemptuous and defamatory statements against the then Chief Justice, it was held that sending a telegram amounts to publication since both before and after transmission the message is read by the telegraphic staff. If it was sent in a letter form then it will not amount to defamation.

DEFENCES AVAILABLE IN CASE OF INFRINGEMENT OF RIGHT TO PRIVACY

- **Truth as Defense**

In all cases of defamation truth cannot be taken as a defense. It is a defense in case of civil action for libel or slander. In case of criminal prosecutions under Indian Penal Code, this defense of truth has not been recognized[61]. It has to be proved that the publication was made in public faith and for the public good[62]. In *Sewakram Sobhani* v. *R.K.Karanjia*[63] *case*, a magazine had published a report that a female detainee in the Bhopal Central Jail had become pregnant through the appellant, a politician. This news report had been made from a government enquiry report. The Court held public good as a defense under the ninth exception to section 499 of the Indian Penal Code, 1860. The justification was that the prison being a public institution should be disciplined properly. And this news was based on reliable sources in good faith for public good. A defamatory statement should be genuine so as to come under the defense of justification by truth. Mere belief that it was thought to be genuine is not enough. It must be proved to be true and genuine. In case of truth as defense, the defendant has to establish it. All defamatory statements are presumed to be false and it is for the defendant to rebut this presumption[64].

- **Fair Comment**

Just like justification by truth, the defense of fair comment is also a complete defense against an action for defamation. These defenses are needed for media; otherwise its working can be affected, which is to bring forth opinion, fair comment and criticism[65]. To get protection

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

[61] Prof.S.N.Misra,*Indian Penal Code.*901(Central Law Publication,Allahabad,19th edn, 2013).
Chapter XXI:Defamation- section 499: Whoever , by words either spoken or intended to be read , or by signs or by visible representations, make or publishes any imputation concerning any person intending to harm , or knowing or having reason to believe that such imputation will harm, the reputation of such person , is said, except in the cases hereinafter expected , to defame that person .**Ninth exception** – Imputation made in good faith by person for protection of his or other's interests-It is not defamation to make an imputation on the character of another provided that the imputation be made in **good faith for the protection of the interests of the person making it, of any other person or for the public good.**

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

[63] *Ibid.*

[64] *Mitha Rustomji* v. *Nusservanji Nowroji*, A.I.R. 1941 Bom. 278.

[65] Winfield and Jolowicz, *Tort* 601 (W.V.H Rogers Sweet And Maxwell South Asian 18th edn.)

under the ninth exception to section 499 of the Indian Penal Code 1860, both public good and good faith have to be established[66]. Even the contempt of court proceedings after the Contempt of Court (Amendment) Act, 2006, truth is maintained as a defense to contempt action[67].

- **Sub Judice Reporting**

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

In *Saibal Kumar* v. *B.K. Sen*[68] case, the Supreme Court held that it is improper for a newspaper to conduct parallel investigation into a crime and publish its results. Trial by newspapers must be prevented when trial is in progress in a tribunal of the country. The reason being, that this interferes with the cause of justice. Reporting is different from investigation of the same matter. Reporting is the function of the media to give the public, knowledge concerning the administration of justice that is taking place. Formation and expression of opinion is needed to safeguard against judicial error. Beyond reporting of cases, moving into conducting the investigation alongside the governmental system is overstepping by the media. Various opinions expressed in the media reports can bring in prejudice to the mind of the judges. In *Saroj Iyer* v. *Maharashtra Medical (Council) of Indian Medicine*[69] *case*, the Court held that as a part of the open justice system, the journalists have a fundamental right to attend proceedings in Court under Article 19(1) (a) of the Constitution. They have a right to publish a faithful report of the proceedings in the Court. So this fundamental right of the press is along with the duty to publish or broadcast things witnessed by them in the Courts and not to couple and mix it with their investigation report.

VARIOUS LEGISLATIVE PROVISIONS RELATING TO RIGHT TO PRIVACY

- **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. 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

[66] *Harbajan Singh* v. *State of Punjab* A.I.R. 1966 S.C. 97.
[67] The Contempt of Courts (Amendment) Act, 2006, section 2, substitutes section 13 of the Contempt of Courts Act, 1971
[68] *Saibal Kumar* v. *B.K. Sen* A.I.R. 1961 S .C 633.
[69] *Saroj Iyer* v. *Maharashtra Medical (Council) of Indian Medicine* A.I.R. 2002 Bom. 97.

Volume 11, July 2020 ISSN 2581-5504

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. Public figures who hold public offices, and by their own conduct give scope to criticism from the media, cannot issue complaints against such criticism. 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 able to afford the same degree of privacy as a private individual does. 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. 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.'[70]

- **The following provisions of the Norms of Journalistic Conduct speak to the privacy principles:**
  Press Council of India - Norms of Journalistic Conduct, 2010
  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. 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.

a) 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.

For obtaining information in respect of private acts done or conducted away from the public gaze, the press should not use surveillance technologies.
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.

[70] M.Neelamalar,*Media Law and Ethics68*(PHI Learning Pvt. Ltd. New Delhi,1st edn.2010)

Volume 11, July 2020 ISSN 2581-5504

b) Disclosure of Information:

The provisions in the Official Secrets Act, 1923[71] which speak of what material is protected from disclosure are binding to the press.

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. Minor children and infants who are the offspring of sexual abuses or forcible marriages should not be identified or photographed.

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. This in affect gives a blessing to sting operations which would infringe the privacy of individuals in the public interest.

c) Caste identification of a person or a particular class should be avoided

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 penalize if they choose to voluntarily disclose the source.

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.

d) Verification and Quality

Any report or article that is of public interest and benefit, but 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. Newspapers should not publish anything that is manifestly defamatory or libelous unless the publication will be for the public good. Personal remarks which can be construed to be derogatory against a dead person should not be published. 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 "Nirbhaya 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

[71] *Id* at 49

Volume 11, July 2020 ISSN 2581-5504

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, 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.

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.[72]

- **Cable Television Network Rules, 1994**

a) Disclosure of Information:

1. No program should be carried by the cable service which contains material that is obscene, defamatory, or deliberately false. 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.
2. No program should be carried by the cable service which contains content that is against the integrity of the President and Judiciary.
3. Penalty/ Redress: Offence Fine Imprisonment
   For any contravention of the provisions found in the Act.28, there is a provision of Rs. 1,000 fine and Two years imprisonment.
   Any person aggrieved by a decision of the court adjudicating on the confiscation of equipment, may appeal the decision.[73]

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:

[72] *Ibid* at 155
[73] *Id* at p.159

b)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, Offence 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.

- **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.[74] 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 court has prohibited the publication of all information relating to the proceedings.

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" there is a provision of Six months imprisonment and Rs. 2, 000 penalty as fine.

[74] M.Neelamalar,*Media Law and Ethics55*(PHI Learning Pvt. Ltd. New Delhi,1st edn.2010)

Volume 11, July 2020 ISSN 2581-5504

- **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.[75]

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;" 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. 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.

[75] Vakul Sharma and Seema Sharma ,*Information Technology Law and practice13 (Universal lexis Nexis Haryana 6th edn.2019*

Volume 11, July 2020 ISSN 2581-5504

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. 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. 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 far before the information was taken down. Unless this provision can be brought within the confines of the section of Disclosure of Information, Intermediaries are required to provide the various 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. 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 to 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 and under what section would authorise this 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. The intermediary must report cyber security incidents and share all related information with the Computer Emergency Response Team. 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. These security measures could be read as prohibiting ISPs from installing backdoors or malware into their systems, hence ensuring greater privacy protection.

Volume 11, July 2020 ISSN 2581-5504

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. 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 Cybercafé Rules, 2011**

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 Guidelines take away ability of Cyber Café users to browse anonymously without having their online activity monitored, stored, and retained.

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. 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 .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. A log registers containing the required information for a period of one year. Online copies of the log register are to be maintained and must be authenticated with an electronic or digital signature. 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. The cybercafé owner must store and maintain backup register logs for at least one year.[76]

These logs must include:

1. History of websites accessed using computer resource at cyber café
2. Logs of proxy servers installed at cyber café.

The extensive data retention regime created by the Rules serves to dilute privacy. The

[76] [76]Vakul Sharma and Seema Sharma ,*Information Technology Law and practice26 (Universal lexis Nexis Haryana 6th edn.2019*

Rules should minimize the amount of information collected and create a deletion policy for retained information.

3. Security: Cybercafés must take all precautions necessary to ensure that their computer systems are not used for illegal activities. 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. 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.
4. Disclosure of Information: The cybercafé must submit hard and soft copies of the monthly report of the log register by the 5th day of every month to the person or agency specified by the Department of Telecommunications. 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. 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.
5. 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. 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. 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. As was done in the case of the program aired by TV, complaints can be filed against any of the broadcasters that are members of NBA on whom the Code of Ethics is binding[77].

Vulnerable Matters

An ordinary citizen needs to know subjects and events of public interest. This right does not however go to the extent of knowing the name of the rape victim or family problem of a public figure. These information's do not fall within the category of newsworthiness of the news. It was stated in *State of Punjab* v. *Gurmit Singh*[78] *case*, that the identity of rape victims should be protected not only to save them from public humiliation but also to get the best available evidence which the victim may not be in a position to provide if she is in public. In *People's Union for Civil Liberties* v. *Union of India*[79] *case*, the Supreme Court further upheld the validity of section 30 of the Prevention of Terrorism Act, 2002, regarding holding of in-camera proceedings for the protection of a witness whose life is in danger. In these cases, the identity and address of the witness is kept secret. There are so many enactments providing in-camera procedures and protection of the identity and other details of persons associated with the case. So it is implicit in the Indian Law that

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

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

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

[77] Available At http://www.ehcca.com/presentations/privacysymposium1/steinhoff_2b_h1.pdf visited on 7th Mrach at 11 am.
[78] *State of Punjab* v. *Gurmit Singh*, (1976) 2 S .C .C. 384, pp. 404-05.
[79] *People's Union for Civil Liberties* v. *Union of India* (2004) 9 S .C .C. 580.

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

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

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

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

Information Technology Act 2000, section 72- Breach of Confidentiality and Privacy- Save as otherwise provided in this Act or any other law for the time being in force, if any person who, in pursuance of any of the powers conferred under this Act, rules or regulations made there under , has secured access to any electronic record, book, register, correspondence, information, document or other material without the consent of the person concerned discloses such electronic record, book, register, correspondence, information , document or other material to any other private and confidential matters[80] in certain cases should be given utmost protection. But this is not enough, it has to be put in practice by the courts by strict gagging orders, as is done in UK where in *Baby P* abuse case, the High Court released the names of the couple who abused the toddler and in the process killed the baby, only after the case was decided and parties put in safe places. Indian Courts have to use their powers and not wait for the victim to ask for these protections.

3.13 CONTEMPT OF COURT

Contempt of Court happens not just when judges are criticized but also when matters which are sub judice are discussed and criticized in the press. This results in lowering the role of the judiciary in the administration of justice. When the issue is before the Court, it is considered the duty of the media to allow the course of law to take place. They can report the matter in Court in a fair manner and not critically. They should wait for the final outcome of the case. This is the object behind the reasoning given by the Court in *Rajendra Sail* v. *M.P. High Court Bar Association*[81] *case*. The Supreme Court warned the media against sensationalizing of the issues and stressed that the press needed a strong internal system of self regulation. It said that the reach of the media is very large and large numbers of people believe it's reporting to be true[82]. This freedom of the press should be exercised in the interest of the public good. Court also stated that the press should have an efficient mechanism to scrutinize the news reports pertaining to such institutions such as judiciary, which because of the nature

[80] Vakul Sharma And Seema Sharma, *Informational Technology Law And Practice* 70 (Universal Lexis Nexis, Haryana,6th edn, 2019).
[81] *Rajendra Sail* v. *M.P. High Court Bar Association* (2005) 6 S.C.C. 109. Para 31 at p. 125.
[82] *Ibid.*

of their office cannot reply to publications[83]. Thus the freedom of the press should be used by them cautiously. Normally, truth and good faith have been recognized as defenses to charges of contempt. Now with the amendment of Contempt of Courts Act 1971[84], truth has been made a legal defense to a charge of contempt. A trial by press, electronic media or public agitation is an antithesis to the rule of law. It can only lead to miscarriage of justice[85]. Therefore, it may be contempt to publish an interview with the accused or a potential witness[86] because there is always a likelihood that the trial is prejudiced by these publications or broadcasting. If the media in the process of reporting adds anything in excess to the actual proceedings in the Court, it no doubt amounts to interference with justice. In UK, where Courts are convinced of the fact that media has influenced the jury, the case is taken away from that Court and posted to a Court far away from that area. In India, it is very difficult to prove that the judge has been influenced by the media talk. But there is no doubt that no person even if it is the judge can stop himself from keeping track of the news of the day. There is every possibility of not only the judges but also the witnesses getting influenced. The intention of the reporter to interfere with the administration of justice or not is immaterial in determining whether it constitutes contempt of court[87]. The possibility of influence has to be considered and not the intention of the journalist.

THE LAW COMMISSION REPORTS

The Forty Second Law Commission examined the various aspects of right to privacy under Chapter 23 of its 42nd Report and recommended for insertion of a new chapter to be called "offences against privacy" to substitute the existing chapter XIX making unauthorized photography and use of artificial listening or recording apparatus and publishing such information listened or recorded as offences[88].

The Law Commission in its one hundredth and fifty sixth report stated that right to privacy is a vast subject and its scope has been widened considerably under Article 21 of the Constitution by the Supreme Court under its various decisions[89]. The Law Commission admitted that on studying the matter of privacy as extended under Article 21 of the Constitution and also in the various reports of foreign law commissions, it would recommend that these offences cannot appropriately be incorporated in the IPC. Therefore it stated that the recommendation of its 42nd Report to include 'Offence against privacy' is deleted and that

[83] *Ibid.*
[84] The Contempt of Courts (Amendment) Act 2006 - Section 2 substituting section 13 of the Contempt of Courts Act, 1971.
[85] *State of Maharashtra* v. *Rajendra Jawanmal Gandhi*, (1997) S.C.C. 386.
[86] *R*.v. *Savundranayagan* [1968] 3 All E.R. 439.
[87] *S.K. Sundaram: Inre*, (2001) 2 S.C.C: A.I.R. 2001 S.C. 2374.
[88] *Law Commission of India, 42nd Report on the Indian Penal Code, 1971*, Chapter 23, pp.336-340
[89] *Law Commission of India ,156th Report on the Indian Penal Code* vol.1 August, 1997, p.340

a separate legislation should be there to comprehensively deal with such offences against privacy[90].

In the Law Commission's 200th report [91], Justice M. Jagannadha Rao stated that at present under section 3(2) of the Contempt of Courts Act, 1971 read with the explanation there under, gives full immunity to publications even if they prejudicially interfere with the course of justice in a criminal case, if by the date of publication, a charge sheet, or challais not filed or if summons or warrant are not issued. Such publications would be contempt only if a criminal proceeding is pending.

The dispute regarding when the case is said to be 'pending' had caused a lot of controversy. The report stated that Indian Supreme Court holds publication, prejudicial after 'arrest' as criminal contempt. It was settled in *A.K. Gopalan* [92] case wherein the Supreme Court stated that it is from the point of arrest that contempt arises. This report also agrees with this decision. India is signatory to the *Madrid Principles[93] on the Relationship between the Media and Judicial independenc*e 1994, wherein the basic principle stated was that though it is the function and right of the media to gather and convey information to the public and to comment on the administration of justice, including cases before, during and after trial, it should be done without violating the principle of presumption of innocence. Therefore the yardstick is whether media reporting has violated the basic principle that an accused is presumed to be innocent till pronounced guilty by the court.

TRIAL BY MEDIA

Recently the press, especially the electronic media has been very enthusiastic to grab and report it even before the Police or other channels get to know about it. This investigative journalism is good but at the same time it is going out of hand. There is no way to regulate it or stop it. Though we have the Press Council of India, which was established around twenty two years before, the electronic media will not come under its regime[94]. The PCI entertains more than 10,000 complaints a year, has no teeth and the purpose is defeated as it evokes no fear or sanctions. Simply an apology is demanded from the press, if found guilty. These types of liberal approaches are not going to remedy the harm caused by press reporting. More stringent measures are to be adopted to curb the malady though self-regulation can operate as a useful and viable tool[95]

CONCLUSION

[90] *Id.* at p. 341.
[91] *Law Commission of India 200th Report on Trial by Media; Free speech and Fair Trial Under Criminal Procedure Code, 1973.*
[92] *A.K.Gopalan* v. *Noodeen* 1969 (2)S. C. C.734.
[93] Madrid Principles on the Relationship between the Media and Judicial Independence – convened by the International Commission of Jurists in Madrid from 18-20Jan.1994.
[94] Dr. Sukanta K. Nanda ,Media Law 24 (Central Law Publication,Allahabad,1st edn. 2014)
[95] *Ibid*

A study of the development of privacy traces back to *Nihal Chand* v. *Bhagwan Dei*[96] *case* in 1935, where the High Court recognized the independent existence of privacy from the customs and traditions of India. India even before independence became a member of UN and was signatory to the UDHR 1948. The UDHR was almost fully incorporated into the Indian Constitution. One of the exceptions to it was the giving of no recognition to the concept of privacy. UDHR gave privacy a foremost position in Article 12, while freedom of speech and expression found place only in Article 19. Article 19 was subject to conditions such as reputation, national security, and public order and of morals. In the Indian Constitution, the restrictions imposed on freedom of speech and expression in Article 19(2) was on the lines of libel, slander, defamation, contempt of court or any matter which offends against decency or morality or which undermines the security of or tends to overthrow the state. This clause was later amended by the 1st Amendment Act of 1951, and a new clause was inserted instead of the above clause. The new clause brought reasonable restrictions on the lines of security of state, public order, decency or morality or in relation to contempt of court, defamation or incitement to an offence. This took away further, the grounds of restrictions in the earlier unamended clause i.e. libel and slander. Freedom of press was included in this right to speech and expression by the Apex Court in *Romesh Thapper* v. *State of Madras*[97] *case*. Here the Court held that this freedom includes right to propagate ideas including the right to circulate. All the above factors further gave impetus to press but at the same time the right of an individual to plead right to privacy against undue interference by press was completely denied as this right to privacy was not given an independent status as a fundamental right on the same footing as of freedom of press in the Constitution . The framers of the Constitution failed to imbibe the full spirit of UDHR1948 by neglecting to recognize the right to privacy as a fundamental right. It was in *Kharak Singh*,[98] case that the Apex Court had the opportunity to discuss privacy for the first time, wherein it struck down domiciliary visits on an accused under Article 21 of the Constitution. But it was only through the minority view of Justice Subha Rao, that privacy found a place in Article 21 of the Constitution. This was due to lack of an article on privacy. Article 21 of the Indian Constitution protects life and personal liberty which is on the lines of Article 3 of the UDHR. Therefore Article 21 is not the solution to the problem faced in the matter of privacy protection. Article 21 is only an interim relief till legislative weapons are put in action to bring in a parallel Article on the lines with Article 12 of the UDHR in the Indian Constitution to protect Privacy. Due to lack of Constitutional and legislative measures to protect privacy, the victims of press abuse had to the take the help of tort law. Tort law did not refer to privacy but only other offences such as libel, slander, defamation, morality and decency. These different offences form part of the term 'Privacy' but individually these offences could never fulfill the need of protection of privacy faced by individuals. Even Indian penal code allowed punishment or penalty for the above offences but not for privacy. Privacy as a term that never came into the minds of legislators. The courts also gave decisions on the lines of

[96] *Nihal Chand* v. *Bhagwan Dei* A.I.R. 1935 All.1002.
[97] *Romesh Thappar* v. *State of Madras* (1950) S.C.R. 594.
[98] *Kharak Singh* v. *State of U.P. and Others* (1964) S.C.R.(I) 332.

the various offences mentioned above. The other grounds left for the victims were only Article 19(2) and Article 21 of the Constitution. There was no legislative effort to codify and protect privacy till date neither in the Constitution nor in any legislation. The victims had to always depend on the court's discretion and interpretation of privacy, when the question of infringement of privacy was considered. This has been a loophole since the time of independence. It is therefore recommended that the Constitution should be amended to include this right to Privacy as the first step. Once the grand norm is amended, the position of privacy will be legally at par with the international standards. Then is the need to enact a Privacy Act. Thirdly the need to amend the Contempt of Court Act 1971, to give the courts, specific powers apart from the general powers to issue gagging orders and other orders to protect an accused from media intrusion which has the effect of tampering with evidences and witnesses and causing interference in administration of justice. Also as stated in Rajendra Sail's case[99], we need a strong press council in India. It should be a strong regulatory authority with representatives of legal, social, common man and press. Presently the Press Council is dominated by the different newspapers. In *Parshuram Babaram Sawant* v. *Times Global Broadcasting Co. Ltd*.[100] case, Retd.Justice P.B.Sawant's photograph was flashed as Justice P.K.Samantha, Retd. Justice of Calcutta High Court, who was alleged to be involved in the famous Provident Fund scam of 2008. It gave a false impression among viewers that the plaintiff was involved in the scam. Though the said channel stopped publishing the photograph, when the mistake was brought to their notice, no corrective or remedial steps to undo the damage were taken by the channel on their own. The plaintiff by his letter dated 15/9/2008 called the defendant to apologize publicly with damages of 50 crore rupees. By its reply the defendant apologized but no mention of damages was there. It was a belated action and hence plaintiff demanded for 100 crores. The Court held that the defendant was entitled to pay 100 crores to the plaintiff. The Bombay High Court ordered the Times to deposit 20 crores in cash and 80 crores in bank guarantee, before taking up its appeal against the Pune trial Court in the defamation case. This was upheld by the Supreme Court. This was a very good move by the Court. To conclude with, the former Chief Information Commissioner of India, Wajahat Habibullah[101] as then he was, had also demanded a law on Privacy complimentary to the law on Right to Information. He had stated that while all information regarding the government should have public accountability, there should be a law to respect privacy also to run parallel to it[102]. Therefore the need for the Right of Privacy is inevitable.

[99] *Rajendra Sail* v. *M.P. High Court Bar Association* (2005) 6 S.C.C. 109.
[100] Special Civil Suit No. 1984/2008 in Pune trial court.
[101] KP Saikiran 'CLC for Law on Privacy', *The New Indian Express* p.11.
[102] *Ibid.*