CHAPTER 8
FREEDOM OF MEDIA AND RIGHT TO PRIVACY

8.1 Introduction

Freedom of speech has been considered as one of the significant concepts for the development of an individual as well as for the society as a whole. People will not be able to develop intellectually and spiritually, unless they are free to formulate their beliefs and political attitudes through public discussion, and in response to the criticisms of others.1 Disclosing the truth for the public good and people’s participation into the democracy via freedom of speech make the government’s actions more transparent and accountable. At present, with the installation of new technologies, like internet, mobile technologies, etc. the scope of traditional “press”, which included only print media, has become enlarged in the form of electronic media. Consequently, the responsibility of the “media” has also been increased. Therefore, the term “media” includes both print media and electronic media. The print media is largely depended upon for news and views and only marginally for entertainment, whereas the electronic media has been looked upon as the chief source of entertainment though increasingly it is also being resorted to for news and views. Together the print and the electronic media today embrace almost the entire section of the society. They have succeeded in crossing the barriers of poverty, illiteracy and even geographical inaccessibility, due to community libraries and reading rooms and the community Television and radio stations. Together they have a wider reach and a more effective and a more direct approach to the people. In fact, there is no institution in the society which has the approach to and the intimacy with the people as these two institutions. That is why the media has come to be looked upon as the fourth pillar of the society along with the other three pillars, namely, the executive, the legislature and the judiciary.2

Simultaneously, with the increase in the accessibility, media’s responsibility towards the society has also been increased. Freedom of media has therefore to be used in a manner which will respect the rights of individuals and will not interfere with the functioning of the other institutions by undermining the confidence of the people in them. The freedom has also to be

used to protect and promote the interests of the society. Self-restraint, self-discipline, a sense of duty and responsibility to the society must therefore mark the exercise of the freedom.³

On the same line, it is proved that the freedom of speech and expression is not absolute. It is subjected to the government’s authority to legislate on matters concerning libel, slander, contempt of court, any matter offending decency and morality, or which undermines the security of or tends to overthrow the state. The right to freedom of speech and expression and the right to privacy are two sides of the same coin. One person’s right to know and be informed may violate another’s right to be left alone. Just, as the freedom of speech and expression is vital for the dissemination of information on matters of public interest, it is equally important to safeguard the private life of an individual to the extent that it is unrelated to public duties or matters of public interest. The law of privacy endeavours to balance these competing freedoms.⁴

As the law has gradually developed to meet human needs, so the development of the law of privacy is marked in juridical thinking, particularly from the close of the nineteenth century. Early common law knew no such separate legal category as privacy; however, there were traces of privacy under the cloak of other legal areas. Modern conditions, with inquiring reporters and candid cameras as well as ambitious managing editors and a popular hunger for the intimate, have drawn from judicial minds in numerous quarters recognition of the need for protection of persons in their seclusion and in their desire to avoid embarrassing realism in the use of their names or personal photographs. The courts have increasingly recognized privacy problems in dealing with written defamation, common law copyright, breach of confidence, violation of contract, and disorderly conduct.⁵ So far as the recognition to the law of privacy vis-à-vis freedom of press is concerned, it is necessary to trace the developments in America as well as in United Kingdom.

8.2 Celebrity Privacy, Paparazzi, and Privacy

Maintaining our privacy is a matter of control over access to us and to certain kind of information about us. Others could gain access to us through seeing or touching us and through photographs or audiovisual recordings. Our control over access to ourselves through touch is legally protected, with laws against battery. We control access to ourselves through sight,
photography, and audiovisual recording by choosing to be in places where there is a reasonable expectation of privacy, or choosing to appear and speak in public.6

Invading the privacy of public officials and candidates must be justified by the expected benefits to the public of having information they need as citizens of a democratic society.7

In the case of entertainment and sports stars, privacy invasions must be justified by showing that the expected benefits outweigh the potential harms of releasing private information and images of celebrities. The harm to celebrities from invasions of their privacy may include loss of self-determination and self-respect; loss of reputation, status, and revenue; emotional damage; and damage to meaningful relationships. Celebrities’ families may be similarly harmed.8

Journalists and news organizations earned the profit by offering the audience sensationalized news stories. Simultaneously, the public’s curiosity to know about famous personalities is also being satisfied. Yet, there are certainly many other ways in which the public could be entertained that don’t invade people’s privacy.9

The information which pertains to entertainment and sports figures does not satisfy the common desires. Rather the potential harms caused by releasing such information are greater than the expected benefits. Such kind of sensational news not only harms celebrities and their families but also destroy the public’s trust in a news outlet. Reputable news organizations would do well to focus attention on the successes and failures of celebrities in their professional fields, rather than delve into their private lives.10

“Paparazzi” is the term used for freelance news photographers who specialize in candid photos or video of celebrities. Celebrities often complain that paparazzi invade their privacy or endanger them through the use of telephoto lenses and aggressive newsgathering techniques. Paparazzi were initially seen as responsible for the car crash that killed Diana, Princess of Wales,
in 1997. That incident, in turn, spawned several attempts in the United States to limit access by photographers to celebrities.\textsuperscript{11}

Americans were not immune to paparazzi. By the late 1960s, these photographers routinely stalked celebrities in the United States, selling their photos on both sides of the Atlantic.\textsuperscript{12}

In the case of \textit{Galella v. Onassis}\textsuperscript{13}, the court held that disclosing celebrity’s daily habits are not essential for any public’s well being. Therefore, it’s violation of celebrity’s privacy.

Paparazzi encroach upon celebrities’ privacy in two key arenas; public and private. In the United States, the law limits anyone’s privacy rights while that person is in public. When a celebrity—or any person—is in public or in a place where they cannot claim a reasonable expectation of privacy, anyone else generally has the right to photograph them. Because of this legal protection, paparazzi cluster in public places—outside buildings, on sidewalks—where they expect to see celebrities. The paparazzi then follow celebrities, sometimes quite closely and aggressively, for “candid” photos. In most situations, this behavior is legal, if not ethical.\textsuperscript{14}

A different legal and ethical issue surrounds photos taken in private settings, usually with the use of telephoto lenses. Celebrities—and others—can generally expect privacy when they are in places not normally seen or frequented by the public, including inside private buildings and on private property, if that property is far from public property. In the United States, it is usually illegal to take photos of individuals in private places, at least if they have taken steps—closing curtains or building fences, for instance—to try to gain privacy. Nevertheless, many paparazzi continue to try to photograph celebrities wherever they are.\textsuperscript{15}

Diana, Princess of Wales, was a prime target of paparazzi during and after her marriage to Britain’s Prince Charles. From the time of her marriage to Charles in 1981, celebrity-oriented media followed Diana’s every move. After the couple’s separation and divorce, paparazzi attempted to get photos of Diana with the men she dated. In August 1997 she and her boyfriend, Dodi Fayed, were killed in Paris when their car crashed as their driver attempted to evade

\textsuperscript{12} Ibid.
\textsuperscript{13} 487 F. 2d 986, (2d Circ. 1973).
\textsuperscript{14} Supra note 11 at 368.
\textsuperscript{15} Ibid.
paparazzi on motorcycles. Her death brought change in the European Privacy law. The public outcry resulted into the adoption of the European Convention on Human Rights and Fundamental Freedoms in the domestic English Law.17

The months following the Princess of Wales’s death saw legislative attempts to curtail paparazzi activity in the United States. In California, one bill would have barred photographers from going within 15 feet of unwilling subjects, and state senator Tom Hayden, the ex-husband of actress Jane Fonda, suggested licensing photographers and creating a “Commission of Inquiry into Paparazzi Behavior.”

In the United States House of Representatives, Representative Sonny Bono, himself a celebrity and paparazzi target, introduced the “Protection from Personal Intrusion Act” just 10 days after Princess Diana’s death. This legislation barred “harassing” behavior, defined as following a victim who had a reasonable expectation of privacy, for the purposes of taking a photo, video, or sound recording that would then be sold for profit. The punishment would have been between one and 20 years in prison. The following year, after Bono’s death in a skiing accident, United States senators Russ Feingold and Orrin Hatch introduced the “Personal Privacy Protection Act,” which would have outlawed following someone with the intent to take a photo for later commercial gain, when that following caused fear of bodily harm to the subject. While none of these bills at the state or federal level became law, they demonstrated the concern that lawmakers had with paparazzi and invasions of privacy.18

Celebrities are entitled to the same general right of privacy that extends to all individuals. However, the degree to which that right is protected is much narrower for public figures. Articles recounting details of the daily lives of celebrities generate a much higher level of interest on the part of the public than do similar stories concerning unknown people. As a result, a broad spectrum of information concerning celebrities is transferred from the protective shield of privacy into the realm of the public interest.19 The reason behind the narrower degree of protection to the private lives of the public figure lies in certain factors. First, on many occasions, public figures themselves give voluntarily consent to publicity. Second, people’s curiosity makes

16 Ibid.
18 Supra note 11 at 369.
private affairs of celebrities as “public concern”. Finally, the press has a right to inform the public about matters of public interest.20

While the First Amendment of the United States Constitution does protect legitimate newsgathering, it does not provide the press with an impenetrable shield from liability for torts committed while gathering the news.21 Four separate tort actions are available to protect individuals against invasions of privacy by the press: appropriation, false light, public disclosure of private facts, and intrusion.

Contemporary attitudes toward the media and celebrities make it very difficult for celebrities to claim that certain facets of their lives are not newsworthy, especially since celebrities are categorized as voluntary public figures. News and entertainment have been mixed up. So long as the courts and legislature are unwilling to impose standards on the media, the media are left to regulate their own behavior.22

The public can no longer distinguish between what is and is not news and is becoming disenchanted with techniques that seem to go beyond the realm of public decency. Thus, the legitimate media who serve the true public interest and fulfill their intended role in society must suffer as a result of the actions of their less responsible counterparts.23

In *Von Hannover v. Germany*, paparazzi took pictures of Princess Caroline of Monaco, the eldest daughter of Prince Rainier III of Monaco, which were completely of private nature. Thus, it is important to note that instead of looking to physical zones when determining privacy (i.e., a public or private place), the court determined that certain activities can be exclusively private. The focus is then on the subject matter of the photographs rather than the location where they were taken.24 The court balanced the competing interests of the individual and of the community as a whole. Therefore, the court held that even public figures retain their private interests.

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20 *Id.*, at 290.
21 *Id.*, at 293
22 *Id.*, at 294
23 *Id.*, at 295
8.3 Investigative Journalism and Privacy Issues

So far as the tussle between media and privacy is concerned the story started with the publication of an article entitled as “Right to Privacy” in the year 1890 by the two Boston lawyers named as Samuel Warren and Louis D. Brandeis. The authors criticized the malfunctions of the press. They observed that the press is overstepping in every direction the obvious bound of propriety and of decency. With the commercialization of the press, the Gossip and details of sexual relations became the breaking news. It was argued that due to the complexity of life, a man has become more sensitive to publicity and hence, he needs solitude and privacy. But modern enterprise and invention have, through invasions upon his privacy subjected him to mental pain and distress, far greater than could be inflicted by mere bodily injury.26

Therefore, with the increase in the science and technology, the journalists have well equipped with privacy invading techniques like miniature cameras, bug devices, etc. And these are very potent tools for investigative journalist who conducts the sting operations. Simultaneously, such potential also increases the responsibility of the journalist to do stings in public good only.

In past, the press played the significant role during three moments-the Civil Rights Movement, the Vietnam War, and Watergate. During this period, the courts also favoured freedom of press because the journalists had public regard.27 This was the time when investigative reporting was really doing something for public good. Whereas, today’s media is more concerned about their Television Rating Point (TRP) ratings and showing news regarding celebrities only, which doesn’t reflect any ‘public good’. The reality television (TV) shows spreading the indecent values in the society. Hence, the media is losing the public support.

The Court’s 1964 landmark decision in *New York Times Co. v. Sullivan*28 provided an even more important boost to journalists’ claims of constitutional privilege. The decision raised barriers to tort recovery against journalists for defamation by requiring plaintiffs who were

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public officials to show that any damaging falsehoods in news reports were made maliciously or with reckless disregard for the truth.\textsuperscript{29} Further in one of the case the U.S. Supreme Court observed that freedom of speech and press has the preponderant role in the development of every society.\textsuperscript{30} The Court held that the freedom of press assures the maintenance of political system and an open society.\textsuperscript{31}

Investigative journalism is a kind of journalism in which reporters deeply investigate a topic of interest, often involving crime, political corruption, or some other scandal.\textsuperscript{32}

It is the responsibility of investigative journalists to make the citizens more informed about public interest. In order to fulfill such responsibility, they will have to cull out the hidden truth from government policies. In the whole process, ultimately people will receive the transparent and accountable government.

In the history of investigative journalism, the famous instance is of “Watergate”. During the 1972 campaign for the White House, when Richard M. Nixon was seeking a second term in office, five persons, acting on orders, broke into the Democratic national offices in the Watergate complex in Washington and planted electronic eavesdropping devices. Their purpose remains unclear till date. Bob Woodward and Carl Bernstein, reporters with the Washington Post, investigated the whole matter and it was discovered that it was not a simple act of burglary but a case of political corruption and manipulation involving the highest office in the land. Therefore it was the time when both the reporters strengthened the reputation of journalism, and the idea of “investigative journalism” was really admired by the people as well as courts.\textsuperscript{33}

However, with the passage of time, Reporters forgot their moral responsibility in finding the truth. Investigative reporters often use various means for their fact-finding like surveillance techniques, miniature cameras, phone records, phone tapping, etc. Many times they even adopt the illegal means to investigate the matter. Obviously, such kind of uses makes the action

\textsuperscript{29} Id., at 264, 280.
\textsuperscript{31} Id., at 389.
\textsuperscript{32} T. Rajsekhar(Ed.), Investigative Journalism, 1 (2007).
\textsuperscript{33} Id., at 16.
punishable under the Indian Penal Code. For instance, in Tehlaka’s Operation Westend case, the undercover journalists used the prostitutes to expose corruption in defence deals.34

In the case of Dietmann v. Time Inc.35 the court held that under the protective shield of freedom of press the journalists have no license to trespass, to steal, or to intrude by electronic means into the precincts of another’s home or office. Writing for the U.S. Court of Appeals, in this case, Judge Shirley Hufstedler declared that, the First Amendment, provides journalists with no immunity from torts or crimes committed in the gathering of news. That principle applies to journalists and others who invade privacy by means of old-fashioned eavesdropping, or who use high-tech means to intercept cell phone messages, voicemails, or electronic mail messages via the Internet. Photographers and videographers are permitted to capture images in public spaces; they are not permitted, however, to intrude into private spaces or to use sophisticated telephoto lenses or microphones that can pick up conversations at a distance far beyond the range of human hearing.36

In the Jacobson v. U.S.37, the United States Supreme Court issued certain guidelines to regulate sting operation and held that an inducement to commit a crime should not be offered unless there is a reasonable indication that the subject (on whom the sting is going to be conducted) has engaged or is likely to engage in some illegal activities. Additionally, in United States, after huge protest by privacy international organization, the judiciary evolved certain strict guidelines for conducting any kind of Sting Operation like38

- Sting operation could be mounted only against persons against whom some evidence of criminality already exists and a sting operation is considered necessary for getting the conclusive evidence.
- Permission is necessary from court or Attorney-General. This safeguard has been laid down since those who mount a sting operation themselves commit the

35 449 F.2d 245 (9th Cir. 1971).
38 Supra note 32 at 114.
offences of impersonation, criminal trespass under false pretences and making a
person commit an offence.

• There must be a concurrent record in writing of the various stages of the sting
operation.

• While the transcript of the recordings can be edited, the film and the tapes
themselves should not be edited. Where there is evidence of editing, there is an
automatic presumption that the recording is probably not authentic.

On one hand, Sting Operation serves the public interest by strengthening the democratic
framework by disseminating information about facts of vital interest to society that are not easy
to obtain by simple requests or efforts. On the other hand, some recent incidents prove the
misuse of Sting Operation by media and private entities to increase the channel viewership, settle
political scores, harm corporate interests, malign reputation etc. Such Sting Operation that are
carried on with ulterior motives not only harm the person and the institution trapped in the sting,
but has the potential to shake people’s faith in the institutions and create a general atmosphere of
cynicism in the society.39

So far as India is concerned, the judiciary has played very significant role in recognizing
freedom of press as fundamental right. Although Indian Constitution does not possess the
explicit provision of “freedom of press”, the courts succeeded in making it implicit provision via
liberal construction of Article 19(1)(a) read with Article 21.

But Indian Courts on the subject of “Sting Operation” has not laid down any clear cut
principles or uniform approach on the legality and extent of permissibility. However certain
broad principles are discernible such as the considerations of public interest, the need to
recognize the fundamental rights of the targeted persons including the right of privacy and
liberty. Also, the illegality inherent in the publication/exhibition of fabricated and misleading
content obtained by Sting Operation which is universally condemned is recognized by the courts
in India.40

In the absence of any strict regulation, the principles of self regulation in journalism are
of worth mentioned over here. As regards sting operation, it is stated thus in paragraph 9 of the
Code of Ethics:

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39 www.lawcommissionofindia.nic.in/stingoperation.doc accessed on December 4, 2010 at 11.48 p.m. IST.
40 Ibid.
As a guiding principle, sting and undercover operations should be a last resort of news channels in an attempt to give the viewer comprehensive coverage of any news story. News channels will not allow sex and sleaze as a means to carry out sting operations, the use of narcotics and psychotropic substances or any act of violence, intimidation, or discrimination as a justifiable means in the recording of any sting operation. News channels will as a ground rule, ensure that sting operations are carried out only as a tool for getting conclusive evidence of wrong doing or criminality, and that there is no deliberate alteration of visuals, or editing, or interposing done with the raw footage in a way that it also alters or misrepresents the truth or presents only a portion of the truth.  

Further the Law Commission of India has observed that the media with the help of sophisticated technologies is carrying out the sting operations to expose corruption, immorality, exploitation, flouting of the rule of law by those holding public offices, influential persons and businessmen. However, at the same point of time, the media is also accused of doing stings for commercial purposes. This led the journalists to make the news more sensational and emotional.

In one of the negative sting operation, on August 28 2007, Live India (Janmat) (TV news channel) aired a sting operation covering a porn racket run by a schoolteacher in Delhi involving school girls. The school teacher named as Uma Khurana was shown in the footage as she’s negotiating with one of customer (undercover journalist) who wants a girl’s “services”. He paid Rs. 400 to her and she handed over the 15-year-old girl, an ex-student at her earlier school. She faced mental agony, suspension and termination from the services. But later on, after police investigation it was discovered that the whole sting was wrong. The police found no concrete evidence regarding Uma Khurana’s involvement in child prostitution. Therefore, she was reinstated in her job. But due to this sting operation she lost her reputation and self-respect. During mob violence her modesty was also outraged. In December 2007 the Delhi High Court

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41 Code of Ethics, paragraph 9. Quoted in Ibid.
42 Ibid.
43 http://en.wikipedia.org/wiki/Live_India accessed on March 6, 2012 at 1:42 p.m. IST.
took *suo motto* notice of such incidence. The court observed that the media is well within its rightful domain when it seeks to use tools of investigative journalism to bring us face to face with the ugly underbelly of the society. However, it is not permissible for the media to entice and try to actively induce an individual into committing an offence which otherwise he is not known and likely to commit. In such cases there is no predisposition. The Court asked the Ministry of Information and Broadcasting to consider the proposed guidelines placed before it by the amicus curiae. The ministry may also incorporate some other guidelines to regulate the sting operations. According to these proposed guidelines, a channel proposing to telecast a sting operation shall obtain a certificate from the person who recorded or produced the same certifying that the operation is genuine to his knowledge, there must be concurrent record in writing of the various stages of the sting operation, permission for telecasting a sting operation be obtained from a committee appointed by the Ministry of Information and Broadcasting, permission will be granted in public interest, both edited and unedited transcripts of recordings be produced before the committee, all television channels must ensure compliance with the Certification Rules prescribed under the Cable Television Network (Regulation) Act 1995 and the Rules made there under, etc.

Therefore, the freedom of press is not an absolute right in our society. Every legal system can impose reasonable restrictions on the grounds like contempt of court, to prevent incitement of an offence, in the security of the state, public decency and morality, defamation, for the protection of privacy rights, etc. On the similar lines, phone-tapping has been considered as serious invasion of one’s right to privacy. In India, only the government has the right to intercept any communication under Indian Telegraph Act of 1885. In *PUCL v. Union of India*, the Supreme Court of India has issued certain guidelines to regulate the practice of phone-tapping like, permission from home ministry is required for every interception, the issuing authority should maintain the complete record of intercepted material, etc. Hence only government can intercept the telecommunications and private individual does not have any right to tap our phones.

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45 *Id.*, paragraph 3.  
46 *Id.*, paragraph 9.  
47 AIR 1997 SC 568.  
48 *Id.*, at 579.
However, the things which are in public records can easily be accessed by anyone through the application of his “right to information”. Therefore, in such situation, one cannot seek his right to privacy.\textsuperscript{49} Almost imperceptibly, a corrupted journalistic culture has emerged, normalizing a repertoire of routine practices that are wholly incompatible with the norms of democracy.\textsuperscript{50} In spite of this fact, no one can discard the importance of investigative journalism. Upholding the legality of sting-operations, the Delhi High Court in \textit{Aniruddha Bahal v. State}\textsuperscript{51}, has declared that every citizen has the fundamental duty to fight against the corruption and expose the corruption at all levels of the society. Again, Article 19(1)(a) of the Indian Constitution is also subject to the law of contempt of court. This law restricts trial by media. In \textit{State of Maharashtra v. Rajendra Jawnmal Gandhi},\textsuperscript{52} the Supreme Court seriously mentioned that a trial by press, electronic media or public agitation is very antithesis of rule of law. It can well lead to miscarriage of justice. A judge has to guard himself against any such pressure and he is to be guided strictly by rules of law.\textsuperscript{53}

By extending the debate over trial by media, the Supreme Court recently in the case of \textit{Sidhartha Vashisht v. State(NCT of Delhi)},\textsuperscript{54} directed that every effort should be made by the print and electronic media to ensure that the distinction between trial by media and informative media should always be maintained. Trial by media should be avoided particularly, at a stage when the suspect is entitled to the constitutional protections. Invasion of his rights is bound to be held as impermissible.\textsuperscript{55}

The court observed that there is danger, of serious risk of prejudice if the media exercises an unrestricted and unregulated freedom such that it publishes photographs of the suspects or the accused before the identification parades are constituted or if the media publishes statements which out rightly hold the suspect or the accused guilty even before such an order has been passed by the Court.\textsuperscript{56}

\textsuperscript{49} \textit{People's Union for Civil Liberties v. Union of India}, (2003) 4 SCC 399.
\textsuperscript{50} Stephan Coleman, “It’s Time for the public to Reclaim the Public Interest”, \textit{Television New Media}. 13:7, 7-11, at 8, (2012).
\textsuperscript{51} (2010) 172 DLT 269.
\textsuperscript{52} (1997) 8 SCC 386.
\textsuperscript{53} \textit{Id.}, at 390.
\textsuperscript{54} AIR 2010 SC 2352.
\textsuperscript{55} \textit{Id.}, at 2430.
\textsuperscript{56} \textit{Id.}, at 2428.
While considering current practices, the Supreme Court mentioned that despite the significance of the print and electronic media in the present day, it is not only desirable but least that is expected of the persons at the helm of affairs in the field, to ensure that trial by media does not hamper fair investigation by the investigating agency and more importantly does not prejudice the right of defence of the accused in any manner whatsoever. It will amount to travesty of justice if either of this causes impediments in the accepted judicious and fair investigation and trial.\footnote{Ibid.}

Therefore, the court emphasized that the freedom of speech protected under Article 19 (1) (a) of the Constitution has to be carefully and cautiously used, so as to avoid interference in the administration of justice and leading to undesirable results in the matters sub judice before the Courts.\footnote{Id., at 2429.}

It is submitted here that conducting sting operation is not in itself an “investigative journalism”. The pious and sacred concept of “investigative journalism” should be used to promote the democratic values of the society. Under the protective shield of investigative journalism, the journalists’ should respect the decent values of civilized community and should not spread the sensationalism. By showing salacious things, the media is not serving any public purpose. It’s very pertinent here to quote Hon’ble Justice Markandey Katju i.e “how is kareena kapor or Lady Gaga or Formula 1 or Sunny Leon important for the Indian masses? Does a hungry or unemployed man want entertainment or food and a job?”\footnote{“Justice Markandey Katju on the role of media in India,” The Hindu, November 5, 2011. Available at http://www.thehindu.com/news/justice-markandey-katju-on-the-role-of-media-in-india/article2600319.ece accessed on March 6, 2012 at 1:42 p.m. IST.}

It is further submitted that Investigative journalism must be used in a legal manner. First the journalists should exhaust the lawful methods to access the things. For example, under right to information one can access any public record (obvious exceptions are there). The journalists can analyze all records and can make their case. After doing this the journalists should prove before some authority that there is a reasonable case and it is in the interest of larger public to conduct sting operation. No doubt, journalists are using very sophisticated bug devices which have the potential to intrude into anyone’s private life. But they should not forget the journalism...
ethics in conducting any sting operation. Therefore, it has become very necessary to codify the uniform laws for regulating the sting operations.

As the researcher observed, investigative reporting essentially intends to be conducted for public good. In fact, the pristine concept of investigative journalism was emerged to bring public accountability and transparency. At the time of the birth of investigative journalism, journalists’ work used to be admired by the courts as well as general public. Indeed, sophisticated bug devices also enhanced the journalists’ potency to conduct sting operations. However, today’s media is more concerned about their Television Rating Point (TRP) ratings and, conducting sting operations for commercial purposes only. This also led the journalists to make the news more sensational and emotional. The recent instances of Television channels are exceeding the limits of decency by using Sting Operations as a tool for the on-going reality shows to expose infidelity of a spouse, boyfriend, etc. Such kind of TV reality shows has decreased the importance and relevance of sting operations. Another problem is of continuous broadcasting of sting operations which creates a widespread public perception of the guilt of the accused and, it might also influence the decision of a trial court judge before whom the matter is pending. Furthermore, the over-inquisitiveness of media towards celebrities’ private life has defeated the purpose of ‘freedom of media’. The news regarding celebrities’ private lives serve no public good. It is because of this reason that the media is losing the public support. Therefore, it is submitted that the pious and sacred concept of “investigative journalism” should be used to promote the democratic values of the society. The journalists’ should respect the decent values of civilized community. They should not spread the sensationalism for the sake of commercial purposes. They should not forget the professional code of ethics in conducting sting operations. The recordings of sting operations should not be altered or edited. The editor should decide judiciously in broadcasting any kind of sting operation and, consider its implications also.

8.4 Privacy as a Tort

The growing number of privacy cases attracted the attention of William Prosser, the leading American torts scholar of the mid-twentieth century. Prosser began the project of imposing some order on the hundreds of privacy cases that had been decided since 1890. He discussed privacy in all of the editions of his torts treatise, which were published in 1941, 1955,
His most famous discussion of the topic was a 1960 article entitled Privacy published in the California Law Review. In that article, he identified four kinds of invasions of privacy i.e. Intrusion upon the plaintiff’s seclusion or solitude, or into his private Affairs, Public disclosure of embarrassing private facts about the plaintiff, Publicity which places the plaintiff in a false light in the public eye, and Appropriation, for the defendant’s advantage, of the plaintiff’s name or likeness.61

Such kind of Torts was also adopted in the Second Restatement of Torts when Prosser was serving as his reporter.

8.4.1 Intrusion
A lawsuit for intrusion requires that one person intentionally intrude on the solitude or seclusion of another in a manner that would be highly offensive to a reasonable person. Courts do not consider ordinary newsgathering techniques intrusive. Gathering information about a person by examining public records and interviewing friends, relatives, enemies and associates is perfectly legal, even if the subject of an investigation objects. Nor are reporters intruding on a person’s solitude or seclusion by requesting interviews. To commit intrusion, they would have to invade some area in which the person had a reasonable expectation of privacy.62

Intrusion cases deal with a number of newsgathering techniques and issues. Some deal with newsgathering in private or semiprivate places, and others deal with newsgathering in public places.63

News reporters must have permission to enter private property. Entering a person’s home without consent would be a clear case of intrusion. It also would be grounds for a trespass action. It is possible to invade another person’s privacy without physically entering that person’s property, for example by using electronic eavesdropping devices, tapping a telephone line, looking into a bedroom window with binoculars or using a powerful telephoto lens to take pictures of people inside their homes. Even if some newsworthy event is happening on private property, a journalist may not enter without the owner’s or legal occupant’s permission.64

63 Ibid.
64 Ibid.
What if reporters enter private property at the invitation or in the company of police officers or firefighters? Television “reality programs” that show actual drug busts or other police actions have generated cases raising that question.65

In one of the case the court ruled that law enforcement officials who allow news reporters and photographers to accompany them on searches are violating the Fourth Amendment, which protects people against illegal search and seizure. The court said the presence of reporters and photographers when officers execute search warrants and arrest warrants serves no law enforcement purpose. Reporters ride along with police for their own purposes, not to help police execute search or arrest warrants. Whatever interests might be served by the journalist’s presence—informing the public about police activities, guarding against police abuses and protecting officers from violence by suspects—were outweighed by the Fourth Amendment interests of the people who were arrested or whose property was searched.66

Although one can protect his right to privacy at private places like one’s home, a person may also have reasonable expectation of privacy in other places. In one of the case the court held that the presence of camera crew in the helicopter ambulance did violate the plaintiff’s privacy because patient has same kind of expectation of privacy in the ambulance as in the hospital.67

8.4.2 Giving Publicity to Private Facts

Everybody has secrets, and most people would be upset if their secrets were made public. Giving publicity to private facts presents the greatest potential for conflict with the First Amendment because an unfavorable judgment may punish truthful publications. A person who sues for this form of invasion of privacy must prove that:

- Publicity has been given to a private matter;
- The matter publicized would be highly offensive to a reasonable person; and
- There is no legitimate public interest in the information.68

But publicizing the public records is not an invasion of one’s privacy. The information that is publicized must also be highly offensive to a reasonable person. Disclosure of information that is merely embarrassing rather than highly offensive cannot be the basis for a lawsuit. The “reasonable person” standard is imprecise, but it asks juries to decide not by what would be

65 Ibid.
offensive to the most sensitive or insensitive individual but by what the reasonable person would find highly offensive.\textsuperscript{69}

Even if the matter publicized is highly offensive to a reasonable person, the plaintiff still must prove that there is no legitimate public interest in the information. However, Courts have said that the public interest does not extend to a morbid and sensational prying into private affairs with which the reasonable person would say he or she had no concern.\textsuperscript{70}

8.4.3 False Light

A false-light invasion of privacy lawsuit is similar in many respects to a libel suit. In fact, a person often may sue for either or both on the same set of facts. The major difference between them is that a libel suit redresses injury to a person’s reputation, whereas a false-light suit protects a person’s interest in being let alone. A false-light suit requires that publicity place a person in a false light and that the false light be highly offensive to a reasonable person. A federal appeals court said “Baywatch” actor José Solano Jr. could sue the magazine Playgirl for false light. The magazine’s senior vice president had ordered the editors to “sex up” the January 1999 issue. The cover of that issue carried a photo of Solano, used without his permission, and close to his photo were headlines saying, “12 Sizzling Centerfolds Ready to Score With You,” “TV Guys: Prime Time’s Sexy Young Stars Exposed,” and “‘Baywatch’s’ Best Body: José Solano.” The appeals court said the juxtaposition of the photo and the headlines could convey the false and highly offensive impression that Solano had posed nude for Playgirl.\textsuperscript{71}

8.4.4 Appropriation

Anyone who uses the name or likeness of another for his or her own use or benefit may be sued for invasion of privacy by appropriation. This was the first form of invasion of privacy to be recognized by the law. The most common form of appropriation is the use of a person’s name or likeness for commercial purposes, as in an advertisement or television commercial.\textsuperscript{72}

8.5 Development of Press and Broadcasting in India

In order to understand the development of the freedom of press, it becomes necessary to classify the time period i.e. pre-independence era and post-independence era.

\textsuperscript{69} Id., at 576.
\textsuperscript{70} Ibid.
\textsuperscript{71} Solano v. Playgirl Inc., 292 F.3d 1078 (9th Cir. 2002).
\textsuperscript{72} Fred Fedler, et al., Reporting for the Media, 577 (2005),
8.5.1 Pre-Independence Era

The British were the last set of invaders whose colonization left a mark on India’s polity, culture, and industry. British rule, starting in the 18th century, had two significant influences germane to the development of the country’s mass media. First, they introduced English language in India and, secondly, a British citizen, James Augustus Hicky, started the early press i.e. Bengal Gazette. Furthermore, it was the British again who started the system of broadcasting.

Englishmen started newspapers in India to support the British Empire, whereas, Indian started their own newspapers to promote social, religious, educational, and political reforms.

During the period of 1818-67, the press struggled against censorship, harassment, deportation, and persecution. The period of 1867-1918 marked the emergence of a press deeply involved in the nationalist struggle against the British Raj, despite competition from those supporting the colonial regime. The reform-minded writers used the press to attack Hindu practices such as child marriage. They also advocated reforms such as widow remarriage and abolition of caste.

The government enacted the 1878 Vernacular Press Act to prevent the Indian language press from being critical of the British rule, thereby engendering wide-spread opposition both in India and Britain. Thereafter, time period of 1919-36 marked the Indian newspapers’ close alignment with the struggle for independence. Prominent leaders of the independence movement, including Mahatma Gandhi, owned or edited newspapers to advance their ideas. A decade before independence i.e. 1937-47 recorded the press as professional and assertive. The press was concerned not only with the freedom struggle but also with practical matters like newsprint availability and the modernizing of printing machinery.

The government’s endeavour to place restrictions on the press was one reason for the formation of the All India Newspaper Editors conference in 1940. Several newspapers closed their operations in 1942 in support of Gandhi’s ‘Quit India Movement’.

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74 Id., at 87.
75 Ibid.
76 Id., at 88.
77 Ibid.
78 Ibid.
Radio broadcasting in India started during British Colonial Rule. The authorities allowed the establishment of an amateur radio club in 1924 in Madras. The colonial government took over radio broadcasting in 1930 and named it the Indian State Broadcasting Service (ISBS). In 1936, the name changed to All India Radio (AIR) or Akashvani. Radio station began sprouting in both colonial India and in the princely states of Hyderabad, Travancore, Baroda, Mysore, Trivandrum, and Aurangabad. The pre- and post-independence governments took action to control these stations, which often supported anti-government positions. It is also being noted that radio was treated as an extended arm of colonial government to enable social and state control. Radio became an important tool of information, as well as for propaganda.79

8.5.2 Post-Independence Era

The post-independence press was originally sympathetic to the government. It offered cautious support to the government’s efforts at building the nation. The government appointed the 1952 and the 1977 press commissions to inquire into the laws and other developments affecting the press and its operations. The Press Council was established in 1965. The country, as well as the press, faced traumatic development in June 1975 when Prime Minister Indira Gandhi declared a political emergency, suspended civil rights, and imposed restrictions on free speech and the press. The foreign correspondents were also expelled. The Press Council was also dissolved.80

After the Emergency, the press evolved into a highly professional, market-oriented business. It introduced new technologies, designs, and magazines, and a new style of journalism. After independence, All India Radio became an important communication vehicle to promote government directed policies and to serve what the ruling, regimes considered vital developmental goals of the nation. Along with Doordarshan, it focused on producing programs for the country’s rural audience with content that was expected to be of interest to them, like agriculture, adult literacy, and folk music, among other things. Programs on health issues were also started. All India Radio and Doordarshan became parts of an autonomous body, the Prasar Bharti (Broadcasting Corporation of India) set up in late 1997. The idea behind Prasar Bharti is

79 Id., at 89.
80 Id., at 90.
the creation of a critical public service broadcaster in the country even while it is expected to be
immune to any interference by the state or the party in power.\textsuperscript{81}

8.6 Media Laws in India

It is submitted that freedom of media is not absolute and, the Parliament can regulate it by imposing reasonable restrictions on it. Freedom of media includes print media as well as electronic media. In this part, legal framework has been classified in two categories. Firstly, the researcher shall discuss policy and legal framework of Press. Secondly, legal framework of broadcasting will be discussed.

8.6.1 Legal Framework for Press

The Indian press is vigorous, activists, and pluralistic constraints, which include laws governing the operations of the press, demands of advertising, labour conditions, government control and regulations of newsprint, activist role of the owners, and institutionalized regulations through such bodies as the Press Council and the Press Commissions.

Article 19(1)(a) of the Indian Constitution guarantees the freedom of speech and expression. The Supreme Court of India has expanded the Article 19(1)(a) and, declared that freedom of speech and expression also includes freedom of press. However, clause (2) and (6) of Article 19 impose certain restrictions on this freedom. Clause (2) permits restrictions in matters relating to public order, friendly relations with foreign states, and incitement to offence. Clause (6) specifies the limits of the right to practice a profession, occupation, trade, or business. However, the Supreme Court has the power to scrutinize the law and, can dismiss unreasonable restrictions.

The major laws that potentially affect the operations of the press include:

- Criminal laws, particularly those in section 144 of the Indian Penal Code, intended to maintain public order. Penal Code provisions on Sedition (Section 124 A), promotion of class hatred (Section 153 A), obscenity (Section 292), Defamation (Section 499), and “public mischief” (Section 505) also apply to the press.

\textsuperscript{81} \textit{Id.}, at 91.
• Section 11 of the Customs Act 1962 prohibits the import or export of goods which endangers the security of India, maintenance of public order or standards of morality or decency.

• The court has power under the Contempts of Courts Act, 1971 to restrict the publication which lowers the authority of the court and interferes with judicial proceedings or obstructs the delivery of justice.

• Provisions pertaining to the press and the legislature, including rules that empower speaker to regulate the entry of non-legislators to legislative proceedings and privileges relating to the publication of these proceedings.

• The Indian Officials Secrets Act, 1923 prohibits the gathering and publication of any sketch, plan, or note that an enemy state could use.

• Drugs and Magic Remedies (Objectionable Advertisements) Act, 1954 deals with injurious advertising.

• General laws on taxation in so far as they do not “single out” the press and place any unfair burdens to limit circulation of the press.

• Press and Registration of Books Act, 1867 mandates that every copy of a paper or book printed in the country must contain the name of the owner, editor, publisher, place of printing, date, and price of publication.

• The Indian Post Office Act 1898 regulates the transmission of “indecent or obscene” material and seditious matter, and allows for interception in the interest of public safety.

• Laws that regulate industrial relations, as well as those relating to operations of business, also apply to press. These include the Factories Act, 1948, the Children (Pledging of Labour) Act 1933, the Collections of Statistics Act 1953, and the Contract Labour (Regulation & Abolition) Act 1970.

• The Payment of Wages Act 1936 and the Working of Journalists (Conditions of Service) and Miscellaneous Provisions Act- both of which deal specifically with the working conditions of journalists.

• The Copyright Act 1957 protects intellectual property under certain conditions.
Besides the legislations, the government also institutionalized regulation of the press through several bodies i.e. the Press Commissions, Press Council, and the Office of the Registrar.

8.6.1.1 Role of Press Commission

The First Press Commission was formed in 1954. It was an outcome of the instances of yellow journalism of one type or another. It was alleged that the scurrilous writing—often directed against communities or groups and, press was spreading sensationalism. There was also a voice against the biasness of news. Without showing the signs of responsibility, the press commented on indecent and vulgar matters. The press was also alleged that it was unnecessary intruding into the private lives.82

The first Press Commission (1952-54) investigated various areas of journalism like, the working conditions of journalists, freedom of press, censorship and journalists’ professional code of conduct. It also dealt with the modes of recruitment, education, and training of professionals. The second press commission 1977 studied different aspects of the Official Secrets Act, Contempt of Court, etc.83

8.6.1.2 Role of Press Council

The Press Council Act of 1965 established the first Press Council of India in 1966. Although the council was dissolved in 1975 during the Emergency, it was again established under the Press Council of India Act of 1978. The Council has the power to hear, adjudicate complaints against the press, as well as against authorities. Ultimate purpose of the Press Council is to regulate freedom of media. The basic philosophy behind the self regulatory institution is to strengthen democratic set up by making free and responsible press.84

The Council discharges its functions primarily through the medium of its Inquiry Committees, adjudicating on complaint cases received by it against the Press for violation of the norms of journalism or by the Press for interference with its freedom by the authorities. There is a set procedure for lodging a complaint with the Council. A complainant is required essentially to write to the editor of the respondent newspaper, drawing his attention to what the complainant considers to be in breach of journalistic ethics or an offence against public taste. Apart from furnishing to the Council a cutting of the matter complained against, it is incumbent on the

82 http://presscouncil.nic.in/history.htm accessed on July 18, 2012, at 1:00 p.m IST.
83 Ibid.
84 Ibid.
complainant to make and subscribe to a declaration that to the best of his knowledge and belief he has placed all the relevant facts before the Council and that no proceedings are pending in any court of law in respect of any matter alleged in the complaint; and that he shall inform the Council forthwith if during the pendency of the inquiry before the Council any matter alleged in the complaint becomes the subject matter of any proceedings in a court of law. The reason for this declaration is that in view of Section 14(3) of the Act, the Council cannot deal with any matter which is sub judice.  

If the Chairman finds that there are no sufficient grounds for inquiry, he may dismiss the complaint and report it to the Council; otherwise, the Editor of the newspaper or the journalist concerned is asked to show cause why action should not be taken against him. On receipt of the written statement and other relevant material from the editor or the journalist, the Secretariat of the Council places the matter before the Inquiry Committee. The Inquiry Committee screens and examines the complaint in necessary details. If necessary, it also calls for further particulars or documents from the parties. The parties are given opportunity to adduce evidence before the Inquiry Committee by appearing personally or through their authorised representative including legal practitioners. On the basis of the facts on record and affidavits or the oral evidence adduced before it, the Committee formulates its findings and recommendations and forwards them to the Council, which may or may not accept them. Where the Council is satisfied that a newspaper or news agency has offended against the standards of journalistic ethics or public taste or that an editor or working journalist has committed professional misconduct, the Council may warn, admonish or censure the newspaper, the news agency, the editor or journalist, or disapprove the conduct thereof, as the case may be. In the complaints lodged by the Press against the authorities, the Council is empowered to make such observations as it may think fit in respect of the conduct of any authority including government. The decisions of the Council are final and cannot be questioned in any court of law. It will thus be seen that the Council wields a lot of moral authority although it has no legally enforceable punitive powers.

The Inquiry Regulations framed by the Council empower the Chairman to take suo motu action and issue notices to any party in respect of any matter falling within the scope of Press Council Act. The procedure for holding a suo motu inquiry is substantially the same as in the

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85 Ibid.
86 Ibid.
case of a normal inquiry except that for any normal inquiry a complaint is required to be lodged with the Council by a complainant. For the purpose of performing its functions or holding an inquiry under the Act the Council exercises some of the powers vested in a Civil Court trying a suit under the Code of Civil Procedure, 1908, in respect of the following matters, namely:

- Summoning and enforcing the attendance of persons and examining them on oath;
- Requiring the discovery and inspection of documents;
- Receiving evidence on affidavits;
- Requisitioning any public record or copies thereof from any court or office;
- Issuing commissions for the examination of witnesses or documents; and
- Any other matter, which may be prescribed.

8.6.1.3 Registrar of Newspaper

The Press and Registration of Books Act 1867 was amended in 1956 to establish the office of the Press Registrar of India. The law requires all newspapers, magazines, journals, and news agencies to register. The Registrar of Newspapers is the statutory authority with responsibility for the collection of statistics on the press.

8.6.2 Legal Framework for Broadcasting

Television commenced in 1959 as an educational experiment involving television clubs in New Delhi where some 21 community TV sets received the programs. Regular broadcasting was introduced in New Delhi in 1965. The expansion of the medium was tentative with about a dozen cities receiving TV signals by 1975. From such a modest beginning, starting in 1982, the TV system has expanded into one of the largest networks in the world. Indian television is modeled on the European model representing a strong network dedicated to public service and a number of private satellite channels primarily offering entertainment programs. This “mixed” model offers a challenge to regulators.

The government’s control over broadcasting rests in Article 246 of the Indian Constitution and in several other laws, including the Indian Telegraph Act 1885 and the Indian Wireless Act 1933. The Parliament has the power to enact legislation on communication-related areas such as post and telegraph, telephone, wireless, broadcasting, other forms of

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87 Ibid.
88 Supra note 73 at 98.
communication. The current broadcasting policy is based on Article 19(2) of the Indian Constitution and the All India Radio Code of 1970. These provisions mandate that broadcasts should not indulge in the criticism of friendly countries, attack religion or communities, air obscene or defamatory material, incite violence, and the like.89

Cable Television is the talk of the day. In each and every corner of the country people talk about it. Urbanites have the privilege to enjoy the cable television has spread its wings with the results that there has been a haphazard mushrooming of cable television networks all over the country due to availability of signals of foreign television networks via satellites. The programmes which are being projected on the satellite channels are predominantly western and are alien to our culture and way of life. On these cable television networks lot of undesirable programmes and advertisements are also being screened without any fear of being checked. To check this tendency it has been considered necessary to regulate the operation of cable television networks in the country so as to bring about uniformity in their operation. On 29th September, 1994 an Ordinance titled the Cable Television Networks (Regulation) Ordinance, 1994 was promulgated by the President to provide for the regulation of the operation of cable television networks in the country. The Ordinance was re-promulgated by the President on 17th January, 1995.90

To replace the said Ordinance a Bill was introduced in the Parliament which was passed by both of the houses. The Preamble to the Cable Television Networks (Regulation) Act 1994 also states the fact that the subscribers of these cable television networks, the programmers and the cable operators themselves are not aware of their rights, responsibilities and obligations in respect of the quality of service, technical as well as content-wise, use of material protected by copyright, exhibition of uncertified films, protection of subscribers from anti-national broadcasts from sources inimical to our national interest, responsiveness to the genuine grievances of the subscribers and perceived willingness to operate within the broad framework of the laws of the land e.g. the Cinematograph Act, 1952, the Copyright Act, 1957, Indecent Representation of Women (Prohibition) Act, 1986. It is, therefore, considered necessary to regulate the operation of

90 http://www.indiancabletv.net/catvaet.htm accessed on July 18, 2012 at 6:30 p.m. IST.
cable television networks in the entire country so as to bring about uniformity in their operation. It will, thus, enable the optimal exploitation of this technology which has the potential of making available to the subscribers a vast pool of information and entertainment.91

Cable Television Networks (Regulation) Act 1994 mandates the registration of cable networks before starting operations, specifies the use of standard equipment, requires a program code, and prohibits the transmission of certain programs. The regulation legalizes the seizure and confiscation of equipment and the imposition of penalties for non-compliance. Furthermore, Parliament has passed the Cable Television Networks (Regulation) Amendment Bill, 2011 that will digitalise cable TV and bring transparency in the system to benefit all stakeholders, including consumers and cable operators. Information and Broadcasting Minister Ambika Soni said in the Rajya Sabha that the legislation will regulate cable operators and digitalise the analog TV network across the country in a phased manner by the end of 2014. She further continues while saying that such legislation will provide the government the right to cancel licences of cable operators who violate rules. Ms. Soni said that the TV programmes are showing obscene material and, spreading superstitions in the society. And all this happen because of channels’ race for highest Television Rating Point (TRP). Therefore, the legislation also contains certain provisions for effective monitoring of contents of the programmes aired through designated officers.92

Increasingly, the Broadcasting Content Complaint Council is an independent Council set up by the Indian Broadcasting Foundation. The Council comprises of a thirteen member body consisting of a Chairperson being a retired Judge of the Supreme Court or High Court and 12 other members. The council would examine complaints about television programmes received from the viewers or any other sources, including Non-governmental organisations, Ministry of Information & Broadcasting etc. and ensures that the programmes are in conformity with the Self Regulatory Content Guidelines. Any person may complain of any breach of the Self Regulatory Content Guidelines for Non News & Current Affairs TV Channels including the Principles of Self Regulations i.e. National Interest, Racial & Religious Harmony, Children & Generally Accessible Programmes, Social Values, Kissing, Sex & Nudity, Violence & Crime, Gambling,

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91 Ibid.
8.6.3 Wider Interpretation of Freedom of Press

One of the significant objectives of the Indian Constitution, as envisaged in the preamble, is to secure liberty of thought and expression to all the citizens of India. This objective has been realized by guaranteeing the freedom of speech and expression as a fundamental right under Article 19(1)(a) of the Constitution. This right is enjoyed by all the citizens, subject only to the restrictions imposed upon its exercise by the State under clause (2) of the Article 19.

In the Indian Constitution there is no separate provision exclusively dealing with or guaranteeing the freedom of the press as is the case in other countries like the USA. The founding fathers of the Indian Constitution were very much aware of the First and Fourteenth amendments of the United States Constitution as also the judgments of the American Supreme Court thereon and they deliberately avoided to incorporate any provision in the Constitution guaranteeing the freedom of the press. The term “freedom of expression” is a broader one and brings under its rubric or includes all possible forms of expressing opinions, thoughts, feelings, ideas and convictions. And this expression may take place through writing, printing, picture or by any other manner, and includes expression through the press.

Recognising the importance of the right to freedom of speech and expression the Supreme Court of India observed in Ramesh Thapar v. State of Madras

[F]reedom of speech and of the press lay at the foundation of all democratic organizations, for, without free political discussion no public education, so essential for the proper functioning of the processes of popular government, is possible. A freedom of such amplitude might involve risks of abuse. But the framers of the constitution may well have neglected with Madison who was the leading spirit in the preparation of the First Amendment of the Federal Constitution, that it is better to leave a few of its noxious branches

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93 http://ibfindia.com/guidelines.php accessed on July 18, 2012, at 7:00 p.m IST.
94 Krushna Singh Padhy, The Indian Press Role (1) and responsibility, 19 (1994).
95 Id., at 20.
96 (1950) SCR 594.
to their luxuriant growth, than, by pruning them away, to injure the vigour of those yielding the proper fruits.97

In Sharma v. Srikrishan,98 it was held that the freedom of press, under the Indian Constitution, is not higher than the freedom of an ordinary citizen. It is subject to the same limitations as are imposed by Art. 19(2), and to those limitations only.99

But it is to be noted that the restrictions which are to be imposed upon the press should be reasonable. The Supreme Court touched upon the rights of the individual to privacy vis-à-vis invasions by journalists in some cases like Prabha Dutta v Union of India100 where journalists sought permission from the Supreme Court to interview and photograph prisoners. Although the issue of privacy was not directly dealt with, the court implicitly acknowledged the right to privacy by holding that the press had no absolute right to interview or photograph a prisoner but could do so only with his consent.101

In R. Rajagopal v. State of Tamil Nadu102, the Supreme Court for the first time discussed right to privacy in the context of the freedom of the press. The Court held that the press had the right to publish the autobiography of the prisoner in so far as it appeared from the public records, even without his consent or authorization. However, if the publication went beyond the public record and published his life story, which would amount to an invasion of his right to privacy.103

In Kaleidoscope (India) P Ltd. v. Phoolan Devi104, Phoolan devi, once India’s most dreaded dacoit, sought an injunction restraining the exhibition of the controversial biographical film Bandit Queen both in India and abroad. The trial court reached a prima facie view that the film infringed the right to privacy of Phoolan devi, notwithstanding that she had assigned her copyright in her writings to the film producers. This was upheld by the Division Bench. The court reached the prima facie conclusion that even assuming that Phoolan devi was a public figure whose private life was exposed to the media, private matters relating to rape or the alleged

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97 Id., at 697.
98 AIR 1959 SC 392.
100 (1982) 1 SCC 1.
101 Supra note 4 at 122.
102 (1994) 6 SCC 632.
103 Supra note 4 at 122.
104 AIR 1995 Del. 316.
murders committed by her could not be commercially exploited as news items or as matters of public interest.\textsuperscript{105}

In regard to public official’s claim to privacy, the Press Council of India has laid down that if there is a clash between the public official’s privacy and the public’s right to know about his personal conduct, habits, personal affairs and traits of character impinging upon or having a bearing on the due discharge of his official duties, the former must yield to the latter. However, in matters of personal privacy which are not relevant to discharge of his official duties, the public official enjoys the same protection as any other citizen.\textsuperscript{106}

Further as per according to the norms of journalistic conduct, it been provided that The Press shall not intrude or invade the privacy of an individual unless outweighed by genuine overriding public interest, not being a prurient or morbid curiosity. So, however, that once a matter becomes a matter of public record, the right to privacy no longer subsists and it becomes a legitimate subject for comment by Press and media among others.\textsuperscript{107}

However, while reporting crime involving rape, abduction or kidnap of women/females or sexual assault on children, or raising doubts and questions touching the chastity, personal character and privacy of women, the names, photographs of the victims or other particulars leading to their identity shall not be published. Minor children and infants who are the offspring of sexual abuse or ‘forcible marriage’ or illicit sexual union shall not be identified or photographed.\textsuperscript{108}

Recently, the Justice Markandey Katju, Chairman, Press Council of India, has warned the media against its immoral and irresponsible actions. He said that the media has lost its sense of proportion. Ninety per cent of Indian media coverage, especially electronic media, goes to providing entertainment-lives of film stars, fashion parades, cricket, disco dancing, reality shows, astrology and so on. Justice Markandey Katju has demanded to provide more teeth to press council of India. It was also being contended that electronic media should be regulated.\textsuperscript{109}

\section*{8.6.4 Radia Tapes, Wikileaks, and Privacy Issues}

\textsuperscript{105} Supra note 4 at 122.
\textsuperscript{106} http://presscouncil.nic.in/history.htm accessed on February 5, 2012 at 4 p.m. IST.
\textsuperscript{107} http://presscouncil.nic.in/partA.htm accessed on February 5, 2012 at 4 p.m. IST.
\textsuperscript{108} Ibid.
The Radia tapes controversy relates to the telephonic conversations between Nira Radia, a political lobbyist and an acquaintance of the (then) Indian telecom minister A. Raja, and with senior journalists, politicians, and corporate houses, taped by the Indian Income Tax Department in 2008–09. After getting authorization from the Home Ministry, the Indian Income Tax department tapped Radia’s phone lines for 300 days in 2008–2009 as part of their investigations into possible money laundering, restricted financial practices, and tax evasion.¹⁰

In November 2010, OPEN magazine carried a story which reported transcripts of some of the telephone conversations of Nira Radia with senior journalists, politicians, and corporate houses, many of whom have denied the allegations. The Central Bureau of Investigation has announced that they have 5,851 recordings of phone conversations by Radia, some of which outline Radia’s attempts to broker deals in relation to the 2G spectrum sale. The tapes appear to demonstrate how Radia attempted to use some media persons to influence the decision to appoint A. Raja as telecom minister. In the recorded conversations between Nira Radia and prominent figures, referred to as the Radia Tapes, several prominent figures are heard in conversation with Radia.¹¹

The Indian Telegraph Act 1885 allows interception of telecommunications if it is in the interest of sovereignty and integrity of India, security of the state, friendly relations with foreign states or public order or for preventing incitement to the commission of an offence. If any of these conditions are not satisfied, telephonic interceptions are unconstitutional. In People’s Union for Civil Liberties v. Union of India,¹² the Supreme Court has laid down certain guidelines for regulating the interception of telecommunications. It is a pre-condition for a competent authority to get permission from the home ministry for tapping the telephonic conversations. Further, intercepted material should only be used for that purpose for which interception was ordered. The Supreme Court held that the competent authority, while passing the order permitting the interception, must state thereupon as to how the intercepted material is to be dealt with.¹³

The intercepted materials are ordinarily not likely to be secrets of the state. Their disclosures are neither prohibited nor can at present be penalised. It is expected that the same

¹¹ Ibid.
¹² Supra note 47.
¹³ Id., at 579.
would be available with the relevant departments of the government and a legitimate disclosure of the same could be made either through the Right to Information Act or through an investigative process if the same are utilized for that purpose. If the material intercepted deals with matters concerning the affairs of the state, unauthorized intervention in the functioning of a government or commission of an offence, it could be handed over to the competent authority dealing with the matter.\textsuperscript{114}

However, if the conversations so tapped are private in nature and have no bearing whatsoever on the functioning of the state, it would ordinarily be expected from the competent authority to direct that such conversations or intercepts be maintained in absolute secrecy and its disclosure and use is prohibited.\textsuperscript{115}

However, those who seek to interfere in the matters of the state and influence decisions concerning the state of play in the political arena are hardly expected to contend that a cloak of secrecy be maintained around their roles. They may have a right to privacy in relation to their private lives but not in relation to activities which are wholly political or related to the public affairs of the state.\textsuperscript{116}

On November 29, 2010, \textit{Ratan Tata} filed a petition in the Supreme Court of India, invoking Article 21 of the Constitution which ensures his fundamental right to life and personal liberty as a citizen. His petition argues that the publication of conversations between him and \textit{Radio} is an invasion of his privacy. He is seeking the direction from the Supreme Court that the government should conduct a thorough inquiry to find out how the secret records were made available to those, not authorized to receive the recordings. The petition also seeks the retrieval and recovery of all the recordings (which were removed from the lawful custody) by the ministry of home, finance, the Director-General of income tax and the Central Bureau of Investigation. \textit{Ratan Tata} has also asked the court to direct the government to ensure that no further publication of these recordings should be appeared in the media. His demand for a total freeze on the tapes indicates, at the very least, that there might be revelations about business practices that could impair the \textit{Tata} reputation for integrity. Equally, there is a case to be made that full disclosure is

\textsuperscript{115} Ibid.
\textsuperscript{116} Ibid.
in public interest for it reveals the murky ways in which decisions are made and lucrative favours given.\textsuperscript{117}

Therefore, the public interest can justify the means. There are moments in the life of a nation when method validates message. The biggest such moment in the history was the American Supreme Court’s judgment in 1971 that allowed the \textit{The New York Times} and \textit{The Washington Post} to resume the publications of a series of articles based on the 7,000 page Pentagon papers. The court said the government’s attempt to ban publication bears a heavy burden of presumption against its constitutionality. The Pentagon papers chronicled the secret history of the US war in Vietnam. The court came to the rescue of the press on the 15\textsuperscript{th} day after the Nixon administration had gagged \textit{The New York Times} in the name of national security.\textsuperscript{118}

In the wake of Wikileaks, it’s the Pentagon Papers paranoia all over again. As the leakage of diplomatic cables reveals the unsavoury truth about the way Washington sees the world.\textsuperscript{119}

Adam D. Moore has rightly said that the recent sharing of government information on sites such as WikiLeaks is forcing a new kind of accountability. One marker of power is the ability to demand information disclosures from others while keeping one’s own information secret. As data mining and profiling have become the norm many have become frustrated and alarmed with a perceived loss of power. Other entities, like governments and corporations, control vast amounts of information, including sensitive personal information about citizens, and use this information for their own ends. The average information target or citizen has little power to demand disclosures from governments and corporations and even less power to control the vast amounts of information being collected and stored. In terms of accountability to family, work, community, and the nation, individuals have felt increased pressure with the arrival of the digital age. For example, consider all the new devices used to monitor workplace activity in the private sector and the corresponding changes in accountability. Information sharing sites, like WikiLeaks, have changed all of this. Now there is the possibility that the “new accountability” will be felt at all levels of government and business. Information that was once only heard in whispers at closed committee meetings is now being shouted from the mountaintop.\textsuperscript{120}

\textsuperscript{118} \textit{Ibid.}
\textsuperscript{119} \textit{Id.}, at 24.
8.6.5 Censorships of Films in India

Cinema is not mere a source of entertainment, it also brings social, economic and political changes in the society. Therefore, the State examines every ‘medium of expression’ in the public interest. Indeed, the State thinks the certification of films necessary as their audio-visual potential has stronger influence on the people’s mind than the print media. Moreover, children’s tender mind also requires protection from psychologically damaging matter. Film certification is thus the end product of the process of previewing of film and it includes a decision either not to allow a particular film or public viewing or to allow it for public viewing with certain deletions and / or modifications or at least proper categorization of the films.\(^{121}\)

While considering the significant impact of movies, than any other mode of communication, on the human minds, the Supreme Court in the case of *S. Rangarajan v. P. Jogjivan Ram*,\(^ {122}\) said that the movies cannot be allowed to function in a free market place just as does the newspapers or magazines. For this Censorship by prior restraint is not only desirable but also necessary. The court observed that:\(^ {123}\)

Movie doubtless enjoys the guaranty under Article 19(1)(a) but there is one significant difference between the movie and other modes of communication. The movie cannot function in a free market place like the newspaper, magazine or advertisement. Movie motivates thought and action and assures a high degree of attention and retention. It makes its impact simultaneously arousing the visual and aural senses. The focusing of an intense light on a screen with the dramatizing of facts and opinion makes the ideas more effective. The combination of act and speech, sight and sound in semi-darkness of the theatre with elimination of all distracting ideas will have an impact in the minds of spectators. In some cases, it will have a complete and immediate influence on, and appeal for every one who sees it. In view of the scientific improvements in photography and production the present movie is a powerful means of communication.


\(^{122}\) 1989 SCR (2) 204 (214).

\(^{123}\) *Id.*, at 213-214.
Before 1918, the censorship was haphazard and voluntary in India. The Cinematograph Act was passed in 1918. This was concerned both with the licensing of cinema houses and the certifying of films declared suitable for public exhibitions. In 1920, the Boards of Film censors were set up at Bombay, Calcutta and Madras. The Boards drew up General principles for the guidance of Inspectors of Films based on the rules of censorship drawn up by the British Board of Film Censors. At that time, the whole aim of censorship was to prevent the Indians from seeing a derogatory image of western life. In 1927, Rangachariar Committee suggested to set up a Central Board of Censorship. But the suggestions were not implemented. In 1949, two Acts were passed amending the Cinematograph Act of 1918. One Act introduced two categories ‘U’ and ‘A’, and the other made provision for the appointment of a single Central Board of Film Censors. Moreover, the Report of the Patil Enquiry Committee was also received. Finally, the Cinematograph Act of 1952 was passed repealing all the previous enactments. And in 1958, Cinematograph (Censorship) Rules were framed.\textsuperscript{124}

The Cinematograph Act, 1952 lays down the guidelines to be followed by certifying films. Apart from “U” (unrestricted public exhibition) and “A” (restricted to adult audiences) certificates, two other categories were added in June, 1983 i.e. “UA” (unrestricted public exhibition subject to parental guidance for children below the age of twelve) and “S” (restricted to specialized audiences such as doctors or scientists). Over the period of years, the Cinematograph Act of 1952 has been amended.\textsuperscript{125}

It has been provided under the Cinematograph Act that a film shall not be certified for public exhibition, if, in the opinion of the authority competent to grant the certificate, the film or any part of it is against the interests of the sovereignty and integrity of India, the security of the States, friendly relations with foreign State, public order, decency or morality or involves defamation or contempt of court or is likely to incite the commission of any offence.\textsuperscript{126} At the same time, Film Certification Appellate Tribunal (FCAT) has been constituted under section 5D of the 1952 Act for hearing appeals against any order of the Central Board of Film Censors (CBFC).

\textsuperscript{125} \url{cbfcindia.gov.in/html/uniquepage.aspx?unique_page_id=20} accessed on March 23, 2013, at 3:45 p.m. IST.
\textsuperscript{126} The Cinematograph Act, 1952, s. 5B.
The Act of 1952 provides that the Central Board of Film Certification (CBFC) consists of a Chairperson and not less than twelve and not more than twenty-five other members appointed by the Central Government. They are appointed for a period not exceeding three years. They are eminent persons from different walks of life such as social sciences, law, education, art, film and so on, thus representing a cross-section of society. The Central Board of Film Certification (CBFC) is assisted by advisory panels in the regional offices each of which is headed by a regional officer and the members of these panels are also representative of a cross-section of society and interests. These members will hold office for a period not exceeding two years. The Certification rules of 1983 equally applicable to foreign films imported into India, dubbed films and video films. It is very important to protect India from any kind of cultural invasion. In order to formulate some guiding factors for issuing certificate, the Guidelines issued on December 6, 1991 assumed certain objectives of film certification which are as follows:\footnote{127}{http://cbfcindia.gov.in/htm/uniquepage.aspx?unique_page_id=20 accessed on March 23, 2013, at 3:50 p.m. IST.}

- The medium of film remains responsible and sensitive to the values and standards of society;
- Artistic expression and creative freedom are not unduly curbed;
- Certification is responsive to social changes;
- The medium of film provides clean and healthy entertainment; and
- As far as possible, the film is of aesthetic value and cinematically of a good standard.

In pursuance of the above objectives, the Board of Film Certification shall ensure that:

- Anti-social activities such as violence are not glorified or justified;
- The modus-operandi of criminals, other visuals or words likely to incite the commission of any offence are not depicted;
- Scenes –(a) Showing involvement of children in violence as victims or perpetrators or as forced witnesses to violence, or showing children as being subjected to any form of child abuse; (b) Showing abuse or ridicule or physically and mentally handicapped persons; and (c) Showing cruelty to, or abuse of animals, are not presented needlessly;
- Scenes which have the effect of justifying or glorifying drinking are not shown;

\footnote{128}{Ibid.}
• Scenes tendering to encourage, justify or glamorize drug addiction are not shown; Scenes tendering to encourage, justify or glamorize consumption of tobacco or smoking are not shown.

• Human sensibilities are not offended by vulgarity, obscenity or depravity;

• Such dual meaning words as obviously cater to baser instincts are not allowed;

• Scenes involving sexual violence against women like attempt to rape, rape or any form of molestation, or scenes of a similar nature are avoided, and if any, such incident is germane to the theme, they shall be reduced to the minimum and no details are shown; etc.

Furthermore, in order to curb sex and violence, the following measures are being taken:\(^{129}\)

• The songs and trailers of Indian films being telecast on Doordarshan are now being subjected to pre-censorship.

• In each Examining Committee/Revising Committee it has to be ensured that 50% of the members are women.

• The members of the Board and Advisory Panels have been requested to implement the guidelines strictly.

• Specific clarifications have been issued about interpretations of some of the frequently violated guidelines.

• The names of the members of the Examining Committees/Revising Committees/Film Certification Appellate Tribunal, on whose recommendation a film is cleared for public exhibition, are shown in the certificate for public exhibition granted to that film.

Considering above said guidelines, following films have been or are banned in India:\(^{130}\)

• Bhakta Vidur (1921), which was banned because of political reason.

• Neel Akasher Neechey (1959), showed the difficulties of Chinese wage laborer in 1930s.

• Nine Hours to Rama (1963), depicted the psychological motivations of Nathuram Godse.


\(^{130}\) http://en.wikipedia.org/wiki/List_of_films_banned_in_India accessed on March 12, 2013, at 2:00 p.m. IST.
• Kama Sutra: A Tale of Love (1996), banned because it showed open sex scenes.
• Paanch (2003), banned due to sexual content and violence.
• Da Vinci Code (2006) was banned in Andhra Pradesh and Goa.
• Fanaa (2006) and Parzania (2007) were banned in Gujarat.
• Recently, Vishwaroopam (2013) was banned in Tamil Naidu. However, after making some agreement it was released.

However, Someswar Bhowmik criticized India's film censorship machinery and its agenda, as being caught in a colonial past. He said that the political manipulation of film censorship encompasses not simply refusal/withholding of censor certificate to 'objectionable' film(s), but deliberate promotion of 'favourable' films.\textsuperscript{131}

On the similar lines, prior restraint has required the cutting of kissing scenes and the beeping out of unacceptable words, like \textit{breasts}. Some films are refused a censor certificate: \textit{Urf Professor}, a story of a scholarly hitman, reportedly for its foul language; \textit{Divya Drishti}, reportedly for its liberal use of profanities and the depiction of a homosexual relationship between two married men. The Central Board of Film Censors (CBFC) is demanding that \textit{War and Peace}, an antiwar film, which triumphed at the Bombay International Film Festival in February 2002, be cut—significantly, according to the documentary's filmmaker Anand Patwardhan. The film details the consequences of India's successful nuclear tests in 1998 and the rise of Hindu fundamentalism. Pornography is illegal in India, but it is a thriving industry. Proposals to amend the Cinematograph Act 1952 in 2002, purportedly to liberalize the code, as of December 2004, have not been enacted into law. Indeed the chair of the Central Board of Film Censors (CBFC), Vijay Anand, resigned as a result of statements of the Information and Broadcasting Secretary regarding the objectives “to provide clean and healthy entertainment and to ensure that the medium of film remains responsible and sensitive to the standards of society.” Suggesting an opposite, conservative direction, it was reported in 2003 that the Information and Broadcasting Ministry is considering the pre-censorship of liquor and sexist commercials.\textsuperscript{132}

8.6.5.1 Role of Indian Judiciary vis-à-vis Censorship in India

No doubt, one thing becomes clear that freedom of speech and expression is not an absolute freedom. And it has been echoed in the Supreme Court’s various decisions. In the judgment of Indian Express Newspapers (Bombay) v. Union of India, the Apex Court held that the freedom of expression is the first condition of liberty and it occupies a preferred position in the hierarchy of liberties giving succour and protection to other liberties. The Apex Court in the case of Life Insurance Corporation of India & Union of India v. Prof. Manu Bhai D.Shah & Cinemart Foundation, also held that the freedom of speech is a basic human right and held that every citizen of this free country has the right to air his or her views through the printing and/or the electronic media subject of course to permissible restrictions imposed under Article 19(2) of the Constitution.

The Delhi High Court in Ram Jethmalani v. Subramaniam Swamy, said that the law of defamation and freedom of speech and expression have been harmonized by judicial process so that one’s right of privacy and right to protect his honour and reputation is preserved and at the same time his fundamental right to free speech is also protected. The court continued to explain the law of defamation, as follows:

Traditional defenses to an action for defamation have now become fairly crystallized and can be compartmentalized in 3 compartments: truth, fair comment and privilege. Truth, or justification, is a complete defense. The standard of proof of truth is not absolute but is limited to establishing that what was spoken was ‘substantially correct’. Fair comment offers protection for the expression of opinions. Standard of proof is not that the Court has to agree with the opinion, but is limited to determine whether the views could honestly have been held by a fair-minded person on facts known at the time. Unlike defense of truth, defense based on fair comment can be defeated if the plaintiff proves that the defamer acted with malice. Similar is the situation where the defense is of qualified privilege. Privilege is designed to protect expression made for the public good. Protection of

\(^{133}\) AIR 1986 SC 872.
\(^{134}\) AIR 1993 SC 171.
\(^{135}\) 126 (2006) DLT 535.
qualified privilege is lost if actual malice is established. In public interest, absolute privilege is a complete defense. Rationale of absolute privilege being restricted to Court proceedings or proceedings before Tribunals which have all the trappings of a Civil Court and Parliamentary proceedings is that if threat of defamation suits loom large over the heads of lawyers, litigants, witnesses, Judges and Parliamentarians it would prohibit them from speaking freely and public interest would suffer.\textsuperscript{136}

Similarly, in the case of \textit{Selvi J. Jayalalithaa and Anr. v. R. Rajagopal @ R.R.Gopal @ Nakkheerangopal and Anr.},\textsuperscript{137} the Madras High Court observed that the investigative journalists are entitled to make criticism under Article 19(1)(a) of the Indian Constitution, but subject to reasonable restrictions which do not allow them to injure another's reputation or to indulge what may be called character assassination.

Again, the Supreme Court in \textit{R. Rajagopal v. State of Tamil Nadu},\textsuperscript{138} held that ‘right to privacy’ is implicit in the Article 21 of the Indian Constitution i.e. ‘right to life and personal liberty’. The court held that nothing can be published about one’s personal matters, whether truthful or not, without his consent. However, the public interest can override one’s right to privacy.

In another case of \textit{K.A. Abbas v. The Union of India & Anr.},\textsuperscript{139} the Supreme Court held that censorship of motion pictures is universal in nature and, comes within the purview of Article 19(2) of the Indian Constitution. The court also favoured the pre-censorship where the motion pictures are involved. The court opined that motion pictures should be treated in a different manner than the other form of art and expression. The court upheld prior restraint on exhibition of motion pictures subject to Government setting up corrective machinery and an independent Tribunal and reasonable time limit within which the decision had to be taken by the censoring authorities.

\textsuperscript{136} \textit{Id.}, Para 95.
\textsuperscript{137} \textit{AIR 2006 Mad. 197}.
\textsuperscript{138} \textit{Supra note 102}.
\textsuperscript{139} (1970) 2 SCC 780.
While balancing the conflicting interests, the Supreme Court in the case of LIC of India v. Cinemart Foundation,\(^{140}\) held that the burden of proving reasonable restrictions under Article 19(2) is heavily upon the authorities.

Analyzing its previous judgements, the Supreme Court in Sahara India Real Estate Corp. v. SEBI,\(^{141}\) said that ‘prior restraint’ per se is not unconstitutional. In the present case, the court mentioned Reliance Petrochemicals Ltd v. Proprietors of Indian Express,\(^{142}\) in which the question of ‘prior restraint’ arose in the context of publication in one of the national dailies of certain articles which contained adverse comments on the proposed issue of debentures by a public limited company. The validity of the debenture was sub judice in this Court. Initially, the court granted injunction against the press restraining publication of articles on the legality of the debenture issue. The test formulated was that any preventive injunction against the press must be “based on reasonable grounds for keeping the administration of justice unimpaired” and that, there must be reasonable ground to believe that the danger apprehended is real and imminent.\(^{143}\)

Therefore, the Supreme Court held that the courts do have powers to postpone reporting of judicial proceedings in the interest of administration of justice. Law regarding contempt of court under Article 19(2) is a reasonable restriction. The Supreme Court said that the courts have discretion to postpone trial, conduct retrials, and change the venue, and in appropriate cases even to grant acquittals in cases of excessive media prejudicial publicity. The very object behind empowering the courts to devise such methods is to see that the administration of justice is not perverted, prejudiced, obstructed or interfered with. Courts may apply the device like postponement of publicity, to balance ‘presumption of innocence’ and ‘presumption of Open Justice’. But an order of ‘postponement of publicity’ has to be passed only when other alternative measures such as change of venue or postponement of trial are not available. Again, it is necessary for the courts, passing ‘postponement of publicity’ order, to keep in mind the principle of proportionality and the test of necessity. Moreover, the higher courts shall pass the orders of postponement under Article 129/Article 215 of the Constitution.\(^{144}\) The Supreme Court said that:

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\(^{140}\) Supra note 134.


\(^{142}\) AIR 1989 SC 190.

\(^{143}\) Supra note 141 at para 30.

\(^{144}\) Id., para 34.
Such orders of postponement of publicity shall be passed for a limited period and subject to the courts evaluating in each case the necessity to pass such orders not only in the context of administration of justice but also in the context of the rights of the individuals to be protected from prejudicial publicity or misinformation, in other words, where the court is satisfied that Article 21 rights of a person are offended. There is no general law for courts to postpone publicity, either prior to adjudication or during adjudication as it would depend on facts of each case. The necessity for any such order would depend on extent of prejudice, the effect on individuals involved in the case, the over-riding necessity to curb the right to report judicial proceedings conferred on the media under Article 19(1)(a) and the right of the media to challenge the order of postponement.

Another case of right of privacy was the Phoolan Devi v. Shekhar Kapoor & Ors. In this case the Supreme Court held that the defendants have no right to exhibit the film as produced as has been filed in this Court violating the privacy of plaintiff's body and person. The court further held that the Balance of convenience is also in favor of restraining the defendants from exhibiting the film any further, if defendants are allowed to exhibit the film further it would cause further injury to the plaintiff. And no amount of money can compensate the indignities, torture, feeling of guilt and shame which has been ascribed to the plaintiff in the film.

Therefore, reputation of a person can never be measured in terms of money. And if it does, then it would be kind of a license to violate anybody's reputation.

Similarly, in the case of Shilpa S. Shetty v. Magna Publications Co. Ltd. and others, the defendants were restrained from publishing the articles about plaintiff's personal life where no public interest was involved. Moreover, the court regarded such articles as per se defamatory.

Recently, a song named as "Mehngai" in movie “Chakravyuh” (2012) was being displayed on YouTube before the movie’s release. The said song was challenged on the ground that its lyrics are causing serious harm to the reputation and goodwill of the plaintiff. The matter was considered by the Delhi High Court in the case of Bata India Ltd. v. A.M. Turaz and

145 Ibid.
the defendants contended that the Central Board of Film Censors (CBFC) certified the 
lyrics as per according to the guidelines. And if any person wants to challenge the Board’s order 
then he or she can approach the revising authority under the Cinematographic Act. The 
defendants also argued that the Members of the Board of Film Certification are experts and this 
court will not sit over the decision taken by the expert body. While rejecting the above 
contentions, the Delhi High Court said that the defendants have no right to use the name of 
plaintiffs with such a disparagement to the extent of attributing that the plaintiff has looted the 
country and that they are running their industry by the blood of the people. It was considered a 
serious attack on the reputation and goodwill of the plaintiff. The Delhi High Court also 
emphasized on the fact that the Cinematographic Act 1952 does not exclude the jurisdiction of 
the civil court to try and entertain a civil suit. Moreover, the Act of 1952 does not contain any 
specific provision which grants remedy against the loss of one’s reputation and goodwill. The 
court did not try to interfere with the Expert bodies’ decision rather took action against the 
violation of fundamental rights. The court considered the lyrics as per se defamatory, and 
restrained the defendants from using such defamatory words. In the present case, the Delhi High 
Court said that in Khushwant Singh v. Maneka Gandhi, the autobiography of a well-known 
author Khushwant Singh was yet to be published and the court refused to restrain it from being 
published. Whereas, in the present case, the promos of the song were already on YouTube and 
the use of the offending lyrics was per se defamatory.

8.7 Social Networking Sites and Privacy Issues

Modern computing technology makes it possible to record, preserve, collate, reconstruct 
and use detailed facts about individuals on a scale and in a style quite different from the past. 
With this technology, data is voluminous, not sparse; is permanent, not transient; and is 
detached, not tied to the individual’s own observation. She noted that the owner of this

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149 IA No. 18245/2012 in CS (OS) No. 3010/2012, decided on October 15, 2012. Available at 
http://www.indiankanoon.org/doc/7582180/ accessed on March 22, 2013, at 1:30 p.m. IST.
150 Id., para 26.
151 AIR 2002 Del. 58.
(2003).
information is often unaware of, or at least unconnected to, its storage and utilization. She argued that such ubiquitous data collection is harmful to personal privacy and autonomy.\textsuperscript{153}

Social networking sites generally have two primary components: a user profile and a network of friends. A user profile consists at the very least of a name or username, but more often is a detailed list of a user’s personal information and preferences, plus photographs, music, videos, animated graphics, and anything else an individual adds to spice up his or her page. The friends network, however, is the real key to social networking sites—the crux of what differentiates them from blogs, online journals, personal Web sites, and other means of personal communication on the Web.\textsuperscript{154} The number and quality of one’s friends on MySpace, Facebook, or a similar site is essentially a form of social currency, in addition to providing an easy means to keep up to date with what one’s friends are doing and saying.\textsuperscript{155} Finding friends is usually just as simple as searching or browsing the Web site, requesting to be someone’s friend, and having that request accepted or turned down.\textsuperscript{156}

“Friending” someone online is not exactly the same as actually being a person’s friend in reality—social networking friends may be personal friends, acquaintances, co-workers, classmates, celebrities, or even commodities. Musicians in particular have made use of sites like MySpace to promote themselves, increasing their reach into pop culture by accepting as many friends as possible. MySpace has become such a massive marketing tool for musicians that there are even online guides teaching musicians how to make the most of MySpace.\textsuperscript{157} One comedian, Dane Cook, famously catapulted his previously lackluster career into stardom using MySpace—he gathered over 1 million friends in his network and used it to self-promote all of his performances and products.\textsuperscript{158} Similarly, a song named ‘why this kolaveri’ was officially released on 16 November 2011 and instantly became viral on social networking sites and became the most

\textsuperscript{153} Ibid.
\textsuperscript{154} Melissa L. Rethlefsen MLS, “Social Networking,” Medical Reference Services Quarterly, 26:S1, 117-141, at 120 (2007), available at http://www.tandfonline.com/doi/abs/10.1300/J115v26S01_07#.Uk0CF5HrZj0 accessed on March 22, 2012, at 1:30 p.m. IST.
\textsuperscript{156} Melissa L. Rethlefsen MLS, “Social Networking,” Medical Reference Services Quarterly, 26:S1, 117-141, at 120 (2007), available at http://www.tandfonline.com/doi/abs/10.1300/J115v26S01_07#.Uk0CF5HrZj0 accessed on March 22, 2012, at 1:30 p.m. IST.
searched YouTube video in India and an internet phenomenon across Asia. Not surprisingly, there are many other benefits of social networking sites. There is research suggesting that for the socially isolated or those with low self-esteem, online social network sites can actually be of significant benefit, as it is easier to form links and make friends online. The research showed that the more intensively those with low life satisfaction or low self esteem use Facebook, the more social capital they gain.

However, social networking sites also involve many privacy issues. It has been alleged that these sites transfer users’ data to third parties for commercial, surveillance or data mining purposes. The sites have installed many features like facial-recognition software which have capacity to automatically identify persons in uploaded photos. Moreover, such tagging is being done even without informing the users. Another practice, which prevails on these sites, is the ability of third-party applications to collect and publish user data without their permission or awareness. Furthermore, the frequent use by social networking sites of automatic ‘opt-in’ privacy controls. It has also been alleged that the sites track online users after they have left a social networking sites. The sites’ are also being used for stalking or other illicit monitoring of users’ physical movements, and subjecting children to many abuses. Moreover, the users are ill informed and unaware about the processing of their personal information. The increased use of social network sites has led to increased concerns about users’ privacy not only in terms of the data collected and used by the organization but also in light of the possible impact of mass sharing of personal information on social relations.

One of the modern example was given by Daniel J. Solove. In his example, it all began in realspace, on a subway train in South Korea. A young woman’s small dog pooped in the train.

Other passengers asked her to clean it up, but she told them to mind their own business. Someone took photos of her and posted them on a popular Korean blog. The dog poop girl story quickly became national news in South Korea. As a result of her public shaming and embarrassment, the dog poop girl dropped out of her university.\textsuperscript{163} Solove argued that the dog poop girl would have been quickly forgotten in the offline world. The incident would have ended when she left the subway train. But the Internet enabled the few witnesses of her transgression to express their outrage to millions.\textsuperscript{164} Solove further emphasized on the general principle of criminal law i.e. punishment should be proportionate to the crime. But the problem with Internet norm enforcement is that it often spirals out of control. Offenses that deserve a mild scolding are punished with digital equivalent to branding.\textsuperscript{165}

Another example is of an employee in England who was dismissed because she wrote that her job was ‘totally boring’ on her Facebook status.\textsuperscript{166} Again, a social networking sites’ user, who had recently broken up with her partner, suffered a privacy violation because this partner put details of the relationship’s demise onto a mutual friend’s Facebook wall.\textsuperscript{167}

At international level, the eight principles set out by the Organization for Economic Cooperation and Development (OECD) are Collection Limitation, Data Quality, Purpose Specification, Use Limitation, Security Safeguards, Openness Principle, Individual Participation, and Accountability Principle.\textsuperscript{168} Therefore, the European Union regulates social networking sites through such principles. In India, social networking sites are governed by The Information Technology Act of 2000. This legislation deals with the issues pertaining to data protection and privacy.\textsuperscript{169} Social Networking Sites are ‘intermediaries’ within the meaning of intermediary under section 2(1)(w) of the Information Technology Act, 2000.\textsuperscript{170} Therefore, social networking

\textsuperscript{164} Id., at 5.
\textsuperscript{165} Id., at 95.
\textsuperscript{166} "Facebook remark teenager is fired," BBC News, 27 February, 2009. Available at http://news.bbc.co.uk/2/hi/uk_news/england/essex/7914415.stm accessed on March 22, 2012, at 1:30 p.m. IST.
\textsuperscript{167} Supra note 162 at 82.
\textsuperscript{169} For detailed discussion, See Supra Chapter 4 “CONSTITUTIONAL PROVISIONS AND LEGISLATIVE MEASURES REGARDING RIGHT TO PRIVACY IN INDIA.”
\textsuperscript{170} The Information Technology Act, 2000, s. 2(1)(w).
sites are bound to follow all rules and regulations drafted under the Information Technology Act, 2000.\textsuperscript{171}

In the latest Google Transparency Report of 2012, it was admitted that Google regularly receives requests from government agencies and courts around the world to remove content from its services. Governments ask companies including Google and other technology and communication companies, to remove content for different reasons like, allegations of defamation, the content violates local laws prohibiting hate speech or adult content, etc. It was also reported that India is also one of the most snoopiest country of the world after United States and Israel. The executive agencies pressurize social networking sites like Google for removing those contents and views, which are against their political ideologies.\textsuperscript{172} Obviously, it is violation of one’s free speech and expression online. Therefore, Jeffrey Rosen calls officials at Internet and telecom companies like Google, Facebook, Twitter, Verizon, and AT&T, the deciders. He argues that the officials and telecom companies are the ones who decide what controversial speech stays up and what comes down in response to government demands or users’ objections. Therefore, whoever controls the information databases holds the real power to decide who can speak and what we can say.\textsuperscript{173}

It is submitted that Social Networking Sites are bound to protect its users’ human rights. The sites should not provide easy access to anyone unless there is some probable cause. The sites should make strict policies in this regard.

In November 2012, the Supreme Court of India issued notice to the Union Government seeking its response to a petition challenging the Constitutional validity of Section 66A\textsuperscript{174} of the

\begin{footnotesize}
\begin{itemize}
\item See Information Technology (Procedure and Safeguards for Interception, Monitoring and Decryption of Information) Rules, 2009; The Information Technology (Reasonable security practices and procedures and sensitive personal data or information) Rules, 2011; The Information Technology (Guidelines for Cyber Cafe) Rules 2011, etc.
\item The Information Technology Act, 2000, s. 66A.
\end{itemize}
\end{footnotesize}
Information Technology Act. It was alleged that States are misusing the provision, and arresting arbitrarily the persons who share messages on social networking sites. But Attorney-General G.E. Vahanvati maintained that the provision was well-intended. A Bench of Chief Justice Altamas Kabir and J. Chelameswar also issued notice to Maharashtra and West Bengal, and the Union Territory of Puducherry. The Bench asked the Maharashtra government to inform the court of the action taken against police officers who arrested the two women, after one posted on Facebook a message questioning the shutdown in Mumbai after the death of a political leader and the other ‘liked’ it. Mr. Vahanvati said that although the police action was unreasonable, Section 66A is not unconstitutional per se. 75

The Delhi High Court in 2013 asked Google Inc and Facebook Inc about the mechanism to deal with a misuse of social networking sites by children below 13 years of age. The bench of the Delhi High Court showed its concern over the issue of minors’ accounts at social media networking sites, and frowned on the fact that they are also being lured into illegal activities, either knowingly or unknowingly. According to reports the court’s direction came after counsel for Facebook submitted that the site operated under the United States law Children’s Online Privacy Protection Act (COPPA) as per which a child below 13 is not allowed to open an account. The Court expressed unhappiness that there is no mechanism that currently exists to verify the age of a child online, and that while children were protected in the United States, what of the children in India. 76 The court also remarked that India is behind time on online protection

(b) any information which he knows to be false, but for the purpose of causing annoyance, inconvenience, danger, obstruction, insult, injury, criminal intimidation, enmity, hatred, or ill will, persistently makes by making use of such computer resource or a communication device,

(c) any electronic mail or electronic mail message for the purpose of causing annoyance or inconvenience or to deceive or to mislead the addressee or recipient about the origin of such messages shall be punishable with imprisonment for a term which may extend to three years and with fine.

Explanation: For the purposes of this section, terms “Electronic mail” and “Electronic Mail Message” means a message or information created or transmitted or received on a computer, computer system, computer resource or communication device including attachments in text, image, audio, video and any other electronic record, which may be transmitted with the message.


76 Mahima Kaul, “Indian court orders Facebook, Google to offer plans for protecting children,” available at http://www.indexoncensorship.org/2013/08/indian-court-orders-facebook-google-to-offer-plans-for-protecting-children/ accessed on August 20, 2013, at 3:00 p.m. IST.

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of children. It is submitted that the time has come to scrutinize the privacy policies offered by these social networking sites. Judicial cognizance, over social networking sites’ privacy policies, is required for protecting Children’s as well as other users’ privacy. Before giving an access of internet to a child, feasible mechanism should be established in which these sites should take parents’ informed consent first. Moreover, parents should be made aware of uses of internet through some training or orientation so that they would have control over their children’s online accesses.

It is concluded that new mediums of expression have brought many challenges in front of us for preserving our right to privacy. The journalists have become stronger than ever by adopting the most sophisticated scientific tools. But at the same time, their responsibilities towards society are also increased. In India, the media is largely self-regulated. The journalists are bound to observe their professional ethics, drafted by the self-regulatory bodies like Press Council of India and Broadcasting Council of India. The legislature is also empowered under the Constitution of India to impose reasonable restrictions on the freedom of media. Similarly, the journalists are always expected to observe individuals’ privacy rights while reporting any news. In India, the legislations are insufficient to regulate sting operations. Due to unhealthy completion in the sphere of journalism, the journalists are compelled to report sensational news. For this, they intrude into the private lives of others. For this, senior journalist Paranjoy Guha Thakurta said that intense competition among newspapers and television news channels has lowered the ethical standards in media. He further emphasized on a provision for statutory regulation of the media which would improve the situation. He said that self regulation worked up to some extent only. He stated that corruption among individuals in the media or among media institutions was as old as the media itself. According to him, media was once a part of the solution, but many journalists nowadays were part of the problems. After conducting an inquiry on “paid news”, Mr. Thakurta said that it had gone beyond individual greed and venality undermining the democracy itself. People believed in the Fourth Estate most once, but it presented a sorry state of affairs now as media ethics had become more like oxymoron, an expression with contradictions, he stated. Yet, there was a lot of hope for the future from Indian

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177 “India behind time on online protection of children: Delhi High Court,” The Economic Times, July 16, 2013. Available at http://articles.economictimes.indiatimes.com/2013-07-16/news/40613307_1_social-networking-sites-web-sites-veerag-gupta accessed on August 20, 2013, at 3:00 p.m. IST.
media and journalists as many good journalists were still around in the profession, Mr. Thakurta said.¹⁷⁸

Not surprisingly, public interest may override one’s right to privacy. But at the same time, such public interest test is expected to be applied in the fair manner. For this, the journalists should be well trained morally, ethically, and legally. Increasingly, right to speak freely, freedom of association, etc. are part and parcel of right to privacy. Therefore, users’ speech and expression should be protected on the social networking sites. Online users should be protected from arbitrary arrests. More importantly, the social networking sites are bound to protect its users’ human rights.