Conclusion

Media the responsible fourth pillar of democracy, which is considered to be an ardent protector of democracy in the past decades, has today come under severe criticism. The fundamental reason for this change is their irresponsibility towards the interest of the public. Democracies want people to work towards achieving its goal of government of the people, by the people and for the people. It does not want the focus to go from the prime topics like difficulties in repayment of loans, female foeticide and move to tabloid items like Sania getting married to a Pakistani, suicide of Nafisa Joseph, Viveka Babaji and such other matters. There are so many murders and suicides taking place in India, among the general population. Do they all get reported? Then why alone these tabloid beauties? Why spend a whole day on news channel discussing the least important subject of the day? Is this an attitude expected of from a responsible media? Does these types of news items add anything to the growth and development of an Indian, if not, then how does it contribute to democracy? These are some of the pertinent questions that are being asked about the media nowadays.

The American and British media, except a few tabloids, are into more serious and mature journalism. They do not waste ink and paper or visuals on suicide and murder reports. They are more into informative journalism and would like to be out of controversies. The reason being, that these controversies may cause very heavily for the press in monetary terms. The American lawyers are on the lookout for such cases to mint money for
themselves and the unaware victims. Contempt of Court proceedings are rarely used by the American and British Courts against media.

In India, in cases of subjudice matters, Contempt of Court Act 1971 is used and that also sparingly and the media is more than excused often from severe punishment and given only mere warnings. Indian Courts are more aggressive to protect the weak victims from the strong and powerful media. They should use their potential energy lying in Contempt of Court Act for the benefit of protecting privacy and public interest. These are the two interests about which the press is not much bothered. They as they claim are only interested in public interest. So the Courts and government should come forward to protect the private rights and public interest. What is public interest is a long disputed question as far as the media is concerned.

Views of eminent people

Having received an opportunity to interview several people in the media, this gave the privilege of getting some good exposure for this thesis. One of the persons interviewed was Dr. J.V. Velanilam, the former Vice-Chancellor of Kerala University. He had a terrible encounter with media during the tenure of his Vice Chancellorship. Ironically, he was the Head of the Department of Journalism and later became a victim of media trial. Following are the excerpts of some of his views which he divulged through telephonic conversation:

- Media decides what is important for the people, and what they should read and hear.
- Media in India are copying the west. The main objective in India should be educative being a growing democracy, which is not the objective in UK or US being developed economies.
People in UK and US are more interested in entertainment and sports. In India we cannot afford this at this stage.

Government is also helpless to some extent in India as they also need the support of media.

Judges can do a lot, but exhibit restraint in present times.

People should form organizations to move against such cases since individually it is difficult and expensive. It was emphasized that these organizations should have no political affiliations.

The above views were supplemented and discussed by his colleague, Jyotindra Kumar, now faculty of MASCOM run by *Malayala Manorama*. He wanted that organizations without political affiliations should come up to fight against these matters as media trial is leading to media terrorism. Lack of money is a big handicap in this matter. He was very apprehensive of the Ministry of Information and Broadcasting bringing in Foreign Direct Investment into press and visual media. He was afraid that media tycoon Rupert Murdoch of the Star TV by taking over Asianet Channel would mean a very dangerous encroachment by foreign media houses into Indian culture. This would have far reaching effect on our private lives and make tabloid method of news gathering the press code. It was opined that the Courts are to be very vigilant in these matters.

On the other hand this issue of FDI was strongly favored by senior journalist and media consultant K.M. Roy. He pointed out that if India can send its magazines abroad then we should also be open to outside view. Though he vehemently supported that the visual media needs to be
regulated, he opined that press should work within its boundaries. Through his experience as a journalist and editor of ‘Mangalam’ he argued that press can definitely work within its limit as it has been proved for the last 30 years. As far as privacy is concerned, he felt people are not yet aware of it. They should come out and fight out their rights. He felt the dire need of a Privacy Act on the basis of a proverb he quoted “every thief has a family”.

Another important aspect he explained was the handicap of not having press investigative detectives. The people in the press depended on the police and mofussil journalist, who are not qualified to give news or to gather information. The ultimate result is that in India we have manufactured news and not proper news. While channels like BBC, CNN spend time on informative news, we in India spend time on gossip and manufactured news. He emphasized the need of investigative journalism to carry on its own investigation parallel to police investigation. He also opined that press should have an ombudsman, though its function is to be limited. The victim of media trial should be compensated in terms of money like in US and UK. He pointed out that the biggest victim of technological revolution in media industry is media ethics. The deterioration of media ethics emanates from several reasons, one of which is the crores of rupees involved in starting a newspaper or news channel, which naturally make the investors focused on financial prospects. In his opinion there is a strong need for regulation and he would like the media to agree with it. He is very clear that the media people should be controlled to maintain the balance between a single man against the collective power of press. He agrees that it can be done only through law by bringing the offender to shame. He would like
organization of lawyers to bring these cases to Court. He opined that if nothing is done, the faith of people in press, which is already low will gradually get lost. He wants a consumer resistance to come to India like in the UK, where people stop the newspaper from entering the homes if they find that it is giving them wrong news, as an act of defiance. There is an urgent need to create awareness of privacy among Indians, which if developed will act as a deterrent against press harassment.

Another important personality interviewed was Dr. Sebastian Paul. He has been the member of the enquiry committee of the Press Council of India and is also practicing at the Supreme Court of India. His opinion was to regulate the press by the system of self regulation, which is done by the PCI. He felt that the PCI is a form of ombudsman for the press. He is for the press as he feels though it may seem to be a paradox but in a democracy the press should be allowed to function like this. He did not feel the need for a specific legislation for privacy as he felt it is already embedded in the Indian Constitution. His concept was that Contempt of Court Act 1971 should not be strictly enforced and free expression of opinion should be allowed. It is only because of the vigil of the media that many criminal cases remain alive till the conviction of the accused. Though he agreed that illegal methods like sting operations are been adopted by the media, he feels they are justified because it serves the public interest. Therefore, he is of the opinion that media should only be regulated not restrained. For this he advises that the overall charge of the visual media should be given either to the PCI or to constitute a separate broadcast council. When asked about the question of paid news he opined that it is a dirty game and felt that the Election Commission of India should take up this matter to prevent this phenomenon from
spoiling the electoral system. Though he was in favor of the press, but when countered with the incidents of victimization of innocent people at the hands of the media, he agreed that in such cases, the media never regrets on its errors and victims are never compensated. In such cases the media is subject to the laws of the land and can be made accountable if the general public is vigilant.

Talking about Foreign Direct Investment into press – he opined against it and stated that this along with the principles and practices associated with the western media will intrude into Indian press i.e. tabloid journalism and paparazzi. This he said will cause erosion of ethics and thereby credibility of the media will suffer. He stated that the credibility of the media is the corner stone of the media. As people are becoming more literate, more channels and newspapers should be allowed to give public a right to choose. Concerning privacy, he states that it is still in its infancy. He points out that when technology and interests of national security are invading the private lives, then the law should find ways and means to protect individual privacy. In cases of a public person, he feels privacy will decrease at the cost of public interest.

**International Obligations**

India is a member of the United Nations and therefore under international obligation to follow it. Article 3 of the *Universal Declaration of Human Rights*, 1948 enumerates that every one has the right to life, liberty and security of person. Article 12 states strongly that no one shall be subjected to arbitrary interference neither with his privacy, home or correspondence nor to attack upon his honor and reputation. It further states that everyone has a right to the protection of the law against such interference or attacks. Our constitution came into
effect in 1950, when we were already members of the UN. Still the framers of our constitution failed to give space for privacy, family and home. They failed to realize that it is the privacy of a secure home which gives the support to a person in public. It is this privacy which provides man his place of solace in times of need for rest and retrospection. It is from this rest that he regains the strength to go and face the public once again. If he is deprived of the above privacy in home and family, then it would drive a man crazy.

Tragically, that lapse in law has misfired as now the biggest danger is loss of privacy. The United Nations declaration gives prime importance to privacy while it is only later in Article 19 it talks about right to freedom of opinion and expression. UN therefore gave privacy and family far greater importance than freedom of press. In contrast to this our constitution gives prime importance to freedom of press than to privacy and home. This runs in contradiction to our international obligations.

The second covenant of which India is a partner is the *International Covenant on Civil and Political Rights* 1966, which also states similarly in Article 17 that ‘no one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence nor to unlawful attacks on his honor and reputation. Every one has a right to the protection of the law against such interference or attacks. Here also right to hold opinions are enshrined only in Article 19. Through these covenants the object of the UN is clear that privacy and family is more important and it is over and above the freedom of press. The importance of privacy of an individual lies in the fact that if his privacy is shattered then his very individuality can be lost and the press or state may not be
able to rehabilitate that person. In Article 19, paragraph 3 of this covenant it states clearly that this right to freedom of expression carries with it special duties and responsibilities viz:

a) For respect of the rights or reputation of others.

b) For the protection of national security or of public order or of public health or morals.

Respect for the rights and reputation of others is very explicit in its terminology. However, it can be stated that this aspect of the Convention, also does not find a place in the Indian Constitution. The reasonable restrictions elaborated in Article 19(2) on the ground of decency or morality and defamation on Freedom of Press is very limited and gives no space for privacy as a distinct right among the restrictions mentioned. The impact of these Conventions have been nullified by not mentioning the term ‘privacy’ in Article 19(2) of the Indian Constitution and by not giving an independent status to privacy as given to press. This can be stated as in violation of the International obligations, and therefore it creates imbalances in our Constitution. As of today the Indian Constitution is prejudicially tilted towards press rather than the individual right to privacy. The provisions of these Conventions ought to have been a source for a Constitutional amendment giving primacy to privacy over and above press freedom.

**The British Experience**

UK being party to the European Convention on Human Rights\(^1\) 1950 has now enacted the Human Rights Act, 1998 which came into

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\(^1\) Hereinafter referred to as E.C.H.R.
force on 2\textsuperscript{nd} October 2000. This Act incorporates the privacy concept articulated in Article 8 of the ECHR along with Article 10 dealing with freedom of press. Article 8 states that ‘everyone has a right to respect for his private and family life, his home and his correspondence’ and ‘that there shall be no interference by a public authority with the exercise of this right except such as in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the right and freedoms of others’.

The question as to whether this Article of ECHR incorporates only infringement by public authority or does it comprehend press also was impliedly answered in \textit{Peck v. United Kingdom}.\textsuperscript{2} Here, Peck had been caught on Council CCTV cameras, moving through the street carrying a knife, immediately after he had attempted to commit suicide by cutting his wrists. This footage was passed by the local authority on to a news broadcast and a popular Television programme ‘Crime Beat’ both of which show this abstract from which he was identifiable by hundreds of thousands of people. Though this coverage forbid him from committing suicide, still here in this case, the European Court found fault with the public authority for passing the extract to the media as It resulted in violation of his right to privacy in article 8.

This question was finally put to rest in \textit{Von Hannover v. Germany}.\textsuperscript{3} The case was concerning a long fight by Princes Caroline of Monaco in the German Courts to stop pictures of herself and her kids taken by

\textsuperscript{3} \textit{Von Hannover v. Germany} (2005) 40 E.H.R.R. I.
Conclusion

Paparazzi appearing in many papers and magazines all across Europe. These included scenes like horse riding, at the restaurant, shopping etc. She was not given a proper remedy by German Courts though the German Supreme Court agreed that she had right to privacy in semi-public places. The object being that a person should be left alone which is indicative of the fact of seclusion act in a way that she would not have done in public. Finally the European Court found and decided that German courts and government have failed to provide her with her right to privacy. She was found to have been not acting in her public capacity but as a private individual. The Court found that there is a zone of interaction of a person with others, even in a public context, which falls in the definition of ‘private life’. Therefore it was found to be a duty of the German government to protect her from paparazzi. This decision was very enlightening as Article 8 was seen in a new light. It now envisage even action against media. Now this is the law and interpretation of Article 8 given in UK. Such a position is to be adopted by us in India also.

Constitutional Framework in India

Indian Constitution was adopted long after the American constitution was formulated. Our basic framework was different compared to that of Americans. Indians were never uprooted from their origin and transplanted elsewhere like the Americans. Though during the Indo-Pak separation, there was some degree of migration but that was limited and its effects were minimal. The Indian society had a very strong base in its family ties, which was very far stretched and tight. At the same time Americans had migrated from the Europe, Africa and Asia. They had no ties with the present American continent and on
coming to the US they lost their family and cultural ties and gradually lost their culture. It was a new life and a new place and a new beginning for many. They did not have much of their original identity and did not even know each other. This brought in a sense of insecurity. Above all they were told that they were free with lots of rights with no queries and questions from their family members, society and the government. This was a new found freedom with not much responsibility. This paved the way for development of an attitude towards the society which meant “please no queries” which meant no interference into their lives. So private lives became just their lives and no one had any say in their life.

When media came into the realm of democracy, it was accepted with wide arms as it was a self declared protector of democracy. But when this self declared protector started invading the privacy of people, it was taken as big offense, especially during the early nineties by eminent jurists like Samuel Warren. The American Constitution gave freedom of speech a clear mandate, while there was no express protection of privacy. As the Constitution was silent regarding privacy, the Courts had to devise some mechanism to protect this inalienable right. This was brought in through the concept of ‘newsworthiness’ as a ground for justifying publication. If this justification failed, the Press could not exercise their freedom of Press and the cost of invasion into privacy was compensated in terms of money.

The American courts hardly ever punished the press with imprisonment because the object was always to make good for the victim the cost of privacy lost. This was the position in American courts, and

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therefore it had a strong effect on the attitude of media. Though it did not affect the freedom of media, but in case of distraction from its social responsibility, they had to pay the damages. It was like the victim is paid for being a commercial object in the media. This compensation was calculated in terms of shame, agony and any other kind of loss involved in that particular case. At the same time, if the victim is purposefully showing off in the public, then that person losses his right for compensation. The principle is simple - the press cannot win always. If they win from the publicity of the article then they loose money to the victim for the measure of privacy lost.

India had a completely different social fabric. It is a closely knit society where privacy is part and parcel of the society. Even in the midst of joint family system people retain their private moments, as the understanding of the family members is evident by the fact that they give them the required space at the appropriate time. Thus privacy is so embedded in Indian lifestyle that we do not feel a specific need to emphasize it. Indians as a result of this close knit society hardly feel insecure or act indifferently towards others peeping into their lives. Such being the general outlook, it is difficult to make the Indians realize that their privacy is at stake. The support by the family and friends were always there at any time of crisis and so they did not feel the need to fight against the media. The law suit is something which Indians generally like to distance themselves with, due to the high cost and time lost and further publicity and shame. So the cost of privacy lost is great but it is made to look minimal compared to the future cost and shame involved.
The foreign media is speedily getting into the Indian veins. They are moving in with their own ideas of sex, live-in relationships, homosexuality, children born outside the wedlock, single parent concept, pornography, sex with objects and such varied concepts which were foreign to a common Indian mind. Today many youngsters, attracted by these fanciful ideas and for money and fame, give up their privacy or part of the privacy through the internet or mobile. Indian people have to be made aware of what this exposure cost them. They are too immature and vulnerable at the hands of these new technologies and the foreign media. This social awareness of having ‘right to be let alone’ should be taught to a child from very early stage itself so that the child is aware as to which part of the child’s life is private and which is public. In India this intermingling of private and public aspects of an individual’s life is the crux of all the confusion in the minds of people. This confusion is manipulated by the media in India. Everyone wants to have a space in news but this happens not at the choice of the individual but at the choice of the media. Journalists have tactful mechanism to extract news and put a person in picture, whether for right or wrong reasons. Once the news comes in to the hands of a journalist, it is molded and twisted according to their needs. Today, many victims have realized that their statement and pictures have been wrongly used for the advantage of the press. This makes it all the more important that Indians need to be taught about their privacy rights and to be beware of the press and to express their right to be left alone.

The Indian constitution in its very inception incorporated the freedom of speech and expression in Article 19. The Supreme Court in
Romesh Thapper v. State of Madras stated that freedom of speech and expression includes freedom of press. It stated ‘Turning now to the merits there can be no doubt that freedom of speech and expression includes propagation of ideas, and that freedom is enshrined by the freedom of circulation’. Here the Supreme Court further increased the ambit of the freedom of the press. Though the Constitution came into effect in 1950, the originally enacted Article 19(2), provided that ‘Nothing in sub clause (a) of clause (1) shall affect the operation of any existing law relating to libel, slander, defamation, contempt of court or any matter which offends against decency or morality or which undermines the security of or tends to overthrow, the state’. After this came the First Amendment of the Constitution in 1951, amending Article 19(2). The new Article provided ‘Nothing in sub clause (a) of clause (1) shall affect the operation of any existing law or prevent the state from making any law, in so far as such law imposes reasonable restrictions on the exercise of the right conferred by the said sub clause in the interests of the security of the state, friendly relations with foreign states, public order, decency or morality or in relation to contempt of court, defamation or incitement to an offence.’ This amendment further increased the ambit of freedom of press under the Constitution.

Article 21 declares right to life and personal liberty. This right can be exercised only against the state. The Article does not mention privacy. Personal liberty cannot be equated to personal privacy. Privacy can only be taken as a far stretched extension of liberty – i.e. a person has a liberty to have private life. It is only one of the various dimensions of Article 21.

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6 Id. at p. 597.
This raises the question as to whether privacy finds a place in the constitution. On elaboration of Article 21, it is difficult to comprehend privacy as a right. In fact, it is only due to the mercy of the courts that privacy is read into in Article 21. Article 21 visualizes a victimizing state and not a victimizing private body like press. Press has nothing to do with the government except for a few state channels. Apart from that it is neither a state nor an instrumentality of the state. Thus it is exclusively a private body and therefore Article 21 in legal terms does not apply to it. Though the Supreme Court in *M.C. Mehta* case\(^7\) has extended this right against private organizations but it is limited only to cases of companies undertaking essential services, which should normally be undertaken by the state. Press has never been stated by courts to be a state function or essential service to be carried exclusively by the state so it only remains at the mercy of the courts with no legislative incorporation. So technically, there is no privacy right of individuals against the media, under the Constitution. This right exists only against the state.

The only available protection is in the shape of decency, morality, defamation, as found in Article 19 (2). Again in this Article, there is no express term ’privacy’. It only incorporates certain attributes of privacy. Therefore, it is very clear that the Indian constitution does not give protection to privacy as a fundamental right. Therefore, it is advocated that in this scenario where Indian media no more carries the flag of truth but instead carry the goal of market realization, the government should make an effort to create privacy as an important right of an individual. Hence it is suggested that Article 21 and 19 (2) should be amended suitably to incorporate right to privacy.

The present Article 21 states ‘no person shall be deprived of his life and personal liberty except by procedure established by law’. This Article can be remodeled as: ‘no person shall be deprived of his life, personal liberty and privacy by the State except by procedure established by law’.

The present Article 19(2) states that ‘nothing in sub clause (a) of clause (1) shall affect the operation of any existing law or prevent the state from making any law in so far as such law imposes reasonable restrictions on the exercise of the right conferred by the said sub clause in the interests of the sovereignty and integrity of India, the security of the state, friendly relations with foreign states, public order, decency or morality or in relation to contempt of court, defamation or incitement to an offense’. It is suggested that Article 19(2) instead should state ‘nothing in sub clause (a) of clause (1) shall affect the operation of any existing law or prevent the state from making any law in so far as such law imposes reasonable restrictions on the exercise of the right conferred by the said sub clause in the interests if the sovereignty and integrity of India, the security of the state, friendly relations with foreign states, public order, decency or morality or privacy or in relation to contempt of court, defamation or incitement to an offense’.

These amendments if made would surely uplift the morale of an ordinary citizen of a country instead of living in fear of anytime being pulled out of their secured homes to be scandalized in the open public by the media.

Statutory Protection

As the mandate of Privacy is nowhere incorporated in the Constitution, there is no express responsibility on the state to bring law
to protect privacy. But as Article 19(2) allows the state to bring reasonable restrictions to protect public order, decency or morality or in relation to contempt of court or defamation. In pursuance of this Constitutional provision, the government has brought in several legislations like the Indecent Representation of Women (Prohibition) Act 1986, the Young Persons (Harmful Publications) Act 1956, the Children’s Act 1960, the Juvenile Justice (Care and Protection of Children) Act 2000, the Cable Television Networks (Regulation) Act 1995, Protection of Human Rights Act 1993 apart from section 293, 294, 499, 500, 501, 502, 509 of the Indian Penal Code 1860 dealing with obscene publications, defamation and outraging the modesty of women. These legislations have no terminology synonymous to privacy.

A careful examination of these enactments would show defects which prove the inadequacy of these legislations to in any way substitute the concept of privacy. They can be enumerated as follows:-

1) These Acts do not expressly refer to privacy; they are only referring to some attributes of privacy such as defamation, morality, modesty and obscenity. This makes the ambit very restricted and confined to defined meaning under law. There is no term as privacy therefore these provisions serve no purpose in safeguarding privacy.

2) These Acts are all penal in nature. Imprisonment is the ultimate object and this punishment is not very severe running only up to a period of six months or more with penalty up to Rs.1000/- or more. This penalty amount goes into the Government exchequer and the victim gets no compensation.
for the moral, physical and emotional damage done to his or her image in society.

3) In these cases, the state appoints authorized officers under a statute, who books the offenders under the respective enactment. The deciding authorities are these officers and only appeals go to the court of law. The result of this administrative act is normally confiscation, penalizing or simple imprisonment. The victim does not get compensated.

4) The PCI is a toothless tiger, as the PCI Act 1978 gives it only the power to censure, warning and admonition the Press. This is not at all effective on the Media as they keep repeating the same act again and again.

As a conclusion of the study, it is suggested that the effective way to bring protection for privacy is to bring in the above suggested Constitutional amendments and to also enact an exclusive legislation on privacy. Press very rarely listens to their inner voice; rather the market rules the show. Therefore when ethics starts deteriorating, protection has to come up in the shape of Right to Privacy Act. A draft model of The Right to Privacy Act is appended to the thesis. This Act should envisage the protection of Privacy. ‘Privacy’ as suggested to be codified, includes private life, self-respect, dignity, status of an individual in the society.

The Law Commission in its 200th report in 2006 compared the Indian position in the Contempt of Court Act, 1971 with the UK position. In India the protection against publication, for an accused comes only at the stage of pending judicial proceeding under section 3 of the Contempt of Court Act 1971, while arrest is the starting point of
pendency of a criminal proceeding under the UK Contempt of Court Act, 1981. Australia also follows similar practice. Therefore the report stated that the explanation to section 3 in the Contempt of Court Act 1971 needs to be amended, by adding a clause ‘arrest’ in the explanation below section 3 as being the starting point of pendency of a criminal proceeding. If this is incorporated any publication after arrest would come under the Contempt of Court Act 1971. The report also proposed section 10 A under which any criminal contempt of court at the subordinate court level could directly come before the High Court. If these recommendations are accepted by the government, then it would give more teeth to the above Act, for the court to act at the earliest.

The fourth pillar of democracy comes under little scrutiny while at the same time the other three pillars, judiciary, legislative and executive, are all governed by stringent rules. Therefore, in this perspective an Act is necessary to control the media when it disturbs the inalienable right of the individual viz. the right to privacy.

To conclude, it is difficult to understand the concept of privacy unless and until one is deprived of it and made a commercial product marketed at the whims and fancies of a third party, which is the media. Media having lost its first loyalty, the responsibility towards people to build a mature nation- to market politics and lobbying objected towards commercial gains and power has no right to claim absolute immunity from its wrongs. Even when the legislature, executive and judiciary are kept under a scanner, the media cannot plead immunity. The government should think independently, keeping itself distanced from the pressure tactics of the media and bring an Act to protect privacy just as it did in the case of Right to Information Act 2005, which has shaken the
foundation of deception and corruption. As stated by the former Chief
Information Commissioner of India, Mr. Wajahat Habibullah,\(^8\) that when
there is a right to information Act, then it is a must that we should have a
right to privacy Act. The government has a responsibility to stand for the
weak and to uplift the weaker sections of the society. Today the press
needs no support from the government as they are strong and powerful.
Now the government should give attention to the individual in the
society and make him feel more secure and uplift his morale to live a life
of dignity and self respect.

\(^8\) KP Saikiran ‘CLC for law on Privacy’, *The New Indian Express*, January 31,
2009, p.11.