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# INTERPLAY BETWEEN TRANSPARENCY LAWS AND PRIVACY LAW WITH SPECIAL REFERENCE TO RESPONSIBLE JOURNALISM

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## Chapter 1 Introduction

While in an interview by Hannah Byrd Little for an article ‘How to spot Responsible Journalism’, Dr. Robert Byrd, Department of Journalism and Strategic Media, university of Memphis answered a question as to how they taught students of journalism from differentiating intrigue in their stories from biased, sensational or misleading stories. He said, “This is the work of media corporations. The more sensational, the more clicks, the more advertising dollars. This also isn’t a new problem. Media history is filled with these kinds of sensational headlines that titillate readers but offer little in the way of public good.

I don’t know that we can change the corporate mentality. I think this is a reader education moment. If we can educate readers to avoid headlines like this, the clicks reduce and so do the profits from stories like this. Also, we have to train readers to read beyond the headline. There’s a ridiculous amount of readers who only skim headlines for news and information—that’s scary given some of the headlines out there.”

“Journalism is defined as a discipline of gathering, writing, reporting news, and more broadly it includes the process of editing and presenting the news articles. According to the Chambers dictionary, journalism is defined as "a profession of collecting, writing, publishing etc. news reports and other articles for newspapers and journals, television and other related media"<sup>1</sup>

However, through the period of sensationalist news delivery the media is more inclined to serve its endless drive for circulation as against honest, unbiased, and ethical news. “Rather than simply stating the truth and making people aware of "meaningful" changes around us, it focuses on presenting an aggrandized and perverted version of the most inane and inconsequential events. Journalism which stoops down to the level of scandal-mongering, sensationalism,

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<sup>1</sup> R. Chopra & S. Swami, ‘Yellow Journalism’ (2007) India law Journal.

jingoism or other unethical or unprofessional practices by news media organizations or journalists is what yellow journalism is. Yellow journalism has become rampant in the recent years and has taken the form of an epidemic spreading widely in media circles. Impartial and analytical reporting is being overshadowed by a flamboyant and irresponsible approach to news presentation.”<sup>2</sup>

For keeping a check on the above perversities of journalism, Responsible Journalism was recognized. The core principles of code of ethics organization are usually embodied in the policy manuals of every individual print, broadcast or online news organization and outlined by professional journalism associations. While various codes vary at different levels, truthfulness, objectivity, impartiality, fairness and public accountability are the commonly shared elements on whose lines the code is broadly based.

The Journalism ethics include the principle of “limitation of harm”, under which certain information is often withheld from reports such as names of minor children, crime victims’ names or information not materially related to particular news reports whose release might cause harm to someone’s reputation.

The way such information is presented, in other words, how news is reported has to have certain restrictions due to the fact that revelation of sensitive information, may have defamatory consequences. A few provisions in particular legislations have recognized this issue, for example, The section 228A of Indian Penal Code provides against the same and prohibits publication which may lead to disclosure of identity of victims of certain offences; and Section 14 of Press Council Act, 1978, grants *power to censure* to the council in cases of complaints made to it, when a working journalist has conducted any professional misconduct, or news agency has offended against the standards of journalistic ethics or public taste and so on.

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<sup>2</sup> *Id.*

## Chapter 2 Media laws in India and Criminal Reporting

*Ashish Bagga v. State of Rajasthan (2017)- a case of criminal reporting and breach of privacy*

The Rajasthan High Court in *Ashish Bagga v. State of Rajasthan (2017)*<sup>3</sup>, pronounced its Judgment on a matter related to criminal reporting in an article published in the India Today magazine. The article dated 30.03.2006 related to the publication of a rape incident of a German tourist, under the title “Bharose pe Bhari Chot”, wherein the rape victim’s name had been published and a complaint under section 228A IPC was filed before the Additional Civil Judge and Judicial Magistrate, First Class No. III, Jodhpur. An issue that arose in the judgment was regarding the element of secrecy for constituting an offence under Section 228A of IPC, and since the name of the victim was already published in the judgment, the Magazine was not responsible for the offence under 228A IPC through its publication of the article. However, the trial court ordered in favour of the Respondents, the same was challenged in the HC.

The appellants made various submissions in respect of the challenge against the Trial Court judgment. The Appellants contended that the publication of the name of the victim would have only amounted to an offence until the ongoing proceedings and not after the conclusion of the same and passing of order of conviction; that until the proceedings were declared to be in camera trial the provisions of Section 327 of Cr.P.C. could not be attracted; the petitioners also brought it to the court’s notice that the victim was a foreign lady and had voluntarily given her interview to several Newspapers and members of Electronic Media without concealing her own identity, and since the social object of the statutory provision was no more operative, therefore, the present provision of law is not attracted in the given facts and circumstances of the case.

The Court held that printing and publication specified in section 228 IPC could not be compared with printing and publication of judgments as publication of judgments was a matter of record, which remains within the ambit of matured legal fraternity, and would not be disclosed, unless someone specifically goes for it. However, in case of printing and publication in media, same was to be consumed by an ordinary citizen.”

Besides attracting a debate regarding the infringement of privacy of individuals and constituting an offence under 228A IPC, there are other concerns that need to be raised in the contemporary news reporting practices in the media, due to the sensationalist tendencies of the

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<sup>3</sup> [2017] RAJ HC MANU/RH/0470/2017

corporate news agencies, for example, fake news reporting by various media houses. The solution to this problem has been provided for by enacting laws that make the content more transparent and those providing information, more accountable. This has been made possible through some of the laws in our country, which are discussed briefly hereinafter.

*Laws regulating Transparency, Accountability and Professional Conduct in News Reporting and other Media in India*

**(a) Press Council Act of India, 1978**

Section 13 prescribes the objects and functions of the Press Council of India.<sup>4</sup> The object is to preserve the freedom of press and to maintain and improve the standards of newspapers and news agencies in India.

It performs the following functions:

- (a) helping newspapers and news agencies maintain their independence;
- (b) building up a code of conduct for newspapers, news agencies and journalists in accordance with high professional standards;
- (d) encouraging the growth of a sense of responsibility and public service among all those engaged in the profession of journalism;
- (e) keeping under review any development likely to restrict the supply and dissemination of news of public interest and importance;
- (f) to keep under review cases of assistance received by any newspaper or news agency in India from any foreign source including such cases as are referred to it by the Central Government or are brought to its notice by any individual, association of persons or any other organisation:

Provided that nothing in this clause shall preclude the Central Government from dealing with any case of assistance received by a newspaper or news agency in India from any foreign source in any other manner it thinks fit;

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<sup>4</sup> Press Council Act of India, 1978

(g) to undertake studies of foreign newspapers, including those brought out by any embassy or other representatives in India of a foreign State, their circulation and impact. Explanation.—For the purposes of this clause, the expression “foreign State” has the meaning assigned to it in section 87A of the Code of Civil Procedure, 1908 (5 of 1908); (h) to promote a proper functional relationship among all classes of persons engaged in the production or publication of newspapers or in news agencies:

Provided that nothing in this clause shall be deemed to confer on the Council any functions in regard to disputes to which the Industrial Disputes Act, 1947 (14 of 1947), applies;

(i) to concern itself developments such as concentration of or other aspects of ownership of newspapers and news agencies which may affect the independence of the Press; And so on.<sup>5</sup>

As the section above suggests, the Press Council of India established through this enactment fulfills certain functions to protect the independence of the Press, as also to govern that the guidelines are not flouted in terms of content that is explicit or not in line with the prescribed guidelines of the various Acts. The various provisions in the Act ensure transparency be maintained in terms of content, subject to grounds of public interest. However, the main focus of this Act is upon the content and the news agencies and not on journalism practices.

#### **(b) Press Registration & Books Act, 1867**

As the access to information keeps expanding through the realms of various forms of communications, whether digital or print, it is onerous upon the publishers to take responsibility for the kind of publication that circulates through their agencies, be it about an event, or a person. Since, reporting of untrue events or statements as true statements of facts may entail criminal or tortuous action once it qualifies the standards of defamatory material. For ensuring that content published by media houses is responsibly handled, the

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<sup>5</sup> Supra (n 4)

Press Registration & Books Act, was enacted and has in place several provisions. The Objects of the Act were to Secure information related to the Printing establishments and their publications' to regulate the newspaper and printing press; To preserve books and register copies of newspaper and every other media printed in India; to prevent literature being published anonymously.

### **(c) Norms of Journalistic Conduct (2010)**

The Press Council of India has issued guidelines which shall be the guiding principles for the Journalistic code of Conduct in India, by which all print media/publications or news agencies must abide by. The norms are divided into 4 parts.

**Part A:** Principles and Ethics

**Part B:** Guidelines of Specific Issues

**Part C:** Laws Relating to the Press **Part D:** Press Council's powers, practices and procedures.

Part A of the Code defining the model code of conduct has, in great detail taken care to prescribe various areas where media may be overstepping the law through its practices, either in its conduct or through the content. These are guidelines prescribing the guiding principles to be followed such as: Journalists in their professional conduct; obscenity and vulgarity must be discouraged; the nature of news whether it is violent or not; to avoid conjecture of guilt and glorification of social evils; as well as guidelines on Investigative Journalism; right of Privacy, right of reply; defamation; internal disputes and numerous other guidelines.

Part B has prescribed guidelines with respect to narrower subjects as in the case of right to privacy in case of public figures; Financial Journalism; Election Reporting; etc.

In as much as regulation of moral code is concerned, the Press Council has gone as far as prescribing the Do's and Don'ts in matters concerning HIV/AIDS. And further detailed on what specific care needs to be taken. There are principles to avoid any disturbance in order and peace in the society due to actions of media. However, the elaborate provisions are only guidelines and do not provide for penal consequences in case of its breach.

### **(d) The Broadcasting Code**

It was adopted by the Fourth Asian Broadcasting Conference in 1962 listing certain cardinal principles to be followed by the electronic media, and is important in respect

of governing broadcast mediums. Although, the Broadcast Code was primarily enacted to govern the All India Radio, the following cardinal principles have ideally been practiced by all Broadcasting and Television Organization:

To ensure the objective presentation of news and fair and unbiased comment

To promote the advancement of education and culture

To raise and maintain high standards of decency and decorum in all programmes

To promote communal harmony, religious tolerance and international understanding

To treat controversial public issues in an impartial and dispassionate manner

To respect human rights and dignity

(e) **Cable Television Networks (Regulation) Act, 1995:** This act is for governing the operation of Cable Television within Indian territory and regulates the subscription rates and the total number of total subscribers receiving programmes transmitted in the basic tier. In pursuance of the Cable Television Network (Regulation) (Amendment) Bill, 2002, the Central Government may make it obligatory for every cable operator to transmit or retransmit programme of any pay channel through an addressable system as and when the Central Government so notifies. Such notification may also specify the number of free to air channels to be included in the package of channels forming the basic service tier.

(f) **Information Technology Act, 2000**

Section 43A: It prescribes how to implement reasonable security practices for sensitive personal data or information. It has provisions for compensation for persons affected by wrongful gain or wrongful loss.

Section 72A: Provides for imprisonment for a period up to 3 years and/or fine up to Rs. 5,00,000/- for a person who causes wrongful gain or wrongful loss by disclosing personal information of another person while providing services under the terms of a lawful contract.

**(g) Indian Penal Code, 1872**

Besides other provisions to protect individual's privacy, either in terms of break-ins into house, or in terms of criminalising sexual voyeurism and stalking, criminal law in India has scope for improvements in respect of publication of private information in media. Although, there are provisions to conduct examination of victims of sexual offences in private, at the victim's residence, or to conduct entire trial in-camera for the safety of victim's privacy, violations in terms of publication of news under guise of matter of public interest, the violations often go unpunished.

Section 228A IPC: It protects Disclosure of identity of the victims of certain offences from being printed or published, whether name or any matter which may make known the identity of any person against whom an offence under section 376, section 376A, 376B, 376C, 376D, is alleged or found to have been committed; and shall punish the offender with imprisonment of a period extending up to 2 years and with fine.

*False Reporting*

In the period of Yellow Journalism, it is not too difficult to stumble into practices of false news reporting, however, such practices, may attract legal action, like defamation, or under section 228A IPC. Such practices may inadvertently also mean flouting of the ethical codes of conduct as prescribed by individual media organizations or Associations of such organizations. The discrepancies arise when there is no uniformity in prescription about what is the ethical code of conduct for journalists.

Despite there being numerous guidelines and codes, the lack of a statute to ensure enforcement with regard to unethical journalistic conduct is still a challenge to maintaining the truth and transparent news reporting in India. However, the lack of penal provisions, and sole dependence on directives, has had a greater hand in promoting a dysfunctional system which often fails to ensure compliance of journalistic ethics.



### Chapter 3 Right to Privacy against Public Interest in view of Responsible News Reporting

*What is right to privacy?*

Privacy as described in the black's Law Dictionary is, "the right to be left alone; right of a person to be free from any unwarranted publicity; the right to live without any unwarranted interference by the public in matters with which the public is not necessarily concerned."

In the Indian constitution, Article 21 guarantees, "No person shall be deprived of his life or personal liberty except according to the procedure established by law." After considerable development through judicial precedents and scholarly debates, privacy has been brought under the purview of Article 21 of the Indian Constitution. It is based on the principle that the right to life means something more than mere survival and mere existence or animal existence, and includes that which makes life more meaningful, complete and worth living. The law evolved through various cases like *Kharak Singh v. State of UP*<sup>6</sup> where the right to privacy was first considered as being under the right to life, in *Smt. Maneka Gandhi v. Union of India (1978)*<sup>7</sup> the SC defined the Triple Test interfering with Personal Liberty, to the *Naz Foundation Case*<sup>8</sup> (2009) where the SC elaborated that privacy shall protect "private space in which man may become and remain himself" in its decision on consensual homosexuality; In the case of *Sharda vs Dharampal*<sup>9</sup> the court defined the right to privacy as "the state of being free and being free from intrusion in one's private life or private affairs."<sup>10</sup>

It is therefore, for the purposes of the present matter, important to note the beginning of debates of privacy in media. In the case of *State of UP v. Raj Narain* the supreme court has observed that the, "Article 19 (1) (a) in the addition, to guaranteeing the freedom of speech and expression, also guarantees the right to receive the information on matters that concerns the public."

Right to privacy has been recognized as implicit and then carved out of the Article 21 and 19 (1) (a) by the judiciary, in the similar fashion the freedom and rights of the press are recognized as implicit in the Article 19 (1) from the inception of the constitution.

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<sup>6</sup> [1964] SC SCR (1) 332

<sup>7</sup> [1978] SCR (2) 621

<sup>8</sup> [2009] 160 Delhi Law Times 277

<sup>9</sup> [2003] AIR SC 3450

<sup>10</sup> Supra (n 9)

*Freedom of Press vs. Privacy and exceptions under Public Interest through judicial precedents*

According to Black's Law Dictionary, Public Interest is defined as "(1) the general welfare of the public that warrants recognition and protection; and (2) Something in which the public as a whole has a stake; especially an interest that justifies government regulation".<sup>11</sup>

In the case of *Indian Express Newspapers (Bombay) Pvt. Ltd. & ors v UOI and ors (1985)*<sup>12</sup>

Supreme Court discussed importance of freedom of press in a democratic society. The Constitution of India under Article 19(1)(a) guarantees freedom of speech and expression however, the same is subject to reasonable restrictions. Further the constitution does not guarantee 'freedom of press', but it forms an essential part of right to freedom of speech and expression under Article 19(1)(a).<sup>12</sup> The Supreme Court in cases of Romesh Thaper and Brij Bhushan also established that there cannot be an imposition of restrictions other those enumerated under Article 19(2), and hence made this clear that there cannot be any interference with freedom of press in the name of public interest.

In this case, it was finally held that the primary duty of all national courts was to uphold freedom of press and invalidate all laws or administrative action which interfered with it, contrary to constitutional mandate.

In the words of Supreme Court of India, "The purpose of the press is to advance the public interest by publishing facts and opinions without which a democratic electorate cannot make responsible judgments. Newspapers being purveyors of news and views having a bearing on public administration very often carry material which would not be palatable to governments and other authorities. With a view to checking malpractices which interfere with free flow of information, democratic constitutions all over the world have made provisions guaranteeing the freedom of speech and expression laying down the limits of interference with it."<sup>13</sup>

From the above mentioned judgment of Supreme Court in case of *Indian Express Newspaper (Bombay) Pvt. Ltd. & ors V. Union of India and ors*, it is safe to conclude that the Constitution and judiciary have given priority to freedom of speech and expression, herein including freedom of press only being subject to reasonable restrictions mentioned in 19(2), the question

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<sup>11</sup> 'Public Interest' Black's Law Dictionary (12th ed. 2019) <<https://sur.conectas.org/en/defines-publicinterest/>> accessed on 01 October 2019 12 [1986] AIR 515, [1985] SCR (2) 287

<sup>12</sup> *Romesh Thaper vs. State of Madras* [1950] SC AIR 124 ; *Brij Bhushan v. State of Delhi* SC [1950] AIR 129

<sup>13</sup> [1985] 1 SCC 641

arises as to which fundamental right should prevail over the other – freedom of press under 19(1)(a) or right to privacy as guaranteed under Article 21 under right to life.

### *Relevant provisions in Legislations*

**Norms of Journalistic Code:** Right to Privacy has been discussed in various cases as mentioned in the previous section, but has also been provided expressly as a guideline in the Norms of Journalistic Code. In the code, Press Council of India has talked about the Right to privacy being subject to Public Interest. In the following words of the code:

“i) 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 the Press and the media, among others. Special caution is essential in reports likely to stigmatise women.

Explanation: Things concerning a person's home, family, religion, health, sexuality, personal life and private affairs are covered by the concept of PRIVACY excepting where any of these impinges upon the public or public interest.”<sup>14</sup>

An understanding may be drawn from the above statement, that the focus that has been drawn to public interest highlights publication of certain news content as being permissible and of certain news content being impermissible, as observed from the above lines, “*Press shall not intrude or invade the privacy of an individual unless outweighed by genuine overriding public interest... ..So, however, that once a matter becomes a matter of public record, the right to privacy no longer subsists...*” and is re-iterating the overriding power of public interest over the right to privacy.

This discussion on privacy v. public interest was brought to light recently in the Radia Tapes case, where Ratan Tata filed a petition before the Supreme Court, challenging the unauthorised publication of his private conversations (recorded for purposes of investigation), with Nira Radia, which was a violation to his right to privacy. The question here was whether such publication of said private conversations was in the public interest. This case shifted the focus back to whether there was a need for a law protecting the right to privacy in India.

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<sup>14</sup> Norms of Journalistic Conduct

Due to the absence of an independent statute protecting right to privacy, it is only a deemed right under the Constitution and therefore has to be considered in context of two fundamental rights: right to freedom under article 19 and right to life under article 21.<sup>15</sup>

“27. Confidence to be respected: If information is received from a confidential source, the confidence should be respected. The journalist cannot be compelled by the Press Council to disclose such source; but it shall not be regarded as a breach of journalistic ethics if the source is voluntarily disclosed in proceedings before the Council by the journalist who considers it necessary to repel effectively a charge against him/her. This rule requiring a newspaper not to publish matters disclosed to it in confidence, is not applicable where:

- (a) consent of the source is subsequently obtained; or
- (b) the editor clarifies by way of an appropriate footnote that since the publication of certain matters were in the public interest, the information”

The above norms ensure professional conduct on the part of Journalists and provide to ensure that information collected by journalists on promises of confidentiality are honoured by the journalist to protect the identity of the sources of information at the same time, ensure that the journalist may not be falsely charged or implicated in trying to maintain the confidentiality of the source, in cases it is extremely important to reveal the source, it may only be done before the Press Council of India.

**RTI Act, 2005:** A few other exceptions under the Indian law to the rule of privacy were made in the interest of the public, after the enactment of the Right to Information Act, 2005 (RTI). Under the RTI Act, section 8 (1) (j), makes an exception which exempts disclosure of any personal information which is not connected to any public activity or of public interest or would amount to an unwarranted invasion of privacy of an individual. What constitutes an unwarranted invasion of privacy has not been defined.

It has been described further, that “The tests delineated by the court in considering what personal information regarding a public authority may be shared under the RTI Act, can be adopted by the media when reporting on public officials. If personal information divulged by the media does not shed light on the performance of a public official, which would be of public

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<sup>15</sup> Sonal Makhija, ‘Privacy & Media Law’ (The Centre for the Internet Society, 19 July 2011) <<https://cisindia.org/internet-governance/blog/privacy/privacy-media-law>> accessed on 01 October 2019

interest, then the information revealed violates the standards of privacy. Personal details which have no bearing on public resources or interests should not be published.”<sup>16</sup>

Moreover, guidelines provide for protection of privacy in terms of caution against Identification. It has been provided that while reporting crimes involving rape, abduction or kidnap of women/females or sexual assault on children, or raising doubts on chastity, personal character and privacy of women, the names, the photographs of the victims or other particulars leading to their identity shall not be published<sup>17</sup>

#### *Exceptions to privacy rule and rulings by the Court*

In the case of *R. Rajagopal v State of Tamil Nadu*<sup>18</sup>, Auto Shankar- a convict sentenced for committing six murders, in his autobiography divulged his relations with a few political officials. The Supreme Court decided on questions related to right to privacy and observed, that right to privacy is implicit in the right to life and liberty guaranteed to the citizens of the country by Article 21. “It is a ‘right to be left alone.’ ‘A citizen has a right to safeguard the privacy of his own....’ ...The publication of any of the aforesaid personal information without the consent of the person, whether accurate or inaccurate and whether ‘laudatory or critical’ would be in violation of the right to privacy of the person and liable for damages. The exception being, when a person voluntarily invites controversy or such publication is based on public records, then there is no violation of privacy.”<sup>19</sup>

The standards of defining what content is in public interest and what isn't, still stands in a grey area, due to the leeway afforded to the authorities and is developing by the day through Judicial precedents. The grey areas afford leeway to the authorities in the sense, that in absence of clear definitions of public interest, political entities who are situated in positions of authorities, may restrict information unfavorable to them and promote publishing of other sensitive information/or news content otherwise against public interest, in case it means a disadvantage against the rival/opposition parties which further opens floor for another argument that in case the flow of information can be restricted, there exists scope for creation of fake-news. Fake news is essentially characterised by spreading of news or information which is false since inception or which may not be false but is framed in such a way which is highly chargeable in

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<sup>16</sup> Supra (n 16)

<sup>17</sup> Norms of Journalistic Conduct

<sup>18</sup> *R. Rajagopal v State of TN*[1994] SCC (6) 632

<sup>19</sup> Supra (n 16)

a way that is misleading.<sup>20</sup> However, that argument is beyond our scope of discussion in the current premises.

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<sup>20</sup> 'Expression Fighting Fake News'

The Information Society Project The Floyd Abrams Institute for Freedom  
of <[https://law.yale.edu/sites/default/files/area/center/isp/documents/fighting\\_fake\\_news\\_workshop\\_report.pdf](https://law.yale.edu/sites/default/files/area/center/isp/documents/fighting_fake_news_workshop_report.pdf)  
>accessed on 01 October 2019

## Chapter 4 Transparency in Media and Investigative Journalism

Besides non-conformity of the ethical code of conduct, there are greater problems that lie in the arena of media law. The increasing aspirations from print and mass media, as being the Fourth Pillar of the democracy has led to it gaining far reaching powers. “Media texts are constantly appearing and changing... Media texts are continually being produced and renewed. Media texts intend to engage people, to convey some kind of information, and to produce reactions in their audiences which justify their continuing production.”<sup>21</sup>

It has been stated in the preface of the norms of journalistic conduct; “The fundamental objective of journalism is to serve the people with news, views, comments and information on matters of public interest in a fair, accurate, unbiased and decent manner and language. The media today does not remain satisfied as the Fourth Estate, it has assumed the foremost importance in society and governance. Such is the influence of media that it can make or unmake any individual, institution or any thought. So all pervasive and all-powerful is today its impact on the society. With so much power and strength, the media cannot lose sight of its privileges, duties and obligations.”<sup>23</sup>

Accordingly, its requirements for greater access to matters concerning public domain are much easily fulfilled. In so far as collection of information is concerned, media’s expansion of outreach is ensured by various practices, some of which may turn out to be violations of professional and ethical conduct, or constitutionally guaranteed fundamental rights, for example, right to privacy; or violations to legislative directives. Besides practices like tipping off, or authorization from government offices, or support from political parties, investigative journalism is also widely recognized as a fair practice which now suffers from severe loopholes in keeping up with the lawful practices.

### *What is Transparency of Media?*

A few essentials of media transparency are openness and accountability of the media, and it is usually defined as a transparent exchange of information subsidies based on the ideas of

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<sup>21</sup> Burton Graeme, *Media and Society Critical perspectives* (2<sup>nd</sup> Edn. Rawat Publications (2017)  
23 Norms of Journalistic Conduct

newsworthiness.<sup>22</sup> Maintaining transparency is a major challenge today, in terms of media practices. News sources may influence what information is published or not published.

In various literature, transparency has been defined as a normative construct which is linked inextricably with accountability to public and Justification of a practice. In an ethical sense, transparency is strategy “for enhancing public knowledge and engagement that demystify journalistic practices and clarify journalistic values.”<sup>23</sup>

Continuing from the above, Meier says “The core task of journalism in modern democracy is to bring (outside) transparency into society by reporting, for example in politics, the economy, culture, education, science and medicine. As a consequence of the increasing complexity and diversification in society, though also due to an (assumed) failure of journalism and the new possibilities offered by the Internet, there are more and more calls for governments, parties, businesses, the financial system, universities, schools and non-profit organizations to develop self-transparency understood as two-way communication that enriches public discourse and empowers citizens (Fung, Graham & Weil, 2007).”

An article written by Josh Stearns has deliberated upon the need for media transparency and how it can use transparency as a tool to deepen community engagement as it supports local news and quality reporting. In 2013, the Poynter Institute published *The New Ethics of Journalism* and replaced “Act Independently” with “Be Transparent.” Kelly McBride, a co-editor of that book, wrote to explain that for news organizations to foster a sense of trustworthiness for themselves in the community, they need to adopt radical transparency and explain every decision they make.

*Challenges in news reporting or collecting information to bring out Transparency in governance & Mill’s Limitation of Harm Principle*

### **Limitation of Harm Principle**

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<sup>22</sup> John Merrill *Global journalism: Survey of international communication*. White Plains, NY: Longman. pp. 77–87.

ISBN 978-0801305122.

<sup>23</sup> Meier Klaus, ‘Transparency in Journalism credibility and trustworthiness in the digital future’ (*The Future of Journalism of Journalism studies and journalism practice*, Cardiff, 2009)



Christopher T Altman's article in the book, *Kant and the 19<sup>th</sup> Century Philosophers*, talks about the Limitation of Harm principle of Mill. Mill being an individualist, believed in maximization of individual's liberty and principle of utility, or greatest happiness of the greatest number.

He further explains, "The harm principle limits the powers of authority for the purpose of preserving individual liberty, based upon the premise that an individual allowed to pursue his or her own course of action, based upon individual choice, will be a more self-realized, selffulfilled, and consequently happier person. When an institution begins restricting individual choice beyond this point, it directly conflicts the principle of utility of an individual not allowed to pursue his or her own choices will be unhappy."<sup>24</sup>

"In *On Liberty*, Mill established three spheres of liberty: liberty of conscience, liberty of individual action, and liberty of communal action. Through liberty of conscience, an individual has the freedom to expression and the right to publish his or her opinions."<sup>25</sup>

The observation regarding the principle is that its objective is to restrict the scope of criminal law and government restrictions over personal liberty and not to guide individual actions.

The principle can be related to journalism in two ways.

- (1) In terms of publishing of information, and
- (2) Use of various methods of collecting information for publishing as news.

The first one relates to transparency & liberty of media to publish sensitive content as news, which upon being published may cause harm to a concerned person or section, but publication of such material is in much greater public interest, it would stand allowed. Here public interest outweighs the harm caused to a certain sect.

In deciding, whether every information which is discovered must be published or not, one needs to verify the harm it can cause, thereby, limiting how much to publish, hence, limitation of principle of harm.

The second one relates to liberty of individual action as long as it does not harm anyone.

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<sup>24</sup> Mills Harm Principle

<sup>25</sup> Walter Kaufmann, Forrest E. Baird, '*Baird and Kaufmann*' (Prentice Hall College Div; 2 edition 1996)

According to John Stuart Mill, social disapproval or dislike for a person's actions isn't enough to justify intervention by government unless they actually harm someone.<sup>26</sup> In the light of this argument, the publication of recorded conversations in the Radia conversations can be viewed. The recording of conversations were necessary for authorized investigation, but the publication of the same private conversations in media was a violation to privacy of certain individuals as well as defamatory. It was defamatory since, the publication was before any final verdict on the guilt of the persons involved could be decided, and therefore it was clearly harmful to the reputation of persons who were taped. Accordingly, viewing publication of sensitive information relating to private individuals and use of surveillance over private individuals is a breach of their right to privacy.

### *Investigative Journalism*

Often, for bringing out certain confidential information, which is deliberately being concealed for reasons political, economic, or otherwise, journalists have resorted to different practices when it comes to collection of information, investigative journalism is one of them.

However, debates may spark over techniques of carrying out such practices, as did in the Radia tapes case. The phone tapping of political lobbyist Nira Radia, and publishing of the private conversations with eminent personalities led to a great controversy. However, in that case, in the petition filed by Ratan Tata, the recording of conversations wasn't in dispute. But the petition challenged the publication of such private conversations between Radia and him.

In the above case, there is however a difference because of which the recording could not be challenged. The phone tapping and recording of conversations was carried out under the orders of an Income Tax commissioner, well under lawful authority. Journalists and news organizations are not afforded such immunity due to lack of authority, and accordingly, publication and surveillance is unlawful.

Ideally, the Investigative journalism should be defined and based on following principles:

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<sup>26</sup> Ethics Explainer: The Harm Principle'(2016) The Ethics centre <<https://ethics.org.au/ethics-explainer-the-harmprinciple/>>accessed on 01 October 2019

“Investigative journalism is finding, reporting and presenting news which other people try to hide. It is very similar to standard news reporting, except that the people at the centre of the story will usually not help you and may even try to stop you doing your job.”<sup>27</sup>

Story-Based Inquiry, which is an investigative journalism handbook published by UNESCO, defines it as: “Investigative journalism involves exposing to the public matters that are concealed—either deliberately by someone in a position of power, or accidentally, behind a chaotic mass of facts and circumstances that obscure understanding. It requires using both secret and open sources and documents. The Dutch-Flemish investigative journalism group VVOJ defines investigative reporting simply as “critical and in-depth journalism.”<sup>28</sup>

Investigative Journalism is carried out against few sections like Governments, companies, criminals and while there are organizations which legally recognize investigative journalism, most of the authorities, in their guidelines discourage unlawful activities in the name of Investigative Journalism.

“In addition to gathering facts, you should also gather evidence to support those facts. This is especially important in case you are taken to court for defamation as a result of your investigation. Courts will only accept facts which can be proved...” “It has been highlighted in the journalism handbook, that surveillance by private entities is unlawful. “...Journalists have no special rights in law, even when investigating corruption. Unlike the police, journalists cannot listen in to other people's telephone calls or open their letters. Journalists cannot enter premises against a person's wish.”

Further, it said “You must work within the law, but more than that, you should not use any unethical methods of getting information. For example, you should not pretend to be someone to whom people feel obliged to give information, such as a police officer or a government official.”<sup>31</sup>

However, the illegal techniques used in Investigative Journalism, fares as far as including, sting operations, surveillance equipment etc which cross privacy rights of the general Public.

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<sup>27</sup> Chapter 39: Introduction to investigative reporting’ The News manual <[https://www.thenewsmanual.net/Manuals%20Volume%202/volume2\\_39.htm](https://www.thenewsmanual.net/Manuals%20Volume%202/volume2_39.htm)> accessed on 01 October 2019

<sup>28</sup> Investigative Journalism: Defining the Craft’ The Global Investigative Journalism Manual <https://gijn.org/investigative-journalism-defining-the-craft/> 31 Supra (n 29)

Determination of private affairs through covert surveillance without authorization is the highest form of breach of privacy which shall be brought to light through this research. Clearly, the lines between news reporting for public interest and infringement are blurred by far which doesn't present an advantage to journalism, but makes it dirtier and unfair. In such a scenario, it is important to have law enforcement to address loopholes, fairly laying down the permissible limits of investigative practices within the circumscribing limits of ethical journalism.

*Norms prescribed in Journalistic Code and other legislations in India with respect to investigative journalism*

In the norms of Journalistic code, there have been guidelines prescribed regarding investigative journalism.

“The Press council described investigative reporting to have three basic elements:

- a. It has to be the work of the reporter, not of others he is reporting;
- b. The subject should be of public importance for the reader to know.
- c. An attempt is being made to hide the truth from people.

The first norm follows as a corollary from

- (a) That the investigative reporter should, as a rule, base his story on facts investigated, detected and verified by himself and not on hearsay or on derivative evidence collected by third party, not checked up from direct, authentic sources by the reporter himself.
- (b) There being a conflict between the factors which require openness and those which necessitate secrecy, the investigative journalist should strike and maintain in his report a proper balance between openness on one hand and secrecy on the other, placing the public good above everything.
- (c) The investigative journalist should resist the temptation of quickies or quick gains conjured up from half-baked incomplete, doubtful facts, not fully checked up and verified from authentic sources by the reporter himself.

- (d) Imaginary facts, or ferreting out or conjecturing the non-existent should be scrupulously avoided. Facts and yet more facts are vital and they should be checked and cross-checked whenever possible until the moment the paper goes to Press.
- (e) The newspaper must adopt strict standards of fairness and accuracy of facts. Findings should be presented in an objective manner, without exaggerating or distorting, that would stand up in a court of law, if necessary.
- (f) The reporter must not approach the matter or the issue under investigation, in a manner as though he were the prosecutor or counsel for the prosecution. The reporter's approach should be fair, accurate and balanced. All facts properly checked up, both for and against the core issues, should be distinctly and separately stated, free from any one-sided inferences or unfair comments. The tone and tenor of the report and its language should be sober, decent and dignified, and not needlessly offensive, barbed, derisive or castigatory, particularly while commenting on the version of the person whose alleged activity or misconduct is being investigated. Nor should the investigative reporter conduct the proceedings and pronounce his verdict of guilt or innocence against the person whose alleged criminal acts and conduct were investigated, in a manner as if he were a court trying the accused.
- (g) In all proceedings including the investigation, presentation and publication of the report, the investigative journalist newspaper should be guided by the paramount principle of criminal jurisprudence, that a person is innocent unless the offence alleged against him is proved beyond doubt by independent, reliable evidence.
- (h) The private life, even of a public figure, is his own. Exposition or invasion of his personal privacy or private life is not permissible unless there is clear evidence that the wrong doings in question have a reasonable nexus with the misuse of his public position or power and has an adverse impact on public interest.
- (i) Though the legal provisions of Criminal Procedure do not in terms, apply to investigating proceedings by a journalist, the fundamental principles underlying

them can be adopted as a guide on grounds of equity, ethics and good conscience.

(j) To say that the press should not publish any information, till it is officially released would militate against the spirit of investigative journalism and even to an extent the purpose of journalism.”<sup>29</sup>

- Guidelines in respect of professional misconduct, avoiding crass commercialism, professional rivalry, plagiarism, unauthorized lifting of news are a few other areas among the plethora of guidelines issued which promote an environment fostering responsible journalism on the part of Press in India.

- In Part B of the Code which is ‘Guidelines on Specific Issues’, the Council has laid down several norms for observance by the press in special cases, for example:

- a) Norms for observance by the Press in the wake of communal disturbances 1969

- b) Guidelines Issued by the Press Council for Observance by the State Governments and the

Media in Relation to Communal Disturbances 1991

- c) HIV/AIDS and the Media

- d) Election reporting

□ It also provides the ‘Right To Privacy – Public Figures And The Press-1998’ and under it, confers a responsibility on the journalists to practice self-restraint and respect privacy of public figures, which is not absolute in their case. In such cases, ‘public interest’ has to be given consideration while reporting news and not ‘what is of interest to public’

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<sup>29</sup> Norms of Journalistic Code

## Chapter 5 Position with respect to Laws in other Jurisdictions

### *Freedom of Expression*

The entire debate relating to right to privacy and responsible journalism finds its origin out of consequences that follow from the freedom of expression guaranteed under various constitutions of the world, to its citizen. Its development started from thinkers such as John Milton and John Locke, who emphasized their opposition to censorship as a part of development of democratic government.<sup>30</sup>

With the span of time, International Conventions started adopting and recognizing the right to freedom of opinion and expression. Article 19 of the 1948 Universal Declaration of Human Rights (UDHR) states:

“Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers.”<sup>31</sup>

In Europe, there was a binding law guaranteeing the right to freedom even before being adopted in the UN General Assembly. In 1953, the Convention for the Protection of Human Rights and Fundamental Freedoms (also known as the European Convention on Human Rights or ECHR) was adopted and entered into force in 1953. Article 10 of ECHR acknowledges and protects the right to freedom of expression inclusive of freedom to hold opinions and to receive and impart information w/o interference by public authority or government.<sup>32</sup>

In addition to right of expression, Freedom of press was recognized by ECtHR in line with that of a “public watchdog”. This was the medium, through which press afforded the public, means to discover and form opinion regarding ideas and attitudes of political leaders and gave the political leaders opportunity to reflect and comment on the preoccupations of public opinion.<sup>33</sup>

The above provisions are the foundations on which freedom of press developed. With the advancement in polity, democracies, economies and technology, media grew in its form and practice and evolved. Often to extents where certain practices came in conflict with other rights

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<sup>30</sup> <https://www.mediadefence.org/sites/default/files/resources/files/MLDI.IPI%20defamation%20manual.English.pdf>

<sup>31</sup> Universal Declaration of Human Rights, UNGA, 1948.

<sup>32</sup> Convention for the Protection of Human Rights and Fundamental Freedoms, 213 UNTS 222

<sup>33</sup> Castells v. Spain, Judgment of 23 April 1992, Series A no. 236

of citizens, such as right to privacy, and violations, or breach of privacy was defined. Also, limitations to exercise such rights were laid down. According to which, law developed in various Jurisdictions in various ways.

However, Article 19 of the ICCPR and Article 10 of the ECHR elaborate that Freedom of expression is not an absolute right, but is limited by restrictions which are necessary:

- (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.<sup>34</sup>

#### *Defamation as breach of right to privacy and exceptions*

One of the restrictions on the absoluteness of freedom of press was for respect of rights or reputation of others. The causing of an action which leads to degradation of such reputation in the eyes of a prudent man is known as defamation in torts.

Defamation has been treated differently when categorised, either as a tort or a civil wrong or as criminal defamation. In the reference and training manual for Europe titled, Freedom of Expression, Media Law and Defamation<sup>38</sup> which defines defamation in terms of Human rights laws as protection against “unlawful attacks” on a person’s “honour and reputation”. It refers to Article 17 of the ICCPR. In recent years, right to a reputation has been understood to be encompassed within Article 8 of European Convention (right to private and family life). Both, Article 19 of the ICCPR and Article 10 of ECHR, use restrictions through the words, “rights and reputation of others” for limiting the right to freedom of expression.

Whereas Article 12 of UDHR provides for protection of reputation, there also reasonable restrictions, on exercise of the same, in following the manner:

- (a) when any statement is true it is an absolute defence to the defamation.
- (b) Criticism of public officials
- (c) Protection of political speech

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<sup>34</sup> Media Legal Defence Initiative, International Press Institute, ‘Freedom of Expression, Media Law and Defamation’ (2015)  
<<https://www.mediadefence.org/sites/default/files/resources/files/MLDI.IPI%20defamation%20manual.English.pdf>> accessed on 01 October 2019 38Supra ( n 38)



The following countries, being members of The ECHR, the following discussion is regarding the situation of freedom of press in U.K. & France. The above discussed provisions, since applicable to these countries, the researcher will elaborate on specific issues prevalent therein.

### ***United Kingdom***

In UK, the Press Complaints Commission (PCC), which is a self-regulatory body is similar to News Broadcasting Association of India. The PCC has laid out a code of ethics for journalists. The PCC guidelines state that everyone has the right to privacy and it is the responsibility of the editors to justify the reasons for intrusions to a person's privacy. This includes surveillance of individuals without their consent by photographing them in private places. PCC code defines private places to include public or private property "where there is a reasonable expectation of privacy." However, In India photographs are taken without the consent of an individual if they are in a public space.

Like the PCI norms, The PCC Code lays down guidelines prescribing actions while reporting on victims of sexual assault who are minors (below 16 years of age). The guidelines provide for protection of the identity of children. Further, it is against the rule to identify relatives or friends of persons convicted or accused of the crime without their consent, unless such information is important to the story. References to a person's race, colour, sexual orientation and gender must be avoided.

In relation to sting operations, the PCC lays down that the press must not publish material obtained through hidden camera or clandestine devices by recording or tapping of private messages, emails or telephone calls without consent. However, revealing private information in cases of public interest is an exception to the general rule to be followed with respect to individual privacy.

The PCC provides that public interest to includes, but it is not restricted to:

- "i) Detecting or exposing crime or serious impropriety
- ii) Protecting public health and safety
- iii) Preventing the public from being misled by an action or statement of an individual or organisation"

It requires that the editors amply demonstrate such a publication is of public interest. If the material is in the public domain already the same rules of privacy do not apply. However, in cases involving minor children who are below 16 years of age, editors must demonstrate an exceptional overriding public interest which outweighs the interest of the child. It is evident, therefore, that the PCC does recognise freedom of expression as public interest.

The PCC has issued desisting orders to ensure the media does not hound persons. The issue of a desisting notice to editors is to prevent the media from contacting persons for whom the order has been passed. Preventive pre-publication is when the PCC pre-empts a story that may be pursued or published and attempts to either influence the reporting of the story in a way that it is not in violation of a person's privacy or persuades the media house not to publish the story. The PCC, however, does not have the powers to prevent publication.

However, no independent law is in existence in the U.K. like in India which would recognize the right to privacy. Although, the judiciary has protected the right to privacy on several occasions, like in the famous J.K. Rowling case where the English Court held, that a minor's photograph without the consent of the parent or guardian, though not offensive, violates the child's right to privacy.

### ***France***

The French legal system protects the right to privacy under: Article 9 of the Civil Code.

Article 9 of the Civil Code states:

“Everyone has the right to respect for his private life. Without prejudice to compensation for injury suffered, the court may prescribe any measures, such as sequestration, seizure and others, appropriate to prevent or put an end to an invasion of personal privacy; in case of an emergency those measures may be provided for by an interim order. The right to privacy allows anyone to oppose dissemination of his or her picture without their express consent.

Article 9 covers both the public and private spheres, and includes not merely the publication of information but also the method of gathering information. Also, in France violation of one's privacy is a criminal offence. This includes recording or transmitting private conversations or picture of a person in a private place without the person's consent. This implies that privacy is not protected in a public place. Any picture taken of a person dead or alive, without their prior

permission, is prohibited. Buying of such photographs where consent of a person also constitutes as an offence. Journalists, however, are not disqualified from the profession if they have committed such an offence.”<sup>35</sup>

“France has the Freedom of the Press of 29 July 1881 which protects minors from being identified and violent and licentious publication which targets minors. It punishes slander, publication of any information that would reveal the identity of a victim of a sexual offence, information on witnesses and information on court proceedings which include a person’s private life.”<sup>36</sup>

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<sup>35</sup> <http://www.kbkcl.co.uk/2008/03/privacy-law-the-french-experience/> and <http://ambafrance-us.org/spip.php?article640> [Last Accessed October 2,2019].

<sup>36</sup> <http://www.ambafrance-uk.org/Freedom-of-speech-in-the-French.html> [Last Accessed April 20,2011].

## Chapter 6 CONCLUSION

“Amid digital innovation, rhetorical theorists may aim to intervene in the cultural production of interfaces and devices, in addition to our more traditional focus on the persuasive content that circulates across a given medium. The constitution of such technologies, after all, levies a profound influence on the communicative flows they enable, constrain, and preserve. Digital interfaces, like them or not, collectively serve as the pre-eminent forum and most vital archive for an ever-increasing portion of the world’s population. Few industries or professions even attempt to feign indifference towards this media seachange, least of all those concerned with communications.”<sup>37</sup>

The right to privacy in India has failed to gain the status of an absolute right as is the case in most other jurisdictions too. It is, to date, only a deemed right. In comparison to other competing rights, for example, the right to freedom of speech & expression, the right of the State to impose restrictions on account of Public Interest and safety and security of the State, and the right to information, the right to privacy is easily relinquished.

There are few exceptions to the right to privacy, such as, overriding public interest, safety and security of the State, applicable in most countries. Nonetheless, unwarranted invasion of privacy by the media is widespread. For instance, in the UK, Sweden, France and Netherlands, the right to photograph a person or retouching of any picture is prohibited as opposed to, in India where press photographers do not expressly seek consent of the person being photographed, if he/she is in a public space. In France, not only is the publication of information is prohibited on account of the right to privacy, but the method in which the information is procured also falls within the purview of the right to privacy and could be violative. This includes information or photograph taken in both public and private spaces. Privacy within public spaces is recognized, especially, “where there is reasonable expectation of privacy.” The Indian norms or code of ethics in journalism fail to make such a distinction between public and private space. Nor do the guidelines impose any restrictions on photographing an individual without seeking express consent of the individual.

The Indian media violates privacy in day-to-day reporting, like overlooking the issue of privacy to satisfy morbid curiosity. The PCI norms prohibit such reporting, unless it is outweighed by ‘genuine overriding public interest’. Almost all the above countries prohibit publication of

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<sup>37</sup> Tinnell John *Actionable Media* (Oxford University Press 2018)

details that would hurt the feelings of the victim or his/her family. Unlike the UK, where the PCC can pass desist orders, in India the family and/or relatives of the victims are hounded by the media.

In India, the right to privacy is not a positive right. It comes into effect only in the event of a violation. The law on privacy in India has primarily evolved through judicial intervention. It has failed to keep pace with the technological advancement and the burgeoning of the 24/7 media news channels. The prevalent right to privacy is easily compromised for other competing rights of 'public good', 'public interest' and 'State security', much of what constitutes public interest or what is private is left to the discretion of the media.

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