

RIGHTS OF ACCUSED AND VICTIM AGAINST MEDIA VICTIMIZATION: A CRITICAL EXAMINATION

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Accepted

26. 6. 2022

Revised

15. 9. 2022

Published

28. 10. 2022

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Abstract With the advent of technology and communication media, it is now possible to gather and integrate data via a digital medium. Data sharing without authorization via electronic media is referred to as a breach of digital privacy. The right to privacy is a human right that is guaranteed by law in nearly every country and has been extended to those who are under trial/ accused. At the same time, the press, including digital media, has the right to freedom of expression. This paper examines the unwarranted intervention of digital media in the personal lives of both the victim and the accused. Inquisitorial as well as adversarial models of judicial process presume the accused innocent until guilt is proven after following the due process of law. This paper investigate the unrestrained and irresponsible publication of news and posts that violate a person's data privacy and available remedies in the law when rights to privacy are breached. It also comparatively examine privacy laws and legal remedies in the United States, the United Kingdom, and India, and make appropriate recommendations. Study of this paper reveals that in the wake of rising interferences by media, there is no specific statute providing protections.

Keywords

technology,
media,
digital privacy,
criminal justice system,
freedom of press

1 Introduction

Every person has a right to have their reputation and privacy preserved inviolate. The concept of privacy is malleable. Privacy law, like many other areas of law, enables a person to assert their right to privacy against the dissemination of speech that violates their privacy. The interest that everyone has in their right to free expression must be weighed against the interest that a person has in maintaining their reputation. Personal information is valued differently by various people in subtle or significant ways. While everyone has an intuitive sense of what information should be kept private, extrapolating general principles from such individual views to concrete situations can prove extremely difficult. Privacy is a fundamental human right in nearly all countries. Privacy in European law encompasses “a right to respect and personal dignity.” Privacy protections includes the “right to one’s image, name, and reputation” and the “right to informational self-determination” which is the right to exercise control on the disclosure of one’s information (An Actionable Right of Privacy, 1902). In the United States, privacy centers on liberty conceptually. Hence, this mainly encompasses citizens’ right to be free from unreasonable governmental intrusions. The Fourth Amendment establishes a right to be free from “unreasonable searches and seizures,” which has been expanded over time, and the Fifth Amendment protects against self-incrimination by forbidding the government from forcing people to testify against themselves in criminal cases and in civil or even administrative matters, where a person under oath may invoke the Fifth Amendment if testifying might put them in jeopardy in a future criminal action (US Government Publication, 6. october 1992).¹ Moreover, in a democratic country like India, the media is considered as a fourth pillar of the democratic system. If journalists or media organizations breach people’s privacy, the primary remedy is torts under state common law, not constitutional law.

According to Salmond, privacy involves the interest of being left alone to maintain one’s intellectual and emotional personality, far from offensive intrusion by conduct calculated to annoy and induce emotional stress (Paranjape, 2016). Infringement of the right of privacy is recognized in the United Kingdom under several enactments including the Human Rights Act (1998), the Interception of Communication Act

¹ 5th Amendment US Constitution-Right of persons. US Government Publication. Retrieved from <https://www.govinfo.gov/content/pkg/GPO-CONAN-1992/pdf/GPOCONAN-1992-10-6.pdf>. (Dec. 22, 2021).

(1985), and the Law of Privacy and the Media (2002) (Talat, 2021). English law of defamation also recognizes the right to privacy. Those making defamatory statements may be held liable for damages. In the United States, the right of privacy is protected under the free speech clause of the First Amendment. The American Restatement of Torts recognizes four forms of privacy, namely: intrusion upon seclusion; appropriation of name or likeness; offensive publicity to private life; and, publicly placing a person in a false light (Warren & Brandeis, 1890). The law of defamation and privacy are inextricably linked (Haydel, 2009).

Freedom of speech and expression includes freedom of the press, albeit with reasonable restrictions. The term 'press' includes digital media. In India, the right to privacy is also interpreted as a fundamental right within the scope of Articles 21 and 14 of the Indian Constitution. It is also recognized as a basic human right by the international community. While exercising the right to communication, the media can use the data available in the public domain. Hence, the right to privacy has been given primacy over the freedom of the press. However, in social media, private data and information, especially data relating to vulnerable groups such as victims of crime and accused whose guilt has not yet been proved, and when the matter is sub judice, may be transmitted without any restrictions or adequate controls. Therefore, while violating the right to privacy of data on social platforms, the right to reputation may also be adversely affected. A serious issue is whether the identity of persons accused of criminal activity should remain confidential until they are found guilty by a court of law. The legal stance on this topic is still unresolved. One strategy advocates keeping accused people's identities concealed until they are found guilty. The reasoning is that disclosure creates a stigma on their character even if they are ultimately found innocent. In New Zealand and Australia, where criminal proceedings may be heard by a jury, a court may order that an accused person's identity not be revealed if the court believes that doing so would jeopardize a fair trial. Although the norm in the UK and India is that legal processes should be held in public, there are laws that limit media coverage of particular criminal trials (Iau, 2022). A person accused of a crime may not be mentioned in media reports in some situations. This could happen for a variety of reasons, none of which have anything to do with "protecting" an accused person. An example is where no charges have been filed against a person. Indeed, there are many cases where charges may never be filed against a person. A news publisher may believe the legal risk of naming them

as an accused culprit is unacceptably high, as that person may sue a publisher for defamation if they were suggested as being accused of committing a crime.

India's Supreme Court has repeatedly recognized the right to privacy as a right "implicit in the right to life and liberty granted to people of this country by Article 21". In the interest of the public, Indian law has carved out exceptions to the concept of privacy, particularly after the enactment of the Right to Information Act (RTI Act) (2005). Under section 8(1)(j) of the RTI Act, any personal information that is neither connected to any public activity nor is of public interest, or that would create an unreasonable violation of an individual's privacy, is exempted from disclosure. Under Indian law, there is no clear definition of what constitutes an unjustified invasion of privacy. In the case of *R. Rajagopal v State of Tamil Nadu*, the Indian Supreme Court stated that "the right to privacy is implied in the right to life and liberty provided to inhabitants of the country under Article 21. It is a fundamental human right to be left alone." The Court held that, "A citizen has a right to safeguard the privacy of his own, his family, marriage, procreation, motherhood, child-bearing and education among other matters. 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" (*R. Rajagopal v State of Tamil Nadu* (Supreme Court of India 1994)).

The *R. Rajagopal* decision marked the first time the Indian court recognized the right to privacy of a person criminally accused and their family. As a consequence of the Court's holding, it is now illegal for anyone to publish any personal information about another Indian citizen without permission, and in case of violation, the conduct is actionable as a basic right (AIR 1995 SC 264). In the *Phoolan Devi's* case (*Phoolan Devi vs Shekhar Kapoor And Ors*, 57 (1995) DLT 154 (Delhi High Court 1. December 1994)), the court observed that defendant had no right to exhibit the movie the *Bandit Queen - Her Story* on the grounds that it violated her right to privacy and banned the movie (Washington Post, 1994). A code of ethics applies to the media. The purpose of reporting crime stories should be to serve the public interest, not to create sensation or gain reader attention for the sake of the media's popularity. The media has a responsibility to publish news that does not unduly infringe on a person's privacy. This study examines the legal structure in India that protects the accused and their family from the irresponsible

media publication of the charges to the crime allegedly committed. This paper further examines and evaluates the right to digital privacy of both an accused person and victim against disclosing their identities, as well as the rights of family members, friends of the victim and accused against publication of their names in relation to incidences where they are not involved, the ethical and moral duties of users of digital platforms, and an analysis of the concept of expanding the meaning of 'press' to include every person circulating information in digital media and the legal framework for same.

2 Evolution of the right to privacy

The concept of privacy naturally associates with the concept of natural person. Being a member of society, a person asserts that neither other people nor the country of which they are a citizen have any right to meddle in their private matters. The considerations involved when analyzing the right to privacy include: privacy as a proprietary right to one's name and image, privacy as the practice of keeping one's affairs private, the privacy of personal relationships and family matters, etc. (Andrade, 2017). In modern legal interpretation, Indian courts have relied heavily upon American legislation for the purpose of understanding privacy issues in the Indian domain. However, it is wrong to believe that the concept of privacy was foreign to Indian culture.

Ancient Hindu literature such as Hitopadesha and Dharmashastras provides valuable historical insights into the concept of privacy. The ancient Indian Dharamasastras and their commentaries outlined the norms of privacy on the Indian subcontinent. The kings were obligated to defend Dharma and to protect the citizens' privacy. During that period, the king was required to support Dharma and respect the privacy of the citizens (Thapa, 2021). Kautilya proposed a thorough protocol to safeguard the right to privacy in his Arthashastra, which was composed during 321-296 B.C. An examination of India's more recent past reveals that by the nineteenth and twentieth centuries, so-called privacy had become synonymous with the inviolability of one's home. For example, the Constitution of India Bill (1895)², is recognized as one of the oldest statutes to assert that every citizen has an inviolable

² Constitution of India (1895). Retrieved from [https://www.constitutionofindia.net/historical_constitutions/the_constitution_of_india_bill_unknown_1895_1st_January_1895_\(Jun._20,_2022\)](https://www.constitutionofindia.net/historical_constitutions/the_constitution_of_india_bill_unknown_1895_1st_January_1895_(Jun._20,_2022)).

asylum in his home, while the Commonwealth of India Bill (1925), protects the undesired intrusion into one's home without due process (Constitution of India, 1895). A similar set of rights was proposed in the Nehru Report of 1928 (Nehru Report 1928 experts, 1928).

Even more recently, during the period when the constitution for an independent India was being drafted, the right to privacy was not specifically mentioned among the essential rights to be granted to Indian citizens. However, there was a debate and discussion focused upon the right to privacy in the Constituent Assembly. Several times throughout the ongoing sessions of the Constituent Assembly, attempts were made to include the right to privacy in the chapter of fundamental rights (Constitution Of India, 1947). Kazi Syed Karimuddin proposed inclusion of a right to privacy in the chapter of fundamental rights by citation to 4th Amendment of the American Constitution, Clauses (2) and (5) of the Irish Constitution, and Articles 114 and 115 of the German Constitution, all of which offered identical rights to their citizens (QAZI, 2020). However, there was no support among the Assembly for inclusion of this proposed modification in the Constitution. As a result, the Indian Constitution fails to acknowledge the right to privacy as one of the fundamental rights guaranteed to Indian citizens. The Supreme Court of India has, however, played a vital role in addressing the right to privacy in a number of instances, defining the right to privacy terms of Article 21 in Part III of the Constitution. Article 21 (Jain, 2006) of the Indian Constitution is worded in very simplistic terms. Although Article 21 does not specifically mention the right to privacy, the Indian Supreme Court has time and again expounded upon the meaning of the article and explored its various dimensions, with the right to privacy being one of them (Bakshi, 2022). The Supreme Court stressed that this right need not be articulated separately but derives its existence collectively from Articles 21, 14, and 19 of the Indian Constitution (*Maneka Gandhi v. UOI*, AIR 1978 SC 597 (Supreme Court of India 1978)). The right to privacy is one of the important dimensions of Article 21 (Khubalkar, 2020).

3 Freedom of the press

The main duty of the press is to disseminate information to the public. Freedom of the press is crucial for the general interest of the public in any democratic society like India. As the freedom is not absolute, the press is expected to exercise care when publishing material about any individual. Freedom of media in terms of individuals' right to privacy is discussed in the following sub-sections.

3.1 Protection to privacy of identity and freedom of the press

The secrecy of one's identification is vitally important. The concept of identity privacy can be viewed through two lenses. The first is concerned with the security of personal data that could be linked to a person's identification so as to divulge their identity. The second acknowledges the importance of reputation. It aims to prevent the misuse or defamation of a person's identity and, as a result, their reputation.

Substantial harm to one's reputation may result when photographs of an accused are broadcast on television, or published in print media or on the internet, and the crime alleged against the person is described. In many cases in which the person was accused or imprisoned for a crime but later released, they were ultimately found not guilty. However, by then, the accused persons' identities have been revealed, their guilt too often assumed, and their futures irreparably damaged as a result of media coverage. An undertrial is an unconvicted prisoner who is on trial in a court of law. According to the latest available data compiled by the National Crime Bureau for 2020, about 76 percent of all prison inmates in India were undertrials, of which about 68 percent were either illiterate or school dropouts. Of the total 488,511 prison inmates, 371,848 were found to be undertrials. Poor undertrials are grossly affected by the media reporting crimes. They are unable to find work and often harassed by neighbours. They are forced to flee the city where they live, despite the fact that all charges against them eventually had been dropped. The courts have ordered both the police and prosecutors not to reveal to the media the identities of those accused of crimes, the techniques of investigation, or facts about the accuseds' family. The names of the accused, victims, witnesses, or the status of the investigation should not be included in news stories since disclosure of this information could jeopardize the case. The

process of identification parades (known as “lineups” in the UK and US) could be hampered if accused persons' images are published beforehand. Taking these concerns into account, the Indian Supreme Court has stated that both the accused's and victim's privacy, as well as the accused's rights, must be protected (Bar & Bench, 2021). Furthermore, if all the details of the investigation, including the substance of the statements made by witnesses during the investigation, are published while the investigation is ongoing, the accused or those involved in the crime can undoubtedly gain an unfair advantage. Moreover, there are neither guidelines nor laws prohibiting crime reporting from revealing the identity of an accused by virtue of freedom of the press (Dore, 2015).

From the time of British control in India, 'freedom of the press' has been a contentious issue. During British control, the press served as a vehicle for spreading nationalistic sentiment among Indians. As a result, after India gained independence, the founding fathers placed a premium on press freedom when drafting India's Constitution in the Constituent Assembly. Surprisingly, the Indian Constitution's Chapter on Fundamental Rights does not directly address freedom of the press. The Supreme Court declared in 1950 that the right to freedom of the press is implied in Article 19(1)(a) of the Constitution's protection of freedom of speech and expression. Additionally, in various judgments the Supreme Court of India has emphasized the importance of freedom of press in a democratic society.

Again, there is no provision in the Indian Constitution that specifically prohibits press censorship. If censorship is imposed, its constitutionality must be determined using Article 19(2)'s reasonableness test. Article 19(2) permits the State to impose upon the freedom of speech and expression in the interests of: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 offence. Similarly, the Supreme Court confirmed the constitutionality of a statute allowing for pre-censorship of motion pictures in order to defend the interests protected by Article 19(2), such as public order and decency (Jain, 2006).

Ethics play an important role in all lines of work. It is critically important that media workers adhere to high ethical standards in order for the media to maintain its image as the "fourth pillar." The government of a country imposes law on journalists in the same way that it imposes law on all of its residents. In order to curb the excesses and errors of journalists, laws such as defamation, contempt of court, and the right to privacy exist. Experienced journalists are well aware of the law governing media coverage, and accordingly while writing an article or reporting on an event, most exercise extreme caution.

3.2 Reasonable Expectation of Privacy

The expectation of privacy is a legal norm that determines whether someone who unjustly and gravely jeopardizes another's right to privacy can be held accountable for the exposure or intrusion. This test is critical in determining the scope of the Fourth Amendment's privacy protections' applicability in the United States. A reasonable expectation of privacy at home is an obvious example of a person's right to be left alone. On the other hand, entering one's home does not confer an absolute right to privacy. The recording and broadcasting of an accused's movements from outside his home while free on bail and awaiting further judicial procedures constitutes an invasion of privacy. The right to a reasonable expectation of privacy in public places can also be safeguarded by laws prohibiting the media from broadcasting the details and photographs of the accused while they are being taken to or from court or while speaking with a lawyer. This rule was upheld in the case of *Carpenter v. United States*.³ In this, the United States Supreme Court held that obtaining a search warrant/court's permission is a prerequisite for accessing the mobile location of the accused from a mobile phone company, including the cellphone's communication and geolocation details. Further, both in the case of *United States vs. Miller* and *Smith vs. Maryland*, the Supreme Court held that individuals have no legitimate expectation of privacy with respect to information they willingly supply to third parties. In *California Bankers Assn. v. Shultz*, the United States Supreme Court observed that, "Even if a criminal prosecution is planned at the time the subpoena is issued, issuing a subpoena to a third party does not violate a defendant's rights" (*United States v. Miller*, 425 U.S. 435 (U.S. Supreme Court 1976)).

³ *Carpenter v. United States*. Retrieved from <https://privacylibrary.ccglnud.org/case/carpenter-vs-united-states> (Jun. 15, 2022).

Robertson v. Rochester Folding Box Company (Victoria, 2008) was perhaps the seminal case in the United States that spawned development of privacy rights. In this case, the plaintiff, a young woman, claimed that the defendant floor manufacturers and dealers printed and distributed photographs of her image with the phrase "Flour of the Family" beneath the portrait without her knowledge or agreement. She brought her lawsuit in the Monroe County Supreme Court in 1900. Although perhaps misleadingly called the Supreme Court, it is actually the trial court, or court of first instance in European parlance. She contended the companies had inflicted mental anguish upon her purely for the purpose of corporate profit and greed. She sought money damages in the amount of \$15,000, along with a prohibitory injunction to prohibit the defendants from further distributing her image. Following trial, the judge ruled in plaintiff's favor. He concluded that Robertson's image belonged to her, and to her alone. He noted, however, that the result would be different if the plaintiff had already been famous, because in such an instance the publication and dissemination of the image would only have served to enhance the plaintiff's reputation. Defendants appealed the trial court's decision to the intermediate appellate court of New York, known as the Appellate Division of the Supreme Court of New York. The Court affirmed the trial judge's ruling. Defendants then appealed to the highest appellate court, known as the Court of Appeals of the State of New York. In a 4-3 decision, the Court overturned Robertson's victory, the majority reasoning that the right to privacy did not exist in the law. The author of the majority opinion, Chief Judge Alton Parker, went so far as to claim that Robertson should have been flattered that her picture was selected and he asserted it was a compliment to her beauty. The next year, in 1903, the New York State Legislature passed legislation granting a statutory right of action in such circumstances, legislation that continues to exist to this day.⁴ It must be said, that while Robertson may have lost her case, the moral outrage that occurred following the New York high court's decision set the stage for the rapid development of right to privacy laws in the United States.

Taking a photograph of a person or any of their property without their knowledge may be treated as an invasion of their right to privacy. In *Corelli v. Wall* (Carty, 2007), the photograph of Marie Corelli, who was a well-known novelist, was published depicting some of her indecent poses without her consent. She sued the

⁴ Abigail M. Roberson v. The Rochester Folding Box Company. Retrieved from <https://faculty.uml.edu/~sgallagher/roberston.htm> (Oct. 14, 2022).

defendants for defamation and prayed for a prohibitory injunction to stop the further dissemination of that photograph. The court denied her relief on the ground that looking at that photograph nobody would reasonably understand it to be a photograph of her, there being no resemblance between the two. The suit for damages was therefore dismissed, though the photograph was annoying to her.

In *Melvin v. Reid* (Court of Appeal, California, Fourth District 1931), the plaintiff had abandoned criminal life after her acquittal in a murder trial. She later married and led an exemplary life. Seven years later, the defendants, without her knowledge or permission, released a motion picture based on her “true past life” and advertised it as such using the plaintiff’s maiden name. She successfully recovered damages for violation of her right of privacy.

3.3 Sting operations vis- a- vis Criminal Justice system

Primary goals of the criminal justice system are to maintain peace and order while also preventing and punishing crimes. Law enforcement officials and courts are in charge of these responsibilities, while the media has no role to play. Other key actors in the criminal justice system include law enforcement agencies, the judiciary, state prosecutors, defence attorneys and correction officers. These pillars are designed to uphold the principles and ideals of the criminal justice system (Turvey & Crowder, 2013). From a due process, procedural standpoint, key principles of the criminal justice system include the right to remain silent, the presumption of innocence, and the elevated burden of proof: proof of guilt beyond a reasonable doubt (in contradistinction to the much lower balance of probabilities standard in civil cases). Adherence to the law is a vital responsibility of these enforcement authorities. Furthermore, recklessly disseminating information accusing someone of committing a crime is not protected under the freedom of the press. By adopting the human right to life and liberty under Article 21 as a fundamental right, and by imposing a duty on the State to defend the life and personal liberty of every citizen, the Indian Constitution has elevated life and personal liberty to a prominent place in society. Any denial or infringement of these valuable rights is illegal unless the manner prescribed by law is just, fair, and reasonable, according to any civilized state. Inquisitorial and adversarial systems are the two major criminal justice systems used around the world (Adele, 2017). The method of holding an accused guilty and the procedure of correction are

defined in both of these systems. Examining an alleged crime through a sting operation by the media and publishing the results by revealing the name of the accused is a deviation from the established procedure.

A sting operation is an investigative activity carried out by the media to expose societal wrongdoings. Unlike the United States and a few other countries, where sting operations are acknowledged as a lawful means of law enforcement, albeit under limited circumstances (Newman, 2007), this is not the case in India.⁵ “The freedom of speech and expression, which is the foundation of journalism, is routinely abused by the electronic and print media. Because of which the prosecuting agencies and courts' freedom to deal with the cases before them freely and objectively has been significantly weakened in recent years. When a notable person or institution is involved in an incident, the media goes into overdrive, leaving little time for the prosecution or the courts to investigate the situation. It has recently grown to alarming dimensions, to the point where it is invading people's privacy”.⁶ Phone tapping is used in sting operations and has been deemed a grave infringement of one's right to privacy. In India, it is also illegal under the Telegraph Act. In the case of *P.U.C.L. v. Union of India*⁷, the Supreme Court held that phone-tapping without utilizing appropriate safeguards, and without following legal process, was a violation of individuals' right to privacy. The Law Commission of India in its report observed that “Even after acquittal, a media-driven trial not only adds to bias against the accused, but it also severely damages the person's reputation. Judges are human beings, and the risk of being swayed by media trials is unavoidable. It creates a pressure on judges unconsciously, and it has an impact on the accused and punishment”.⁸

3.4 Legislative Framework: Indian Laws

In India, a violation of the right to privacy has been recognized as an actionable wrong under Articles 19 and 21 of the Indian Constitution. Criminal laws in India govern on the principle of presumption of innocence until proven guilty. An undertrial accused, as with any other person accused of a crime, is presumed

⁵ *Raj Veer Singh v State of U.P.*, WRIT No. 52107/2014 (Allahabad High Court 2017).

⁶ *Labour Liberation Front v The State Of A.P.*, 2005 (1) ALT 740 (Andhra High Court).

⁷ *P.U.C.L. v. Union of India*, A.I.R.1997 S.C. 568 (Supreme Court of India 1997).

⁸ India, L. C. (2006). 200th Report on Trial By Media Free Speech And Fair Trial Under Criminal Procedure Code.

innocent until their guilt is proven in the competent court. The right to privacy of an accused, as well as their family, is violated when news of an alleged crime is published, revealing the identity of the accused. The principle of natural justice suggests the just procedure of administration of justice and requires that both parties should be heard. A target rating point (TRP) (or television rating point for televisions) is a metric used in marketing and advertising to compare target audience impressions of a campaign or advertisement through a communication medium relative to the target audience population size. Sting operations by the media for TRP constitute not only a violation of this principle of natural justice but also are not protected under traditional notions of freedom of speech and expression. Moreover, the right to freedom of speech and expression is not absolute in nature and is subject to reasonable restrictions. For example, even if a statement is true it may not be disseminated (i.e., published orally or in any written form) unless it passes the test of public policy (order public).

The rights of the accused are divided into three categories in India: rights prior to trial, rights throughout the trial, and rights following trial. One of the rights of an accused person is the right to a fair trial. Human rights are understood to be the fundamental rights to which every person is entitled and which must always be upheld. The press is the most powerful pillar for freedom of speech and expression (Sinha, 2020). However, the media must be restricted from abusing this power to violate the accused's private rights and human rights. This balance can be struck by enacting regulatory legislation to set limits on the media's freedom to speech.

The Indian Information Technology Act, 2000, significantly deals with physical privacy as envisaged in section 66E of the Act, which makes it an offence to publicize the private and physical image of a person through the electronic medium. Under Section 66E, privacy is understood in a physical sense, privacy of the body of a human being and not of one's rights or personal information (Talat, 2021).

The Indian Juvenile Justice (Care and Protection of Children) Act stipulates that the names, addresses, or schools of juveniles in conflict with law, or of a child in need of care and protection, shall not be disclosed to the media, as this would lead to their identification. "Juvenile in conflict with law defined under the above said

Act means a juvenile who is alleged to have committed an offence and has not completed eighteenth year of age as on the date of commission of such offence". Identification of a juvenile or child in need of care and protection is only permitted when it is in the child's best interests. In such cases, the media is barred from publicizing the child's identify ("The Juvenile Justice (Care And Protection Of Children", 2016). The procedure for reporting of cases under the Protection of Children from Sexual Offences Act, 2012 is provided for under Chapter V, paragraph 23, subparts (1) – (4):

*"No person shall make any report or present comments on any child from any form of media or studio or photographic facilities without having complete and authentic information, which may have the effect of lowering his reputation or infringing upon his privacy. No reports in any media shall disclose, the identity of a child including his name, address, photograph, family details, school, neighbourhood or any other particulars which may lead to disclosure of identity of the child: Provided that for reasons to be recorded in writing, the Special Court, competent to try the case under the Act, may permit such disclosure, if in its opinion such disclosure is in the interest of the child. The publisher or owner of the media or studio or photographic facilities shall be jointly and severally liable for the acts and omissions of his employee. Any person who contravenes the provisions of sub-section (1) or sub-section (2) shall be liable to be punished with imprisonment of either description for a period which shall not be less than six months but which may extend to one year or with fine or with both."*⁹

Safeguarding the identity of children in India, the Juvenile Justice Act prohibits media from publishing the name and address, school that the minor accused attends and which may lead to the identification of the juvenile in conflict with the law or in care. The Convention on Child Rights mandates the state to protect the identity of a child accused in all the proceedings of a criminal trial. In a series of judgments in India, the Supreme Court has issued guidelines to restrain electronic media and the public from using social media to publish information, photographs or any other matters pertaining to the identity of rape victims (Rajagopala, 2018).

⁹ *Ravi And 2 Others v. State of U.P.*, app. U/S 482 No. - 5009 of 2021 (Allahabad High Court 2021).

Unfortunately, nearly all media, both print and broadcast, disregard these rules far too often. The Indian Penal Code, Section 228A, makes it illegal to reveal the identity of a rape victim. The media frenzy surrounding the recent Aarushi Talwar murder case, and the rape of an overseas student studying at the Tata Institute of Social Sciences, jeopardized the victim's privacy and tarnished the deceased's reputation. Both section 5 of the Cable Television Networks (Regulation) Act, 1995, and the Cable Television Network Rules, state that no program may be broadcast or rebroadcast on any cable service provider if it contains defamatory, provocative, misleading, or obscene innuendos or half-truths.

Section 509 of the Indian Penal Code (IPC) (Paranjape, 2016) specifically protects women against the invasion of their privacy and makes it a punishable offense if any word, picture, publication, or gesture is intended to insult a woman's modesty. In *Deepthi Kapur v. Kunal Jhulka* (Agrawal, 2020), the issue before the court was whether a conversation between two persons, if recorded secretly, is admissible in court to prove the facts. In this case, the court held that the unconsented to phone recording did constitute an invasion of the right to privacy and therefore was inadmissible. The secret recording of a conversation is an infringement of the right to privacy, which is a fundamental element of a fair trial.

In Justice K.S. Puttaswamy's case¹⁰, the Supreme Court declared privacy as a fundamental right under Art. 21 of the Indian Constitution. Prior to this judgment, this right was protected in numerous landmark cases such as *People's Union for Civil Liberties (PUCL) v. Union of India*, *M.P Sharma v. Union of India*, *Kharak Singh*, but in that case the court expressly opined that privacy is not enshrined as a fundamental right under the Indian Constitution (Jain, 2006). Some contradictory opinions were expressed by smaller benches of the Supreme Court in the cases of *R. Rajagopal v. Union of India* and *Govind Sharma v. U.O.I.* where the courts held that phone tapping and surveillance during night hours at the residence of the accused was violative of the right to privacy (Basu, 2015).

¹⁰ *Justice k.s. Puttaswamy vs. Union of india* (2017) 10 SCC1 (Supreme Court of India 2017).

3.5 Digital privacy and media

People have the right not to have their name or image used for profit by commercial companies without their permission. Exceeding the right to use content agreed in the life story agreement also amounts to a violation of an individual's privacy. The right to privacy includes a person's right not to make public information about their private life. Misappropriation of name, voice, or picture amounts to a violation of the right to privacy.

The principle of natural justice stresses the importance of a just trial and the presumption of innocence until guilt is proved. The right of the accused to maintain privacy is also protected as a fundamental right as one of the facets of a fair trial. This right protects the accused from the disclosure of their identity by the media so as to avoid possible prejudice. However, the media too often has failed to observe such restraint, and instead has transmitted and published the name, photographs, address of the accused, their relationship with family members, etc. In the case of *State v. Manu Sharma*, after the accused was released on bail, a photograph of him partying in pubs was published. In its decision which was critical of the media, the Indian Supreme Court observed that »the presumption of innocence of an accused is a legal assumption that should not be undermined at the very threshold through the process of media trial and even when the investigation is underway" (Baid, 2021).

The Indian government just unveiled a plethora of new social media regulations. The Information Technology (Intermediary Guidelines and Digital Media Ethics Code) Rules, 2021¹¹, were notified by the Centre Government by publishing it in the official gazette. However, these guidelines offer no legal protection to accused people referred to on news reports, or whose photographs are published in social media sites like Facebook and Twitter. Social media platforms, in particular, must become more responsible and accountable for the content they host. There is now a list of things that are considered offensive. Even if the post on social media is found by some (or many) to be a hilarious post in a family What's App group, it nevertheless can be removed from the platform if it threatens India's unity,

¹¹ Notification (2021). Retrieved from Ministry of Electronic and Information Technology: <https://www.meity.gov.in/content/notification-dated-25th-february-2021-gsr-139e-information-technology-intermediary> (Aug. 29, 2022).

integrity, defence, security, sovereignty, friendly relations with foreign states, the public order, causes incitement to the commission of any cognizable offence, prevents investigation of any offence, or insults any foreign states. Thus, one's private communication can also be subjected to restrictions.

3.6 International framework on digital privacy

The Universal Declaration of Human Rights (UDHR), 1948, prohibits any arbitrary interference with the privacy of a person which makes attacks upon his honour.¹² The UDHR safeguards a person's right to privacy from arbitrary state interference. Similarly, under Article 17 of the International Covenant on Civil and Political Rights (ICCPR), "the State must ensure that individuals are protected by law from 'arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation."¹³

India has signed and ratified the aforementioned Conventions. Signatories to the Conventions are required to take steps to adopt laws to safeguard their citizens if the Conventions are ratified. Despite this fact, the Indian government has to date failed to give adequate attention to this issue. Minor children are likewise protected by Article 16 of the Convention on the Rights of the Child¹⁴ against any unlawful interference with their right to privacy. Article 40 of this Convention protects the privacy of a child accused of a crime against media publication at all stages of the proceedings. Law prescribes in-camera proceedings as a mandatory requirement.

Laws in the United Kingdom prohibit taking photographs of an individual without their consent in private or public places in certain situations under the privacy law. The editor has a responsibility to protect the privacy rights of individuals and in case of intrusions to privacy, the editor is answerable to provide lawful justification. There are no explicit regulations that forbid the media from taking pictures without permission of individuals and using them for commercial purposes. Unless there is a compelling public interest case, newspaper editors

¹² Universal Declaration of Human Rights. Retrieved from https://www.un.org/en/udhrbook/pdf/udhr_booklet_en_web.pdf (Aug. 5, 2021).

¹³ International Covenant on Civil and Political Rights. Retrieved from <https://www.ohchr.org/en/instruments-mechanisms/instruments/international-covenant-civil-and-political-rights> (Oct. 14, 2022).

¹⁴ Convention on the Rights of the Child. Retrieved from <https://www.unicef.org/child-rights-convention/convention-text#>(Oct. 14, 2022).

often will not publish a photo when an individual had a legitimate expectation of privacy. Public figures are more adversely affected. Moreover, UK laws have specific provisions under Press Complaints Commission (PCC Code)¹⁵ prohibiting the disclosure of the identity, colour, nationality or any other information of rape victims. In India, on the other hand, the law provides no protection for citizens (both to private and public figures) that have their picture taken at public places and then published.

In accord with the Convention on the Rights of the Child, the UK privacy code prohibits disclosure of both the identity and pictures of a minor that is the victim of a crime.¹⁶ There also is a prohibition against the publication of the details of relatives of not only the victim of rape cases but also the relatives of the person accused of the crime in any form, unless they have a specific involvement in the crime. In the UK, media sting operations are not allowed to intercept mail, tap phones, take cover photos, publish them, or transmit them unless doing so is in the public interest.

Laws also define the public interest to include public safety and health. It also is in the public interest for the State to promulgate regulations to restrain individuals and organizations from disseminating misleading information to the public in financial matters. To avoid liability, the burden of proving that information disseminated is in the public interest rests with the editor, who is tasked with the responsibility of knowing and understanding privacy laws and regulations. However, in cases of children below the age of 16, in order to protect their best interests given their heightened vulnerability, the media must advance compelling reasons to justify why the information disseminated is in the public interest and is paramount to that of the interests and the right of privacy of the child. Regrettably, at least at present in India, the media is only self-restrained in these matters by their own ethical standards and perhaps their sense of morality and what subjectively is “right or wrong,” as there are no special laws or regulations to help ensure that the public is not harassed by the media and for the protection of the right to privacy.

¹⁵ PCC Code. Retrieved from <https://publications.parliament.uk/pa/cm200203/cmselect/cmcmuceds/458/3032508.htm> (Oct. 14, 2022).

¹⁶ *Ibid.*

In the United States, privacy is conceptually based on liberty. Consequently, Americans' primary right is to be free of government intrusion. The Fourth Amendment establishes a right to be free from excessive searches and seizures, a right which has been expanded over time, while the Fifth Amendment protects against self-incrimination, which prevents the government from forcing people to testify against themselves in criminal cases. The Fifth Amendment also allows a person with possible criminal law exposure to decline answering questions in a civil case that might prove incriminating against them in a later criminal case.

In the post-9/11 environment, the concept of privacy has shifted in the sense that when high-profile cases involving privacy vs. security arise, a majority of people favour a "security-first" approach to these concerns, while also advocating that extreme compromises on civil liberties be avoided. The Patriot Act of the United States of America allows the government to acquire personal information. The Act was passed to prevent and punish acts of terrorism in the United States. The FBI may not conduct a physical search or place wiretaps on American individuals to gather evidence of crime without demonstrating probable cause, as the Fourth Amendment expressly demands under the Patriot Act.

In the United States, the Electronic Communications Privacy Act of 1986 (ECPA), established privacy shields for the content of stored communications and the related non-content information. Under the ECPA, upon proper showings of reasonable suspicion, the court can issue search warrants, or other special orders, and some information may even be obtained through issuance of subpoenas, to force disclosure of the content and stored communication for the purpose of criminal investigation.¹⁷

Other than forbidding excessive search and seizure and self-incrimination, the US Constitution and most state constitutions do not explicitly list any privacy rights. At the time they were created, there was simply no overarching concern about privacy. Because there were no phones to tap, no digital platforms for the media to broadcast from, no microphones to hide, and the tort of trespass was already in place to prevent someone from encroaching upon another's land or physical seclusion, in those early years it was relatively difficult to physically intrude into

¹⁷ Electronic Communications Privacy Act (ECPA). Retrieved from <https://epic.org/ecpa/> (Oct. 15, 2022).

the privacy affairs of another (Moore, 2017).

Presently, Singapore's Constitution does not explicitly recognize privacy as a fundamental right. The Bill of Rights Act in New Zealand treats privacy as a subject of private law rather than constitutional law. Privacy has not played such a role in Australia, where the High Court has established an inherent freedom of political expression in the democratic ideals of its Constitution (Richardson, 2021).

3.7 Comparison of the remedies between India, US and UK laws

3.7.1 United Kingdom

It was well said by William Shakespeare that “Man is mortal but his reputation is immortal: the good name of man is his richest jewel which a person can possibly be possessed...” (Doran, 1967). In the UK, incitement³⁷⁶ fan offence against a person through publication constitutes defamation. This offence originated as a misconduct in the thirteenth and fourteenth centuries in the UK, but the earlier records show that civil actions were more frequent at that time as a remedy. Earlier, the offence was divided into libel and slander, which was actionable per se if it could be proven that the words were imputing a crime. The UK Defamation Act (2013)¹⁸, is the most apt reformation in the UK in the wake of the proliferating boundaries of communication. The Act addresses the geographical criteria, requires evidence of actual or probable harm and enhances the existing defences of the website operators, public interest and privileged publications. The Act also expands the list of possible defences in a case of defamation and introduces new defences of justification, fair comment as well as a completely new defence applying to peer reviewed publications in scientific or academic journals.

3.7.2 US

The libel laws in the US initially were based upon the English common law until various domestic changes altered them. The landmark judgment in the case of *New York Times Co. v Sullivan*¹⁹, drastically changed libel law. The Court held that in a libel action brought by a public official against a newspaper, the newspaper could

¹⁸ Defamation Act 2013. Retrieved from <https://www.legislation.gov.uk/ukpga/2013/26> (Oct. 15, 2022).

¹⁹ *New York Times Co. v. Sullivan*, 376 US 254 (1964) (US Supreme Court 1964).

not be held liable for making false defamatory statements against the public official unless the statements were made with actual malice, that is, with knowledge that they were false or with reckless disregard of whether they were false or not. The defamation law in the US is more freedom savvy, more defendant friendly and less stringent. Although American judges historically have looked warily on prior restraints, the press has been placed on notice that it must take responsibility for what it wrongfully publishes. Although the press may not be restrained in advance, it may be punished for what it prints. Libel is one of these subsequent punishments and has long been regarded as an exception to the press freedom protected by the First Amendment (Mason & Stephenson, 2017).

3.7.3 India

Publication of news resulting in the defamation of either the victim or the accused is not separately dealt with in Indian laws just as with the US and UK laws. Defamation is treated both as a civil law tort and as a criminal law offence. When done knowingly and intentionally, it shall amount to an offence punishable under the IPC. The civil liability forming part of the law of torts is governed by the principles of English law while criminal liability is subject to the provisions of the IPC of 1860. A criminal law remedy is available only when the said imputation has been made to harm the reputation of the person concerned and thus ‘intention to harm’ is the *sine qua non* for securing a criminal law.

After analyzing the legislation, it is evident that neither the UK nor the US nor India have a specific statute that regulates the privacy of an accused or victim against the media. Additionally, rules pertaining to defamation and human rights offer civil and criminal remedies for people to assert their rights. Parties to a dispute have the right to a fair and impartial trial or hearing, uninfluenced by other outside forces, including media reports. This right is guaranteed as one of the fundamental rights of an accused. The following are the rights available both to the accused and victim in the background of the forgoing discussion:

Rights of Accused and Victim in India

1. The right to be free from discrimination is a fundamental right guaranteed under the constitution as a human right. This right

- demands the absence of interference by the media in order to secure justice through the courts without any external pressure or influence.
2. The accused is presumed innocent until otherwise proven guilty by due process of law. This presumption of innocence is contained both in international and national documents. It is permissible for the investigative criminal authority to inform the public of the suspect's identity as long as the accused is not publicly declared as guilty.
 3. The accused should not be depicted as being guilty through drawings or graphics unless their guilt is proven. This right is implicit in the above-mentioned rights. The accused is entitled to a fair public hearing in the open courts and must be provided with free legal assistance when needed. India, as well as UK and US laws, provides free legal aid services when the accused is unable to afford it.
 4. The right to remain silent and not to incriminate oneself is an absolute right in India. Hence, interviewing either the witnesses or parties to a crime by the media and transmission of same is not admissible in the courts. Indian law also ensures the criminally accused of freedom from coercion, torture, inhuman and degrading treatment.
 5. Cameras are not allowed in courts and the privacy of both victim and accused is taken into consideration if it is used in cases of unavoidable circumstances.

3.8 Common law remedies and freedom of speech

In the Aadhar case, the Indian Supreme Court observed that privacy is a common law right (Darji, 2018). The individual's right to full protection both of person and property is a common law principle that dates back to the Middle Ages, but periodically it has been necessary to redefine the nature and scope of those protections. Historically, the ancient common law only provided a civil remedy for violent interference with life and property for trespass. The right to life merely functioned to defend the individual against battery in many forms, as well as liberation from physical restraint. Eventually, the common law expanded to give legal recognition to man's spiritual character, his feelings, and his intelligence. The scope of these legal rights has continually expanded, and presently the "right to life" includes not only the right to enjoy life but the right to be left alone (Warren & Brandeis, 1890).

A common law remedy for a defamatory statement protects a person's reputation, which is paramount. The purpose of the defamation legislation is to safeguard a person's reputation, honour, and dignity in society. Along with the right to enjoy one's property, health, personal safety, liberty, and a variety of other rights, a person also needs protection for their good name, integrity, and moral character (Dhirajlal, 2016).

It must be acknowledged that everyone has a natural right to their reputation. The reputation of a person is their property, and to many persons it may be more precious than any other asset. The common denominator between the violation of the right to privacy and defamation is an injury to one's respect and esteem. In India, the criminal law governing defamation is codified in sections 499 to 502 of the IPC. In England, the publication of a criminal libel is punishable to the extent of one year imprisonment and fine, and if the libelous publication is made with the knowledge of its falsity, then imprisonment up to two years. In common law slander is only a civil wrong. In most defamation actions, the claimant is required to prove special damages in order to secure a monetary recovery. Under the law, slander is considered to be less damaging than libel (after all, statements in writing generally are more permanent in character than are oral statements). There are certain exceptions when slander is actionable *per se* and plaintiff is excused from the burden of establishing that they suffered special damage. An example of slander *per se* is where the statement falsely claims that a person committed a criminal offence. In India, both slander and libel are actionable in civil cases, i.e., without the necessity of plaintiff proving special damage. Indian courts have observed that the English rule regarding proof of special damage in actions for slander does not apply in India (Shukla, 2021).

3.9 Conclusion and recommendations

Journalism principles address how news should be gathered and reported from various sources. The moral standards guiding news reporting and coverage are known as media ethics. An ethical journalist should avoid sensationalizing events or incidents. Admittedly, especially in times of community confrontations and calamities, the public is anxious to receive the most current news (Frye, 2005). Rather than simply cashing in on such expectations, the media should ensure that their reporting does not further exacerbate the conflict, and in the course of doing

so, breach others' right to privacy, or instill unwarranted fear in the minds of the public. The media's desire to provide the most up-to-date information and stay ahead of the competition in the ratings must be balanced against the need to protect the privacy interests of all persons involved in the incident.

Although sources are necessary for breaking news, their privacy also should be respected and protected, and the media should not take them for granted. Obscene phrases and depictions must be avoided at all costs, especially when reporting crimes involving women. The press must take pains to not interfere or invade an individual's privacy unless there is a genuine, compelling public interest that is not based solely on a prurient or morbid curiosity. As a result, once a topic becomes public, the right to privacy ceases to exist, and it becomes a legitimate subject for discussion by the press and media, among others. It must also be borne in mind that the concept of privacy expansively covers things like a person's home, family, religion, health, sexual preferences, nationality, personal life, and private affairs, except if any of these things infringe on the public or public interest.

When reporting a crime involving rape, kidnapping, sexual assault on children, or which raises doubts and questions about women's chastity, or personal character, the victims' names, images, or other details revealing their identities must be withheld. In a similar vein, the name of the accused, whose guilt has not yet been proven, must be protected. When there are minor children and newborns involved who are the progeny of a sexual abuse, coerced marriage, or unlawful sexual union, they should not be identified or photographed, and the media otherwise must exercise the utmost caution. In addition, photography should not be used to intrude into personal moments of sadness. The media should avoid making accusations of guilt by association. When a person is innocent and a reference to them is not relevant to the topic reported, the media should not name or identify the family, relatives, associates or connections of a person convicted or accused of a crime.

The government and the media should be permitted to pursue leads resulting from digital data that is solely available in the public domain. Proper guidelines and restrictions should be enumerated in media law so as to prevent trying cases in the media and victimization, and ensuring that the media does not publicize statements and videos of witnesses and victims. Most people do not understand,

or at least fully appreciate, the law and how the judicial process works. Instead of publicizing the names of accused persons and victims, it would be beneficial for the general public to be more fully informed about the judicial process. The media should play an important role in educating them.

The administration of justice is the domain of the courts and not the media. The right to speech should not override either the fair administration of justice or the right to privacy. All journalists do not have knowledge of law. Therefore, those journalists involved in the legal sphere also need training to help ensure they report to the public in both an ethical and legal way. The legal profession must have similar training. Five years and three years' law school programs should also include writing news, reports and journalism in the syllabus.

All legal systems provide protections to accused persons as constituent elements of their basic human rights. The right to privacy is guaranteed as a major component of a fair trial in both the non-digital and digital world. These norms developed as a component of human rights law and have been extended to the digital platform both at national and international levels. The law provides safeguards to balance the individual right to privacy against legitimate state interests. Legal institutes, however, are not the entire solution to the problem. It is also important for the intermediaries and individuals responsible for posting such content in digital medium not to cause any kind of harassment to the victim and accused. When the media reports news in the public interest or for the public good, the right to privacy is suspended. Furthermore, this argument against the right to privacy must be evaluated against the right to information. Excessive media interference sometimes even endangers life. The appropriate balance must be maintained to ensure fairness in the judicial procedures.

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