Trumping Public Interest: Should Violation of Privacy be a Tort?

Nirupama Pillai* and Kalyani Ramnath**

It is the self-proclaimed aim of tort law to alleviate the sufferings which arise as a consequence of the infringement of a legal right. As society has evolved, circumstances have demanded that tort law adopt a new perspective to view what is, and what is not, a 'legal right' and what constitutes 'legal damage'. Several new heads such as psychiatric illness have been recognized by way of judicial pronouncements to constitute actionable torts.¹ The right to privacy, as a tort, is still at the nascent stage of development. Stemming from the philosophical discussion on where exactly to draw the line to bifurcate the private and the public sphere, the right to 'be let alone' has been recognised only in a fragmentary manner. However, as a specific tort, privacy has still a long way to go. Jurists have to say on this as follows:

“There is clearly a need for some development [as regards the right to privacy] if the right of individual freedom is to be safeguarded properly in the age of such scientific achievements as micro-miniature radio transmitters, subliminal and subaudial projection of images, truth drugs, the tape records, telescopic cameras and the television”.²

Today, ethical considerations in investigative journalism, medical practice and so on have been eclipsed, in the name of ‘newsgathering’.

---

* III year B.A., LL.B. (Hons.), National Law School of India University, Bangalore.

** III year B.A., LL.B. (Hons.), National Law School of India University, Bangalore.


Issues like abortion, homosexuality and violence against women have become the subject of public debate with the result that many details of the private lives of the victims are, inadvertently or otherwise, revealed by the Press and sometimes, even by the Judiciary. The increased commercial potential of public figures has also added to the problem. The degree to which such development has taken place depends, in large measure, upon societal outlooks and the moral stands taken by its members. Due to the practical difficulties encountered in identifying the parameters relating to privacy rights, there has been erratic development in this area. The right to privacy as a tort, although protected under different heads such as trespass, defamation and so on, has not been expressly held to be such, legislation has variously defined it under criminal, constitutional and property rights. With several international conventions heralding the right to a private life as a human right and the increasing importance given to international law as a guideline in evolving municipal law, much seems to be in favour in recognising breach of privacy as a separate tort.

From looking at the problem of defining privacy and attempts to classify them under existing torts, the paper primarily goes on to address the primary context in which the need for such laws was felt – newsgathering. The paper encompasses developments in Indian, American and English law, to the extent that comparisons can be drawn.

Privacy – Defying Definitions

The 1890 Harvard Law Review article penned by the two young Boston lawyers, Samuel Warren and Louis Brandeis perhaps laid the foundation for the genesis of the tort of privacy which contain the following words:

“To satisfy a prurient taste, the details of sexual relations are spread broadcast in the columns of the daily papers. To occupy the indolent, column upon column is filled with idle gossip, which can only be procured by intrusion upon the domestic circle. The intensity and complexity of life, upon advancing civilisation, have rendered necessary some retreat from the world, and man, under the refining
influence of culture, has become more sensitive to publicity, so that solitude and privacy have become essential to the individual; but modern enterprise and invention have, through invasions upon his privacy, subjected him to mental pain and distress, far greater than could be inflicted by mere bodily injury.”

Judicial creativity has since then adapted to changing circumstances, more recently in the context of online privacy. In 1999, DoubleClick, a Silicon Valley advertising firm, purchased 88 million household names from a direct marketing firm. In addition, it had also millions of profiles in its database, generated by hookies that were placed whenever a viewer visited a site which had an advertisement put there by DoubleClick. The firm intended to match its profiles with the household names and create a database of who was looking at what on the Internet. Online privacy was debated extensively in this regard as also the creation of new statutes to deal with the protection of individual privacy. Thus, clearly, what constitutes privacy continues to undergo transformations in tune with the legal challenges of the day.

The philosophical underpinnings of the need to secure to every individual the right to a private life are related to the right to person, property and reputation. The right to life, beyond mere animal existence, the right to liberty and to freedom of speech and expression are all inextricably linked with the right to privacy; so also an atmosphere conducive to one’s development. J.S.Mill’s ‘self regarding action’, where the individual’s actions are free from intervention by the state is relevant in this regard. It

is a means of protecting one’s interests, the right to be entitled to the luxuries suited to one’s position in life consequent to the separation of the private and public action as Habermas defined it.\(^5\) In the Indian context, the right to privacy was defined as encompassing the personal intimacies of the home, the family, marriage and motherhood, procreation and child rearing, the unifying thread being that the fundamental right must be implicit in the concept of ordered liberty.\(^6\) Thus, no comprehensive definition is evident, though many have been attempted.\(^7\)

**Infringement of Privacy Rights – A Separate Tort?**

In 1963, William L Prosser attempted to classify the torts under the broad head of ‘invasion of privacy’: (a) the intrusion on the plaintiff’s physical solitude; (b) putting the plaintiff in a false position in the public eye; (c) appropriation of plaintiff’s personality for commercial use; (d) publication of private matters violating ordinary decencies.\(^8\) Although the right to privacy has not been expressly dealt with, interests were protected under other legal actions such as libel and trespass. Courts have borrowed features from property, equity, contracts, torts and bailment to create a jurisdiction for the tort of privacy.\(^9\) For example, in many respects, privacy violations are akin to proving libel *per se*. Firstly, special damage does not have to be proved in order to have a cause of action. Secondly, right to sue lies only with the injured individual. Thirdly, it dies with the person. However, it differs fundamentally in that privacy is the freedom from emotional distress while defamation’s primary concern is with reputation.\(^10\)

---

8. *Supra* n. 4 at p. 341.
9. *Supra* n. 1 at p. 32.
10. *Supra* n. 4 at p. 342.
Although many defences to the 'tort' exist\textsuperscript{11}, newsworthiness appears to be the most significant in the context of media and newsgathering. The idea of 'public interest' is one that is extremely contentious and it attains a different dimension in this context.

**Adequacy of Law of Right Privacy**

In India, the Indian Penal Code under Sections 509, 441 (for example), Indian Evidence Act 1872\textsuperscript{12}, Indian Easements Act 1882 and the Census Act 1948 to cite just a few embody statutory provisions dealing with the right to privacy. In addition, Articles 14,20,25,19 and 21 of the Constitution could be judicially interpreted to include the right to privacy.\textsuperscript{13}

In England, the European Convention of Human Rights\textsuperscript{14} and the Human

\textsuperscript{11} (a) newsworthiness, usually used by the media to define 'public interest', based on, in the United States, the First Amendment (held by the US Supreme Court in *Time Inc.* v. *Hill*) (b) consent, dealing with those have consented to having their names or likenesses. The consent has to be legally enforceable and (c) public record defence, created by the US Supreme Court in *Cox Broadcasting* v. *Cohn*, which states that publication of material obtained lawfully from records accessible to the public, can be used even if the same is otherwise prohibited by law. However, some public records deserve to be kept confidential in the interests of morality.

\textsuperscript{12} Under Section 122, a married person shall not be compelled to disclose any communication made to him/her during the marriage. Section 130 holds that a witness shall not be compelled to produce documents regarding a property he holds as pledge or mortgage. Section 126 protects the attorney-client privilege and Section 129 prevents their disclosure.

\textsuperscript{13} M.C.Pramodan, "Right to Privacy," [1990] C.U.L.R. 68

\textsuperscript{14} Article 8 of the European Convention on Human Rights defines this right as: "Everyone has the right to respect for his private and family life, his home and his correspondence and that there shall be no interference by a public authority with the exercise of right except such as in accordance with the law and it is necessary in a democratic society in the interests of national security, public safety or the economic well being of the country, for the prevention of health or morals or for the protection of the rights and freedoms of others."
Rights Act 1998\textsuperscript{15} are seen to protect the individual's private interests from state intervention. However, there is lack of a statutory provision dealing exclusively with privacy. The Younger Committee on Privacy has suggested new torts of unlawful surveillance, actionable \textit{per se}, the use of unlawfully acquired information and the law on breach of confidence. The Press and Broadcasting Authorities have been urged to consider instituting complaints committees.\textsuperscript{16} The corporate right to privacy is protected under the Broadcasting Act 1996. In the United States, the First, Fourth and Fifth Amendments have been creatively interpreted to include the right to privacy. Moreover, close to forty states of the Union have statutory provisions dealing with privacy rights. The United States, which witnessed the birth of privacy rights, has led the way in judicial interpretation of the same, including a comprehensive Privacy Act 1974. Article 12 of the Universal Declaration of Human Rights reads: “No one shall be subjected to arbitrary interferences with his privacy, family, home or correspondence, nor to attack upon his honour and reputation.” Article 17 of the International Covenant on Civil and Political Rights also deals with the right in an identical manner, invoking the power of the law to deal with infringement of such matters.

Even a cursory perusal of laws, both at the municipal and international laws, would display an increasing concern on the part of lawmakers to give privacy laws their supposedly deserved importance.

\textsuperscript{15} Article 8 reads as : “(1) Everyone has the right for his private and family life, his home and his correspondence

(2) There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well being of the country for the prevention of disorder or crime, for the protection of health or morals, or for the protection of similar rights and freedom of others”.

I  Traditional View of Privacy – Inadequate in Contemporary India?

The phrase ‘right to privacy’ is traditionally used in Indian case law in two respects – relating to custom and to easement rights. However, a different dimension has been given by the Andhra Pradesh High Court in Sankara Satyanarayana v. State of Andhra Pradesh, where it was held that when a human right – under which the right to privacy is recognised – is infringed, a citizen has remedies both in public law as well as in private law. Trespass, defamation, nuisance and negligence are recognised torts, which fall under the broad head of the right to privacy.

Genesis of Privacy Rights in Kharak Singh v. State of Uttar Pradesh

This case is not one that is traditionally discussed under tort law, but nevertheless signals the genesis of privacy as a legal right within the Indian context. The petitioner in this case, who was constantly under police surveillance, contended that the actions of the police compromised his Fundamental Rights under Article 19(1)(d) and Article 21. The State

17. Under the Indian Easement Act, such a right may be acquired by local custom as in those parts of the country where the custom of seclusion of women prevails. Section 509 of the Indian Penal Code lays down that the modesty of a woman shall be protected at all costs and thus it forms an intrusion upon the privacy of the woman. For example, it has been defined as the right of a woman belonging to an ‘aristocratic’ family to regard her room as a private sanctuary. In Gokal Prasad v. Radho, 1880 I.L.R. 10 All. 358, Edge, C.J., took cognizance of the peculiar circumstances of purdanashin women to restrain neighbours from opening doors or windows in a manner such as to interfere with the women’s right to privacy.


21. Article 19 (1) reads: (d) “All citizens shall have the right to move freely throughout the territory of India”.

22. Article 21 reads: “-No person shall be deprived of his life or personal liberty except according to procedure established by law”.


21. Article 19 (1) reads: (d) “All citizens shall have the right to move freely throughout the territory of India”.

22. Article 21 reads: “-No person shall be deprived of his life or personal liberty except according to procedure established by law”.


21. Article 19 (1) reads: (d) “All citizens shall have the right to move freely throughout the territory of India”.

22. Article 21 reads: “-No person shall be deprived of his life or personal liberty except according to procedure established by law”.
contended firstly, that the impugned regulations do not constitute an infringement of any of the freedoms guaranteed by Part III of the Constitution which are invoked by the petitioner and secondly, that even if they were, they have been framed ‘in the interests of the general public and public order’ and to enable the police to discharge its duties in a more efficient manner and were therefore ‘reasonable restrictions’ on that freedom. It was held that right to personal liberty encompassed the right to be free from restrictions placed on movements as also free from encroachments on his private life. The recent case of *Mohammed Akhtar v. State of Uttar Pradesh* has followed the decision of the case in holding that unnecessary maintenance of a history sheet or perpetual surveillance was an invasion of privacy if no reasonable doubts were entertained.

**Public Figures and ‘Private Facts’ – Questions of Morality?**

The case of *Manisha Koirala v. Shashilal Nair* brought to light the question of whether public figures had, by virtue, of them being so,

---

23. Regulation 236 of U.P. Police Regulations reads:

"Without prejudice to the right of Police to put into practice any legal measures, such as shadowins in cities, by which they find they can keep in touch with suspects in particular localities or special circumstances, surveillance may for most practical purposes be defined as consisting of one or more of following measures:

(a) Secret picketing of the house or approaches to the house of suspects;
(b) domiciliary visits at right;
(c) through periodical inquiries by officers not below the rank of Sub-Inspector into repute, habits associations, income, expenses and occupations;
(d) the reporting by constables and chaukidars of movements and absence from home;
(e) the verification of movements and absences by means of inquiry slips;
(f) the collection and record on a history-sheet of all information bearing on conduct.” Regulation 237 provides that all “history-sheet men” of class A (under which the petitioner falls) “starred” and “unstarred”, would be subject to all these measures of surveillance”.

waived their right to privacy. Certain scenes of a Hindi movie were contended to have been extremely vulgar, repulsive and harmful to the plaintiff's reputation. The plaintiff contended that there had been a violation of her right to privacy by certain scenes which contained nudity. The scenes were shot with the plaintiff's consent. The tort of defamation was clearly ruled out in this regard as the plaintiff had already acted in the film and the Censor Board of India had classified it as being meant for an adult audience. Once again, the right of privacy was aligned with the tort of defamation. Holding that tort law aimed at condemning reprehensible conduct rather than affording specific protection. As the tort of defamation had not been proved, there was consequently no invasion of the plaintiff's right to privacy.

**Medical Records and Confidentiality: Fighting Social Stigma with Privacy Rights?**

In yet another landmark case, dealing with constitutional rights in privacy law, *Mr X v. Hospital Z*, the question of public interest was debated upon. The appellant in this case argued that there was unauthorised disclosure and breach of confidentiality as regards his personal medical information and consequent breach of privacy. It was held that the doctor concerned could reveal such information in 'public interest'. The case of *M. Vijaya v. Singareni Collieries Co. Ltd* concerned a worker who had been similarly afflicted with AIDS due to the negligence of concerned hospital authorities. The conflict between the right to privacy of a person suspected of HIV not to submit him forcibly for medical examination and the duty of the State to identify HIV infected persons for the purpose of stopping further transmission of the virus was recognised and finally decided in favour of the public. Several rhetorical questions were raised in this regard – Can the State segregate HIV-AIDS

---


patients in hospitals from others? Can the State compel the high-risk groups like migrant workers, truck drivers, prison inmates and sex workers to undergo HIV-AIDS test and deny those persons normal life? Can the State deny the privileges and facilities to those persons who are tested HIV positive? The questions are unlikely to be answered if the right to privacy were recognised as a separate tort, given that the predominant consideration appears to be 'public interest'.

_Telephone Tapping and Private Conversations: Arbitrary Use of Authority?_

The growth of communication technology has admittedly posed a serious threat to privacy rights. While many may think that newer forms of surveillance equipment constitute a more severe danger, the facts of the following case illustrate otherwise. In _People's Union for Civil Liberties v. Union of India_ 28, the petitioner protested against the indiscriminate and arbitrary use of telephone tapping and challenged Section 5(2) of the Indian Telegraph Act. The judgment berated the loss of privacy rights with the growth of highly sophisticated communication technology and agreed that no democratic Government, sworn to protect 'public interest' could infringe upon the same. Privacy as a concept was conveniently deemed too broad and moralistic an issue to be defined judicially, but the same was brought under the aegis of Article 21 and Article 19(1)(a). Prior judicial scrutiny of such tapping, as suggested by the _amicus curiae_ in this case is also a suggestion worth considering. In _District Registrar and Collector, Hyderabad v. Canara Bank_ 29, the sweeping powers given to the Government with regard to documents in custody of a public officers under the Stamp Act, 1833 were sought to be expunged on the basis of a recognised right to privacy.

---

Publicity Consented to and Privacy: Blurred Boundaries?

In one of the more widely publicised cases on privacy, *R. Rajagopal v. State of Tamil Nadu*\(^{30}\) concerned sensitive information regarding certain Government officials, including police and prison officials which was sought to be restrained from being published. The Court recognised the 'distinctive' nature of privacy in tort law, apart from its position as a constitutional right. Privacy of a person would be, in the opinion of the Court, upheld unless a person voluntarily thrusts himself into controversy or voluntarily invites or raises a controversy or if it forms part of public record. In a similar case *A.B.K. Prasad v. Union of India*\(^{31}\) however, the tortious liability of an infringement of privacy rights was not discussed at all.

In *Khushwant Singh v. Maneka Gandhi*\(^{32}\), it was held that the right of privacy, under Article 21 of the Constitution of India, is enforceable *qua* the state and not against private individuals. Further, the fact on which the book was based is common knowledge, not anything which would merit from being kept confidential. The Court importantly considered this a tort action and held, on the strength of the arguments advanced by the appellant that there was no infringement of the right to privacy. This case raises the only pertinent issue regarding the right of privacy as a tort — that it would allow litigation against private parties.

Rape Victims and Rights to Privacy: Re-enacted Violence in the Courts

In *Thogorani v. State of Orissa and Ors*\(^{33}\), the impact of DNA testing on familial privacy was examined. It was held that this would not


\(^{32}\) A.I.R. 2002 Del. 58.

\(^{33}\) 2004 Cri. L.J. 4003
amount to the accused becoming a witness against himself and thus a direction if issued to collect blood sample from the accused for conducting DNA test would not in any way take away his privacy rights. In practice though, rape victims are often subjected to humiliating cross-examination in the court rooms. It is not uncommon for judicial officers to go into the previous sexual history of the woman. DNA technique provides a scientific and unbiased answer to this problem. When a crime as serious as rape is alleged, it is in the public interest, as so defined by the judiciary, to ask the accused to subject himself to medical examination. In such cases, using a broad definition of privacy, in all its different avatars, would further the cause of justice. In State of Maharashtra v. Madhukar, prostitutes too have been allowed the right to privacy for sexual acts carried out against their will, perhaps the first case to deal directly with the issue. However, the possibilities of developing the law from this point have not been fully explored.

**Future Trends in Privacy Jurisprudence**

The Information Technology Act 2002 touches upon the issue of privacy only under Section 72 which talks about breach of confidentiality and privacy. Thus, if a Government official passes on electronic information or data that he has received about an individual in his official capacity, he can be punished. The National Human Rights Commission hauled up

---

35. Section 72 reads: “Save as otherwise provide in this Act or any other law for the time being in force, any person who, in pursuance of any of the powers conferred under this Act, rules or regulation made thereunder, has secured assess to any electronic record, book, register, correspondence, information, document or other material without the consent of the person concerned discloses such material to any other person shall be punished with imprisonment for a term which may extend to two years, or with fine which may extend to one lakh rupees, or with both”.
the Government for enacting the Prevention of Terrorism Act (since repealed in name) which gives scant regard for privacy rights. The Communications Commission for India to be set up to oversee voice and data (including telecom, broadcasting, and Internet) communications includes provisions barring the interception of communications and prescribes penalties for unlawful interception. The Tehelka expose and the recent MMS scandal raise serious concerns – will privacy rights be ultimately be a question of morality and ethics?

II Treading the Middle Ground – Right to Privacy in the United Kingdom

Unlike in the United States, English common law has not recognized any direct action for the invasion of privacy. Whatever remedy there is, is not aimed directly at the redressal of a wrong caused due to the invasion of privacy, but rather, is construed as damages for the torts of defamation, nuisance or trespass. Therefore, privacy as a tort has failed to be recognized in the United Kingdom and is instead, recognized within the ambit of other torts. With the introduction of the European Convention on Human Rights (hereafter, the Convention), it was thought that greater pressure would be placed on English law to recognize the right to privacy. The following cases examine whether the absence of a tort of privacy has indeed created a lacuna in the law or whether privacy should continue to be brought within the ambit of other torts.


38. This was especially with regard to intrusion by the media. This prompted the Chairman of the Press Complaints Commission to express misgivings about its potential to restrain the media. C.f. I.Leigh, “Horizontal Rights, the Human Rights Act and Privacy: Lessons from the Commonwealth?”, (1999) I.C.L.Q. 48 at p. 57.
The supposed lacuna in English law with respect to privacy was exposed in *Kaye v. Robertson* where, even though it was clear that the plaintiff’s privacy had been violated and the court affirmed it to be so, he was unable to proceed on these grounds due to the absence of a tort of privacy. The plaintiff’s case was based on *Tolley v. J.S. Fry & Sons Ltd*. In fact, Winfield had used *Tolley* to press the case for the need for law to recognize the right to privacy before the House of Lords. The court in *Kaye* was also of the opinion that *Kaye* could be made an example to emphasize the desirability of a statutory provision to protect the privacy of individuals. Bingham, L.J., who concurred with the majority decision, held that the defendants’ conduct towards the plaintiff construed “a monstrous invasion of his privacy”. Nevertheless, it may be argued, as has been stated in this paper later, that the European Convention on Human Rights is sufficient in this regard.

Regarding the question as to when a person’s privacy could be said to have been violated, in *Bernstein v. Skyviews*, the court stated that

---

39. [1991] F.S.R. 62. The plaintiff was a well-known actor. He suffered an accident and was in intensive care. He was permitted very few visitors. A journalist and a photographer from Sunday Sport went to the hospital, entered the plaintiff’s room. Mr. Kaye apparently agreed to talk to them. He did not object to their photographing his room. Medical evidence proved that Mr. Kaye was not in fit condition to be interviewed or to give any informed consent to be interviewed.


41. [1931] A.C. 333. This was a defamation plea in which the plaintiff, an amateur golfer, was caricatured by the defendants without his knowledge or consent for an advertisement for chocolates. The plaintiff claimed that it made him appear as though he was appearing in advertisements for gain and thus prostituted his reputation as an amateur golfer.


44. [1978] Q.B. 479. Here, defendants flew over the plaintiff’s land to take an aerial photograph of the plaintiff’s country house. They then offered to sell *(f.n. contd. on next page)*
constant invasion of privacy was necessary to claim that privacy had been violated. Griffiths, J. held that if the circumstances were such that the plaintiff had been subject to constant surveillance, an action for the invasion of privacy could be found. Such was not applicable in this situation and it could not be said that there was infringement of the right to privacy. The judgement in Bernstein was problematic and the reasoning of the court that constant invasion was necessary as was illogical as undoubtedly there is an invasion of privacy involved in the taking of photographs of a person's house without his permission. This judgement would be significant in connection to the media as it offers an ambiguity for them to elude claims of invasion of privacy.

**Investigative Journalism – Invasion of Privacy?**

Does clandestine filming which is part of an undercover investigation amount to a breach of privacy? In Regina v. Broadcasting Standards Commission *ex parte British Broadcasting Corporation*, it was held to him. The plaintiff claimed damages, alleging that the defendants were guilty of trespass and an invasion of the plaintiff's right to privacy by taking the photograph without his consent or authorisation. The plaintiff's claim failed.

45. An early case laid down that the law did not recognize an exclusive right to take photographs of property. In *Sports and General Agency Ltd. v. ‘Our Dogs’ Publishing Co. Ltd.*, [1916] 1 K.B. 467. The promoters of a dog show had assigned a particular photographer to take exclusive photographs of the event. The plaintiff's complaint was that the defendant took unauthorised photographs and published them in the newspaper. He sued for an injunction to prevent the further use of the photographs by the defendant. Hence, the recognition that there could exist such a right was slow in being recognized.

46. [2001]Q.B 885. A broadcasting company secretly filmed transactions in a chain of stores, Dixon Ltd as part of an investigation into the alleged selling of second hand goods as new. The film did not reveal any evidence of cheating. D. Ltd made a complaint to the Broadcasting Standards Commission (f.n. contd. on next page)
to be so. While arriving at this conclusion, Woolf, J. maintained that if there was a justifiable reason for secret filming, it would not amount to an unwarranted infringement of privacy. He said that a shop was a private place to which the public were invited. He argued that clandestine filming amounted to a loss of control over private property. The interference with the Dixon stores’ privacy was deemed to be unwarranted. The Convention was not limited to individual rights alone, but took companies into account as well. This reasoning is incongruous. It would amount to limiting the scope of investigative journalism. If in public interest, at certain times, clandestine filming may be necessary, it should be allowed. Privacy interests should be subjugated to public interests if it is so deemed necessary.

Celebrities and Privacy – A Two Way Street?

When celebrities use the media to further their interests, the issue is whether, by doing so, they negate their right to privacy. In *Douglas v. Hello! Ltd*[^47^], the claimants applied claiming invasion of the privacy. Keene, L.J. held that the injunction barring the magazine Hello! from publishing the photographs was to be discharged. He stated that there were varying degrees of privacy and under normal circumstances; a wedding had to be granted a certain amount of privacy. This was not the case here as there was widespread publicity around this particular wedding created by the claimants themselves. The intention of the claimants seemed to be to control the nature of publicity released to the general public. He was of the opinion that if persons chose to lessen the degree of privacy attaching to an

otherwise private occasion, then the balance to be struck between their rights and other considerations was likely to be affected.

The ruling in this case may be linked to the Indian case *R. Rajagopal v. State of Tamil Nadu*\(^48\) where the court was of the opinion that privacy of a person would be upheld unless a person voluntarily thrust himself into controversy. It may be seen that English courts, similar to Indian courts, pays little heed to complaints of breach of privacy to those who voluntarily seek to negate it such as Zeta Jones and Douglas.

Too often, celebrities tend to use the media to publicize themselves. Perhaps it is a pointer of the double standards applied to celebrities and the general public, that a definition of privacy has been evaded for a long time\(^49\). In another case involving the right to privacy of public figures, *Von Hannover v. Germany*\(^50\), the German Court considered whether, as a public figure, the Princess of Monaco had to tolerate the publication of photographs of herself in a public place. Nevertheless, it was held unanimously that there had been a violation of Art. 8 of the Convention. The images taken were pertinent to very personal information. The court took into account the fact that photographs published in the tabloid press were often taken in a climate of harassment. The mere classification of the applicant as a public figure did not justify such an intrusion into her private life. In addition, the absence of a contribution to the public interest was also taken as a factor to hold that there had been a breach of privacy.

Similarly, in *Campbell v. MGM*\(^51\), the claimant was an internationally known fashion model. The defendant published two articles along with

---

49. *Supra* n. 40 at p. 7.
50. (2005) 40 E.H.R.R. 1. The applicant, Princess Caroline of Monaco, had applied to the German courts to prevent the publication of certain photographs. She claimed that their publication infringed her right to the protection of her private life from the scrutiny of others.
photographs revealing the information that the claimant was a drug addict and was attending meetings of Narcotics Anonymous. In light of this revelation, the claimant brought proceedings seeking damages for breach of confidence and invasion of privacy. Lord Carswell held that the information was private and publishing constituted an infringement of the appellant's right to privacy.

Furthermore, in *A v. B Plc* 52., the defendant published two articles about the claimant who was a professional footballer and a married man regarding his extra marital relations with two women, which were well known. Jack, J. held that such intimate information was not in the public domain and that there was no public interest involved in this matter. There did exist a requirement to ensure that the law protect the confidentiality of facts concerning sexual relationships whether within or outside marriage53.

It may be noted that in the absence of a defined role for privacy in Indian law, cases similar to *Campbell* and *A v. B Plc.* such as *Manisha Koirala v. Shashilal Nair* privacy has been aligned with the tort of defamation – yet another instance of the inevitable overlaps in the law.

**Convention Jurisprudence: Recognizing the Right to Privacy?**

With the enactment of the Convention, the right to privacy has gained new dimensions. In *R v. Khan*54, Lord Browne-Wilkinson was of the opinion that it was not necessary to decide whether English law recognized the right to privacy, but that in the light of Article 8 and Article 13 of the Convention, such an issue was likely to be reiterated. In *Wainwright v. Home Office*55, the House of Lords held that, following the decision in

55. The claimants, Mrs. Wainwright and her son Alan were strip searched for drugs while visiting Mrs. Wainwright's other son in prison. The search was *(f.n. contd. on next page)*
Peck v. United Kingdom\textsuperscript{56}, the failure of the United Kingdom to provide a remedy for an invasion of privacy in the late 1990s amounted to a breach of Articles 8 and 13 of the European Convention of Human Rights\textsuperscript{57}. In this context, Lord Hoffman stated that there seemed to be a great difference between identifying privacy as a value which underlies the existence of a rule of law and privacy as a principle of law in itself. The jurisprudence of the European Court of Human Rights does not require that the adoption of some high level principle of privacy is necessary to comply with article 8 of the Convention. The coming into force of the Human Rights Act 1998 has meant that the need for a general tort of invasion of privacy is has been met under Sections 6 and 7 of the Act and hence the appeal was dismissed.

In the cases that have been discussed, the fact that a breach of privacy may have occurred is undeniable. Nevertheless, a challenge to the recognition of the tort of privacy in the United Kingdom is its failure, similar to the situation in India, in many cases to distinguish itself from other torts such as defamation, nuisance and trespass. In addition, the special case of the right to the privacy of public figures muddies the waters with respect to privacy law. If there is to be a particular law with respect to celebrities and another for the general public, the law is liable to become problematic. On the other hand, the application of a uniform law of privacy would not be just, owing to the reasons already outlined earlier. Also, with the enactment of the Convention, it has been argued that there is no requirement for the introduction of a tort of privacy as it is sufficiently

---

not conducted according to rules and the claimants suffered mental and emotional torture. Alan's penis was handled by the prison authorities and as a result, Alan who was mentally challenged, suffered from post traumatic stress disorder. The judge held their right to privacy had been infringed. On appeal, it was dismissed.


\textsuperscript{57} This was with respect to strip-searches and also to the interference which it constituted with their right to visit a family member in prison.
covered by the Articles 8 and 13 of the Convention. Reluctance to ratify legislation on privacy could be due to concerns that the American example might be followed where right to privacy cases invariably spill over to other areas of the law. Another reason could be apprehension that opening a new area of law and a new cause of action could open the floodgates of litigation. The English legal system has for years shied away from a formal enactment of a law relating to the right to privacy, relying instead on other torts to provide succour for the breach of privacy. It is submitted that in the light of the Convention providing relief for privacy breaches and the fallout in the United States as a result of the recognition of the right to privacy, the present status quo should continue.

III Judicial ‘Activism’ and Privacy Rights in the United States

In spite of the fact that Warren and Brandeis’ article was a landmark in the field of privacy, an immediate recognition of the right to privacy was absent. Rather, the recognition of privacy as a tort in the United States was the result of a protracted struggle. Probably, an early instance of the recognition of the right to privacy was in 1886 when the court stated in Boyd v. U.S58 that the Fourth and the Fifth Amendments entitled citizens to protection from the invasion of their privacy by the government. In addition, a famous dissenting judgement delivered by Brandeis in Olmstead

58. 116 U.S. 616. In this case, two reporters were investigating a man suspected of being a quack. They visited his home, where he was reported to be practising his trade by posing as a patient and her husband. They surreptitiously took photographs and also carried a hidden transmitter so that law enforcement personnel could listen to the conversation. The result was a criminal prosecution of the man and an article in their magazine Life titled ‘Crackdown on Quackery’. The man accused of medical quackery sued for invasion of privacy. It was held that the man ultimately won $1000 as damages. In the 1971 decision, the appellate court agreed that the story and pictures were newsworthy but that the reporters had intruded on the man’s privacy. The magazine had the right to publish the story but did not have the right to plant hidden transmitters in his house.
v. U.S. urged recognition of the right to privacy. It may be gleaned from these that there was a gradual recognition of the fact that individuals had a right to freedom from the invasion of their privacy. More importantly, such an invasion was to be regarded as a tort which required compensation for the injury suffered by the individual. This distinguished it from the development of the law in the United Kingdom which does not recognize privacy as a tort.

The concept of privacy may be said to consist of three elements: the need for secrecy, regulating the dissemination of personal information; the requirement of anonymity, controlling the attention a person receives; and solitude, relating to a management of the physical access of the public to oneself. This became increasingly threatened in the early 20th century as newspapers, in a desperate attempt to increase their circulation, resorted to publishing sensational, lurid stories with questionable accuracy. In contemporary times, with the proliferation of mass media, the media requires a method to ensure that their market increases. As a result, investigative journalism, often employing ethically dubious methods is on the rise. In addition, development of technology has ensured that the media has more tools to obtain information even without the subject having cognizance of the fact. An early case was Dietemann v. Time Inc. where the Court clearly stated that the First Amendment gave the media no right to break laws with impunity and violate a person’s right to privacy. The subject of investigative journalism raises sensitive issues such as the need

59. 277 U.S. 438.
61. 449 F. 2d 245. 9th Cir., 1971. This dealt with a motion picture that revealed the past activities of a former prostitute who had been charged for murder and acquitted. However, after the trial, the woman married and moved to another town. Her friends there were not aware of her past. Her maiden name was used in the advertising for the movie.
to balance the public good with a person’s right to privacy. It is unquestionable that investigative journalism serves public interests. When it is carried out purely with motives of malice and harassment, it should be subjugated.

In this context, the issue arises as to whether public figures are entitled to privacy from the media. Can celebrities, who use the media to generate publicity for their own ends, be allowed to cry foul when their privacy is invaded? Should there be a different standard for the privacy rights of celebrities and attention seekers? In *Cher v. Forum International*[^63^], Cher, the American singer and movie actress complained regarding misappropriation of her name and likeness and misappropriation of the right to publicity. She claimed that the impugned interview portrayed her in a false light as the magazines were much more salacious than US Magazine. The suit against *Star* was dismissed as its promotional claim of exclusivity did not constitute reckless falsity as ascertained in *Time Inc. v. Hill*[^64^]. Nevertheless, *Forum* did not escape liability as they made it appear that Cher had given the interview to their magazine and used her name

[^62^]: A pioneer in investigative reporting was Elizabeth Jane Cochrane, better known as Nellie Bly who, by feigning mental illness, became an inmate of a Texas mental asylum. In the course of her investigation, she uncovered the abusive methods used there and her expose was instrumental in pushing through reforms in the treatment of mentally ill patients. See [http://www.rihs.us/bly.html](http://www.rihs.us/bly.html) (last visited May 19th, 2006) A recent example would be *Food Lion v. Capital Cities/ABC Inc.*, 984 F.Supp.923. which involved an investigation by a newspaper which sent reporters undercover at a supermarket and discovered wide scale use of unhygienic practices in the selling of meat.

[^63^]: 692 F.2d 634. Fred Robbins, a tabloid writer, taped an interview with Cher. The taped interview was to be published in *US* magazine. The editors of *US* magazine, at Cher’s request, did not run the interview. Robbins sold the interview to a tabloid called *Star* and *Forum*

[^64^]: 385 U.S. 374.
and likeness in promotional advertisements. The court held that publishers could use promotional ads as long as there was no false claim that the celebrity endorsed the publication.

Publicity and Privacy

Regarding celebrities and other public figures, it would be useful to understand how the right to privacy would balance against the right to publicity. In *Zacchini v. Scripps-Howard Broadcasting* 65, Zacchini, a performer sued for infringement of his right to publicity, stating that the recording of his performance was an unlawful appropriation of his personal property – his right to gain adequate publicity from it. The Supreme Court upheld his claim, stating that the First and the Fourteenth Amendments did not offer the media any protection if they broadcasted a performer’s entire act without his permission, causing damage to the economic value of the programme and the right to publicity of the performer.

The case is of great significance in the history of the American judiciary considering the fact that it was the first case to deal with and recognize the right to publicity. The right to publicity may be viewed as a corollary to the right to privacy. In this case, the broadcasting company had no right to telecast an event which was a product of a person’s creativity and originality without his permission with the knowledge that such an action could destroy the economic value of the programme and the opportunity for him to reap benefits from the same. It would seem that this was a far sighted decision. Undoubtedly, the ruling in *Zucchini* has played a substantial role in regulating the issue of the right to publicity till the present

65. 433 U.S 562. Hugo Zacchini was an entertainer whose main act consisted of being shot out of a cannon into a net 200 feet away. A local television station filmed this, despite his request not to do so and broadcasted the film of his feat.
day when the issue of broadcasting rights is a regimental feature of any public performance.

In connection with breach of privacy by the media, the issue of telephone tapping when used as a means to the same, gains importance. In Bartincki v. Vopper\textsuperscript{66} the Supreme Court, held that application of the provisions of the Omnibus Crime Control and Safe Streets Act of 1968 violated free speech rights, even though the tape concerned a matter of public importance. He stated, ‘Surely the interest in individual privacy must, at its narrowest, embrace the right to be free from surreptitious eavesdropping on, and involuntary broadcast of, our cellular telephone conversations.’ Therefore, the Court subordinated the claims of those who wished to publish the intercepted conversations of others. The verdict of the Circuit Court was affirmed and Congress’ effort to balance the above claim to privacy against a marginal claim to speak freely was set at naught. The issue of telephone tapping has gained notoriety in recent times with controversies raging in the USA as to whether the government has the right to tap private phone lines. With the advent of mobile phones, surveillance of citizens has become extremely easy.

Indian case law has also had occasion to discuss this issue in People’s Union for Civil Liberties v. Union of India\textsuperscript{67} which condemned the loss

\textsuperscript{66} 532 U.S. 514. During negotiations between a union representing teachers at a Pennsylvania high school and the local school board, an unidentified person intercepted and recorded a cell phone conversation between the chief union negotiator and the union president. The respondent Vopper, a radio commentator, played a tape of the intercepted conversation on his public affairs talk show in connection with news reports about the settlement. The United States intervened to defend the constitutionality of the Federal Act. The court found the statutes invalid because they deterred significantly more speech than necessary to protect the private interests at stake.

\textsuperscript{67} A.I.R. 1997 S.C. 568
of privacy rights with the development of sophisticated technology and deemed it to be inconsistent with the aims of a democratic government and to be used only in the rarest of the rare cases, where it was necessary in the public interest.

The Right to Information and Privacy – Loopholes in the law

How is the right to information countenanced against the right to privacy? In *National Archives and Records Admin. v. Favish* \(^{58}\), the Freedom of Information Act was used in an attempt to counter the right to privacy. The Supreme Court stated that the Act recognized the surviving family members’ right to personal privacy with respect to their close relative’s death-scene images. The descendent family’s privacy interest outweighed the public interest in disclosure. Mere suspicion of misfeasance in Government’s investigation was deemed insufficient to obtain disclosure, especially where enquiries had established that the death was a suicide. Undoubtedly, the right to information has to be balanced against the right to privacy and the Supreme Court was accurate in its decision in this matter.

Regarding the right to information, it is a cardinal rule that the privacy of victims of sexual assault cannot be infringed by the media. This is required in order to protect the privacy and dignity of victims of sexual assault and where a law exists to prevent this, any dilution of this principle would be highly irregular. Nevertheless, when the information is lawfully received what are the ramifications of the same? This was the issue raised in *The Florida Star v. B.J.F* \(^{69}\), where Justice Marshall held that where a

---

68. 541 U.S. 157. The reporter sought to compel production of death-scene photographs of body of the President’s deputy counsel who apparently committed suicide.

69. (1931)491 U.S. 524. B.J.F. reported to the police that she had been sexually assaulted. They prepared a report, which identified B.J.F. by her full name.

*(f.n. contd. on next page)*
newspaper publishes truthful information which it has lawfully obtained, liability imposed must be limited. The appellant's argument was based on the fact that police reports were not part of "public record". But the news article was accurate, and the Star lawfully obtained B.J.F.'s name from the government. It is pertinent to note that the court desisted from following the rule laid down in the Cox\textsuperscript{70} case. The ruling in the Cox case seemed to be regressive as it did not lay enough responsibility on the media to protect the privacy of victims of sexual assault. Although the interests in protecting the privacy and safety of sexual assault victims and in encouraging them to report offences without fear of exposure are highly significant, imposing liability on the Star in this case is too precipitous a means of advancing those interests. Since the Indian legislation on the Right to Information has been enacted only in 2005, it is too precipitous to engage in a discussion on its effect on privacy. The fact that the courts are denied jurisdiction of disputes relating to the Right to Information Act, it would be interesting to note how disputes regarding breaches of privacy are to be dealt with.

The United States has recognized that a tort of privacy exists and in this sense, there has been immense development in American law with regard to this emerging issue. The fallout of the recognition of privacy as a tort has been that it has resulted in a blurring of the lines of distinction between privacy and other torts such as defamation. The tort of privacy has also been criticised as leading to excessive frivolous litigation and increased and unwarranted sensitivity with a heightened and unreasonable

\begin{flushright}
Her name was included in a story in the Florida Star. B.J.F. filed suit in a Florida court alleging, \textit{inter alia}, that the Star had violated the law that it was unlawful to publish the name of a victim of sexual offence.
\end{flushright}

\textsuperscript{70} (1975) 420 U.S. 469. In Cox Broadcasting v. Cohn, the U.S. Supreme Court ruled that it was not unconstitutional for the media to be held accountable under privacy law for accurate publication of information lawfully obtained from court records and other public documents. The facts of the case were similar to \textit{Florida Star}. 
sense of privacy so as to drastically regulate and restrain the role of the media. In such a situation, it is probable that the recognition of the tort of privacy has led to much unforeseen consequences.

Is There a Need for a Tort of Privacy?

In essence, the right to privacy aims at protecting the inviolate personality, preventing information from falling into the wrong hands, the opportunity presented for harassment, the inevitable involvement of persons as to whom no basis for supervision exists, the use of material monitored by the government for unauthorised purposes, the danger for political expression and so on.

Firstly, the problem with the development of the common law is that none of the cases deal with the question of privacy per se, but with peripheral matters. Hence, the situations perceived to have been interfering with the right to privacy have been classed as either nuisance (persistent watching, the paparazzi etc.), defamation (publishing true content causing emotional distress), harassment (tele-marketing calls), trespass (photo-journalists trying to get an exclusive shot) and so on. In this regard, even if courts were to evolve a separate tort of privacy, the old standards with respect to existing torts would remain. Hence, the utility of such a move is still uncertain.

Secondly, privacy has been defined as providing "a context for respect, love friendship and trust" as also understanding why its breach "seems to threaten our very integrity as persons". Beyond prescribing limits for morality, the tort of privacy has to have a sound legal grounding. In this regard, the researchers put forward the following conclusions. Privacy rights must be enforceable with respect to three broad categories

71. Supra n. 4 at p. 343.
– against the press (or society in general), against the state and against private persons. In the absence of a coherent understanding of privacy, there is little merit in drawing up a set of formal criteria. The debate centres on, as renowned jurists have put it, whether it is privacy per se that needs to be protected or the loss of it, whether privacy is to be regarded as a value, as an individual interest and so on.

Thirdly, as case law shows, recognising a right to privacy in the constitutional framework makes much sense in the light of arbitrary abuse of government authority. The need to recognise it as a tort is therefore, only in the light of private party violations. However, this is, as a perusal of existing torts show, adequately secured. The need to constitute a separate tort of privacy is, at best, of academic interest.

Fourthly, the defences to the ‘tort’ have been clearly spelt out by American courts, although Indian courts continue to use the solitary defence of ‘public interest’. However, terms such as newsworthiness, public documents and consents have implicit moral connotations and hence must be dealt with in a sensitive manner. Creative licence must give way to ‘private facts’. However, a parallel debate exists as to whether private facts exist at all, and if they should exist at all. Must public documents necessarily remain public? Must courts conduct a ‘roving inquiry’? Must there be legal limiting of morality with respect to issues like abortion and sexual preferences? Even in the most liberal societies, the private sphere must be safeguarded, for the right reasons. The absence of truth as a defence to the tort of privacy has the undesirable effect of placing emphasis

on the phrase 'public interest’. The possible misuse by persons who launch tort actions after 'consenting’ to public exposure, such as tort actions initiated by celebrities, must be recognised.

Seventhly, privacy rights have been regarded as an offshoot of the information and communication revolution, as also increasing urbanisation\textsuperscript{76}. However, with issues like genetic confidentiality and online privacy attracting the interests of the judiciary and the public alike, it seems likely that the need for a tort of privacy will outweigh the desire\textsuperscript{77}. It has been held that the right to privacy essentially accords recognition to the fact that the law has to protect not only those people whose trust has been abused, but those who simply find themselves subjected to an unwarranted intrusion into their personal lives. The law no longer needs to construct an artificial relationship of confidence between intruder and victim: it can recognise privacy itself as a legal principle drawn from the fundamental value of personal autonomy. However, as of the moment, it appears to be a redundant endeavour and one clouded over with too many ambiguities.
