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Public Figure vs Public Interest vs Privacy

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Hello & Welcome to The Firm. The Abhishek Manu Singhvi scandal has once again pitched the right to privacy against public interest. While conventional media was barred from publicising the contents of a C-D containing an alleged sex act, new media put the video on display with impunity. This show is not about to sit in moral judgment of what Mr. Singhvi did or did not do. Nor are we going to analyse his political future. All I'm interested in knowing is what is public interest, when does public interest trump the right to privacy and can the law keep up with the internet.

Joining me to do that -- Ajit Balakrishnan, Founder & CEO of Rediff.Com, Ravi Kadam, Former Advocate General of Maharashtra and Pavan Duggal, a Supreme Court lawyer who specialises in cyber laws. Doshi: In your assessment and you have to assess on a daily basis because you run an internet business that streams entertainment, news, you have dealt with requests to pull down content, you have dealt with complaints from users- in your assessment- is this a case of public interest or would a case like this qualify as a case for public interest or do you believe it's an infringement of privacy?

Balakrishnan: I think the issue is, in short, neither. The issue for me is that Indian court has issued an order which they are not able to implement. It's an example of the sovereign state feeling powerless to implement a legitimate judgment that it has made and that is the interesting part for me. Whether its privacy issue or whether there is public interest involved, for me, that is the secondary issue. We need to figure out the sovereign state which is that constrict of the 19th century which means that it is geographically and territorially feels powerless and that is worth some thought.

Doshi: And that's important whether the law can catch up with the internet or not but that's secondary because if this is deemed to be in public interest you wouldn't want to be able to catch police or punish the people that have put videos like this up on the net right? So the primary issue till continues to be as an editor, as somebody who runs this business if you were to get a complaint against such a video going up on your website how would you determine whether this is an infringement of someone's privacy or this is in fact a case of public interest and therefore maintain that video on your website?

Balakrishnan: We can't do that. Under the Information Technology Act if there is a server take down notice, we have to "within a reasonable time" take it down irrespective of our judgment on it in any case in India.

Doshi: But still, you are not telling me in your assessment whether this is...(Interrupted)

Balakrishnan: I cannot make the judgment because the Delhi High court has passed a judgment; who am I to say that they are wrong or right.

Doshi: But they haven't passed the judgment on the merits of the case, right? This is an injunction against the display of whatever that CD contains, it's an ex-parte order on the basis of what the complaint that was filed by Mr. Singhvi saying that it would cause irreparable damage. That case hasn't really gone into the merits of privacy versus public interest. In your assessment is this a matter of public interest?

Kadam: Let's keep the present case out of the loop. A case like this, let's talk about a hypothetical case, because this case is already done and dusted; in a sense it's been decided. I am told even the suit has been decreed, we haven't had access to the judgment so we can't speak about that. But take a case like this or a similar case about a public figure. Somebody who is in a position of authority, position to do things as part of a government, lets assume. If he were to do something which is outside the bounds of morality or decency, if he gets involved in such an act, the fact that he is a public figure and that the public associates him with some kind of authority as part of a government, it would then certainly be within public

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interest to allow such kind of information to be made available to the public. Now, so far as any actual video or film is concerned that may violate the laws relating to obscenity- so uploading that may have another context but for people to know that such an event happened- that I think is in public interest.

Doshi: So I want to follow up two questions- how do you define a public figure? Is it a public official, somebody who is on the payroll of the government in some form or the other like for instance a Member of Parliament (MP) or it is somebody who exists in public life and how do you define whether a case like this is public interest or not because it could be a very private matter that may have no bearing on his official duties?

Kadam: So let's take a celebrity. Celebrities are of two kinds, one are those who may be celebrity by reason of being in film, music, sports and celebrities are people who become well known or publically known because they are part of government or associated with government in any way. So far as those are actors, sportsmen- there is, I don't think, any real public interest, its more of an interest in knowing what their personal lives are about and courts in England have been granting injunctions for such people. But when it comes to somebody who is in the public domain in the real sense, who is a part of the state or associated with the state in any way, who exercises some kind of power and who is then looked up to as a figure from whom one expects a source as justice or something more, then of course public interest would require that we know what kind of character he has and whether we should trust him as a person, as a representative of the people or otherwise.

Doshi: So you are saying that in a case like this it would qualify both as being a public figure and therefore his or her actions being of public interest.

Kadam: Yes.

Doshi: Do you agree with that because I know your commentary so far on TV discussions has been that you believe we need to strengthen up privacy laws because this is an infringement of privacy?

Duggal: I personally believe that first and foremost there are certain parameters in which you are going to judge these entire issues. Number one, if it's patently obscene or it appeals to the prurient interest or the effective which is to tend to deprave and corrupt the minds of those who are likely to see, hear or read the same clearly transmitting a publishing of such content is an offence. So you have your hands tied up- that's Section 67 of the IT Act. Now in a case like this, not this particular case but a case like this, well the biggest challenge is who is going to determine what is public interest vis-à-vis what is private interest. The IT Act is completely silent; there are various permutations combinations of interpretations that are being given. So the bottom line will be that at no point of time should any person be given the handle to blatantly handle somebody's privacy but yes your privacy should not be a curtain that's guaranteed to hide all kinds of discrepancies and your potential mis-contributions of... (Interrupted)

Doshi: That's neither here nor there because if you look at the commentary out there on Twitter or on Facebook, I think people are saying that if you are somebody who lives in public life and enjoys the benefits of it, then please beware that there are downsides to it as well and you have to be extra careful than most normal people because you almost don't have the same right to privacy in the sense and that would apply to several politicians across the board?

Duggal: I don't personally agree to that thought process. Just because somebody is a public figure does not mean that he has no privacy of any kind whatsoever. Yes, if he does something which has an impact upon its public standing, clearly everybody in the public has got a right to know about it but just because somebody is a public figure you say he will have no private moments, he has no privacy and that anybody, any kind of tendencies can be legally allowed – there will be some reservations to that thought process.

Balakrishnan: I would add to that that a mere fact that public personality committing sexual act does not in anyway disqualify him or doesn't create anything in the public interest because there is no other evidence on record other than the fact that he or some person has been caught on camera engaging in a sexual act. That's not particularly a crime.

Doshi: But that clip maybe an edited clip, maybe there was something more to that clip which might be evidence of some kind of corruption. We are again talking in a hypothetical space here?

Balakrishnan: How would be conclude that. On the evidence of that clip, there is nothing which says that.

Doshi: The Supreme Court has and let me get into the specifics of the law- they have said

when there is a competition between the right to privacy of an individual and the right to information of the citizens, the former right has to be subordinated to the latter. In simple worlds public interest trumps the right to privacy especially in the case of public officials but they have also gone on to say in that very famous Auto Shankar judgment which has held up every time we talk about privacy- they have gone on to say that it is equally obvious that in matters not relevant to the discharge of his duties, the public official enjoys the same protection as any other citizen.

Kadam: That's true. In England what has happened is the English Court of Appeal - surprisingly and one would not think this would happen in England in the 21st century but they did. They came to a conclusion that if the act is within a marriage it is entitled to privacy and if it is outside the marriage of a person and it's an extra marital kind of relationship, then public is entitled to scrutinize it and come to a conclusion on character or the nature of the person. That surprising judgment came in 2002- that judgment however has not been followed regularly and lately in the last three-four years the tendency has been to injunct any kind of disbursement of information of this kind which concerns the privacy of any public figure if it does not impinge on the duties which he is suppose to do as a public figure.

Doshi: I want to expand the public figure conversation because we have another current case that is been heard in the Supreme Court and that is Ratan Tata's privacy petition. It has to do with a very different situation; it has to do with wiretaps by government and then unofficial leaks of those wiretaps but in that sense what he is also fighting to some extent would be that as a public figure, as a business leader, does he qualify as a public figure and does he have no right to have his phone conversations kept personal when they are not related to crime or any situation of national interest in any fashion. That again has yet to be fully heard and decided upon but are we continuously expanding the definition of public figure because will it also include business leaders, will it include Members of Parliament, may be high profile journalist, where do we draw the line?

Kadam: May be Ratan Tata's case stands on a different footing and he stands on a better wicket than the case of the kind which we are discussing because what was done is - firstly it's an unauthorized wiretap or assuming it is authorized, the disclosure of it into the media is certainly unauthorized; therefore it's a clear cut violation of...(Interrupted)

Doshi: That is the case here as well. The recording of this- of an act of such nature- to put it vaguely is also in an unauthorized fashion, it's not an authorized recording. Someone has either stolen some footage or morphed some footage as is the accusation or whatever - so that too is illegal and by putting that up in the media and in any fashion, you may argue public interest but are you not party to that crime of illegally obtaining somebody else's private footage?

Duggal: I am saying that whenever somebody is publishing or transmitting or causing to be published or transmitted anything in electronic form which is lascivious, which in this case the CD contents are, that concerned person is committing a crime under the Information Technology Act, 2000. Having said that, that did not deter the social media from making this particular CD viral and there is some particular misconception also and misconceptions being that the injunction against social media. Social media is not a legal entity that can be made a party. So no amount of social media per se can be injuncted, you can at best injunct legal entities, individuals and organizations but definitely not social media. But I think this case is a wakeup call for us to think. If this happens to any Tom, Dick and Harry, how the Indian law is going to behave. Currently we are in a situation where the law does not at all help privacy because of privacy in any manner whatsoever and till such time we don't strengthen the law, we are going to be in troubled waters.

Doshi: I don't know whether you have checked out the draft of the Privacy Bill 2011 which is still in draft form or discussion form that doesn't seem to make any specific references to situations like this. Though it does have prohibitions against surveillance for instance if someone illegally recorded a private act- that would maybe amount to surveillance and he could be prosecuted. But if that video fell in the hands of the media and the media believes that you being a public figure, your private acts are of public interest- the media could argue a public interest defence in putting that up and by media I mean widely including the conventional media, social media all of it?

Duggal: I think right now the need of the hour is for the law to determine what is public interest in the context of the internet, the world wide web and this network world, where does public interest begin, where does it end and where are the blurring of the lines and the boundaries. Currently everything can be argued to be in public interest so long as it has got something to do or some word or some component which has got to do with public interest. But this is a very dangerous trend, if we keep on enhancing the boundaries and the scope of public interest; very soon we will have no private space made available.

Kadam: What I feel is that there is a difference in public knowing about such an event and

such an event being uplifted onto a website and being broadcast; then the people know....
(Interrupted)

Doshi: But it's the same thing. If I know, then I want to see it for myself. Why should I believe any other reporter?

Kadam: So because of lascivious act is something which is prohibited from being telecast or from being uploaded or being broadcast from a website. That's because that will be violation of statutory prohibition, it will also be a violation of an old law which is the Indian Penal Code and that is transmitting something which is obscene etc. But for the public to know something has happened, I don't think that public interest necessarily requires that the public must have a right to know this.

Doshi: Very difficult to determine what is public interest or not. The only legal reference I found dates back to 1885 to the Indian Telegraph Act that says public interest is the interest of the sovereignty and integrity of India, the security of state, friendly relations with foreign States, public order or for preventing incitement to the commission of an offence. It is these five things that qualify public interest, not videos that feature public officials. In which case if this is not a video that qualifies as public interest then it is an infringement of someone's privacy?

If this is in fact an infringement of privacy how easy or difficult it is to catch those who posted those videos given the current laws?

Balakrishnan: There are three axes to it. One is privacy, the other is public interest. The third is sovereign state's ability to influence and ours is not the only government which is going to feel more and more frustrated about the inability to act. We followed the debate Stop the Piracy Act which United States almost passed I can say. What were the provisions in it? It's very interesting. Even in that so called freedom loving country, what it said that they had a provision to make all US facing sites, that are the exact words used, have a filter to prevent pirated content being visible to people living within the United States. Even the United States Senate felt insecure enough to create a boundary around. So I think this is a feeling of powerlessness that many states are going through. Even Cameron doing their riots in London loudly wondered in the House of Commons whether they ought to do something to control Twitter transmitting all those messages. So I think this is a fundamental clash which is between the sovereign state...(Interrupted)

Doshi: Let me turn your response into a question. Where do we draw the line? On one hand, we can say we don't have an adequate privacy law as Pawan has brought up. On the other hand we can say that the current IT Act that we have allows for a cartoonist professor in Calcutta to be arrested for what a politician thought was an offensive cartoon which was not vulgar or obscene or anything of that nature, just offensive to her sensibilities and the intermediary guidelines that were put out last year are so wide that a large number of adjectives qualify as objectionable content and all you need to do is write into Ajit Balakrishnan or one of his officials at Rediff.com saying I don't like what you have put up about me. I think it violates my privacy or its blasphemous and force you to take it off within 36 hours leading to a degree of censorship that would sort of trespass on Freedom of Speech?

Balakrishnan: It's not that absolute. It's not that we will take it down just because we received a notice. We will exercise reasonable judgment to see whether we are we going to do it.

Doshi: So you are going to sit in discretion of whether this is harmful to the person who has complained or not?

Balakrishnan: Of course, there will be within limits but just one other thing. You must remember your own industry- the cable network's people- were under a great amount of anxiety about similar issues in 91-92-93 till the Cable Networks Act 95 was legislated. Today what prevents satellite television of pornographic material to India? That is very clear that law will catch the MSOs (Multiple System Operators) and cable operators and people who are retransmitting it from India. In the early 90s, there was great amount of anxiety about satellite television broadcasting things which are not acceptable in India. I wouldn't be that worked up about the internet. It's the similar issue or the territorial integrity of India being worried about.

Doshi: Are you as sanguine as Mr. Balakrishnan is because I do know that there is a current campaign on that is also being supported by a Member of Parliament to nullify the Intermediary Guidelines that came in last year, because they do amount to very heavy censorship or could amount to heavy censorship and transgress Freedom of Speech, Freedom of Media and all those other freedoms?

Duggal: Well, let me at the very outset say with utmost respect to Ajit that I am slightly disagreeing with him primary because under the Information Technology Rules 2011, a service provider has no kind of judgment or role of any kind whatsoever. The moment

somebody complains to him or the government notifies to the service provider that any of the parameters are met, that's it. You have no other option but to act within 36 hours. You don't do that and you lose your own exemption from liability. More importantly, the IT Rules 2011 are possibly a huge disaster, primarily because of the kind of language that's used in it. The parameters that are used are capable wide subjective interpretations that it hasn't really served the purpose for which they are and more importantly the IT Rules 2011 have gone far, far beyond the Information Technology Act 2000 and it's a cardinal principle of law that no amount of secondary legislation can overreach the primary legislation. The IT Rules are a classic case of a secondary legislation trying to overreach primary legislation.

Doshi: So we are faced with this irony of the IT Rules being void, potentially leading to censorship and yet when it comes to privacy matters, you are not sure of how to police the internet, how to take off prurient videos or videos of prurient interest? How to catch those people and therefore an injunction that is binding upon conventional media becomes of little consequence to those on the internet. How do you deal with this?

Balakrishnan: It's not such a black and white situation. Running an internet company with 17-18 million users, we face these issues 10 times a week and Pawan of course is a lawyer and expert. But I think his individual businesses...(interrupted)

Doshi: How does law deal with this, because the injunction was quite literally done away with impunity when it came to the videos being posted on the internet?

Kadam: That's true, because this is a problem which courts are facing. As Ajit rightly says, there is always a kind of hiatus between scientific development and the law catching them. As he says it will catch up; sooner or later you will find a way. At the moment, courts are issuing what you call futile writs. Because the moment a writ of injunction is issued, it becomes futile as in Mr. Singhvi's case - though the writ was issued, there is an injunction because of social media and it was rendered futile.

Doshi: People are posting videos or people could be posting videos from all kinds of different countries, servers in other countries. How would this Writ become applicable or enforceable in another country?

Balakrishnan: It is impossible; so some kind of a new regulatory framework has to develop to deal with such situations, we don't know what it is. People like the World Trade Organization (WTO) have evolved over disputes not of exactly the same kind but similar where no single country can decide. So they have a dispute resolution mechanism.

Kadam: Can I give you one example, for copyright as an IP (intellectual property) Lawyers, Pawan also will tell you, you have something like the international copyright order so where if you have copyright protection in 'A' country, you get copyright protection in other countries also which are members of that convention. Something on those lines- if that can be evolved and countries agree to a convention on internet control, it's a bad word to use but for want of a better word, say for internet control of regulation if you call it and a Writ issued in one country can be enforced then in another country just by transmitting...(Interrupted)

Doshi: So copyright violation is a very different thing from the freedom of speech and the freedom of the media. If we were to find an international convention that somehow made Writs of this nature enforceable in another country whereby video hosted on a foreign server that is enjoined against in India is pulled down, we are now interfering with freedom of speech, freedom of media in those countries as well. These are precious rights, I am alarmed that we want intermediaries to sit in judgment of what is right and what is wrong and what is offensive - how many countries will be agreeable to allowing a Writ located in one country policing the media in another country?

Duggal: I think that's going to be a hugely monumental kind of a task primarily because of the intrinsic nature and architecture of the internet and also primarily because today countries are very clear- we are a sovereign country and this kind of international treaty is bound to somewhere impact our respective sovereignty, integrity and security. So that's possibly one reason why we haven't seen any kind of an international rule in that regard but Ajit is bang on target, we need something like that and in any case, we require some kinds of rules of the game as far as social media is concerned. Social media is not equal to World Wide Web- it's requiring some kind of a regulation but how to do so. At the time when internet jurisdiction is really providing some huge challenges to different nations in this regard, I think we have only one successful example of an international treaty working and that's on cyber crime which is a convention on cyber crime of the council of Europe and unfortunately the convention has got nothing to do either on social media or on the subject that we are talking but clearly there is a huge vacuum, there is a need for this kind of an international regulation to come in place.

Kadam: So we'll have to eventually come around to some kind of regulation which all countries, by being signatories to a convention, will agree. We'll probably have a very base

minimum standard but it has to be there.

Doshi: Your last thoughts on this?

Balakrishnan: As I keep saying, don't get worried, the emergence of every new technology media- be it telegraph or radio or television- such anxieties have existed. Let a few court cases happen and we will in our own Indian way muddle through all this and find a solution.

Duggal: I personally think there are a couple of points that are immediately action points for the government. Number one, you need to wake up, number two as far as your IT Act is concerned, it's thoroughly inadequate and it's time once again to re-amend the same and most importantly it's a time to have a relook at this entire issue. It's very important to give effective remedies to people who are victims of violations of privacy; they should not be looking at just lame ducks while others continue to invade their privacy.

Doshi: I would like to end with the very same 3 questions that I began the show with because they are questions that will continue to face us over time to come.

First – What is public interest? It is a phrase that is widening in scope every day.

Second – When does public interest trump the right to privacy?

And third most important one – Can the law catch up with the internet?

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