CHAPTER 5
FREEDOM OF SPEECH AND EXPRESSION AND THE JUDICIAL RESPONSE

Brief Summary

The fundamental right to freedom of speech and expression is multifaceted. It has been judiciously interpreted by the Hon’ble Supreme Court of India, keeping with the theme of the Constitution and the liberal philosophy of the framers of the Constitution. Wherever required, its scope has been widened to encourage people’s participation in democracy, and at the same time, keeping it within the bounds of the constitutional framework of reasonable restrictions. The Supreme Court is the guardian of the basic structure of the Constitution, therefore, its response regarding freedom of speech and expression requires to be studied.

It is worth mentioning that after over six decades of the Indian Republic, the basic foundation of freedom of speech and expression in India is quite firmly in place. There are, however, newer challenges which are being thrown up by globalization and evolving technologies. The new legal challenges are more likely to centre about issues such as individual privacy, online defamation, intellectual property, fighting words, hate speech, obscenity, pornography, commercial speech etc. Some of these issues have been examined in this chapter in the light of the judicial response.

It is important to mention here that in this chapter the case law method has been adopted. Particular attention has been given for determining the role of the Supreme Court of India as the guardian of freedom of speech and expression. However, wherever needed, reference has been taken from the judicial response of other countries, particularly USA, UK, to have a holistic view of the subject. It appears to be a better approach for the appraisal of the theme. However, only important cases have been examined for establishing the work within limits. It is explicit that essential
principles deemed necessary for the safeguard of rights relating to freedom have been laid down only in important cases.

It may also be pointed out that compared to the decisions of the High Courts, the judgments of the Supreme Court have been given greater importance for two reasons, first, decisions of the high Courts on the same legal issue are not always uniform, and, second, the decisions of the high Courts are not final, for an appeal may be filed against the judgment of a high Court in the Supreme Court. Decisions of the Courts provide an opportunity for implementation of high priority programmes for social and economic development.

This chapter, thus, explores the contribution of the judiciary as a protector of fundamental right to speech and expression and as a creative interpreter of the said right thereby widening its ambit and also as a regulator of this freedom in the larger interest of the state and society.

It is worthy to mention here that since freedom of speech and expression includes the freedom to communicate through any available media whether print, electronic or audio-visual, therefore, the expressions “press”, “media”, “freedom of press” used in this chapter may be construed so as to denote the phrase “freedom of speech and expression”.

5.1 Introduction

Article 19 of the Constitution is one of the jewels in our Constitution which conveys to the nation that a citizen of the country has certain fundamental rights which he can exercise freely subject to the reasonable restrictions which are imposed for compelling reasons.¹

The freedom of speech and expression under Article 19(1)(a) is a concept with diverse facets, both with regard to the content of the speech and expression and in the means through which communication takes place.

¹ M. Hasan v. Govt. of A.P., AIR 1998 AP 35 at 39, (Para 15)
It is also a dynamic concept that has evolved with time and advances in technology.\(^2\)


In all these cases, every attempt of the State to restrict the freedom of the speech and of the press has been converted into an opportunity to enlarge its sweep and to make the press more effective. Judges armed with Constitutions, laws & precedents and experience with the rules for objective legal reasoning can reach very different conclusions about a situation, although they are working with the same set of facts. Lawyers and judges are human beings whose decisions are shaped by, among other forces, politics, economics, religion, family, education and personality. However, the beauty of the situation lies in the fact that by virtue of judicial interpretation, even at different points of time, the scope of freedom of speech has been expanded.

As Soli Sorabjee, memorably and courageously wrote, during the Emergency in 1976:

> Ultimately freedom cannot be preserved for an inert people by the Constitution or Courts. Civil liberties do not defend themselves. They are not sustained by the chanting of mantras or by any brooding omnipresence in the sky. Yet, without independent Courts manned by judges possessed with courage and vision and above all, a vibrant sensitivity for human rights, Civil liberties become cruel shibboleths. Above all else, the reality of

their existence lies in their constant assertion by the people and their *judicious judicial protection*.\(^3\) (Emphasis Supplied).

Thus, the judicial creative interpretation has played a very important role in the growth and expansion of the concept of freedom of speech and expression. Broadly speaking, a study of various case laws throws light on the following dimensions of the freedom of the speech and expression.

**5.2 Freedom of Publication**

This includes the freedom of propagation of ideas and publication in a printed form.

In *Romesh Thappar*’s case,\(^4\) briefly the facts were as follows:

The Government of Madras imposed a ban upon the entry and circulation of the “Cross Roads”, an English weekly published from Bombay, under Section 9(1-A) of Madras Maintenance of Public Order Act, 1949.\(^5\) The petitioner who was the printer, publisher and editor of the journal challenged the said order, being violative of his freedom of speech and expression conferred by Article 19(1)(a) of the Constitution.

Justice Patanjali Shastri, (as he then was), speaking for the majority\(^6\) of the Supreme Court observed:\(^7\)

> There can be little doubt that freedom of speech and expression includes freedom of propagation of ideas and that freedom is ensured by the freedom of circulation.

Justice Shastri, assuming that the liberty of press is protected under Article 19(1)(a) as under the First Amendment to the U.S. Constitution,\(^8\)

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\(^4\) AIR 1950 SC 124.
\(^5\) *Id.*, at 126. (para 3).
\(^6\) For himself and Kania, C.J. Mahajan, B.K. Mukherjee and S.R. Dass, J.J.; *Id.* at 124.
\(^7\) *Supra* note 4, at 127, (para 6).
\(^8\) The First Amendment to the U.S. Constitution reads: “The Congress shall make no law ... abridging the freedom of speech or of the press”.

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went on to quote from the judgment of the United States’ Supreme Court in the case of Ex parte Jackson.\(^9\)

> Liberty of circulation is as essential to that freedom (i.e. of press) as the liberty of publication. Indeed without circulation the publication would be of little value.

The learned judge further pointed out that freedom of speech and expression are the foundation of all democratic organizations and are essential for the proper functioning of the processes of democracy.\(^10\)

Shastri, J., further observed that the said order would be violative of petitioner’s fundamental right guaranteed under Article 19(1)(a) unless the impugned Section, under which the said order was issued, is saved by the reservation contained in the restrictive clause (2) of Article 19. On this point, Shastri, J., concluded that the impugned Section fell outside the scope of authorized restrictions under clause (2) and hence void and unconstitutional\(^11\).

In another important case Baragur Ramachandrappa v. State of Karnataka,\(^12\) concerning the novel “Dharamakaarna” by P.V. Narayana, the Supreme Court held that the government can nullify publication in the interest of “public order”.

5.3 **Freedom of Circulation**

Freedom of speech includes not only the freedom of publication but circulation also. Indeed without freedom of circulation, the freedom of publication would be of little value. Freedom lies both in circulation and in content.

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\(^9\) Supra note 4 at 128, (para 11).
\(^10\) Ibid.
\(^11\) Ibid.
\(^12\) (2007) 5 SCC 11.
In 1962, there was pronounced a very important judgment by Supreme Court in *Sakal Papers (Pvt.) Ltd. v. Union of India*\(^ {13}\), in the sphere of regulation of economic aspects of the press. In this case, the question of freedom of circulation of press was also involved. It may be pointed out that the right to freedom of speech and expression and of press is infringed not only when there is a direct ban on the circulation of publication, but also when action on the part of the Government would adversely affect the circulation of the paper.

It is well-known that in implementation of the First Press Commission Report (1954),\(^ {14}\) Parliament had in 1956, enacted the Newspapers (Price and Page) Act\(^ {15}\) to regulate the prices of newspapers in relation to their pages and sizes and to regulate the allocation of space for advertising matter. To give effect to the policy of the Act, the Daily Newspapers (Price and Page) Order, 1960\(^ {16}\) was issued fixing the member of pages that could be published by a newspaper according to the price charged. In essence, the volume of circulation of press was sought to be effected by the Act and the Order.

The contention of the petitioner was that the Act and the Order infringed his freedom of speech and expression guaranteed by Article 19(1)(a).\(^ {17}\) The state justified the legislation as a restriction on the business activity under clause (6) of Article 19\(^ {18}\).

Here an important question arises which relates to the two aspects of the activity of newspapers. These are dissemination of news and views, and the publication of advertisement etc, which form the commercial income-bearing activity.

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\(^{13}\) AIR 1962 SC 305.


\(^{15}\) Hereinafter referred to as *The Act*.

\(^{16}\) Hereinafter referred to as *The Order*.

\(^{17}\) *Supra* note 13 at 307, (para 8).

\(^{18}\) *Id.*, at 308-309, (paras 11-12).
The first freedom can be restricted only within the limits provided by clause (2) of Article 19. In the present case, the second aspect of the freedom, namely the commercial income bearing activity of newspapers was sought to be restricted under clause (6) of Article 19. The object of the government was stated to be that newspapers which had built up huge revenue by advertisements could not be allowed to throttle or hamper the growth of smaller newspapers that had entered the field as newcomers.

The question, therefore, was whether the restrictions could be placed on the exercise of the right for curbing the monopolistic tendencies among newspapers, or in other words, can the freedom guaranteed under clause (1)(a) of Article 19 be restricted on the grounds set out in Clause (6) of Article 19.

Justice Mudholkar, speaking for the unanimous Supreme Court (consisting of B.P. Sinha, C.J., A.K. Sarkar, K.C. Dass Gupta, N.R. Ayyangar, J.J., and of himself) accepted the plea of the petitioners that the order affected the circulation and so restricted the discrimination of news and views which a newspaper has the freedom to do. Therefore, the order was struck down and held to be inoperative. As to the plea of the state justifying the legislation as a restriction on the business activity under clause (6) of Article 19, the learned judge observed that the only restrictions which may be imposed on the press are those which clause (2) of Article 19 permits and no other. The learned judge, concluding the case observed:

The right of freedom of speech cannot be taken away with the object of placing restrictions on the business activities of a citizen. Freedom of speech can be

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19 Under clause (2) of Article 19, reasonable restrictions can be laid down in the interest of sovereignty and integrity of India, the security of the state, friendly relations with foreign states, public order, decency or morality or in relations to contempt of Court, defamation or incitement to an offence.

20 Under clause (6) of Article 19, the freedom can be restricted 'in the interest of the general public; whereas under clause (2), the freedom cannot be restricted 'in the interests of general public'.

21 Supra note 13 at 313, (para 36).

22 Id., at 315, (para 41).

23 Id., at 313, (para 37).

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restricted only in interest of the security of state, friendly relations with foreign states, public order, decency or morality or in relations to contempt of Court, defamation or incitement to an offence. It cannot, like the freedom to carry on business, be curtailed in the interest of the general public.

In this regard, it is noteworthy to mention about the Explanation which was added to Section 5(3) of The Press Council (Amendment) Act, 1994, according to which, a newspaper is to be categorized as big, small or medium on the basis of its circulation per issue as the Central Government may notify in the Official Gazette.

Freedom to circulate extends not merely to the matter which the Press is entitled to circulate but also to the volume of circulation.²⁴ In short, it is both qualitative and quantitative.²⁵

So far as the freedom as to the matter to be published is concerned, it has been established in India²⁶ (following the U.S. precedents) that the object of the guarantee of freedom of the Press is to prevent public authorities from lassuming the guardianship of the public mind. Human history reveals that all evolution and progress is because of the power of thinking and any attempt aimed to control thought is doomed to failure. Our Constitution guarantees freedom of thought and expression, the only limitations being as provided under Article 19(2).²⁷

Thus, the Supreme Court held that the State could not make laws which directly affected the circulation of a newspaper for that would amount to a violation of the freedom of speech. The right under Article 19(1)(a)

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²⁴ Supra note 13.
²⁵ Bennett Coleman v. Union of India, AIR 1973 SC 106 at 249, (paras 40, 42-43); (1972) 2 SCC 788.
²⁶ Express Newspapers v. Union of India, (1959) SCR 12 at 207, (para 36(e)).
extends not only to the matter which the citizen is entitled to circulate but also to the volume of circulation.\textsuperscript{28}

In \textit{Bennett Coleman \& Co. v. Union of India},\textsuperscript{29} the Supreme Court held that newspapers should be left free to determine their pages and their circulation. This case arose out of a constitutional challenge to the validity of the Newspaper (Price and Page) Act, 1956 which empowered the government to regulate the allocation of space for advertisement matter. The Court held that the curtailment of advertisements would fall foul of Article 19(1)(a) since it would have a direct impact on the circulation of newspapers.\textsuperscript{30} The Court held that any restriction leading to a loss of advertising revenue would affect circulation and thereby impinge on the freedom of speech.\textsuperscript{31}

In \textit{Indian Express Newspaper v. Union of India},\textsuperscript{32} a challenge to the imposition of customs duty on import of newsprint was allowed and the impugned levy struck down. The Supreme Court held that the expression ‘freedom of the press’, though not expressly used in Article 19 was comprehended within Article 19(1)(a) and meant freedom from interference from authority which would have the effect of interference with the content and the circulation of newspapers.\textsuperscript{33}

In \textit{LIC v. Manubhai Shah},\textsuperscript{34} the Supreme Court reiterated that the ‘freedom of speech and expression’ must be broadly construed to include the freedom to circulate one’s views by word of mouth or in writing or through audio visual media. This includes the right to propagate one’s views through the print or other media. The Court observed:

\begin{quote}
Freedom to air one’s view is the lifeline of any democratic institution and an attempt to stifle or
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\textsuperscript{28} \textit{Id.}, at 313,(para 33-34).
\textsuperscript{29} Supra note 25.
\textsuperscript{30} \textit{Id.}, at 824, para 82 (SCC).
\textsuperscript{31} \textit{Id.}, at 813, para 43 (SCC).
\textsuperscript{32} (1985) 1 SCC 641.
\textsuperscript{33} \textit{Id.}, at 693, (para 84).
\textsuperscript{34} (1992) 3 SCC 637.
suffocate or gag this right would should a death knell to democracy and would help usher in autocracy or dictatorship.\textsuperscript{35}

The right to circulate encomasses the right to determine the volume of circulation.\textsuperscript{36} The freedom of a newspaper or other publication, from the aspect of the volume of circulation, means that (i) it is entitled to propagate its ideas and views and reach any class and number of readers as it chooses, subject, of course, to constitutionally permissible restrictions;\textsuperscript{37} and (ii) to print and publish any number of pages it chooses.\textsuperscript{38}

This freedom would be undermined by any excessive burden imposed on the Press which narrows its scope of dissemination of information\textsuperscript{39} or renders it so uneconomical as to ultimately compel it to seek Government aid, which would obviously destroy its freedom.\textsuperscript{40}

The press, as such, is not entitled to any special privilege to which other citizens are not entitled, freedom of the Press does not include the following\textsuperscript{41} - i.e. immunity from the general laws of the land, which are applicable to the press, without being discriminatory,\textsuperscript{42} e.g., laws relating to industrial relations;\textsuperscript{43} conditions of service of its employees,\textsuperscript{44} such as minimum wages,\textsuperscript{45} hours of employment; laws against monopolies and restrictive trade practices.\textsuperscript{46}

\textsuperscript{35} Id., at 651, para 8 (SCC).
\textsuperscript{36} Supra note 25; See also Secretary, Minister of Information and Broadcasting v. Cricket Association of Bengal, (1995) 2 SCC 161 at 208, (para 43).
\textsuperscript{37} Supra note 25 at 855, (SCC).
\textsuperscript{38} Ibid.; See also Bunn v. British Broadcasting Corporation and another, (1998) 3 All ER 552.
\textsuperscript{39} Supra note 26 at 127.
\textsuperscript{40} Ibid.
\textsuperscript{42} Oklahoma Press Publishing Co. v. Walling, (1945) 327 U.S. 184 at 194; Printers (Mysore) Ltd. v. Asst. CTO, (1994) 2 SCC 434 (no immunity from taxation or other general laws relating to industrial relations).
\textsuperscript{43} Associated Press v. N.L.R.B., (1936) 301 U.S. 103 at 136; Supra note 32 at 614.
\textsuperscript{44} Ibid.
\textsuperscript{45} Ibid.
The position, however, would be different if the burden imposed on the Press is excessive and directly endangers its existence or circulation.

In short, the state is not debarred from exercising any of its legitimate powers, so long as the effect of such legislation is not directly to affect the circulation or other aspect of the freedom of the Press.

The primary function of the press is to provide comprehensive and objective information of all aspects of country’s political, social, economic and cultural life. It has an educative and mobilizing role to play and it plays an important role in moulding of public opinion and can be an instrument of social charge.

As far as an exhibitor of video films is concerned, it has been held that he cannot claim protection of Article 19(1)(a), as he is not propagating or circulating any of his own views. The producer of a film can, but a mere exhibitor of video films cannot, claim protection of Article 19(1)(a). A right of a film maker to make and exhibit his film is a part of his fundamental right of freedom of speech and expression under Article 19(1)(a) and the restrictions imposed under Sections 4 and 5A of the Cinematograph Act, 1952 relating to certification by Censor Board by applying the guiding principles set out in Section 5B is a reasonable restrictions contemplated under Article 19(2). The exhibitor shows films merely to earn profit and not to propagate any ideas or arousing any public opinion. An exhibitor of films cannot be equated with circulation or distribution newspapers. Exhibiting films is a commercial activity. Circulation of newspapers lines continues with the publisher but the film after production goes out of the producer’s hands for being exhibited by such persons as are totally unconnected with production.

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47 Supra note 32 at 641 (para 89); Virendra v. State of Punjab, (1958) SCR 308 at 319.
48 Supra note 26 at 207, (paras 38-39).
Where the fundamental freedom of speech gets intertwined with business it undergoes a fundamental change and its exercise has to be balanced against social interest. For example, the Court has upheld the entertainment tax on cable television.\(^{52}\)

### 5.4 Freedom of Press

The question of whether or not to insert in the Indian Constitution a separate right for the press as distinct from that of the ordinary citizen was extensively debated by members of the Constituent Assembly. The Constituent Assembly came to the conclusion that such a provision was not necessary. Dr. B.R. Ambedkar, Chairman of the Constituent Assembly’s Drafting Committee argued:

> The press is merely another way of stating an individual or a citizen. The press has no special rights which are not to be given or which are not to be exercised by the citizen in his individual capacity. The editor of a press or the manager are all citizen and therefore when they chose to write in newspapers, they are merely exercising their right of expression and in my judgment therefore no special mention is necessary of the freedom of the press at all.\(^{53}\)

Although no special provision was made to safeguard the rights of the press, the Courts have time and again confirmed that the rights of the press are implicit in the guarantee of freedom of speech and expression under Article 19(1)(a) of the Constitution.\(^{54}\)

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\(^{52}\) Supra note 1. See also **Hukum Singh v. State of UP**, AIR 1998 All 120.

\(^{53}\) **Constituent Assembly Debates**, Vol. VII, p. 780 (2\(^{nd}\) December, 1948).

\(^{54}\) **Brij Bhushan v. State of Delhi**, AIR 1950 SC 129; **Maneka Gandhi v. Union of India**, (1978) 1 SCC 248; See also Supra note 26, 27, 28.
Romesh Thappar v. State of Madras,\textsuperscript{55} and Brij Bhushan v. State of Delhi,\textsuperscript{56} were amongst the earliest cases to be decided by the Supreme Court declaring freedom of press as a part of freedom of speech and expression.

The strongest affirmation of the spirit of the First Amendment is echoed in Express Newspapers (P) Ltd. v. Union of India.\textsuperscript{57} This case arose out of a challenge to the Working Journalists and other Newspaper Employees (Conditions of Service) and Miscellaneous Provisions Act, 1955, on the ground that its provisions violated Article 19(1)(a). In the facts of the case, the Court held that the impact of the legislation on the freedom of speech was much too remote and no judicial interference was warranted. However, the Court did recognise an important principle which is as follows:

Laws which single out the press for laying upon it excessive and prohibitive burdens which would restrict the circulation, impose a penalty on its rights to choose the instrument for its exercise or to seek an alternative media, prevent newspapers from being started and ultimately drive the press to seek Government aid in order to survive, would be struck down as unconstitutional.\textsuperscript{58}

5.5 Freedom of Volume of News & Views

In 1973, came the famous Bennett Coleman\textsuperscript{59} case. This was a momentous judgment having a bearing on the freedom of speech and expression generally, and on the freedom of the press, in particular.

In this case the constitutional validity of the newsprint policy of 1972-73\textsuperscript{60} passed by the Central Government was challenged as being
violative of freedom of speech and expression guaranteed by Article 19(1)(a). The four main features of the policy were:

1. no newspaper or edition could be started by a common ownership unit within the authorized quota of newsprint;

2. there was a limitation on the maximum number of pages to ten. No adjustment was permitted between the circulation and pages so as to increase the pages.

3. no interchangeability was permitted between different newspapers of common ownership unit or different editions of the same paper; and

4. allowances of 20 percent increase in page level upto a maximum of ten had been given to newspapers with less than ten pages.

The petitioner contended that the impugned policy had infringed his freedom of speech and expression conferred by Article 19(1)(a).

The Union of India contended that the newsprint policy did not directly and immediately deal with the right of freedom of speech and expression conferred by Article 19(1)(a) and the right under Article 19(1)(a) was not violated though the freedom of speech and expression was incidentally or consequently abridged.

Justice Ray (as he then was) speaking for the majority of the Supreme Court set aside the impugned newsprint policy as unconstitutional. Justice Beg, in a separate judgment, concurred with him. In view of the law hitherto laid down, Ray, J., observed that in effect the Newsprint policy was

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61 Supra note 26, at 111, (para 6).
62 Id., at 114, (para 219).
63 Id., at 116-117, (para 28).
64 Three judgements were delivered. The majority judgement by Ray J., for himself, Sikri, C.J., and Reddy, J., held that the impugned policy violated Article 14 and 19(1)(a), in a separate judgement Beg, J., concurred in the result; and in a dissenting judgement, Mathew J., held the impugned policy was valid. Id., at 106.
65 Supra note 25, at 152, (para 169).
‘Newspaper Control Policy’. The learned Judge cited with approval the law laid down in two earlier cases and added:

Freedom of the Press is both qualitative and quantitative. Freedom lies both in circulation and in content.

The principle points made in this case (majority view) regarding freedom of press are:

1. Freedom of speech cannot be restricted for the purpose of regulating the commercial aspects of the activities of newspapers. A restraint on the circulation of newspaper and a restraint on the space permitted for advertisements would affect the fundamental right under Article 19(1) in respect of propagation, publication and circulation of news and views.

2. Restrictions on page limit, prohibition against newspapers and new editions control the growth and circulation of newspapers, also depriving newspapers of their area of advertisement. The direct effect of such restraints is that newspapers are exposed to financial loss. The direct effect of which is that the freedom of speech and expression is infringed.

The judgment given by the Supreme Court will go down as a landmark in the history of citizen civil rights in India. A democratic society can thrive on freedom of speech of the people. Newspapers are an integral part of a democratic society. There is no doubt that the Newsprint Control Policy was designed, apart from ensuring a fair distribution of the imported newsprint, also to achieve certain broad social objectives viz., to restrict the growth of big newspapers and to promote the growth of small newspapers no
one will deny the need to promote small newspapers but it will have to be done now without infringing the fundamental rights of the big newspapers.

It is submitted that in a free and democratic society, there should be as few restrictions on the freedom of speech and expression as possible and this is the result which the Supreme Court’s decision seeks to achieve.\footnote{M. P. Jain, “Article 19(1)(a): Freedom of the press: Bennett Coleman & Co. v. Union of India”, 15 JILI (1973), 154-164 at 162.}

\section*{5.6 Freedom of Choice in Matters of Employment}

It includes freedom of employment or non-employment of the necessary means of exercising this right or in other words, freedom from restriction in respect of employment in the editorial force.

An important decision in which the commercial aspect of the activity of newspapers came up for consideration before the Supreme Court is \textit{Express Newspapers Pvt. Ltd. v. Union of India;\footnote{Supra note 57.}}

In this case, the constitutional validity of the Working Journalists (conditions of service) and Miscellaneous Provisions Act, 1955\footnote{Herein after referred to as The Act.} was challenged being violative of freedom of speech and expression guaranteed under Article 19(1) (A) of the constitution.

The Act was passed to regulate the conditions of service of working journalists and other persons employed in newspaper establishment\footnote{Supra note 57 at 589, (para 15).}. The main contention of the petitioner was that the impugned Act was unconstitutional because it had.

1. The effect of laying a direct and preferential burden on the Press, and

2. A tendency of curtail circulation and fetter their freedom to choose the means of exercising their right.

3. The petition further contended that the Act was likely to undermine the independence of the Press by compelling it to seek government aid.\footnote{Id., at 619, (para 157).}

The State, on the other hand, argued that it was not a direct legislation on the subject of the freedom of the press and was a reform measure, and therefore, did not fall within the prohibition of Article 19(1)(a).

Justice Bhagwati (for himself and B.P. Sinha, Jafar Imam, J.L. Kapur and P.B. Gajendragadkar, J.J.) with a view of determine the constitutional validity of “the Act” stated the broad proposition regarding the nature, scope and extent of freedom of speech and expression after referring, to the decisions of the Supreme Court of the United States of America:\footnote{Id., at 616, (para 142). The U.S. decisions referred were: Grosjean v. American Press Co., (1935); Associated Press v. National Labour Relations Board, (1936); Sheneides v. Urvinger, (1939); Thomas v. Collins, (1994); Termiello v. Chicago, (1949) and Deanharnais v. Illinois, (1951).}

1. The freedom of speech comprehends the freedom of press and the freedom of speech and press are fundamental personal rights of citizens.

2. The freedom of the press rests on the assumption that the widest possible dissemination of information from diverse and antagonistic source is essential to the welfare of the public;

3. Such freedom is the foundation of free government of a free people;

4. The purpose of such a guarantee is to prevent public authorities from assuring the guardianship of the public mind; and

5. Freedom of press involves freedom of employment or non-employment of the necessary means of exercising this right or in other words, freedom from restriction in respect of employment in the editorial force.
Bhagwati, J., further observed that:

No measure can be exacted which have the effect of imposing a precensorship curtailing the circulation or restricting the choice of employment or unemployment in the additional force. Such a measure would certainly tend to infringe the freedom of speech and expression.\textsuperscript{76}

The learned judge further observed that the Press was, however, not immune from the ordinary forms of taxation for support of the government nor from the application of the general laws relating to industrial relations.\textsuperscript{77}

The judge finally upholding the constitutional validity of the Act observed\textsuperscript{78} that the Act had no direct and adverse effect on the freedom of the press.

5.7 Freedom to Comment

Everyone has a fundamental right to form his opinion on any issues of general concern. Open criticism of government policies and operations is not a ground for restricting expression. Intolerance is as much dangerous to democracy as to the person himself. In democracy, it is not necessary that everyone should sing the same song.\textsuperscript{79}

The democracy is a government by the people \textit{viz.}, open discussion. The democratic form of government itself demands from its citizens an active and intelligent participation in the affairs of the community. The public discussion with people's participation is a basic feature and a national process of democracy which distinguishes it from all other forms of government. The democracy can neither work nor prosper unless people go

\textsuperscript{76} Id., at 616, (para 143).
\textsuperscript{77} Id., at 616, (para 144).
\textsuperscript{78} Id., at 619, (para 159).
out to share their views. The truth is that public discussion on issues relating to administration has positive value.\textsuperscript{80}

\textit{Express Newspapers (P) Ltd. v. Union of India}\textsuperscript{81} constitutes a significant pronouncement seeking to protect the freedom of the press against executive excesses. The petitioner-Indian Express newspapers constructed a building on a piece of land in Delhi on a perpetual lease from the Central Govt. The Govt. served a notice of reentry after forfeiture of the lease. The company challenged the reentry order through a writ petition under Article 32.\textsuperscript{82}

It was argued by the Express newspapers that the notice constituted a direct threat to the freedom of the press implicit in Article 19(1)(a) guaranteeing freedom of speech and expression. The order was challenged as mala fide and illegal, its purpose being to bring about the closure of the Indian Express which had been critical of the Government\textsuperscript{83}. Article 14 of the constitution was also involved as the government order was characterized as arbitrary.\textsuperscript{84}

Justice Sen, speaking for the majority of the Supreme Court,\textsuperscript{85} held:\textsuperscript{86}

Here, the impugned notices of re-entry upon forfeiture of lease and of the threatened demolition of lease and of the threatened demolition of the Express buildings are intended to and meant to silence the voice of the Indian Express. It must logically follow that the impugned notices constitute a direct immediate threat to the freedom of the press and are thus violative of Article 19(1)(a) read with art 14 of the construction.

\textsuperscript{80} \textit{Id.}, at 595-596, (para 45).
\textsuperscript{81} AIR 1986 SC 872.
\textsuperscript{82} \textit{Id.}, at 876, (para 1).
\textsuperscript{83} \textit{Id.}, at 876, (para 3).
\textsuperscript{84} \textit{Id.}, at 876, (para 4).
\textsuperscript{85} A.P.J. Sen delivered main judgement, E.S. Venkataramiah, and Mishra, R.B., JJ., concurred with him; \textit{Id.}, at 872.
\textsuperscript{86} \textit{Id.}, at 909-910, (para 77).
Sen, J., also ruled that the impugned notices “were actuated with an ulterior and extraneous purpose” and “were wholly malafide and politically motivated”. 87

Mr. Justice Sen’s views on the question whether freedom of press is inclusive in freedom of speech and expression is really commendable, when he observed: 88

It is now firmly established by a series of decisions of this Court and is a rule written into the constitution that freedom of the press is comprehended within the right to freedom of speech and expression guaranteed under Article 19(1)(a).

5.8 Right of Reply

Freedom to air one’s view is the lifeline of any democratic institution. The freedom extends to citizens being permitted to use the media to answer the criticism leveled against the views propagated by him. In other words, it impliedly recognizes the right of reply or the right of rebuttal.

The Supreme Court decision in Life Insurance Corporation of India v. Manubhai D. Shah, 89 has laid down new dimension to press freedom. The issues in this case relates to the scope of constitutional policy of freedom of speech and expression of press included under Article 19(1)(a) of the constitution. Briefly the facts of the case were as follows:

The respondent, Prof. Manubhai Shah, Executive Trustee of the Consumer Education and Research into the working of the Life Insurance Corporation (LIC) published on July 19, 1978, a study paper titled, “A fraud on policy holder – A shocking story”. 90

87 Ibid.
88 Id., at 908, (para 74).
89 Supra note 34.
90 Hereinafter referred to as Study Paper.
This study paper was highly critical of the working of the LIC. This paper was widely circulated by the respondent Mr. N.C. Krishnan of the LIC prepared a counter to the respondent’s study paper and published the same as an Article in The Hindu, a daily newspaper challenging Manubhai Shah’s conclusions. Shah sent a rejoinder which The Hindu published. The petitioners contended that LIC publishes a magazine called Yogakshema for informing its members, staff and agents about its activities. Mr. Krishnan’s Article which was in the nature of a counter to the respondent’s study paper was published in this magazine. The respondent, therefore, requested the LIC to publish his rejoinder to the said Article in the said magazine but his request was refused.\(^1\)

LIC’s refusal to publish respondent’s rejoinder in Yogakshema was successfully challenged in Gujarat HC. The petitioner’s contention before the Gujarat HC was that the refusal by the LIC to publish his rejoinder in Yogakshema violated his rights under Article 14 and 19(a) of the constitution.\(^2\)

The High Court came to the conclusion that the LIC’s stand that the magazine was an-in-house magazine was untenable for two reasons, namely, (1) it was available to any person on payment of subscription; and (2) it invited Articles for publication there in from members of the public. The H.C. further held that assuring that the magazine was an in-house magazine as contended by the LIC the LIC cannot under the guts of publication of an in-house. Magazine violates the fundamental rights of the respondents. The High Court observed that in the interest of the democracy and free society and magazine should be available to both-in adviser and a critic, for discrimination of information. The High Court concluded that the LIC had violated the respondent’s Fundamental right under Article 19(1)(a) of the constitution by refusing to publish his rejoinder in its magazine, and the Court directed the LIC to publish the respondent’s rejoinder in the

\(^1\) Id., at 646, (para 3).
\(^2\) Ibid.
immediate issue of Yogakshema. This view of the Gujarat High Court was assailed by the LIC before the Supreme Court.93

The Supreme Court rejected the appeal of the LIC and held that the LIC being a “State” within the meaning of Article 12 must function in the best interest of the community. The LIC was created under the life insurance to the best advantage of the community. The community was, therefore entitled to know whether or not this requirement of the statute was being satisfied in the functioning of the LIC.

Referring to the earlier decisions, the Supreme Court explained the scope of the freedom of speech and expression guaranteed under Article 19(1)(a) and observed:

Freedom of speech and expression is a natural right which a human being acquires on birth. It is, therefore, a basic human right. The words freedoms of speech and expression have to be broadly construed to include the freedom to circulate one’s views by words of mouth or in writing or through audio-visual instrumentalities. Once it is conceded, and it cannot indeed be disputed that freedom of speech includes freedom of circulation. Of ideas, there can be no doubt that the right extends to the citizen being permitted to use the media to answer the criticism leveled against the views propagated by him.94

5.9 Right to Criticize

The question of civil liberty arises not when the people of a country obediently carry out the orders of the government. It arises only when there is a conflict between the people and the executive authority. The idea of civil liberty is to have the right to oppose the government. On the other

93 Ibid.
94 Ibid.
hand, for a public man, press is an essential tool which formulates public opinion and howsoever he may be irritated at times with the press, he must ultimately be inclined to love the press.\textsuperscript{95}

The fundamental freedoms enumerated under Article 19 are not necessarily and in all circumstances mutually supportive, although taken together they weave a fabric of a free and equal democratic society. Some restrictions on one’s rights may be necessary to protect another’s rights in a given situation.

\textit{For example, in M.H. Devandrappa v. Karnataka State Small Industries Development Corporation,}\textsuperscript{96} the appellant was an employee of the respondent-corporation and also the president of the employee’s welfare association. He wrote a letter to the Governor directly without the permission of the employer alleging malfunctioning of the corporation. He stated that the corporation was likely to be wound up on account of bad administration, corruption and nepotism. He also published a press statement in this regard in the local newspaper. The above action of the appellant was in direct conflict with the conduct rules of the employer-corporation. After a departmental enquiry, the appellant was dismissed from service.

The Supreme Court upheld the imposition of penalty and rightly rejected the contention of the appellant that he was exercising his constitutional right under Article 19(1)(a) and (c) read with clauses (2) and (4). A proper balancing of interests of an Individual as a citizen and the right of the state to frame a code of conduct for its employees in the proper functioning of the state is required. In the present case the freedom of speech of an employee was circumscribed by the need for efficiency and discipline of the employment.

\textsuperscript{95} Nehru, \textit{Selected Works}, Vol. 7, p. 428, 439.
\textsuperscript{96} (1998) 3 SCC 732. See also S.B. Narasimha Prakash v. State of Karnataka. (1997) 2 SCC 425, wherein the High Court refused permission to a judicial officer to publish a commentary on a statute.
It is submitted that acceptance by Government of a dissident press is the measure of the maturity of the nation.\(^{97}\)

*Kedar Nath Singh v. State of Bihar\(^{98}\)* arose out of a constitutional challenge to Sections 124-A and 505 of the Indian Penal Code, 1860 which penalise attempts to excite disaffection towards the government by words or in writing and publications which may disturb public tranquillity. The Supreme Court dismissed the challenge but clarified that criticism of public measures or comments on government action, however strongly worded, would be within reasonable limits and would be consistent with the fundamental right of freedom of speech and expression.

Tolerance of diversity of viewpoints and the acceptance of the freedom to express of those whose thinking may not accord with the mainstream are cardinal values which lie at the very foundation of a democratic form of Government. A society wedded to the rule of law, cannot trample upon the rights of those who assert views which may be regarded as unpopular or contrary to the views shared by a majority. The law does not have to accept the views which have been expressed by the petitioner in the play in order to respect the right of the petitioner as a playwright to express those views.

Respect for and tolerance of a diversity of viewpoints is what ultimately sustains a democratic society and Government. The right of a playwright, of the artist, writer and of the poet will be reduced to husk if the freedom to portray a message—whether it be in canvas, prose or verse—is to depend upon the popular perception of the acceptability of that message. Popular perceptions, however strong cannot override values which the constitution embodies as guarantees of freedom in what was always intended to be a free society.\(^{99}\)

\(^{97}\) Douglas J. in *Terminiello v. Chicago*, 337 U.S. 1 (1949), *Supra* note 75.

\(^{98}\) AIR 1962 SC 955.

5.10 Right to Expression beyond National Boundaries

The question whether an Indian citizen’s right to freedom of speech and expression extends beyond the geographical limits of India was considered by the Supreme Court in *Maneka Gandhi v. Union of India*.

The case concerned a challenge to Section 10(3)(c) of the Passport Act, 1967 which permitted a passport to be impounded ‘in the interest of the general public’. One aspect of the challenge was that the provision infringed Article 19(1)(a) since it precluded the petitioner from exercising her right to free speech and expression abroad. The Court considered whether Article 19(1)(a) was confined to Indian territory, and whether such a right could be said to have been violated in the present case. The Court held that the freedom of speech and expression was not confined to national boundaries and a citizen had the right to exercise that right abroad.

The Court observed that the authors of the Constitution had deliberately chosen not to use words confining the right by refraining from the use of words ‘in the territory of India’ at the end of Article 19(1)(a).

It was argued on behalf of the government that the right under Article 19(1)(a) could not be extended beyond Indian territory since the State could not protect the enforcement of the fundamental right to free speech in a foreign country. The Court rejected that argument and recognized that on account of the vast improvement in technology and communications, a person, while in India, could transmit information to a foreign country and in the process exercise her right to free expression abroad, which if restricted by the State, would amount to an infringement of Article 19(1)(a).

Similarly, the Court observed that the right to go abroad had already been recognised by the Supreme Court as being part of the right to personal liberty under Article 21 and, thus, the operation of fundamental rights had not been confined to the territory of India.

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100 Supra note 54.
The Court also examined whether the right to go abroad, could in itself be part of the fundamental right to free speech and expression. The Court held that although going abroad may be necessary in a given case for the exercise of the right to free speech that could not elevate it to the status of an integral part of the fundamental right to free speech and expression. The Court held:

Every activity that may be necessary for exercise of freedom of speech and expression or that may facilitate such exercise or make it meaningful and effective cannot be elevated to the status of a fundamental right as if it were part of the fundamental right of free speech and expression. Otherwise, practically every activity would become part of some fundamental right or the other and the object of making certain rights only as fundamental rights with different permissible restrictions would be frustrated.\(^\text{102}\)

5.11 Right to Fly National Flag

In *Union of India v. Naveen Jindal*,\(^\text{103}\) the Supreme Court upheld the right of a citizen to fly the national flag. This right was held as being integral to the fundamental right of the citizen under Article 19(1)(a) being an expression of the citizen’s allegiance to and love for his nation. This right is however not an absolute one but is regulated by the Emblems and Names (Prevention of Improper Use) Act, 1950 and the Prevention of Insults to National Honour Act, 1971.

The right to fly the national flag, however, is neither unfettered, unsubscribed, unrestricted nor unchannelised. It is to be noted that the right to fly the flag is regulated by the Emblems and Names (Prevention of Improper Use) Act, 1950 and Prevention of Insults to National Honour Act, 1971.

\(^{102}\) *Supra* note 54 at 302, (para 29).
\(^{103}\) (2004) 2 SCC 510.
It is also true that unrestricted use of the National Flag may result in commercial exploitation of the flag. The unrestricted use of the National Flag may result in its indiscriminate use in procession, meetings etc. Instances of insults to the National Flag as a matter of protest may also occur. It must certainly be treated with the utmost respect and dignity. This might not be possible without imposing any restrictions on its use.

The Flag Code, 2002 is not a law within the meaning of Article 13 of the Constitution of India. Thus, for the purpose of clause (2) of Article 19 it would not restrictively regulate the free exercise of the right of flying the National Flag. But the Flag Code to the extent it provides for preserving respect and dignity of the National Flag, the same deserves to be followed.104 In other words, our National Flag cannot suffer any indignity.105

5.12 Compelled Speech

The right to free speech and expression also includes compelled speech often known as a must carry provision in a statute, as it furthers informed decision-making.

In Union of India v. Motion Picture Assn.,106 there was a challenge by distributors and exhibitors of motion pictures to the compulsory screening of educational scientific or documentary films or films carrying news or current events along with other films.107 The short films produced by the Films Division of the Government of India were required to be screened along with the usual films exhibited in cinema halls and the exhibitors were required to enter into agreements with the Films Division for supply of such films and pay for such supply a rental of 1% of the net collections. The Court held that the test was to examine whether the purpose of the compulsory speech in question was to promote freedom of speech or to curtail it. S. V. Manohar, J. observed:

104 Ibid.
106 (1999) 6 SCC 150; See also M.C. Mehta v. Union of India, (1992) 1 SCC 358, where in a public interest litigation on environmental pollution, the Supreme Court directed that all cinema halls must show short films to spread environmental awareness.
107 See the Cinematograph Act, 1952, Sections 12 (4) and 16.
We have to examine whether the purpose of compulsory speech in the impugned provisions is to promote the fundamental freedom of speech and expression and dissemination of ideas, or whether it is to restrain this freedom. The social context of any such legislation cannot be ignored. When a substantially significant population body is illiterate or does not have easy access to ideas or information, it is important that all available means of communication particularly audio visual communication, are utilised not just for entertainment but also for education, information, propagation of scientific ideas and the like. The best way by which ideas can reach this large body of uneducated people is through the entertainment channel which is watched by all–literate and illiterate alike. To earmark a small portion of time of this entertainment medium for the purpose of showing scientific, educational or documentary films, or for showing news films has to be looked at in this context of promoting dissemination of ideas, information and knowledge to the masses so that there may be an informed debate and decision making on public issues. Clearly, the impugned provisions are designed to further free speech and expression and not to curtail it. None of these statutory provisions require the exhibitor to show a propaganda film or a film conveying views which he objects to.  

The contention of the exhibitors, that the exaction by the government of 1% of their net collections for these documentaries, exhibiting which was

\[108\] Supra note 106 at 165 (para 17).
costing the exhibitors vital business time, did not find favour with the Court. The Court found that the Films Division was incurring huge expenses on the production and distribution of these films throughout India and was able to recover only part of the expenditure from the impugned levy. There was nothing excessive or unreasonable about the charge.

5.13 Right of the Press to Interview Prisoners

In *Prabha Dutt v. Union of India*, the petitioner was seeking to interview the condemned prisoners Billa and Ranga. The Court held that the press does not have an absolute or unrestricted right to information and there is no obligation on the part of citizens to supply that information. An interview may be conducted provided the convict gives his consent to being interviewed. The right to interview would also be subject to Rule 549 (4) of the Manual for the Superintendence and Management of Jails which allows every prisoner sentenced to death to give interviews, engage in communications with relations, legal advisors, etc. as the Jail Superintendent considers reasonable. The Court held that where there are ‘weighty’ reasons to do so, the interview can be refused, although the reasons ought to be recorded in writing. The Supreme Court took a similar view in *Sheela Barse v. Union of India*.

In *M. Hasan v. Govt. of AP*, the Andhra Pradesh High Court held that the denial by jail authorities to journalist and videographer to interview the concerned prisoners in jail amounted to deprivation of a citizen’s fundamental right of freedom of speech and expression under Article 19(1)(a) of the Constitution. The reasons given by the jail authorities for refusing permission for interviewing prisoners sentenced to death were that (i) it would give an opportunity to public to campaign for reducing their sentence; (ii) it might lower the position of the Court; (iii) prisoners had not expressed their desire for interview; and (iv) it could not be allowed for safety and security reasons. The Court rightly rejected the above reasons on

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111 Supra note 1.
the ground that these restrictions were not mentioned in Article 19(2) of the Constitution. However, the press should make publication after ascertaining the genuineness, correctness and authenticity from records. The Court has rightly taken the view that a trial by press, electronic media or public agitation is very antithesis of rule of law and it can well lead to miscarriage of justice.113

In *State v. Charulata Joshi*,114 the Supreme Court reiterated the restricted scope of this right. The Additional Sessions Judge had granted the news magazine, India Today blanket permission to interview Babloo Srivastava who was lodged in Tihar Jail. The Court held that the under trial could be interviewed or photographed only if he expressed his willingness. The interview had to be regulated by the provisions contained in the Jail Manuals and could be published in a manner that did not impair the administration of justice.

In case of reporting of such an interview, the press is guided by its own restrictions and censorship as given in Cinematograph Act, 1952. If there is any objectionable element or situation which falls within prohibitions mentioned in Article 19(2), it can be prohibited in public interest.

Thus, at every stage before reporting or releasing, there will be a check and counter check by the authorities. Reporters and producers also are aware of the consequences if they report or exhibit objectionable items or information. They may also be responsible for prosecution. Even the Jail Manual permits the prisoner to be interviewed by others including friend provided he is willing. A friend includes a journalist and which in turn includes a videographer. In view of all this, it is not just and proper for jail authorities to prevent the petitioners to interview the condemned prisoners orally and by videography.

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112 *Id.*, at 47.
However, the Court has also held that right of press to interview prisoner in jail is not unfettered.\textsuperscript{115}

5.14 Right to Silence

The right to speech implies the right to silence. It implies freedom, not to listen, and not to be forced to listen. The right comprehends the freedom to be free from. A loudspeaker forces a person to hear what he wishes not to hear. The use of a loudspeaker may be incidental to the exercise of the right but, its use is not a matter of right or part of the rights guaranteed by Article 19(1)(a).\textsuperscript{116}

When a person enjoys his right under Article 19(1)(a), he must do so causing very minimum inconvenience to others. A person cannot claim his freedom of speech so as to interfere with the human rights and fundamental rights of others.\textsuperscript{117}

The question of noise pollution has arisen in connection with the use of loud speakers. Loud speakers amplify sound manifold and thus create noise pollution. The question that arose was how far the use of loud speakers be regulated under Article 19(1)(a).\textsuperscript{118}

However, in the USA, an uncontrolled discretion vested in the Chief of Police to permit or not to permit the use of loudspeakers at public meetings has been held to be bad for “loudspeakers are today indispensable instruments of effective public speech”.\textsuperscript{119}

To begin with, the Courts in India also took the same position. It was ruled that the right to use loudspeakers can be regarded as a Fundamental Right in itself being a part of the right of the freedom of speech and expression and, so, a blanket ban on the use of loudspeakers cannot be imposed. A person has a right to propagate, communicate and circulate his

\textsuperscript{115} Ibid.
\textsuperscript{116} Noise Pollution (V), In re, (2005) 5 SCC 733; AIR 2005 SC 3136.
\textsuperscript{117} New Road Brothers v. Commissioner of Police, Ernakulam, AIR 1999 Ker 262.
\textsuperscript{118} Supra note 116 at 1111.
views through all means of communication and through all forms of media for reaching a wider audience. Reasonable restriction can, however, be imposed on this right under Article 19(2).

An uncontrolled discretion cannot be given to executive officers to control the use of loudspeakers, etc. The discretion will have to be controlled as exercisable only when there is an apprehension of a breach of peace. A condition that at a public meeting, loudspeakers should not be used at any time infringes Article 19(1)(a).

In earlier cases, for example, in *Indulal v. State of Gujarat*, the Gujarat High Court held that freedom of speech includes freedom to circulate one’s views in any manner.

On the other hand, lately the Courts have started adopting a different stance. For example in *K. Vent v. Director General of Police*, a single Judge of the Kerala High Court expressed the view that he was not inclined to hold that the right to use loudspeakers was a Fundamental Right in itself on the ground that sound pollution was an accepted danger and indiscriminate use of loudspeakers could not be permitted. In a given situation, it was for the authority concerned to satisfy itself whether a loudspeaker could be used or not.

In *P.A. Jacob v. Suptd of Police, Kottayam*, the Kerala High Court has taken noise pollution into account saying, “exposure to high noise is a known risk”. The Court has observed that, howsoever, wide a right is, it cannot be as wide as to destroy similar rights in others”.

It is submitted that the people use loudspeakers to disseminate music, speeches and what not without caring for the rights of others who live in the surround areas. The Kerala High Court held that while the use of a loud

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121 AIR 1963 Guj 259.
122 AIR 1990 Ker 344.
123 AIR 1993 Ker 1.
124 Ibid.
speaker may be incidental to the exercise of a right to freedom of speech and expression, its use was not a matter of right. No one had a right to trespass on the mind or ear of another and commit auricular or visual aggression. Such a use of the loud speaker exposed unwilling persons to dangerous and disastrous levels of noise amounting to infringement of their right to life.

The Court added that the right to life guaranteed by Article 21 comprehended the right to safe environment including access to good air and freedom from noise. The Court pointed out the consequences of noise pollution. The Court, however, also mentioned that the right to speech included the right to silence implying freedom not to listen and not to be forced to listen. It is submitted that such right to silence and the right not to listen is part of the right to personal liberty which includes the right to privacy.

It is, further, submitted that the right not to speak besides being derived as part of the right to freedom of speech and expression could also be very easily be comprehended within the right to be let alone which is part of the right to personal liberty.

The Supreme Court has ruled in *Church of God v. K.K.R.M.C. Welfare Association*, that the question of religious freedom does not arise as no religion requires that prayers be performed through voice amplifiers. The Court directed that the guidelines framed by the Government under the relevant rules framed Under the Environment Protection Act, 1986, must be followed by the concerned authorities.

*In All India ADMK v. Chief Secretary, Govt. of Tamil Nadu*, it has been held that expression need not be by spoken or written words. Silent thoughts and certain symbols also may be considered forms of speech and be eligible for protection.

In Selvi and Others v. State of Karnataka, the legality of three scientific tests namely narcoanalysis, polygraph test (lie detector test) and Brain Electrical Activation Profile (BEAP) test was challenged, inter alia, on the ground that these tests violate the test subject’s rights under Article 20(3) and 21 of the Constitution and under Section 161(2) of the Criminal Procedure Code, 1973.

The Court held that testimonial compulsion is prohibited by law. A person has a right to remain silent on questions which may incriminate him. This protection is lost in case of narcoanalysis because the test subject is under the influence of a drug injected into his body and he loses control over his verbal responses and, therefore, cannot decide consciously about the questions which he should not answer.

5.15 Right to Protest

In Railway Board v. Narinjan Singh, it was held that there is no fundamental right for anyone to hold meetings in government premises. It was observed:

The fact that the citizens of this country have freedom of speech, freedom to assemble peaceably and freedom to form associations or unions does not mean that they can exercise those freedoms in whatever place they please.

The right to hold meetings in public spaces is subject to control of the appropriate authority regarding the time and place of the meeting. Orders, temporary in nature, can be passed to prohibit the meeting or to prevent an imminent breach of peace. Such orders constitute reasonable restriction upon the freedom of speech and expression. This view has been followed consistently by this Court.

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130 (1969) 3 SCR 548 at 554.
Within certain limits, picketing or demonstration may be regarded as the manifestation of one’s freedom of speech and expression. “Peaceful picketing is free speech. Non violent acts are like words”. Picketing or demonstration is a non-violent act of persuasion.\footnote{Thornhill v. Alabama, 310 U.S. 88 (1940).}

As regards government servants, the judicial view appears to be that while banning demonstrations by them is not valid, a strike by them can be validly prohibited. A rule made by the Bihar Government prohibited government servants from participating in any demonstration or strike in connection with any matter pertaining to their conditions of service. The rule was challenged. The Supreme Court said that a government servant does not, by accepting government service, lose his fundamental rights under Article 19. In the instant case, the government justified the rule as being in the interests of ‘public order’. Nevertheless, the Court declared the rule bad as it banned every type of demonstration howsoever innocent, and did not confine itself to those forms of demonstrations only which might lead to a breach of public tranquility, or would fall under the other limiting criteria specified in Article 19(2). However, the rule was not held bad in so far as it prohibited a strike as there was no fundamental right to resort to strike.\footnote{Kameshwar Pd. v. State of Bihar, AIR 1962 SC 1166: 1962 Supp (3) SCR 369. Damodar v. State of Bombay, AIR 1951 Bom. 459.}

A demonstration is a visible manifestation of the feelings or sentiments of an individual or a group. It is thus a communication of one’s ideas to others and is in effect a form of speech or expression, because speech need not be vocal since signs made by a dumb person would also be a form of speech and expression. Accordingly, certain forms of demonstration would fall under Art. 19(1)(a). However, there is no fundamental right to resort to strike.\footnote{Thornhill v. Alabama, 310 U.S. 88 (1940).}

valid if it imposed a reasonable restriction in the interests of public order. The Court did however emphasize that government servants are subject to the rules of discipline, which are intended to maintain discipline among them and to lead to an efficient discharge of their duties.

The above-stated principle has been reiterated by the Court in other causes as well. Section 3 of the Essential Services Maintenance Ordinance, 1960, authorised the Central Government to prohibit any strike in any essential service in the public interest. Going on a prohibited strike became illegal and punishable with imprisonment. The provision was declared valid as it did not curtail freedom of speech and there was no Fundamental Right to go on a strike.\footnote{Radhey Shyam v. P.M.G., Nagpur, AIR 1965 SC 311: (1964) 7 SCR 403.}

In a landmark decision in \textit{Bharat Kumar},\footnote{Bharat Kumar K. Palicha v. State of Kerala, AIR 1997 Ker 291.} a full Bench of the Kerala High Court has declared “\textit{Bandhs}” organised by political parties from time to time as unconstitutional being violative of the Fundamental Rights of the people. The Court refused to accept it as all exercise of the freedom of speech and expression by the concerned party calling for the \textit{Bandh}. When a \textit{Bandh} is called, people are expected not to travel, not to carry on their trade, not to attend to their work. A threat is held out either expressly or impliedly that any attempt to go against the call for \textit{Bandh} may result in physical injury.

A call for \textit{Bandh} is clearly different from a call for general strike or burial. There is destruction of public property during a \textit{Bandh}. Accordingly, the High Court has directed that a call for a \textit{Bandh} by any association, organisation or political party and enforcing of that call by it is illegal and unconstitutional. The High Court has also directed the State and all its law enforcement agencies to do all that may be necessary to give effect to the Court order.

The Supreme Court has dismissed an appeal against the above-mentioned High Court decision. The Supreme Court refused to interfere with
the High Court decision. The Court has accepted the distinction drawn by the High Court between a ‘Bandh’ and a strike. A Bandh interferes with the exercise of the Fundamental Freedoms of other citizens, in addition to causing national loss in many ways.137

Thus, a three judge bench138 of the Supreme Court in Communist Party of India (M) v. Bharat Kumar,139 while approving Bharat Kumar K. Palicha v. State of Kerala,140 held thus:

There cannot be any doubt that the fundamental rights of the people as a whole cannot be subservient to the claim of fundamental right of an individual or only a Section of the people. It is on the basis of this distinction that the high Court has rightly concluded that there cannot be any right to call or enforce a bandh which interferes with the exercise of the fundamental freedoms of other citizens, in addition of causing national loss in many ways.141

The Supreme Court had also declared the reason why Bandh should be banned. It is submitted that in the name of hartal or Bandh or strike, no person has any right to cause inconvenience to any other person or to cause in any manner a threat or apprehension of risk to life, liberty and property of any citizen or destruction of life and property, and the least to any government or public property. The Supreme Court pointed out that it was high time that the authorities concerned took serious note of this requirement while dealing with those who destroy public property in the name of strike, hartal or Bandh. Any soft or lenient approach for such

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138 J.S. Verma, C.J., B.N. Kirpal and V. N Khare JJ.
139 Supra note 137.
140 Supra note 136.
141 Id., at 136, (Para 3).
offenders would be an affront to the rule of law and challenge to public order and peace.\textsuperscript{142}

In *Ranchi Bar Association v. State of Bihar*,\textsuperscript{143} following the Apex Court decision mentioned above, the Patna High Court has ruled that no party has a right to organise a causing/compelling the people by force to stop them from exercising their lawful active The government is duty bound to prevent unlawful activities like Bandh which invades peoples life, liberty and property. The government is bound to pay compensation to those suffer loss of life, liberty or property as a result of a Bandh because of the failure of the Government to discharge its public duty to protect them.

In appropriate cases, even the organisers of the *Bandh* may be directed to pay compensation. A peaceful strike, which does not interfere with the rights and properties of the people, is however not illegal. In the instant case, the High Court awarded compensation against the State Government for loss of property and death of a person during the Bandh for failure of the authorities to take appropriate action and provide adequate protection to the people’s life, liberty and property. The Government failed to discharge public duty to protect the people during the *Bandh*.\textsuperscript{144}

*In Kerala Vyapari Vyavasayi Ekopana Sanmithi v. State of Kerala*,\textsuperscript{145} the Kerala High Court observed that a political party which indulged in a bandh or hartal by force or intimidation would be violating Section 29 A (5) of the Representation of the People Act, 1951 and the Election Commission could deregister or cancel the registration of such a party. The Court further observed that such a party would be liable to pay damages to those who incurred loss of life or property due to such a bandh.

The bandh decision of the Court was already breached by several bandhs that had taken place since then. It is submitted that Bandhs could not be prevented unless the Representation of the People Act, 1951 is amended


\textsuperscript{143} AIR 1999 Pat 169.

\textsuperscript{144} Supra note 132 at 1096.

\textsuperscript{145} AIR 2000 Ker 389.
and the Election Commission is given power to de-register a party, which violates the Constitution.

Certain writ petitions\textsuperscript{146} were filed before the High Court in which it was alleged that despite the law having been declared by the Supreme Court that calling of a Bandh is unconstitutional\textsuperscript{147} the political parties in the State of Kerala continued to call Bandh under the name and cover of hartal. It was prayed that direction may be issued to the Government of Kerala for taking appropriate measures to give effect to the declaration of law by the Supreme Court in the case of Communist Party of India.\textsuperscript{148} In one of the writ petitions one of the relief sought was to issue a direction to the Election Commission of India to take action against the registered political parties for violation of their undertaking that they will abide by the Constitution by de-registering such parties.

The writ petitions were opposed by the Communist Party of India (Marxist). It was contended that the party did not call for Bandh but only a hartal, that there was only an appeal to the public to join the hartal, that there was no element of compulsion and there was no violation of either the provisions of the Constitution or the decision of the Supreme Court. Indian National Congress (I) also filed counter opposing the petition. It was contended that giving a call for hartal was part of freedom of speech protected under Article 19(1)(a) of the Constitution.

The Election Commission of India also filed its return stating that it does not have power to de-register or cancel the registration of apolitical party under Section 29A of the Act. The High Court overruled the contention of the Respondents and allowed the writ petition. The High

\textsuperscript{146} \textit{Indian National Congress (I) v. Institute of Social Welfare and Ors.}, MANU/SC/0451/2002.
\textsuperscript{147} \textit{Supra note 136}; See also \textit{T.N. Seshan, Chief Election Commissioner of India etc. v. Union of India and Ors.}, MANU/SC/0738/1995; \textit{State of H.P. v. Raja Mahendra Pal and Ors.}, MANU/SC/0227/1999.
\textsuperscript{148} \textit{Supra note 136}. In this case, it was held that there is a distinction between Bandh and hartal. A call for a Bandh involves coercion of others into towing the lines of those who called for the Bandh and that the act was unconstitutional, since it violated the rights and liberty of other citizens guaranteed under the Constitution.
Court, among other things issued a writ of mandamus to the Election Commission to entertain complaints, if made of violation of Section 29A(5) of the Act and, after a hearing, take a decision to de-register or cancel the registration of that party or organization, if it is warranted by the circumstances of the case. The judgment was challenged in appeal.

The Supreme Court held that de-registration of a political party is a serious matter as it involves divesting of the party of a statutory status of a registered political party. Therefore, unless there is an express power of review conferred upon the Election Commission, the Commission has no power to entertain or enquire into the complaint for de-registering a political party for having violated the Constitutional provisions.

However, there are three exceptions where the Commission can review its order registering a political party. One is where a political party obtained its registration by playing fraud on the Commission, secondly it arises out of sub-Section (9) of Section 29A of the Act and thirdly, any like ground where no enquiry is called for on the part of the Election Commission, for example, where the political party concerned is declared unlawful by the Central Government under the provision of the Unlawful Activities (Prevention) Act, 1967 or any other similar law.

The Court further held that neither under the Election Symbols (Reservation and Allotment) Order, 1968 nor under Section 29A of the Representation of the People (Amendment) Act, 1988, the Election Commission has been conferred with any express power to de-register a political party registered under Section 29A of the Act on the ground that it has either violated the provisions of the Constitution or any provision of undertaking given before the Election Commission at the time of its registration.\(^\text{149}\)

The appeal was, thus, partly allowed holding that the Election Commission while exercising its power to register a political party under

\(^{149}\) Supra note 146.
Section 29A of the Act, acts quasi-judicially and decision rendered by it is a quasi-judicial order and once a political party is registered, no power of review having conferred on the Election Commission, it has no power to review the order registering a political party for having violated the provisions of the Constitution or for having committed breach of undertaking given to the Election Commission at the time of registration.\textsuperscript{150} The present case is significant as it reaffirms the decision taken in Communist Party of India case.

The Delhi High Court has held a strike by the Air India pilots as “illegal”. Justice Khetrapal had issued a notice to the Indian Pilots Guild restraining its members and office-bearers from illegal strike. The pilots were also restrained from reporting sick, holding dharnas, staging demonstrations or resorting to any other modes of strike in and outside the company’s offices in Delhi and other regional offices. The judge said allowing such strikes to continue would cause irreparable loss to the company as well as huge inconvenience to passengers travelling by the national carrier.\textsuperscript{151} The Court further ruled that a public service entity could not be held to ransom by protests.\textsuperscript{152}

In \textit{Ramlila Maidan Incident Dt. 4/5.06.2011 v. Union of India},\textsuperscript{153} the Apex Court has held that associating Police as a pre requirement to hold public meetings, dharna and protests, on a large scale, would not infringe the fundamental rights enshrined under Articles 19(1)(a) and 19(1)(b) of the Constitution as this would squarely fall within the regulatory mechanism of reasonable restrictions, contemplated under Articles 19(2) and 19(3). Furthermore, it helps in ensuring due social order and also does not impinge upon the rights of the others, as contemplated under Article 21 of the Constitution of India.

\textsuperscript{150} \textit{Ibid.}
\textsuperscript{151} “Air India Pilot’s Strike Illegal: HC”, \textit{The Tribune, Chandigarh}, 2 (May 10, 2012).
\textsuperscript{152} “HC Declares Strike Illegal, AI Sacks 10 More Pilots”, \textit{The Indian Express}, 1 (May 10, 2012).
The Court opined that as far as maintenance of public order is concerned, the legislature, under Section 144 Cr.P.C., empowers the District Magistrate, Sub-Divisional magistrate or any other Executive Magistrate, specially empowered in this behalf, to direct any person to abstain from doing a certain act or to take action as directed, where sufficient ground for proceeding under this Section exists and immediate prevention and or speedy remedy is desirable.

Further, by virtue of Section 144A Cr.P.C., which itself was introduced by Act 25 of 2005, the District Magistrate has been empowered to pass an order prohibiting, in any area within the local limits of his jurisdiction, the carrying of arms in any procession or the organizing or holding of any mass drill or mass training with arms in any public order. 144 Cr.P.C., therefore, empowers an executive authority, asked by these provisions, to impose reasonable restrictions vis-à-vis the fundamental rights. The provisions of Section 144 Cr.P.C., provide for a complete mechanism to be followed by the Magistrate concerned and also specify the limitation of time till when such an order may remain in force. It also prescribes the circumstances that are required to be taken into consideration by the said authority while passing an order under Section 144 Cr.P.C.154

The Apex Court held that disturbances of public tranquility, riots and affray lead to subversions of public order unless they are prevented in time. Nuisances dangerous to human life, health or safety have no doubt to be abated and prevented. The key-note of the power under Section 144 is to free society from menace of serious disturbances of aggravated character. The Section is directed against those who attempt to prevent the exercise of legal rights by other or imperil the public safety and health. If that be so the matter must fall within the restrictions which the Constitution itself visualizes as permissible in the interest of public order, or in the interest of the general public.155

154 Ibid.  
155 Ibid.
It is submitted that the State has a duty to ensure fulfillment of the freedom enshrined in our Constitution and so it has a duty to protect itself against certain unlawful actions. It may, therefore, enact laws which would ensure such protection. The rights and the liberties are not absolute in nature and uncontrolled in operation. While pacing the two, the clue of justice and fair play requires that State action should neither be unjust nor unfair, lest it attracts the vice of unreasonableness or arbitrariness, resultantly vitiating the law, the procedure and the action taken thereunder.

Thus, it is neither correct nor judicially permissible to say, that taking of police permission for holding of Dharnas, processions and rallies is irrelevant or not required in law. The Court, in the present case, held that the assembly was not illegal as the individuals were all asleep who were taken by surprise altogether of a simultaneous implementation and action under Section 144 Cr.P.C. without being preceded by an announcement or even otherwise giving no time in a reasonable way to the assembly to disperse from the Ramlila Ground. To the contrary, the sleep of this huge crowd was immodestly and brutally outraged and it was dispersed by force making them flee hither and thither, which by such precipitated action caused a mayhem that was reflected in the media.

The Court concluded that the present case was a glaring example of trust deficit between the people and the government. Greater confidence needs to be built between the authorities in power and the public at large. Thus it was held that while considering the threat perception as ground for revoking such permissions or passing an order under Section 144 Cr.P.C., ‘care perception’ has to be treated as an integral parameter of the same. ‘Care perception’ is an obligation of the State while performing its constitutional duty and maintaining social order.156

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156 Ibid.
In *Koluttumottil Razak v. Kerala*, the Supreme Court held that where lawyers boycotted the Courts or went on strike, it infringes rights of litigants to speedy trial, which has been held to be part of the procedure established by law.

It would not be an exaggeration to say that *T.K. Rangarajan v. State of T.N. and Ors.*, is an epoch-making judgment. The Apex Court reiterated in no uncertain terms that there is no fundamental right to strike. The division bench minced no words in castigating the reckless tendency to resort to strikes. The verdict was, of course, a culmination point. Though the judgment was widely welcomed, it also met with stiff opposition from the trade unions. The plea of the union was that the *Rangarajan case* deprived workers of their fundamental right to strike.

The Industrial Disputes Act defines strike as:

Cessation of work by a body of persons employed in any industry acting in combination, or a concerted refusal, or a refusal under a common understanding of any number of persons who are or have been so employed to continue to work or to accept employment.

It is true that strikes have played a very vital role in the past. But that is hardly a justification to confer on them the status of a “Right”. They were justified and, therefore, made available as they led to industrial peace and development, however, they were never accepted as, or as part of, a “Right”.

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159 *Id.* at 589-91. The Court held that there is no fundamental and legal/statutory right to go on strike, and there is no moral or equitable justification to go on strike.
160 The bench consisted of M.B. Shah and A. R. Lakshmanan, JJ.
161 *Supra* note 159.
162 Claimed through and under Article 19 (1) (c) of the Constitution.
163 Section 2 (q) of the Industrial Disputes Act, 1947.
The Apex Court has, thus, in the larger interests of the society, left no stone unturned in denouncing strikes. Donning the robes of a crusader, right from the days of All India Bank Employees’ Association case, the Supreme Court has tried its best to rid the society of the menace of strike.

In Ex. Capt. Harish Uppal v. Union of India, the constitution bench of the Court held: “lawyers have no right to go on strike or give a call for boycott, not even for a token strike”. Commenting on the pernicious effects of strike, the Court further observed: “for just or unjust cause, strike cannot be justified in the present day situation. Take strike in any justice. Sufferer is the society public at large”.

In this regard, the reaction of Khare CJ, a few days before his retirement, is worth mentioning. The issue involved the action of 25 judges of the Punjab and Haryana High Court in proceeding on leave en masse over difference of opinion with their chief justice. This came in for sharp criticism by Khare CJ. He is reported to have told them point blank that their going on leave amounted to strike and such “trade unionism” adopted by them has caused “irreparable damage” to the judiciary. They were asked to desist from activity in future since the Apex Court and several high Courts have been giving rulings against strikes.

In, All India Anna Dravida Munnetra Kazhagam v. Chief Secretary, Govt. of Tamil Nadu, it was held that under Article 19(1)(a), nobody had a right to call for Bandh.

Bandhs do not fall within the fundamental right of speech. A Bandh is a warning to a citizen that he goes for work or opens his shop he would be

165 AIR 1962 SC 171.
167 The bench consisted of G. B Pattanaik, CJI, M. B. Shah, Doraiswamy Raju, S. N. Variava and D. M. Dharmadhikari JJ.
168 Ibid note 166.
169 Ibid.
170 Reported in Deccan Herald at 6, (April 27, 2004).
171 Supra note 127.
prevented. Even if legislature does not prohibit them, Courts should intervene to protect the right to work or right to study.

5.16 Right to Marry Person of One’s Choice

In Ashok Kumar Todi v. Kishwar Jahan & Others, it was held that right to marry person of one’s choice outside one’s caste is a facet of freedom of expression. Police officials have no role in their conjugal affairs and the law enforcing authorities have no right to interfere with their married life.

The facts of the case were as follows—Rizwanur Rahman fell in love with Priyanka Todi, the daughter of Ashok Kumar Todi, and married her on 18.8.2007 under the Special Marriage Act, 1954. They also registered their marriage before the notified authority and obtained the certificate for the same. Pursuant to the same, Priyanka Todi left her father’s house on 31.8.2007 and went to live in her husband’s house at Tijala Lane within the jurisdiction of Karaya Police Station, Kolkata. She informed her father about their marriage and also informed the Police Commissioner as well as Dy. Commissioner of Police (South), Superintendent of Police, Parganas (S), the Officer-in-charge, Karaya Police Station and the Officer-in-charge, Bidhan Nagar Police Station. On a complaint made by Pradip Todi, Priyanka Todi and Rizwanur Rahman were summoned to Police HQ., Lalbazar, Kolkata on 8.9.2007 and the custody of Priyanka Todi was handed over to Anil Saraogi—her material uncle with condition that she will return to her husband after one week. Thereafter the dead body of Rizwanur Rahman was found on 21.9.2007 on the railway tracks between Dum Dum and Bidhan Nagar Road Stations with injuries and his head smashed. The details were furnished by the mother and brother of the deceased about the interference by the various police officers in their marital efforts and they suspected the hands of the girl’s relatives behind the murder.174

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172 Supra note 137.
173 AIR 2011 SC 1254.
174 Id., at 1258.
The Supreme Court observed that the caste system was a curse on the nation and the sooner it is destroyed the better. In fact, it was dividing the nation at a time when there was a need to be united to face the challenges before the nation. Hence, inter-caste marriages were in fact in the national interest as they result in destroying the caste system. However, disturbing news was coming from several parts of the country that young men and women, who undergo inter-caste marriage, were threatened with violence, or violence is actually committed on them. The Supreme Court held that such acts of violence or threats or harassment were wholly illegal and those who commit them must be severely punished. This is a free and democratic country, and once a person becomes a major he or she can marry whosoever he/she likes. If the parents of the boy or girl do not approve of such inter-case or inter-religious marriage the maximum they can do is that they can cut-off social relations with the son or the daughter, but they cannot give threats or commit or instigate acts of violence and cannot harass the person who undergoes such inter-caste or inter-religious marriage.\textsuperscript{175}

The Court further directed that the administration/police authorities throughout the country would see to it that if any boy or girl who is a major undergoes inter-caste or inter-religious marriage with a woman or man who is a major, the couple is not harassed by anyone nor subjected to threats or acts of violence, and anyone who gives such threats or harasses or commits acts of violence be taken to task by instituting criminal proceedings by the police against such persons and further stern action is taken against such persons as provided by law.\textsuperscript{176}

The Court ruled that both Rizwanur Rahman and Priyanka Todi married on their own will, who were majors, and the marriage was duly registered under the notified authority, the police officials have no role in their conjugal affairs and the law enforcing authorities have no right to interfere with their married life and, in fact, they are duty bound to prevent others who interfere in their married life.

\textsuperscript{175} Id., at 1260.
\textsuperscript{176} Id., at 1263.
The Court opined that a man is born free and has the right to stay free unless he indulges in unlawful activities which, if proved, may result in penal consequences depriving him of such right. The Constitution guaranteed this right to Rizwanur Rahman. By marrying Priyanka Todi, he did not commit any crime. He had, therefore, the absolute right to live a life which is decent, complete, fulfilling and worth living.\textsuperscript{177}

The Court, thus, upheld the right to freedom of conscience and expression and included under Article 19 the right of a person to marry with another person of his choice outside one's caste.\textsuperscript{178}

In \textit{Lata Singh v. State of Uttar Pradesh},\textsuperscript{179} the Supreme Court held that citizens have a right under Article 19(1)(a) to have inter-caste marriages. It was also held of the caste system. According to the Court, the nation is passing through a crucial transitional period in our history, and Supreme Court could not remain silent in matters of great public concern, such as the case in hand. Thus, it was held that inter-caste marriages are in national interest resulting in destruction of caste system.

5.17 Freedom of Speech and Immunity from Imposing Any Special Tax

The freedom of press includes the immunity from any tax specially imposed on the press or advertisement on a newspaper which was calculated to limit its circulation. Infact, tax on newsprint is thought as tax on knowledge.

The Supreme Court decision in \textit{Indian Express Newspapers (Bombay) Pvt. Ltd. v. Union of India}\textsuperscript{180} has been described as a landmark judgment in the development of law relating to the freedom of press in India. In this case the important question about the freedom of the press \textit{vis-a-vis} the state's power of taxation were considered in detail by Supreme Court in a group of petitions, a number of companies running newspaper challenged the duty

\textsuperscript{177} \textit{Ibid.}
\textsuperscript{178} Id., at 1263.
\textsuperscript{179} (2006) 5 SCC 475.
\textsuperscript{180} AIR 1986 SC 515.
levied on newsprint under the relevant Acts and various notifications there under. It was a common ground that 80 percent of expenditure involved in printing a newspaper was attributable to newsprint.\(^{181}\)

The petitioner contended\(^{182}\) that the imposition of import duty on newsprint has the effect to crippling the freedom of speech and expression guaranteed by the constitution, as it led to the increase in price of newspapers and inevitable consequence of reduction of their circulation. In essence, the main contention of the petitioners was that the imposition of levy on newsprint policy was violative of freedom of speech and expression under Article 19(1)(a) of the constitution.

Mr. Justice Venkataramiah (as he then was) for himself and Chinnappa Reddy and A.P. Sen J.J.,\(^{183}\) discussed at length the importance of freedom of press in a democratic society, and the role of the Court in dealing with that freedom Venkataramiah, J., at the outset observed that “Our constitution does not use the expression ‘freedom of press’ in Article 19(1)(a) which guarantees freedom of speech and expression”.\(^{184}\)

After citing the observations made in the constituent assembly on the freedom of speech, and the views of Jawahar Lal Nehru that he would “rather have a completely free press with all the danger involved in the wrong use of that freedom than a suppressed or regulated press”.

Venkataramiah, J., referred to the Supreme Court’s observations in Romesh Thappar’s case and in Brij Bhushan’s case that “there would not be any kind of restriction on the freedom of speech and expression other than those mentioned in Article 19(2)\(^{185}\) and thereby made it clear that there could not be any interference with that freedom in the name of public

\(^{181}\) \textit{Id.}, at 519, (para 1).
\(^{182}\) \textit{Id.}, at 519-520, (para 4).
\(^{183}\) Justice Venkataramiah delivered the judgement for himself and on behalf of Reddy and Sen, JJ.
\(^{184}\) \textit{Supra} note 180.
\(^{185}\) Under Article 19(2), reasonable restrictions cannot be laid down on the ground of “in the public interest”.

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interests. Venkataramiah, J., then referred to Article 19 of the universal declaration of Human Rights Article 19 of the International Convent on Civil and Political Rights; Article 10 of the European Convention on Human Rights and the first Amendment to the U.S. Constitution, all of which provided for the freedom of speech and the press, thus emphasizing the importance and necessity of the freedom of speech and the freedom of press in a free democratic society. He then referred to certain publications which emphasized the importance of the freedom of speech, and then observed that the “carrot and stick policy” employed by government to interfere with the free functioning of the Press led to many malpractices.

It is with a view to checking such malpractices which interfere with free flow of information, that democratic constitutions all over the world have made provisions guaranteeing the freedom of speech and expression laying down the limits of interference with it. It is, therefore, the primary duty of all the national Courts to uphold the said freedom and invalidate all laws or administrative action which interfere with it, contrary to the constitutional mandate.

Further the importance attached to the freedom of speech and the press to which he had drawn attention applied equally to the Indian Courts and he cited the undernoted cases in which our Supreme Court had very strongly pronounced in favour of the freedom of the press. He also referred to the observations of the Second Press Commission Report (1982). After emphasizing the importance of freedom of speech and the freedom of press, Venkataramiah, J., considered whether “it is open to the state to leafy any tax on any of the aspects of the press industry”. He contrasted the first Amendment to the U.S. Constitution, which conferred the right to freedom

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186 Supra note 180 at 524-525, (para 24).
188 Frank C. Newman and Karel Vasak; see Id., at 526, (para 29).
189 Id., at 527, (para 31).
190 Supra note 4, 13, 25 and 54.
191 Supra note 180 at 529, (para 37), where concept of freedom of press as explained by the second press commission has been referred.
192 Id., at 531, (para 42).
of speech and the press in absolute terms with Article 19(1)(a) which conferred the freedom of speech and expression subject to reasonable restrictions provided for in Article 19(2). Consequently, the Court could not be solely guided by the American decisions though they may be referred to in order to understand the basic principles of the freedom of speech and expression and need for that freedom in a democratic country.\textsuperscript{193}

Venkataramiah, J., then proceeded to consider the judgments in the \textit{Sakal} and \textit{Bennett Coleman} cases which had been relied upon by the petitioners to show that no tax could be imposed on the business of publishing newspapers. He said that having carefully considered those decisions neither of them was concerned with the power of parliament to lay taxes on any goods used by the newspaper industry.\textsuperscript{194}

The learned judge observed that while levying a tax on newspaper industry it should not be an overburden on newspapers which constitute the Fourth Estate in the country, nor it singled out newspaper industry for harsh treatment. He observed:\textsuperscript{195}

A wise administrator should realize that the imposition of tax like the customs duty on newsprint is an imposition on knowledge and would virtually amount to a burden imposed on a man for being literate and for being conscious of his duty as a citizen to inform himself about the world around him.

Venkataramiah, J., then laid down the test for determining the constitutionality of taxing newsprint as:\textsuperscript{196}

In view of the intimate connection of newsprint with the freedom of the press, the tests for determining the vires of a statue taxing newsprint have, therefore, to be

\begin{footnotesize}
\begin{itemize}
  \item \textsuperscript{193} \textit{Ibid.}
  \item \textsuperscript{194} \textit{Id.}, at 539, (paras 64-66).
  \item \textsuperscript{195} \textit{Id.}, at 539, (para 66).
  \item \textsuperscript{196} \textit{Id.}, at 540, (para 67).
\end{itemize}
\end{footnotesize}
different from the test usually adopted for testing the vires of other taxing statutes. In the case of ordinary taxing statutes, the laws may be questioned only if they are either openly confiscatory or colourable device to confiscatory or colourable device to confiscate. On the other hand in the case of tax on newsprint it may be sufficient to show a distinct and noticeable burdensomeness, clearly and directly attributable to tax.

The reasons for applying different tests in case of newspaper industry were- firstly, the Public interest in freedom of the press stems from the requirements that members of a democratic society should be sufficiently informed that may protect themselves. And secondly, freedom of expression as writers have observed, has four broad social purposes to serve: (i) it helps an individual to attain self-fulfillment, (ii) it assists in the discovery of the truth, (iii) it strengthens the capacity of an individual participating in the decision making and (iv) it provides a mechanism by which it would be possible to establish a reasonable balance between stability and social change. All members of society should be able to form their own beliefs and communicate them freely to others. In sum, the fundamental principle involved here is the people’s right to know.

Newspapers enjoy two fundamental rights: (i) freedom of speech and expressive; and (ii) the freedom to engage in any profession, occupation, trade, industry of business. There can be a tax on profession, occupation or trade, and therefore, tax is livable on his newspaper industry. But when such tax transgresses into the field of freedom of expression and stifles that freedom, it can become unconstitutional. As long as it is within reasonable limits and does not impede the freedom of expression it will not be contravening the constitutional limitation. The delicate task of determining

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when the taxing low crosses into the area of freedom of expression and unreasonably interferes with the freedom of expression is left to the Courts, remembering that “newsprint constitutes the body, if expression happens to be the soul”. 198

5.18 Freedom of Speech and Parliamentary Privileges

The term “parliamentary privilege”199 is essentially used to describe the law relating to the privileges or immunities of Parliament and includes its powers to punish for “contempt” or breach of privilege. The privileges, whether of Parliament itself as a collective body or of the individual members, are intended to enable them to carry out their constitutional functions of legislating, debate and enquiry effectively, independently and without interference or obstruction from any quarter.

Article 105 (1) guarantees freedom of speech in Parliament subject of course to the rules and Standing Orders regulating the procedure of Parliament. What makes Article 105 (1) effective and much more than the right of every citizen to free speech guaranteed by Article 19(1)(a), is the immunity from the process of the Courts in respect of anything said in the House. The Privilege is available not only to the Members of Parliament but also, under Article 105(4) of the Constitution, to persons like the Attorney General of India or Ministers who are not members but have a right to speak in the House. The stage has been set for fearless participation in the debates in the House. In order to claim the immunity, what needs to be shown is only that Parliament was sitting and that its

The limitations on the privilege regarding free speech in Parliament are few. One limitation obviously is that the freedom is subject to the

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198 Supra note 180 at 540,( Para 66-68).
199 Erskine May, Parliamentary Practice, 75 (2004) defines “parliamentary privilege” as “...the sum of the peculiar rights enjoyed by each House collectively as constituent part of the High Court of Parliament, and by the members of each House, individually, without which they could not discharge their functions, and which exceed those possessed by other bodies or individuals”.

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constitutional provisions and the rules and procedures of Parliament. The Parliament cannot discuss the conduct of Judges of the Supreme Court and of the Judges of the High Court. Even if there is any violation of these limits it would still be a matter exclusively for Parliament to deal with and the Courts would have no jurisdiction to look into the matter. In view of Article 122, the Courts are also explicitly barred from enquiry into the validity of any proceeding in Parliament. Another exception is of course that Parliament must be sitting. The privilege cannot, arguably, be stretched to cases of casual conversation in the House. A member cannot also claim immunity for any speech that he may make outside the House even if it is a verbatim reproduction of what he has said inside the House.

The provisions of Article 194 are in the same terms as Article 105 but deals with the privileges of Legislative Assemblies. The Supreme Court has opined that the argument that the whole of Article 194 was subject to Article 19(1)(a) overlooked the provisions of Article 194(2). The right conferred on a citizen under Article 19(1)(a) could be restricted by a law which fell within sub-Article 2 of that Article and he could be made liable in a Court of law for breach of such law, but Article 194(2) categorically laid down that no member of the legislature was to be made liable to any proceedings in any Court in respect of anything said or any vote given by him in the Legislature or in committees thereof and that no person would be liable in respect of the publication by or under the authority of the House of such a Legislature of any report, paper or proceedings.

The provisions of Article 194(2), therefore, indicated that the freedom of speech referred to in sub-Article (1) thereof was different from the freedom of speech and expression guaranteed under Article 19(1)(a) and could not be cut down in any way by any law contemplated by Article 19(2).

5.18.1 Parliamentary Privileges and Reporting of Legislative Proceedings

Since an express provision is made for freedom of speech in Parliament in sub-Article (1) of Article 105, it suggests that this freedom is independent of the freedom of speech conferred by Article 19 and unrestricted by the exceptions contained therein business was being transacted.201

The protection is absolute against Court proceedings that have a nexus with what has been said, or a vote that has been cast in Parliament. The second part of sub-Article (2) of Article 105 provides that no person shall be liable to any proceedings in any Court in respect of the publication of any report, papers, votes or proceedings if the publication is by or under the authority of either House of Parliament. A person who publishes a report or papers or votes or proceedings by or under the authority of Parliament is thereby given protection in the same broad terms against liability to proceedings in any Court connected with such publication.202

5.18.2 Basis of Parliamentary Privileges

Freedom of speech is of the utmost importance. A full and free debate is of the essence of a Parliamentary democracy.203 It is of the essence of parliamentary system of Government that people’s representatives should be free to express themselves without fear of legal consequences. What they say is only subject to the discipline of the rules of Parliament, the good sense of the members and the control of proceedings by the Speaker. The Courts have no say in the matter and should really have none.204

201 Tej Kiran Jain v. N. Sanjiva Reddy, (1970) 2 SCC 272. A suit for damages filed by devotees of the Sankaracharya in respect of derogatory remarks made by six members in the House was dismissed by the Supreme Court.
202 Supra note 200.
204 Hidayatulla, C. J. in Supra note 200 at 272, (para 8).
The legislature has been reluctant to define precisely what constitutes a privilege or its breach or what amounts to contempt. But commonly recognised privileges include.\(^{205}\)

(i) The privilege of the freedom of speech and immunity from proceedings.

(ii) The right to control publication of legislative proceedings.

(iii) The right of each House to be the sole judge of the lawfulness of its own proceedings.

(iv) The right of the House to punish members for their conduct in Parliament.

(v) Protection of witnesses, petitioners and their counsel who appear before the House or any committee thereof.

(vi) The right to exclude strangers from the House.

(vii) The right to decline permission for taking of evidence in Courts of law of proceedings in Parliament.

Parliamentary privilege is described as:

The sum of the peculiar rights enjoyed by each House collectively as a constituent part of the High Court of Parliament, and by Members of each House individually, without which they could not discharge their functions, and which exceed those possessed by other bodies or individuals.\(^{206}\)

An extension of privilege is the power of Parliament and the State Legislatures to punish for breach of privilege or for contempt of the House. Contempt of Parliament is:

\(^{205}\) Supra note 2, at 212-213.

\(^{206}\) Supra note 199, at 69.
Any act or omission which obstructs or impedes either House of Parliament in the performance of its functions, or which obstructs or impedes any Member or officer of such House in the discharge of his duty, or which has a tendency, directly or indirectly, to produce such results may be treated as a contempt even though there is no precedent of the offence.\(^{207}\)

Ironically, the very institution whose function it is to define rules of law has been reluctant to clarify the limits of its own powers and privileges. Arguably, it is this lack of precisely defined rules which enables misuse of the power to punish for contempt or for breach of privilege.

On occasion, the use of these powers has brought the legislature into confrontation with the media. Legislative privilege and freedom of speech and expression are both constitutional rights but involve competing interest. On the one hand is the right of members of Parliament and the assemblies to debate freely and without fear of legal consequences. On the other is the ordinary citizen’s right to information about legislative proceedings and that of the media to report and to comment upon matters of public importance. Whether the right to information overrides legislative privilege is a matter of debate.

5.18.3 Privileges under the Indian Constitution

The Constitution of India expressly confers privileges on Parliament and the State Legislatures.\(^{208}\)

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\(^{207}\) *Id.*, at 115.

\(^{208}\) The Constitution of India, 1950, Articles 105 and 194. When the Constitution came into force in 1950, it read:

“105. (1) Subject to the provisions of this Constitution and to the rules and standing orders regulating the procedure of Parliament there shall be freedom of speech in Parliament.

(2) No member of Parliament shall be liable to any proceedings in any Courts in respect of anything done, said or any vote given by him in Parliament or any committee thereof, no person shall be so liable in respect of the publication by or under the authority of either House of Parliament of any report, paper, votes or proceedings.
5.18.3.1 Qualified Privilege

Till 1956, there was no qualified privilege enjoyed by newspapers for publishing proceedings of Parliament. The Parliamentary Proceedings (Protection of Publication) Act, 1956 introduced the concept of qualified privilege. The Act afforded immunity to publications (including newspaper reports and broadcasts on air) from civil and criminal liability in respect of ‘substantially true’ reports of proceedings of either House of Parliament provided the report was untainted by malice and was for the public good.209

The Indira Gandhi government was responsible for repealing the Act during the Emergency of 1975. This was one of the measures taken by her government to muzzle a dissident and inconvenient press.

In 1976, Parliament enacted the 42nd Amendment to the Constitution and Article 105(3) underwent a change:

In other respects, the powers, privileges and immunities of each House of Parliament and of the members and the committees of each House shall be those of that House and of its members and committees at the commencement of Section 21 of the Constitution (Forty-second Amendment) Act, 1976 and as may be evolved by such House of Parliament from time to time.

Article 194 which confers privileges on the State Legislatures was couched in almost identical language.

Section 3, Parliamentary Proceedings (Protection of Publication) Act, 1956. Under Section 3, protection was given only to newspapers as defined in Section 2 or to broadcasting agencies but not to a pamphlet or booklet. Cited in C.K. Daphtary v. O.P. Gupta, (1971) 1 SCC 626.
The implications of the 42nd Amendment were far-reaching. The underlying idea appeared to be to leave the concept of privilege conveniently vague and to dispense with the need to pass a law that defined or curtailed privileges.

Qualified privilege was revived by the Janata government in 1977 after the resounding defeat of the Indira Gandhi-led Congress Party. The Parliamentary Proceedings (Protection of Publication) Act, 1077 was brought into force on almost identical lines as the earlier Act of 1956.\(^{210}\)

This Act, however, relates to publication of proceedings in either House of Parliament; it has no application to proceedings in a State Legislature. Simultaneously, the 44th Amendment to the Constitution added Article 361-A providing a more solid safeguard for the press and rectifying the unsatisfactory position in so far as the State Legislatures were concerned.\(^{211}\)

The 44th Amendment also amended Articles 105(3) and 194(3).\(^{212}\) This Amendment came into force on 20th June, 1979. Article 194(3) also underwent the corresponding change.

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\(^{210}\) Section 3 of the 1977 Act provides:

> “3. (1) Save as otherwise provided in sub-Section (2), no person shall be liable in any proceedings, civil or criminal, in any Court in respect of the publication in a newspaper of a substantially true report of any proceedings of either House of Parliament unless the publication is proved to have been made with malice. (2) Nothing in sub-Section (1) shall be construed as protecting the publication of any matter, the publication of which is not for the public good. Section 4 extends the protection to broadcasting agencies.”

\(^{211}\) Article 361-A reads: “361-A (1) No person shall be liable to any proceedings, civil or criminal, in any Court in respect of the publication in a newspaper of a substantially true report of any proceedings of either House of Parliament or the Legislative Assembly, or as the case may be, either House of the Legislature of a State, unless the publication is proved to have been made with malice: Provided that nothing in this clause shall apply to the publication of any report of the proceedings of a secret sitting of either House of Parliament or the Legislative Assembly, or, as the case may be, either House of the Legislature, of a State. (2) Clause (1) shall apply in relation to reports or matters broadcast by means of wireless telegraphy as part of any programme or service provided by means of a broadcasting station as it applies in relation to reports or maters published in a newspaper. Explanation—In this Article, ‘newspaper’ includes a news agency report containing material for publication in a newspaper.”

\(^{212}\) Amended Article 105(3) reads:
5.18.4 Legislative privileges and Judicial Response

In a number of cases, the Hon’ble Supreme Court has given important rulings in this regard.

In the 1950s, Searchlight, well-known English daily with a wide circulation in Bihar, published an expunged portion of the proceedings of the Assembly containing a bitter attack by a member against the Chief Minister. A notice for breach of privilege was issued against the Searchlight’s editor, who petitioned the Supreme Court claiming, *inter alia*, that his right to free speech under Article 19(1)(a) had been infringed by the notice. Dismissing the petition, the Court held that the report of a member’s speech, part of which had been expunged, would only be regarded as an unfaithful and perverted report and would amount, *prima facie*, to a breach of privilege.213

Whether there had, in fact, been a breach of privilege was a matter for the House to decide.214

Upholding Articles 105 and 194 of the Constitution, the Court held:

> Our Constitution clearly provides that until Parliament or the State Legislature, as the case may be, makes a law defining the powers, privileges and immunities of the House, its members and committees, they shall have all the powers, privileges and immunities of the House of Commons as at the date of the commencement of our Constitution and yet to deny them those powers, privileges and immunities after finding that the House of Commons had them at the relevant time, will not be to

“In other respects, the powers, privileges and immunities of each House of Parliament, and of the members and the Committees of each House shall be such as may be from time to time defined by Parliament by law, and until so defined, shall be those of that House and of its members and Committees immediately before the coming into force of Section 15 of the Constitution (Forty-fourth Amendment) Act, 1978.”

213 Supra note 203.
214 Id., at 412, (para 32).
interpret the Constitution but to remake it. Nor do we share the view that it will not be right to entrust our Houses with these powers, privileges and immunities, for we are will persuaded that our Houses, like the House of Commons, will appreciate the benefit of publicity and will not exercise the powers, privileges and immunities except in gross cases.\textsuperscript{215}

The Court went on to hold that the freedom of speech referred to in Article 194(1) stands on a different footing from the freedom of speech guaranteed under Article 19(1)(a); the former cannot be curbed by any law contemplated under Article 19(2).\textsuperscript{216} Articles 105(3) and 194(3), being constitutional laws and not ordinary laws enacted by Parliament or the State Legislatures, are therefore as supreme as the provisions of Part III of the Constitution on fundamental rights. Any conflict between Article 19(1)(a) and legislative privileges would have to be reconciled, held the Court, by reading Article 19(1)(a) as subject to the latter part of Articles 105 and 194. Article 19(1)(a), being a general provision, would have to yield to Articles 105 and 194.\textsuperscript{217}

The dissenting judgment of Subba Rao, J. in the \textit{M.S.M. case} takes a far more progressive view. Subba Rao, J. referred to an extract from the famous English judgment in \textit{Wason v. Walter},\textsuperscript{218} to emphasise the irrelevance of privilege in the modern day:

\begin{quote}
It seems to us impossible to doubt that it is of paramount public and national importance that the proceedings of the houses of parliament shall be communicated to the public, who have the deepest interest in knowing what passes within their walls, seeing that on what is said and done there, the welfare
\end{quote}

\begin{footnotes}
\item [215] \textit{Id.}, at 407, (para 23).
\item [216] \textit{Id.}, at 408, (para 26).
\item [217] \textit{Id.}, at 410 (para 28).
\item [218] (1868) LR 4 QB 73.
\end{footnotes}
of the community depends. Where would be our confidence in the Government of the country or in the Legislature by which our laws are framed, and to whose charge the great interests of the country are committed—where would be our attachment to the Constitution under which we live— if the proceedings of the great council of the realm were shrouded in secrecy and concealed from the knowledge of the nation?\textsuperscript{219}

Following the Supreme Court’s judgment in \textit{Gunupati Keshavram v. Nafisul Hasan},\textsuperscript{220} Subba Rao, J. held that the privileges of the legislature were subject to Part III of the Constitution, and that where there was a conflict, the privilege must yield to the extent it affects the fundamental right of the citizen.\textsuperscript{221}

In this case, the appellant, a member of the Legislative Assembly of West Bengal was not allowed to ask certain questions in the Assembly. Later, he published those questions in a local journal. The question arose as to whether the publication by a member of a disallowed question fell within the powers, privileges and immunities of the House under Article 194; and whether he was, therefore, immune from prosecution for defamation in respect of that publication.

The Supreme Court held that so long as Parliament does not crystallize the legal position by its own legislation, the privileges, powers and immunities of a House of a State Legislature or Parliament or its members are the same as those of the House of Commons. As in the case of the House of Commons, a member enjoys an absolute privilege only in respect of what he has said within the four walls of the House, not in respect of what he causes to be published without the authority of the House and he could, therefore, be prosecuted for defamation if his speech contained matters defamatory of any person. It was held that the impugned publication

\begin{footnotesize}
\begin{enumerate}
  \item Supra note 203, at 410.
  \item AIR 1954 SC 636.
  \item Supra note 203, at 418, (para 44).
\end{enumerate}
\end{footnotesize}
was not covered by any of the statutory exceptions to defamation contained in Section 499 of the Indian Penal Code.

In another important case *P.V. Narsimha Rao v. State (CBI/SPE)*, the two questions which arose were: (i) whether by virtue of Article 105, a member of Parliament could claim immunity from prosecution on a charge of bribery in a criminal Court; and (ii) whether a member of Parliament is a ‘public servant’ within the meaning of the Prevention of Corruption Act, 1988. The case arose out of charges of criminal conspiracy against members of Parliament belonging to the Congress Party who intended to defeat the non-confidence motion moved against Prime Minister P.V. Narasimha Rao’s government by bribing M.P.s from the Jharkhand Mukti Morcha Party.

In the majority judgment delivered by S.P. Bharucha, C.J. the Court held that the alleged bribe-takers who had voted for the non-confidence motion were protected by Article 105(2), and were not answerable for the conspiracy to defeat the non-confidence motion, since the proceedings arose out of and were in connection with the votes they cast in Parliament.

On the other hand, the protection under Article 105(2) was not available to members of Parliament who had given the bribes. The Court reached this conclusion on a broad interpretation of the expression ‘in respect of’ in Article 105(2) which protects a Member of Parliament against proceedings in Court that ‘relate to or concern, or have a connection or nexus with anything said or a vote given by him in Parliament’.

The majority justified its conclusion by holding that to do otherwise would result in a narrow interpretation of the constitutional guarantee of freedom of speech in Parliament. This was so, even though the Court was quite conscious that the members concerned had acted in gross abuse of their powers.

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222 *Supra* note 200.
223 *Id.* at 626.
224 *Id.* at 729.
The crime of corruption is complete when the bribe is offered or given or solicited or taken.227

The Supreme Court expressed the hope that although Parliament was not a Court of record and could not try members in civil cases or bribe-giving, the House would proceed against them for breaches of privileges or for contempt.228 But predictably, after the members concerned were let off the hook by the Court, no action was taken against them in Parliament.

The minority judgment (S.C. Agarwal, J. and A.S. Anand, J.) is more in keeping with the spirit and intendment of the law rather than its letter. An extract is worth reproducing:

It would indeed be ironic if a claim for immunity from prosecution funded on the need to ensure the independence of Members of Parliament in exercising their right to speak or cast their vote in Parliament could be put forward by a member who has bartered away his independence by agreeing to speak or vote in a particular manner in lieu of illegal gratification that has been paid or promised. By claiming the immunity such a member would only be seeking a licence to indulge in such corrupt conduct.229

The facts of the case were as follows - On 26th July, 1993, a motion of no-confidence was moved in the Lok Sabha against the minority government of P.V. Narsimha Rao. The support of 14 members was needed to have the no-confidence motion defeated. On 28th July, 1993, the no-confidence motion was lost, 251 members having voted in support and 265 against. Suraj Mandal, Shibu Soren, Simon Marandi and Shailender Mahto, members of the Lok Sabha owing allegiance to the Jharkhand Mukti Morcha (the JMM), and Ram Lakhan Singh Yadav, Ram Sharan Yadav, Roshan Lal, Anadicharan Das, Abhay Pratap Singh and Haji Gulam Mohammed, members of the Lok Sabha owing allegiance to the Janata Dal. Ajit Singh group (the J.D., A.S.), voted against the no-confidence motion. Ajit Singh, a

228 Supra note 200, at 732-733, (para 146).
229 Supra note 203, at 672,( para 44).
member of the Lok Sabha owing allegiance to the J.D., A.S., abstained from voting thereon.


A prosecution being launched against the aforesaid alleged bribe givers and bribe takers subsequent to the vote upon the no-confidence motion, cognizance was taken by the Special Judge, Delhi. Charges were framed against P.V. Narsimha Rao under Section 120B IPC r/w Sections 7, 12 and 13(2) r/w 13(i)(d) of the Prevention of Corruption Act, 1988.

Similar charges were framed against the other alleged bribe givers and bribe takers. The persons charged as aforesaid filed petitions in the High Court at Delhi seeking to quash the charges. By the judgment and order, the High Court dismissed the petitions and the aggrieved persons filed an appeal in the Supreme Court. The appeals were heard by a bench of three learned judges-and then referred to a Constitution Bench. The argument on behalf of the appellants, broadly, was that by virtue of the provisions of Article 105, they are immune from the prosecution and that, in any event, they cannot be prosecuted under the Prevention of Corruption Act, 1988.

The Supreme Court held that a Member of Parliament does not enjoy immunity under Article 105(2) or under Article 105(3) of the Constitution from being prosecuted before a criminal Court for an offence involving offer or acceptance of bribe for the purpose of speaking or by giving his vote in Parliament or in any committees thereof. Further, it held that a Member of

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Supra note 200.
Parliament is a public servant under Section 2(c) of the Prevention of Corruption Act, 1988.

The Court held that a vote, whether cast by voice or gesture or the aid of a machine, is treated as an extension of speech or a substitute for speech and is given the protection that the spoken word has.

Two comments were made in regard to the plain language of the first part of sub-Article (2). Firstly, what has protection is what has been said and a vote that has been cast, not something that might have been said but was not, or a vote that might have been cast but was not. Secondly, the protection is broad, being “in respect of. It is so given to secure the freedom of speech in Parliament that sub-Article (1) provides for. It is necessary, given the role members of Parliament must perform.

Since there is no authority competent to remove a Member of Parliament and to grant sanction for his prosecution under Section 19(1) of the Prevention of Corruption Act, 1988, the Court can take cognizance of the offences mentioned in Section 19(1) in the absence of sanction but till provision is made by Parliament in that regard by suitable amendment in the law, the prosecuting agency, before filing a charge-sheet in respect of an offence punishable under Sections 7, 10, 11, 13, and 15 of the 1988 Act against a Member of Parliament in a criminal Court, shall obtain the permission of the Chairman of the Rajya Sabha/Speaker of the Lok Sabha, as the case may be.  

A similar view was taken by the Supreme Court earlier also when it held that the Speakers/Chairman hold a pivotal position in the scheme of Parliamentary democracy and are guardians of the rights and privileges of the House”. The Chairman of the Rajya Sabha/Speaker of the Lok Sabha by virtue of the position held by them are entrusted with the task of preserving the independence of the Members of the House.

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Ibid.

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In order that Members of Parliament may not be subjected to criminal prosecution on the basis of frivolous or malicious allegations at the hands of interested persons, the prosecuting agency, before filing a charge-sheet in respect of an offence punishable under Sections 7, 10, 11, 13 and 15 of the 1988 Act against a Member of Parliament in a criminal Court, shall obtain the permission of the Chairman of the Rajya Sabha/Speaker of the Lok Sabha, as the case may be.\textsuperscript{232}

Another important case \textit{Keshav Singh}'s case,\textsuperscript{233} also known as the Privileges case deals extensively with the scope of the privileges of legislative bodies.

This was a landmark case involving an ugly confrontation between the legislature and the judiciary, leading to an arrest warrant being issued by the Allahabad Legislative Assembly against two judges of the Allahabad High Court. The Supreme Court resolved the matter with an approach far more progressive than that of the majority in \textit{M.S.M. Sharma}.\textsuperscript{234}

The Presidential Reference was made in the following circumstances: The Legislative Assembly of the State of Uttar Pradesh committed one Keshav Singh, not one of its members, to prison for contempt. The warrant it issued was a general warrant, in that it did not set out the facts which had been found to be contumacious. Keshav Singh moved a petition under Article 226 challenging his committal and he prayed for bail. Two learned judges of the Lucknow Bench of the High Court ordered that Keshav Singh be released on bail pending the decision on the writ petition.

The Legislative Assembly passed a resolution requiring the production in custody before it of Keshav Singh, the advocate who had appeared for him and the two judges who had granted him bail. The judges and the advocate filed writ petitions before the High Court at Allahabad. A Full Bench of the High Court admitted their petitions and ordered the stay of

\textsuperscript{232} \textit{Kihoto Hollohon v. Zachillhu and Ors}, (1992) 1 SCR 686.
\textsuperscript{233} \textit{Special Reference No. 1 of 1964}, AIR 1965 SC 745.
\textsuperscript{234} \textit{Supra} note 203.
the execution of the Assembly’s resolution. The Legislative Assembly modified its earlier resolution so that the two judges were now asked to appear before the House and offer an explanation.

The President thereupon made the Special Reference. Briefly put, the questions he asked were:

- Whether the Lucknow Bench could have entertained Keshav Singh’s writ petition and released him on bail; whether the judges who entertained the petition and granted bail and Keshav Singh and his advocate had committed contempt of the Assembly;

- Whether the Assembly was competent to require the production of the judges and the advocate before it in custody or to call for their explanation; whether the Full Bench of the High Court could have entertained the writ petitions of the two judges and the advocate and could have stayed the implementation of the resolution of the Assembly; and

- Whether a judge who entertained or dealt with a petition challenging any order of a Legislature imposing penalty or issuing process against the petitioner for its contempt or for infringement of its privileges and immunities committed contempt of the Legislature and whether the Legislature was competent to take proceedings against the judge in the exercise of its powers, privileges and immunities.

The adjectival clause “regulating the procedure of the Legislature” in Article 194(1) governed, it was held, both the preceding clauses relating to “the provisions of the Constitution” and “the rules and standing orders”. Therefore, Article 194(1) conferred on legislators specifically the right of freedom of speech subject to the limitation prescribed by its first part. By making this sub-Article subject only to the specified provisions of the Constitution, the Constitution makers wanted to make it clear that they
thought it necessary to confer on the legislators freedom of speech separately and, in a sense, independently of Article 19(1)(a). It was legitimate to conclude that Article 19(1)(a) was not one of the provisions of the Constitution which controlled the first part of Article 194(1).

Having conferred freedom of speech on the legislators, Article 194(2) emphasized the fact that the freedom was intended to be absolute and unfettered. Similar freedom was guaranteed to the legislators in respect of the votes they might give in the legislature or any committee thereof. “In other words”, this Court said, “even if a legislator exercises his right of freedom of speech in violation, say, of Article 211, he would not be liable for any action in any Court.”

Similarly, if the legislator by his speech or vote is alleged to have violated any of the fundamental rights guaranteed by Part III of the Constitution in the Legislative Assembly, he would not be answerable for the said contravention in any Court. If the impugned speech amounts of libel or becomes actionable or indictable under any other provision of the law, immunity has been conferred on him from any action in any Court by this clause. It is plain that the Constitution makers attached so much importance to the necessity of absolute freedom in debates within the legislative chambers that they thought it necessary to confer complete immunity on the legislators from any action in any Court in respect of their speeches in the legislative chambers in the wide terms prescribed by Clause (2). Thus, Clause (1) confers freedom of speech on the legislators within the legislative chambers and Clause (2) makes it plain that the freedom is literally absolute and unfettered.

Article 105 confers immunity *inter alia* in respect of anything said in Parliament. The word ‘anything’ is of the widest import and is equivalent to ‘everything’. The only limitation arises from the words ‘in Parliament’ which means during the sitting of Parliament and in the course of the business of Parliament. We are concerned only with speeches in Lok Sabha.

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235  *Supra* note 233.
Once it was proved that Parliament was sitting and its business was being transacted, anything said during the course of that business was immune from proceedings in any Court.\textsuperscript{236}

In the instant case, The President, in exercise of his powers under Article 143(1) of the Constitution, made a reference to the Supreme Court on five questions which were answered thus by the Court:

1. In the facts and circumstances of the case, it was competent for the High Court to entertain the petition under Article 226 challenging the legality of the sentence imposed by the Assembly on Keshav Singh and to pass orders releasing him on bail pending disposal of the petition.

2. Neither the two judges of the High Court nor the advocate had committed contempt of the Assembly in entertaining or in moving the petition under Article 226.

3. It was not competent for the Assembly to direct the production of the two judges or the advocate before it or to call for an explanation of their conduct.

4. A judge, who deals with a petition under Article 226 challenging the decision of a legislature or any penalty imposed by it upon a non-member for a contempt alleged to have been committed outside the House, does not commit contempt of the legislature.

5. The Supreme Court under Article 32 and the High Court under Article 226 are conferred with the jurisdiction to inquire whether the fundamental right of a citizen under Article 21 has been violated by his arrest and detention under a warrant of the Speaker for contempt of the House in respect of conduct

\textsuperscript{236} Supra note 201.
outside the House. By exercising such jurisdiction, the judge could not be said to have committed contempt of the House.\textsuperscript{237}

The Court also stressed that Article 194(1) confers a freedom of speech on legislatures distinct from that conferred by Article 19(1)(a) on the citizen. It held that where the House makes rules for exercising its powers under the latter part of Article 194(3), those rules must be subject to the fundamental rights of the citizen.\textsuperscript{238}

The Court, thus, held that the House of Commons, unlike the India Parliament functioned as a superior Court of record and general warrants issued by it were therefore, exempt from scrutiny. The right claimed by the House of Commons not to have its general warrants questioned in \textit{habeas corpus} proceedings stemmed from its position as a superior Court of record. In India, Parliament or the State Legislatures could not claim such a right since they have neither historically nor constitutionally enjoyed the powers of a Court of record.\textsuperscript{239}

In \textit{State of Karnataka v. Union of India \& Another},\textsuperscript{240} it was held that the Constitution vested only legislative power in Parliament and in the State Legislatures. A House of Parliament or State Legislature could not try anyone or any case directly, as a Court of Justice could. It could proceed quasi-judicially in cases of contempt of its authority and take up motions concerning its privileges and immunities because, in doing so, it sought removal of obstructions to the due performance of its legislative functions. If any question of jurisdiction arose, it had to be decided by the Courts in appropriate proceedings. Beg, J. added, “For example, the jurisdiction to try a criminal offence, such as murder, committed even within a house vests in ordinary criminal Courts and not in a House of Parliament or in a State Legislature”.

\textsuperscript{237} \textit{Supra} note 233 at 791, (para 143).
\textsuperscript{238} \textit{Id.}, at 767, (para 61).
\textsuperscript{239} \textit{Supra} note 233 at 780, 781, 785 and 786, (paras 107, 109, 124 and 125).
\textsuperscript{240} MANU/SC/0144/1977.
In the cash for query case, *Raja Ram Pal v. Hon’ble Speaker, Lok Sabha*,\(^\text{241}\) based on a sting operation showing MPs demanding money for asking questions in a case and in another sting operation showing an MP asking money to let NGOs work under the MP Local Area Development Scheme and to recommend works under this scheme, a five judge constitution bench of the Supreme Court held that it has the constitutional jurisdiction to decide the content and scope of the powers, privileges and immunities of the legislatures in India. The Supreme Court held that it has the jurisdiction to interfere by judicial review with the exercise of the power of expulsion by the legislatures.

The Court pointed out that the power of Parliament to expel for contempt is part of the broad power of contempt of the British House of Commons and the *U.P. Assembly case*\(^{242}\) only decided one aspect of this power, namely, to issue unspeaking warrants, to hold that such a power was not available under the Constitution of India. The question whether legislatures have the power of expulsion of its members is a matter of interpretation of Articles 105(3) and 194 (3) and so the final arbiter on this issue is the Supreme Court and not the legislatures. Further, neither Parliament nor state legislatures can claim the power to provide for or regulate their own constitution in the manner claimed by the British House of Commons due to the elaborate provision made in the Constitution. Hence, the Parliament and the state legislatures are completely subservient to the control of the written provisions of the Constitution of India.

The Court reiterated the U.P. Assembly case which held that it cannot be accepted in its entirety that all the powers enjoyed by the House of Commons at the commencement of the Constitution of India vest in an Indian legislature, as the legal fiction created by Article 105(3) cannot


\(^{242}\) AIR 1965 SC 745.
introduce historical facts peculiar to the English Constitution into the Constitution of India.\textsuperscript{243}

Recently,\textsuperscript{244} a very controversial incident took place in the Karnataka Legislative Assembly which raises certain issues of concern with respect to the codification of the legislative privileges. Further, there is a need to find out the limitations on the immunity enjoyed by the legislators on the floor of the legislature or the Parliament.

In the said incident, two BJP ministers - Lakshman Savdi and CC Patil - in Karnataka were caught allegedly watching porn film clips on the former’s cell phone on the floor of the legislative assembly, while Savdi holds cooperation portfolio, Patil is woman and child development minister.

The ministers were caught in the act even as the house was in the middle of the heated debate on the recent hoisting of Pakistan flag in Sindagi in Bijapur district. Close up shots of the ministers watching blue films were beamed on television channels in the evening which sparked off a furore. The television visuals showed both the ministers sitting next to each other, gazing into Savdi’s hand set and having banter. This was for the first time that the Karnataka assembly was rocked by such a scandal.

Soon after the news broke out, the opposition parties including opposition leader Siddaramaiah, JD(S) leader YSV Datta demanded resignation of the ministers. They said the ministers have been elected by the people and the act by them is an insult to the people. The issue generated a lot of heat in the coming days.\textsuperscript{245}

Meanwhile, a private complaint was filed against the three ministers in a local Court in Bangalore. However, the Vidhan Sabha (state secretariat) Police filed an affidavit in a local Court saying that the complaint was “not maintainable” as the complainant had not taken any permission from the

\\textsuperscript{243} Ib\textit{id.}

\textsuperscript{244} “Karnataka Legislative Assembly MMS Case”, available at \url{http://timesofindia.indiatimes.com/cw/I1794727.cms}, visited on June 8, 2012).

\textsuperscript{245} Ib\textit{id.}
Speaker of Legislative Assembly before filing it. They submitted that since the incident took place inside the Assembly hall and all the three former ministers are sitting MLAs, permission of the Speaker is necessary and mandatory. And since the permission has not been sought, the complaint is not maintainable. 

The Court had earlier directed the police to investigate the complaint and submit a report. Thus, the Court dismissed the complaint holding that they were sitting MLAs and enjoyed immunity. The Additional Chief Metropolitan Magistrate Venkatesh Hulagi dismissed the complaint on the grounds that Lakshman Savadi, CC Patil and Krishna Palemar were protected by parliamentary privileges and enjoyed immunity. Meanwhile, advocate Dharamal Gowda, who filed the complaint, said he would file a revision petition in the session's Court. 

In the legislature, the Speaker K.G. Bopaiah served notices on the three seeking their reply and finally Savadi, Patil and Palemar resigned as ministers after the scandal evoked public outrage. 

The instance points out the gap between the practices and the codification of the legislative privileges. There is a strong need to limit the immunity of the legislators when their conduct, expression or speech goes beyond the limits of decency or morality. 

5.18.5 Submissions: Need for Codification

It is submitted that the honourable Courts have always been interpreting the Constitutional provisions in their true spirit. So much so that the words “anything” used in Article 105(2) has been interpreted by the Supreme Court to “include everything”, i.e. immunity from judicial review

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with respect to anything said or vote given on the floor of the House, has been given a very wide scope by the Apex Court.\textsuperscript{247}

However, the view of the Court that “anything” used in Article 105(2) “includes everything” should not be misunderstood or misinterpreted as giving the Legislators an unrestricted licence to say anything. Thus, liberal interpretation taken to its logical absurdity would have undesirable consequences. Does the freedom to say everything logically extend to anything or everything done in the House?

Therefore, while the Courts should be excluded from judicially reviewing the freedom of speech in a Legislature, the members have a commensurate duty to exercise self-restraint even in difficult moments. They must always keep in mind their special position and the position of the august legislative body. They must at the same time not forget their representative character. They are elected by the people to mitigate their grievances and not to claim superiority over their ultimate masters.

The rules of procedure and conduct of business in the Parliament and the Legislatures provide for parliamentary decorum and decency and it is the onerous duty of the Presiding Officers to see that the freedom is used properly.\textsuperscript{248}

The very concept of Parliamentary and legislative privilege is outdated in an age of information and accountability. The public’s right to full knowledge about the performance of their elected representatives in Parliament or in the assemblies is a matter of larger public interest and must override unwarranted privileges and immunities. Unfettered immunity yields opacity, not transparency, and is, therefore, clearly anathema to the spirit of a modern democracy.\textsuperscript{249}

\textsuperscript{247} Supra note 201.
\textsuperscript{248} K.C. Joshi, “Parliamentary Privileges”, (1970) 2 SCC (Jour), 10-12 at 11.
\textsuperscript{249} Since December 2004, the entire proceedings of the Lok Sabha and the Rajya Sabha are telecast live on Doordarshan. Under Gazette Notification issued by Prasar Bharati vide No. 16(1) Cable/2005 E III dated 25\textsuperscript{th} February, 2005, it is mandatory for cable
The authors of the Constitution intended that Parliament would define its privileges. This is clear from the words of Article 105(3). It is time that privileges are precisely defined and limited to the minimum that is necessary for protecting free debate in the House as well as to ensure better accountability of the representatives of the people.

Explaining the reasons for leaving the Parliamentary privileges undefined in the Constitution, Dr. Ambedkar, the Chairman of the Drafting Committee pointed out that apart from the privilege of freedom of speech and immunity from arrest, the privileges of Parliament were much wider and extremely difficult to define. In this view, it was not possible rather practicable to exact a complete Code on privileges and immunities of Parliament as a part of the Constitution and the best course was to leave it to Parliament itself to define its privileges and in the mean while to confer on Parliament the privileges enjoyed by the House of Commons.

However, in the present times, the need for codification of legislative privileges has been felt much more than ever before.

Sh. A.P. Chatterjee had suggested defining and codifying law relating to contempt and breach of privileges. This according to him will serve dual purpose; on the one hand it will enable the citizens to know the law on the subject and on the other hand it will protect them against the arbitrary exercise of powers by Parliament in case of contempt and breach of privileges.

Dr. L.M. Singhvi, the Chairman Constitutional and Parliamentary studies, also favours the codification. In his view the codification of the privilege would undoubtedly strengthen the fundamental rights of speech

operators in all States and Union Territories of India to retransmit DD Lok Sabha channel and DD Rajya Sabha channel on their cable network.

250 Supra note 203 at 229.
252 A.P. Chatterjee, Parliamentary Privileges in India, 13 (1971).
and expression; and it would be transition from an inchoate and nebulous uncertainty to a stage of greater legislative precision and clarity. 253

Sh. V.G. Ramachandra has pleaded for codification, which according to him is in accordance with the Constitution and code of privileges will be useful in the prevailing uncertainty. 254

The press commission also made recommendation as early as 1954, when it stated: 255

It would therefore, be describable that both Parliament and State legislature should define by legislation the precise powers, privileges and immunities Arts. 105 and 194 to contemplate enactment of such a legislation and its during the intervening period that Parliament and State legislature have been endowed with powers, privileges and immunities of House of Commons.

Further, the National Commission for review of the constitution in its report 256 submitted in 2001 has recommended that Article 105(2) ought to be amended:

The Commission recommends that Article 105(2) may be amended to clarify that the immunity enjoyed by the Members of Parliament under parliamentary privileges does not cover corrupt acts committed by them in connection with their duties in the House or otherwise. Corrupt acts would include accepting money or any other valuable considerations to speak and/or vote in a particular manner. For such acts they would be liable for

255 Ibid.
action under the ordinary law of the land. It may further be provided that no Court will take cognizance of any offence arising out of a member’s action in the House without prior sanction of the Speaker or the Chairman, as the case may be. Article 194(2) may also be similarly amended in relation to the Members of State Legislatures.257

5.19 Freedom of Speech and Expression: Emerging Trends

With the changing needs of the society and the advancement of science and technology, several new concepts have emerged in the arena of freedom of speech and expression. These issues need to be considered in the light of the creative judicial response in India and abroad. All this would help in understanding the growing scope of the freedom of speech and expression in the light of the changed circumstances. The various issues revolve around concepts like right to information, privacy, advertisements, hate speech, trial by media etc. In the following pages, all these concepts are discussed in detail.

5.19.1 Right to Information

In a democratic country, the government from village to central level is accountable to the people and the people have a right to know as to what the government is doing and how it is doing and why it is doing. There is a presumption that whatever is done by the Government is done for the betterment of the people. A popular Government without popular information or means of acquiring it is but a prologue to a farce or tragedy or perhaps both. A Government which is not open may be tempted to commit administrative misconduct. An open Government, on the other hand, ensures the reduction in number of administrative faults.

Justice Krishna Iyer has very aptly remarked that “a Government which revels in secrecy, not only acts against democratic decency but busies itself with its own burial”. Openness in Governmental working is bound to act as a powerful check on the misuse of power by it.

In the words of Bhagwati J. (as he, then was) “open Government is new democratic culture of an open society towards which every liberal democracy is moving and our society should be no exception”. There is no denying the fact that there are certain things which must be kept confidential in the interest of the public or in the interest of the security of the state. But such secrecy must not be more than what is absolutely necessary.

For proper functioning of democratic polity full participation of the people in the Government is a must. For enabling full participation of people, ‘right to know’ is a sine qua non.

A society which adopts openness as a value of overarching significance not only permits its citizens a wide range of freedom of expression, it also goes further in actually opening up the deliberative process of the Government itself to the sunlight of public scrutiny.

In Dinesh Trivedi, M.P. and others v. Union of India, the Supreme Court dealt with the right to freedom of information and observed:

Democracy expects openness and openness is concomitant of a free society and the sunlight is a best disinfectant.

The expression “freedom of speech and expression” in Article 19(1)(a) has been held to include the right to acquire information and disseminate the same. It includes the right to communicate it through any available media, whether print or electronic or audio visual, such as,

258 Supra note 57, at 597.
259 S.P. Gupta v. President of India, AIR 1982 SC 149 at 235.
262 Supra note 27.
advertisement, movie, Article or speech, etc. This freedom includes the freedom to communicate or circulate one’s opinion, without interference, to a large population in the country as well as abroad. The Supreme Court has added a new dimension to Art 19(1)(a) by laying down the proposition that freedom of speech involves not only communication, but also receipt of information.

Communication and receipt of information are the two sides of the same coin. Right to know is a basic right of the citizens of a free country and Article 19(1)(a) protects this right. The right to receive information springs from the right to freedom of speech of expression enshrined in Article 19(1)(a). The freedom to receive and to communicate information and ideas without interference is an important aspect of the freedom of speech and expression. Without adequate information, a person cannot form an informed opinion.

5.19.1.1 Freedom of Access to Means of Information

Media is a generic term and collectively it refers to means of mass communication i.e. broadcasting mediums or the electronic media and newspapers or the print media. In a nation wedded to the democratic form of governance, non-disclosure of information cannot be justified except when security of the nation may be at stake.

The newspapers and in the recent times the electronic media also have been the main users of the ‘right to know’. The press can exercise the duty of informing the public only when it has access to means of information. A free press should have the freedom to collect news or information from any source and to disseminate such of them, within the bounds of the law, as are in accord with its editorial policy, without interference from governmental or any other agency.

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263 Supra note 36.
264 Id., at 1236.
The media, be it electronic or print media, is generally called the fourth pillar of democracy. The media, in all its forms, whether electronic print, discharge a very onerous duty of keeping the people knowledgeable and informed. The impact of media is far-reaching as it reaches not only the people physically but also influences them mentally. It creates opinions, broadcasts different points of view, brings to the fore wrongs and lapses of the Government and all other governing bodies and is an important tool in restraining corruption and other ill-effects of society.

The media ensures that the individual actively participates in the decision-making process. The right to information is fundamental in encouraging the individual to be a part of the governing process. The enactment of the Right to information Act, 2005 is the most empowering stop in this direction. The role of people in a democracy and that of active debate is essential for the functioning of a vibrant democracy.266

With this immense power, comes the burden of responsibility. With the huge amount of information that they process, it is the responsibility of the media to ensure that they are not providing the public with information that is factually wrong, biased or simply unverified information.

The idea of ‘pressman as friends of the society’ came to be involved in an interesting manner in Prabha Dutt v. Union of India.267 In this case, the petitioner, Smt. Prabha Dutt, Chief Reporter of the Hindustan Times, wanted to interview the two prisoners, Billa & Ranga, who were sentenced to death for an offence under Section 302, Indian Penal Code. Her application for interviewing these prisoners was rejected by the Superintendent and Management of Jail, Punjab as extend to Delhi (Herein after referred to as Jail Manual). Thereafter she approached the Lt. Governor for Permission. Anticipating delay in such permission, she moved the Supreme Court under Article 32 of the constitution praying for a writ of

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267 Supra note 109.
Mandamus or any other appropriate writ or direction, directing the respondent, particularly, the Delhi Administration and Superintendent of Tihar Jail.268

Keeping in view the urgency of the matter the Court consisting of Y.V. Chandrachud, A.P. Sen and Bahrul Islam, J.J., met at the residence of the Chief Justice.269

The petitioner, it seems had relied upon Article 19(1)(a) of the constitution for her right to interview the prisoners perhaps it is in this context the Court observed:

The constitutional right to freedom of speech and expression conferred by Article 19(1)(a) of the constitution which includes the freedom of the press, is not an absolute right, nor does it confer any right on the press to have an unrestricted access to means of information. The press is entitled to exercise its freedom of speech and expression by publishing a matter which does not invade the rights of other citizens and which does not violate the sovereignty and integrity of India, the security of the state, public order, decency and morality.270

It may be pointed out here that the Court’s observation that “Article 19(1)(a), indeed, does not confer any right on the press to have unrestricted access to means of information”,271 implies that Article 19(1)(a) of the constitution does not confer a right on the press to have an access to means of information, although this right like any other right is not absolute or unrestricted.

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268 Id., at 6, (Para 1).
269 The two prisoners whom the petitioner wanted to interview were to be executed next morning; Cited Ibid.
270 Id., at 6, (para 2).
271 Id., at 6, 7, (para 2).
Strictly speaking, the right to means of information and the right to express views and opinions appear to be two different things, but they are not. The two are so interrelated that they cannot be separated without doing violence to logic and consistency. Commenting upon the right to means of information, the Court observed:

No such right can be claimed by the press unless in the first instance the person sought to be interviewed is willing to be interviewed. The existence of a free press does not imply or spell out any legal obligation on the citizens to supply information to the press.

The concretion of the right to means of information is found in clause (4) of Rule 549 of the Jail Manual. According to the stipulation of this rule, “every prisoner under a sentence of death shall be allowed such interviews and other communications with his relatives, friends and legal and vision as the superintendent thinks reasonable”. Reading petitioner’s right within the ambit of this rule, the Court stated most categorically “without fear of contradictions” that they see no reason “why newspaperman be denied the right of an interview under clause (4) of Rule 549”.

The propounding of the Supreme Court that “newspaperman-as friends of society (have) the right of interview (the prisoner) under clause (4) of Rule 549”, has opened a new vista of rights to newspapermen. And the Supreme Court’s stipulation that without fear of contradiction,” newspapermen can be termed as friends of the society” is indeed justified and commendable.

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272 Id., at 7, (para 3).
273 Ibid.
274 Ibid.
275 Ibid. See also Hindustan Times v. State to U.P., (2003) 1 SCC 591. In this case, the government by executive orders directed to deduct an amount of five percent from the bills of government advertisements payable to the newspapers having circulation of more than 25,000 copies for publication of government advertisement for implementation of its “pension and social security scheme for full time journalists”. The newspapers were also given the option to “take it or leave it”. The Supreme Court held that advertisement revenue of newspaper had a direct nexus with its
It is eminently desirable that to enable the press to play its role positively and effectively, the right to information should be guaranteed. In the absence of right to information, the right to freedom of speech and expression, including the freedom of press, indeed, becomes meaningless. Right to information is a basic right incidental to the right to freedom of speech and expression.276

5.19.1.2 Right to Receive Information

Right to know or receive information is multifaceted:-

In Tata Press Ltd. v. Mahanagar Telephone Nigam Ltd.,277 while considering the scope of Article 19(1)(a) in the context of advertising or commercial speech, the Supreme Court reiterated that the public has a right to receive information. The Supreme Court held:

Advertising as a commercial speech has two facets-
Firstly; advertising which is no more than a commercial transaction is nonetheless dissemination of information regarding the product-advertised. Public at large is benefited by the information made available through the advertisements. In a democratic economy free flow of commercial information is indispensable. The economic system in a democracy would be handicapped without there being freedom of commercial speech. Examined from another angle, the public at large has a right to receive the commercial speech.

Article 19(1)(a) not only guarantees freedom of speech and expression, it also protects the rights of an individual to listen, read and receive the said speech. So far as the economic needs of a citizen are

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concerned, their fulfilment has to be guided by the information disseminated through the advertisements. The protection of Article 19(1)(a) is available to the speaker as well as to the recipient of the speech. The recipient of “commercial speech” may be having much deeper interest in the advertisement than the businessman who is behind the publication.

In *Secretary, Ministry of Information and Broadcasting v. Cricket Association of Bengal*,²⁷⁸ while considering the right of a person to telecast a sports event on television through the use of air waves, the Supreme Court held that the right under Article 19(1)(a) includes the right to receive and acquire information and that viewers have the right to be informed adequately and truthfully. The Supreme Court reiterated the proposition that the freedom of speech and expression guaranteed by Art 19(1)(a) includes the right to acquire information and to disseminate the same. In support of this right, the Court quoted from Article 10²⁷⁹ of the European Convention on Human Rights and Fundamental Freedoms, 1950.

The Court held that although a person seeking to telecast a sports event when he himself is not participating in the game is not exercising his right to self-expression; he is seeking to educate and entertain the public, which is part of the freedom of expression. The Court held that the right of the viewer to be entertained and informed is also, likewise, integral to the freedom of expression.

The Karnataka High Court in *K.M. Nataraj v. State of Karnataka*,²⁸⁰ while deciding on a prayer for direction to the electricity board not to apply power cut during the telecast hour of the Wills World Cup Cricket, followed the Secretary, Ministry of Information and Broadcasting’s case and held that right to information and right to acquire knowledge about the game of cricket through electronic media is a right guaranteed to the petitioners

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²⁷⁸ *Supra* note 36 at 161.
²⁷⁹ Article 10 of European Convention on Human Rights and Fundamental Freedoms, 1950 provides that ‘everyone has the right to freedom of expression. This right includes the freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers’.
²⁸⁰ AIR 1997 Kant 36.
under Article 19(1)(a) of the Constitution of India and there cannot be any dispute on this proposition.

Thus, the right to participate in the affairs of the country is meaningless unless the citizens are well informed on all sides of the issues, in respect of which they are called upon to express their views. One-sided information, disinformation, misinformation and non-information all equally create an uninformed citizenry which makes democracy a farce when medium of information is monopolised either by a partisan central authority or by private individuals or oligarchic organisation.\footnote{Supra note 277 at 229, (para 82); see also Food Corporation of India v. V.K. Sukumaran, (1996) 8 SCC 401, where it was held that it is the duty of the government to use the media for dissemination of vital public information.}

In \textit{Central Board of Secondary Education and Anr v. Aditya Bandopadhyay and Ors.}\footnote{MANU/SC/0932/2011.} the question before the Supreme Court was whether the examinee is entitled to inspect his evaluated answer-books or take certified copies thereof. This right is claimed by the students, not with reference to the rules or bye-laws of examining bodies, but under the RTI Act which enables them and entitles them to have access to the answer-books as ‘information’ and inspect them and take certified copies thereof.

The Court observed that in furnishing copy of an answer-book, there was no question of breach of confidentiality, privacy, secrecy or trust. Examining body was ‘principal’ and examiner was agent entrusted with work of evaluation of answer-books. Examining body does not hold evaluated answer-books in a fiduciary relationship. Therefore, exemption under Section8 (1) (e) of Act was not available to examining bodies with reference to evaluated answer-books. Therefore, examining bodies would have to permit inspection sought by examinees.\footnote{Ibid.}

The term ‘fiduciary relationship’ was used to describe a situation or transaction where one person (beneficiary) places complete confidence in another person (fiduciary) in regard to his affairs, business or transactions
Fiduciary was expected to act in confidence and for benefit and advantage of beneficiary, and use good faith and fairness in dealing with beneficiary or things belonging to beneficiary. Examining bodies could be said to act in a fiduciary capacity with reference to students who participated in an examination. Examining body cannot be in a fiduciary relationship either with reference to examinee who participated in examination and whose answer-books were evaluated by examining body.

The Court opined that Section 22 of RTI Act provides that the provisions of the said Act will have effect, notwithstanding anything inconsistent therewith contained in any other law for the time being in force. Therefore the provisions of the RTI Act will prevail over the provisions of the bye-laws/rules of the examining bodies in regard to examinations. As a result, unless the examining body is able to demonstrate that the answer-books fall under the exempted category of information described in Clause (e) of Section 8(1) of RTI Act, the examining body will be bound to provide access to an examinee to inspect and take copies of his evaluated answer-books, even if such inspection or taking copies is barred under the rules/bye-laws of the examining body governing the examinations.

Therefore, the decision of the Supreme Court in *Maharashtra State Board v. Paritosh B. Sheth*, 1984 (4) SCC 27, and the subsequent decisions following the same would not affect or interfere with the right of the examinee seeking inspection of answer-books or taking certified copies thereof.

If the examinees are to be given access to evaluated answer-books either by permitting inspection or by granting certified copies, such access will have to be given only to that part of the answer-book which does not contain any information or signature of the examiners/coordinators/scrutinisers/head examiners, exempted from disclosure under Section 8(1)(g) of RTI Act. Those portions of the answer-books which contain information regarding the examiners/co-ordinators/scrutinisers/head examiners or which

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may disclose their identity with reference to signature or initials, shall have
to be removed, covered, or otherwise severed from the non-exempted part of
the answer-books, under Section 10 of RTI Act. This is needed in order to
maintain the safety and impartiality of the examinees.\footnote{285}

The right to access information does not extend beyond the period
during which the examining body is expected to retain the answer-books. In
the case of CBSE, the answer-books are required to be maintained for a
period of three months and thereafter they are liable to be disposed
of/destroyed. Some other examining bodies are required to keep the answer-
books for a period of six months. The fact that right to information is
available in regard to answer-books does not mean that answer-books will
have to be maintained for any longer period than required under the rules
and regulations of the public authority.\footnote{286}

An evaluated answer book of an examinee is a combination of two
different ‘informations’. The first is the answers written by the examinee
and second is the marks/assessment by the examiner. When an examinee
seeks inspection of his evaluated answer-books or seeks a certified copy of
the evaluated answer-book, the information sought by him is not really the
answers he has written in the answer-books (which he already knows), nor
the total marks assigned for the answers (which has been declared). What he
really seeks is the information relating to the break-up of marks, that is, the
specific marks assigned to each of his answers.

The Court held that when an examinee seeks ‘information’ by
inspection/certified copies of his answer-books, he knows the contents
thereof being the author thereof. When an examinee is permitted to examine
an answer-book or obtain a certified copy, the examining body is not really
giving him some information which is held by it in trust or confidence, but
is only giving him an opportunity to read what he had written at the time of
examination or to have a copy of his answers. Therefore, in furnishing the

\footnote{285} Supra note 282, (para 28).
\footnote{286} Id. (para 29).
copy of an answer-book, there is no question of breach of confidentiality, privacy, secrecy or trust.

The Court further observed that the real issue therefore is not in regard to the answer-book but in regard to the marks awarded on evaluation of the answer-book. Even here the total marks given to the examinee in regard to his answer-book are already declared and known to the examinee. What the examinee actually wants to know is the break-up of marks given to him, that is how many marks were given by the examiner to each of his answers so that he can assess how is performance has been evaluated and whether the evaluation is proper as per his hopes and expectations. Therefore, the test for finding out whether the information is exempted or not, is not in regard to the answer book but in regard to the evaluation by the examiner.²⁸⁷

In People’s Union for Civil Liberties v. Union of India,²⁸⁸ the Supreme Court held that “right of Information” is a facet of the right of “speech and expression” as contained in Article 19(1)(a) of the Constitution. Right to information, thus, indisputably is a fundamental right.

This case arose out of a challenge to Section 18 of the Atomic Energy Act, 1962 which restricts the disclosure of information relating to an atomic energy plant. In this case the appellants sought disclosure of information from the respondent relating to purported safety violation and defects in various nuclear installation and power plants across the country including those situated in Trombay and Tarapur. The demand was made on the basis of a report of the Atomic Energy Regulatory Board (AERB) which documented 130 instances of serious safety defects and violations.

On the other hand the respondent raised the plea of privilege on the basis of the notification dated 04.02.1975 passed under Section 18 of the Atomic Energy Act, 1962, contending that the information sought was of “secret” nature as it pertained to nuclear installations in the country which

²⁸⁷ Id., (para 25).
included several sensitive facilities therein involving activities of highly 
classified nature. The Supreme Court upheld the constitutionality of Section 
18 of the Act and relying on the earlier judgment *S.P. Gupta v. Union of 
India*, Supra note 259 held that the report was privileged and its disclosure was rightly 
withheld in the Public interest.

It was neither contended nor could it be contended that the operation 
and functioning of a nuclear plant is not sensitive in nature. Accordingly, 
any information relating to the training features, processes or technology 
cannot be disclosed, as it may be vulnerable to sabotage. Knowledge of 
specific data may enable the enemies of the nation to estimate and monitor 
strategic activities. As fissile materials are used in fuels, although the 
nuclear plants are engaged in commercial activities, the contents of the fuel 
discharged or any other details must be held to be matters of sensitive 
character. Thus, the Atomic Energy Act, 1962 provided a reasonable 
restriction within the meaning of Article 19(2) of the Constitution.

It is submitted that the Supreme Court rightly observed that right to 
speech and publish does not carry with it unrestricted right to gather 
information. A reasonable restriction on the right exercise of the right to 
know/of information is always permissible in the interest of the security of 
the State.

Generally, the government can impose reasonable restrictions to 
withhold information relating to the following matters: (i) international 
relations; (ii) national security (including defence) and public safety; (iii) 
investigation, detection and prevention of crime; (iv) internal deliberations 
of the government; (v) information received in confidence from a source 
outside the government; (vi) information, which, if disclosed, would violate 
the privacy of the individual; (vi) information of an economic nature 
including trade secrets), which, if disclosed, would confer an unfair 
advantage on some person or concern, or, subject some person or

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289 *Supra* note 259.
290 *Id.*, at 499-500.
291 *Id.*, at 499.
government to an unfair disadvantage; (viii) information which is subject to a claim of legal professional privilege, e.g., communication between a legal advisor and client; between physician and the patient; (ix) information about scientific discoveries.  

The Court was, however, completely silent on the public interest in safety and protection against accidents in nuclear plants.  

In *Reliance Petrochemicals Ltd. v. Proprietors of Indian Express Newspapers Bombay Pvt. Ltd. and Ors.*, Justice Sabyasachi Mukherjee observed:

> We must remember that the people at large have a right to know in order to be able to take part in a participatory development in the industrial life and democracy. Right to know is a basic right which citizens of a free country aspire in the broader horizon of the right to live in this age in our land under Article 21 of our Constitution. That right has reached new dimensions and urgency. That right puts greater responsibility upon those who take upon themselves the responsibility to inform.

5.19.1.3 **Right To Information: A Fundamental Right of Consumers**

Right to information of a consumer involves a right to be informed about the quality, quantity, potency, purity, standard and price of goods or services, with a view to protect the consumers against unfair trade practices. Right to Information, though, a legal right has now been assumed as a fundamental right of consumers.

This question came for discussion before the Delhi High Court in *Ozair Husain v. Union of India.* In this case the petitioner claims to be

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292 *Id., at 498-499.*
293 *Supra* note 2 at 164-165.
animal welfare volunteer and a member of several animal welfare organizations. He is also stated to be a conscientious objector of consumption and use of animals and their derivatives for food, cosmetics and drugs. It has been high-lighted in the petition that more than 60% of the people of this country are vegetarian and over 50% of them are illiterate and large number of them cannot read or write English. It is also urged that there should be complete disclosure of constituents of cosmetics and food products and that such food products should bear an easily recognizable symbol conveying the origin or ingredients of the products, whether vegetarian or non-vegetarian, so that both literate or illiterate consumers can make an informed choice before selecting the products.

By this public interest litigation the petitioner sought:296

(i) A direction to the respondents to protect the rights of innocent conscientious consumers who object to the use of animals in whole or in part or their derivatives in food, cosmetics and drugs, etc., by making the manufacturers and packers thereof to disclose the ingredients of the aforesaid products so that they may make an informed choice with regard to their consumption.

(ii) A direction to the manufacturers and packers of cosmetics, drugs and Article of food for complete and full disclosure of the ingredients of their products being sold to consumers;

(iii) A declaration that the consumers have right to making an informed choice between the products made or derived from animal and non-animal ingredients; and

(iv) A direction to manufacturers and packers of food, cosmetics and drugs that the products made from animals should bear an

295 AIR 2003 Del 103.
296 Ibid.
easily identifiable symbol conveying that it was an animal ingredient.

The petitioner pleaded that Articles 19(1)(a) 21 and 25 of the Constitution as also the Preamble to the Constitution mandate disclosure of Information.

Article 19(1)(a) enables a person who practice the beliefs and opinions which he holds, in a meaning manner. It is essential for him to receive the relevant information, otherwise he way be prevented from acting in consonance with his beliefs and opinions. In case a vegetarian consumer does not know the ingredients of cosmetics, drugs or food products which he/ she wishes to buy, it will be difficult for him or her to practice vegetarianism. In the aforesaid context, freedom of expression enshrined in Article 19(1)(a) can serve two broad purposes:297

1. It can help the consumer to discover the truth about the consumption of the products, whether made of animals including birds and fresh water or marine animals or eggs, and

2. It can help him to fulfil his belief or opinion in vegetarianism.

This is also in consonance with Article 10 of the European Convention on Human Rights. Accordingly, accepting the contentions of the petitioner, the Court issued directions about declarations and different coloured symbols to be displayed on packages of products regarding their vegetarian or non-vegetarian origin. A limited exception has, however, been provided as far as life saving drugs are concerned. It seems that the Parliament realizing that the consumers have a fundamental right to be appraised of the fact whether or not a food Article contains whole or part of any animal including birds, fresh water or marine animals or eggs or products of animal origin, brought about necessary changes in the Prevention of Food Adulteration Act, 1954.298

297 Id., at 109.
298 Every package of food to carry a label and unless otherwise provided in the rules, there shall be specified on every label: (a) The names of ingredients used in the
For over fifty years after independence, secrecy was the norm in the working of the government, and transparency, the exception. In the guise of protecting the State’s interest, secrecy in public affairs has been a shield for those in government, concealing their actions from public scrutiny. Access to information, on the other hand, is power in the hands of the electorate. It demands accountability and transparency. This is fundamental to the functioning of any truly democratic society.

In May 2002, the Supreme Court passed a landmark judgment on the right of the voter to information about the antecedents of electoral candidates. The Court directed that all candidates for election to Parliament and to the legislative assemblies were required to furnish information about the candidate’s criminal record, if any, his or her assets and liabilities and educational qualifications. The Court held that the requirement to disclose this information arose from every citizen’s fundamental right to information which flows from the right to free speech and expression under Article

19(1)(a) of the Constitution. The Court relied on a number of previously decided cases where the Supreme Court interpreted the right to free speech and expression to include the public’s right of knowledge on public affairs.

The government promptly responded with an Ordinance\textsuperscript{300} professing to introduce electoral reform but which was really aimed at undoing the effect of the Supreme Court judgment.

33-B. Notwithstanding anything contained in any judgment, decree or order of any Court or any direction, order or any other instruction if sued by the Election Commission, no candidate shall be liable to disclose or furnish any such information, in respect of his election, which is not required to be disclosed or furnished under this Act or the rules made thereunder.\textsuperscript{301}

The amendment did away with the Court-mandated requirement for a candidate to disclose his educational qualifications, his assets and liabilities. Further, a candidate was not required to disclose his entire criminal record, but only (a) if he had been convicted and sentenced to imprisonment for at least one year,\textsuperscript{302} or (b) was accused of a crime punishable with imprisonment for at least two years and if charges in the matter had been framed by a Court of competent jurisdiction.\textsuperscript{303} The provision defeated the very idea behind the Supreme Court’s directions: that the voter must be able to make an informed choice.

Fortunately, the matter did not end there. The Supreme Court came to the rescue of citizens once again and struck down the amendment under Section 33-B of the Ordinance. In \textit{People’s Union for Civil Liberties v. Union of India},\textsuperscript{304} the Supreme Court ruled that the legislature’s power to interfere with a fundamental right under Article 19(1)(a) was limited to the grounds provided under Article 19(2) and that Section 33-B was beyond legislative competence. M.B. Shah, J. said:

\begin{itemize}
  \item \textsuperscript{300} Repealed and subsequently enacted as the Representation of People (Third Amendment) Act, 2002.
  \item \textsuperscript{301} The Representation of People (Third Amendment) Act, 2002, Section 33-B.
  \item \textsuperscript{302} \textit{Id.}, Section 33-A (1) (ii).
  \item \textsuperscript{303} \textit{Id.}, Section 33-A (1) (i).
  \item \textsuperscript{304} (2003) 4 SCC 399.
\end{itemize}
The legislature can remove the basis of a decision rendered by a competent Court thereby rendering that decision ineffective but the legislature has no power to ask the instrumentalities of the State to disobey or disregard the decisions given by the Court. A declaration that an order made by a Court of law is void is normally a part of the judicial function. The legislature cannot declare that decision rendered by the Court is not binding or is of no effect. It is true that the legislature is entitled to change the law with retrospective effect which forms the basis of a judicial decision. This exercise of power is subject to constitutional provision; therefore, it cannot enact a law, which is violative of fundamental right.305

Reddi, J. observed:

If the legislature in utter disregard of the indicators enunciated by this Court proceeds to make a legislation providing only for a semblance or pittance of information or omits to provide for disclosure on certain essential points, the law would then fail to pass the muster of Article 19(1)(a). Though certain amount of deviation from the aspects of disclosure spelt out by this Court is not impermissible, a substantial departure cannot be countenanced.306

It must be remembered that the concept of freedom of speech and expression does not remain static. The felt necessities of the times coupled with experiences drawn from the past may give rise to the need to insist on additional information on the aspects not provided for by law. New situations and the march of events may demand the flow of additional facets of information. The right to information should be allowed to grow rather than being frozen and stagnated; but the mandate of Section 33-B prefaced

305 Id., at 452, (para 78).
306 Id., at 466, (para 109).
by the non obstante clause impedes the flow of such information conducive to the freedom of expression.\textsuperscript{307}

5.19.1.5 **Right to information and Open Ballot**

The right to have secret ballot in election to Council of States was the issue in *Kuldip Nayar v. Union of India*.\textsuperscript{308} The new amendment provided for ‘open ballot’ in place of ‘secret ballot’. Constitutional validity of amendment was challenged as violative of the secrecy of ballot, a vital principle for ensuring free and fair elections. The Court held that if secrecy becomes a source for corruption then transparency has the capacity to remove it. Hope was expressed by the Supreme Court that open ballot will eliminate evil of corruption.

The Court also accepted the justification of the impugned amendment on the reasoning that open voting eradicates the evil of cross-voting by electors who have been elected to the assembly of the particular state on the basis of party nomination.

5.19.1.6 **Right to Information and Governmental Secrecy**

The Government has lived on culture of secrecy and silence, which it inherited from its colonial past. Occasionally the pressures of democracy have forced the Government to reveal information under duress. One of the most fundamental pillars of democratic functioning is the recognition of an inalienable right to know, which is inherent in and springs out from Articles 19(1)(a) and 21 of our Constitution.

At one time, knowledge, wealth and weaponry were important sources of power, but today ‘information’ is the most powerful source. Whosoever has the power to control and disseminate information will rule over the world. The right to know should be declared a universal right.

\textsuperscript{307} ld., at 467, (para 110).
\textsuperscript{308} (2006) 7 SCC 1.
There has been a major global trend in recent years towards recognition of the right to information. Non-Governmental organizations, civil societies and common masses have been demanding for such legislation in the country. Many Indian States like Andhra Pradesh, Delhi, Maharashtra, Tamil Nadu, Rajasthan, Karnataka, Assam, Goa and Madhya Pradesh have introduced the law on the right to information to show their commitment towards building a dynamic and prosperous society by involving the people in governance and decision making process.\textsuperscript{309}

In \textit{L.K. Coolwal v. State of Rajasthan},\textsuperscript{310} the Rajasthan High Court held that the citizen has a right to know about the activities of State, its instrumentalities, the departments and the agencies of the State. The privilege of secrecy to the effect that the State is not bound to disclose the facts to the citizens or that the State cannot be compelled by the citizens to disclose the facts, does not survive now to great extent.

5.19.1.7 Secrecy Versus Information

In modern constitutional democracies, it is axiomatic that citizens have a right to know about the affairs of the Government which, having been elected by them, seeks to formulate sound policies of governance aimed at their welfare. However, like all other rights, even this right has recognized limitations; it is, by no means, absolute. Further, implicit in this assertion is the proposition that in transactions which have serious repercussions on public security, secrecy can legitimately be claimed because it would then be in the public interest that such matters are not publicly disclosed or disseminated.\textsuperscript{311}

“Freedom of the Press is not an end in itself but a means to the end of a free society”, says Felix Frankfurter.\textsuperscript{312}

\begin{footnotesize}
\begin{enumerate}
\item Dr. P. Sri Devi, “Evaluation of Right to Information and Role of Judiciary”, 2010 (6) SCJ 17-23 at 17.
\item AIR 1988 Raj 2.
\end{enumerate}
\end{footnotesize}
The freedom of Press is vital to transparency in administration and for an informed citizenry. Historically, the newspapers are information lungs of the society and to suppress the newspapers is to suffocate the people’s free speech. But history also reminds us that there are grave dangers to citizens’ right to know from the media itself. It is a fallacy to imagine that the Press is always a guardian of information. Quite often it plays a reverse role also. While governmental control of the media is totalitarian, the tycoon’s control can be strangling and the multi-nationals may tend to destabilize the progressive stand. A Special Committee of the Canadian Senate identified some journalist decease areas. Of those, the profit making and socially restrictive tendencies of the media can be serious maladies.\textsuperscript{313}

It must be remembered that freedom of the Press is only an expanded expression of the freedom to know of the common man. Even if the Press misuses its power, its occasional obnoxious ‘speech’ serves better then it’s long continued ‘silence’.

‘Freedom of speech and expression’ is dependent upon ‘right to know’. A person or press can be vigilant only when it has access to the official records to know the malfunctioning, non-functioning or arbitrary exercise of power by the government. Therefore right to information and right to dissent should not be denied to the press as well as to the individuals and an attempt to deny this freedom must be frowned upon unless it falls within the exceptions contained in Article 19(2) of the constitution.

President Nixon of the USA could never have ceased to be occupant of the White House but for the freedom of information of the press. The English Thalidomide babies would have suffered had not the London Times exposed the dubious settlement. Lord Denning had dismissed the case against the London Times for contempt. The eye-gouging of prisoners in

\begin{flushright}
\textsuperscript{313} Dr. Shiva Sharma, \textit{Right to Know Versus Governmental Secrecy}, 50 (2009).
\end{flushright}
Bihar and the shameless sales of tribal girls of Madhya Pradesh would have remained unknown tragedies but for investigative journalism.\textsuperscript{314}

The American Constitution is more than two-centuries old. First Amendment exalts the freedom of press as of inviolable value. The Indian position practically is the same in law though different in fact. But the British lag behind. The Fourth Estate, as the press is known, exposes, investigates, assembles, organizes argumentatively and presents descriptively all material, which helps the masses know and understand the problems of the government and doings of the ministers and bureaucrats.

Since the press acts for the public in fulfillment of its right to know, its freedom is broadened and deserves higher protection. The press is, \textit{pro bono} public, engaged in the risky operation of collecting news and views and difficult data from sensitive and secret areas for the fulfillment of people’s informational right. Special consideration is therefore, necessary for access to informational by the press because of its strategic role in mobilization of the public opinion.\textsuperscript{315}

The Indian Supreme Court in \textit{State of Uttar Pradesh v. Raj Narain},\textsuperscript{316} has held that Article 19(1)(a) not only guarantees freedom of speech and expression, it also ensures and comprehends the right of the citizens to know, the right to receive information regarding matters of public concerns. The Supreme Court has underlined the significance of right to know in a democracy in these words:\textsuperscript{317}

In a government of responsibility like our own, where all the agents of the public must be responsible for their conduct their can be fit few secrets. The people of this country have a right to know every public act,

\textsuperscript{314} \textit{Id.}, at 54.
\textsuperscript{315} \textit{Id.}, at 55.
\textsuperscript{316} AIR 1975 SC 865; Also See Supra note 294.
\textsuperscript{317} \textit{Id.}, at 884.
everything that is done in a public way, by their public functionaries. They are entitled to know the particulars of every public transaction in all its bearings. To cover with veil of secrecy the common routine business, is not in the interest of the public. Secrecy can seldom be legitimately desired. It is generally desired for the purpose of the parties and polities or personal self-interest or bureaucratic routine. The responsibility of officials to explain and to justify their acts is the chief safeguard against oppression and corruption.

5.19.1.8 Should the Journalist reveal the Source of Information

The Press Council Act, 1978, provides that it should not compel a journalist to disclose the source of any news or information published by the newspaper. Justice P.B. Sawant, Chairman of the Press council of India, however, holds that the Courts can compel, journalist to disclose the source, if necessary.

As regards the disclosure of source at an interim stage in answer to the interrogatories, the Bombay High Court is Nishi Prem v. Javed Akhtar,318 said that it was settled practice in England that the press would not be compelled to disclose the source of information at an interim stage in an action for libel and slander. The Court held that this rule known as the newspaper rule should be applied in India too.

A Division Bench of the Supreme Court in the Re: Harijai Singh,319 has ruled that freedom of the press was not absolute or unfettered and that it was subjected to reasonable restrictions. In this contempt case against the Editors of the Tribune and the Punjab Kesari, the contemnors’ while tendering apology reveal the source of their item. The Court, while accepting their apology, laid down that journalists and

318 AIR 1988 Bom 222.
319 Supra note 49.
publishers had greater responsibility towards the society to safeguard public order, decency and morality. It may, therefore, be understood that if justice demands, scribe may be compelled to reveal the source of their news. The press, though one of the pillars of a democratic society should exercise its role with the fullest sense of responsibility.

In these cases, the Supreme Court has reiterated that there had to be an active and intelligent participation of the people in all spheres and affairs of the community in a democratic set up so that they are capable of forming a broad opinion about the way in which they were being managed, tackled and administered by the Government or its functionaries.\textsuperscript{321}

A case that arose in 2002, infamously known as the ‘Mysore sex scandal case’, raised interesting questions on different facets of the right to know. Leading newspapers published reports on how three judges of the Karnataka High Court had been found indulging in immoral behaviour at a private resort in Mysore. The High Court responded by issuing to the editors and publishers notice for contempt of Court. The Court’s demand to know the journalists’ sources of information was staunchly resisted by the press on the grounds of journalistic privilege. In the meantime, a committee comprising of senior judges appointed by the Chief Justice of India carried out an ‘in-house investigation’ and absolved the judges concerned who have since continued in judicial office. There was a strong demand for the contents of the report to be made public.

In \textit{Indira Jaising v. Registrar General, Supreme Court of India},\textsuperscript{322} a senior advocate practising in the Supreme Court filed a petition demanding the publication of the inquiry report. The Court declined the disclosure and held that:

\begin{quote}
A report made on such inquiry if given publicity will only lead to more harm than good to the institution, as judges would prefer to face inquiry leading to
\end{quote}

\textsuperscript{321} \textit{Supra} note 49 at 73.
\textsuperscript{322} (2003) 5 SCC 494.
impeachment. In such a case the only course open to the parties concerned, if they have material, is to invoke the provisions of Article 124 or Article 217 of the Constitution, as the case may be.\textsuperscript{323}

That the Supreme Court had instituted an inquiry into the incident was a fact allowed to be widely publicised. This was a measure that inspired public confidence and was intended to do so. It was therefore in the fitness of things that the report itself be made public. The public, after all, has a right to know about the integrity of those who dispense justice. Quite apart from the public interest it was in the interest of the judges concerned to have the report made public; in fact, the more so if it established their innocence.

5.19.1.9 New Role of Media Persons and Need for their Security

Even the media is not free from pressures. There are certain of them which include prosecution for privacy of official secrets, defamation of persons, spreading of disharmony or violation of censorship laws plus more severe penalties under penal laws relating to national security and the like. Secrecy laws provisions demand from the reporter courage and resourcefulness and a dedication to the democracy of truthful politics. Punitive processes are unleashed even against truthful publications in the name of breach of privileges of the House and contempt of the Court. These tactics are obstructive and violative of the right to know of an independent press.

Apart from the statutory secrecy provisions the state has other tactics to thwart the free flow information by gagging the press and also by supplying false or half-true information through its electronic media i.e. Doordarshan and Akashvani. The state power attempts to gag the press by putting economic pressure and professional interference and thereby obstruct the free flow of information.

\textsuperscript{323} Id., at 498.
The press had been the greatest champion of the freedom of information in the campaign against official secrecy.

Speaking about the United States, Campbell says:

The press campaign against government secrecy dates back many years and has been one of the most potent factor in the movement for legal reform. ‘For reasons of economic self-interest as well as poor ideological dedication to a free press’, one commentator writes, ‘the newspaper industry’s condemnation of government secrecy has been even more seeping and persistent than that of the legislature’. A number of press associations formed freedom of information committees both to gather evidence of suppression of information and to spearhead attacks on the strongholds of secrecy. The cooperation between these organisations and their congressional sub-committees has been close; many of the Moss Subcommittee hearings were the direct result of complaints by newspapermen of denial of access to official data. The public service performed by the press was warmly applauded by the House committee on Government operations.

There is also the problem of erosion of credibility of the media. Media is also accused of not sufficiently highlighting the common persons’ concerns and of being co-opted by the people in power whether it is big business houses or the politicians. Newspapers have an urban slant and cater to urban concerns. Few editors or owners encourage rural coverage. The problem is aggravated by high rates of illiteracy. It is felt necessary that the media must conform to higher ethical standards. The media itself needs to be more transparent and the media companies should publish their balance

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324 Supra note 313 at 57.
sheets, profits, expenses, sources of their funds, etc. processes of selection of programmes should be made transparent.325

The other aspect is of the media themselves not being able to access information from government. It is not very easy even for the media to get information even though most government offices have an information department. Information is not given in the form in which it can be used. The information given out to the media is often misleading. Journalists are partly to be blamed as they do not verify the news from different sources as ought to be done. There should be a system under the law, which creates a point of access to accurate information for the media. Besides and beyond a right to information, we need a right to correct information. This raises the issues of professionalism and journalistic ethics.326

All the problems of the media are exacerbated by governmental control of the media and the impact of State-run electronic media and how it counters power of the press. State control of the electronic media is a serious issue for concern. But control of the electronic media whether by the state or by the private individuals constitutes a serious threat to the freedom of information. Therefore, a balance needs to be struck between the two. Control of the media by government does not make any sense in times when we have been overwhelmed by satellite television and the information revolution. The internet brings all the newspapers of the world to our personal computer. The information monopoly of the State violates the basics of the open society to which many of the developing countries seem to be attuned with. The right to know actually becomes real for the citizens when the media informs the public about what the government is doing. People now look to satellite channels for information and entertainment and conveniently sidetrack the state-run electronic media.327

325  Ibid.
326  Id., at 58.
327  Ibid.
5.19.1.10 Protection of Sources of Information

The press gathers information from various sources which must be assured anonymity and protection to ensure the free availability of information. Investigative journalism is assisted by sources who would be exposed to danger or embarrassment if named and to whom anonymity must be assured as a precondition for assistance. Journalism, a service oriented profession, often entails a great amount of courage. Journalists act like vigilant watchdogs of civil liberties, making critical scrutiny and carefully questioning various aspects of our everyday life, which generates healthy public discussions and debates that help augmenting the way we perceive human existence in society today.\textsuperscript{328}

However, owing to their widespread influence on the masses and the nature of their work, journalists, especially investigative reporters, whose free and critical writings inevitably tend to heckle some elements of society against whom such writings may have been directed, are particularly vulnerable to retaliatory attacks.\textsuperscript{329} These elements by assaulting, threatening and sometimes even killing media personnel, intend to curb them from letting out confidential and secretive information to the masses, which may expose some scam, racket, criminal activity which has been persistent in society or when they write against the harmful acts of people who wield power and influence in society.\textsuperscript{330} The recent brutal killing of Mid Day journalist’ Jyotirmoy Dey was due to similar aforementioned reasons, as reports suggested that he was exposing the oil mafia prevalent in India.\textsuperscript{331} The recurring attacks on the media over the past few years in India,


has angered the media fraternity, who have constantly been demanding a law which would protect them from such revenge attacks.\footnote{Ramya Mahidhara and Parnav Menon, “Safeguarding the Pen from the Line of Fire: Need for a Special Legislation to Protect Scribes in India”, 2 NMLR 2011, 120-139 at 121.}

Journalists, in any democratic setup, ought to be provided with certain rights such as the right to operate in a democratic legal framework with access to information, protection of sources, freedom to report professionally and to practice journalism in a safe environment.\footnote{“IFJ Press Report”, Cited Ibid.}

Despite recognizing this fundamental freedom in Article (19(1)(a) of the constitution as well as other legislations, the harassment to newsmen, in discharge of their professional duties, has been persistent and alarming. As the sector and its influence grow and as the media takes it upon itself to expose wrongdoers, people are responding with fists and guns. They get killed, attacked and maimed, their office-property is destroyed and often their equipment cameras, laptops or phones - are seized or smashed.\footnote{Geeta Seshu, “Draft protection Jaw double edged”, Media Law and Policy, June 2011, Available at www.thehoot.org, visited on July 10, 2011.}

In 2010 alone, there have been 27 attacks on journalists in different parts of India.\footnote{“Free Speech Issues in India 2010, Part I: Media under attack, Selections from the free speech hub on the hoot.org for various instances of violence on media persons,” Available at http://www.scribd.com/doc/50679747/Free-Speech-Issues-in-India-2010, visited on July 10, 2011.} Journalists in India, face several problems because of the prevailing political and social conditions, particularly due to the separatist and armed struggles going on in areas like Kashmir and the north east\footnote{Terror groups like the ULFA have been constantly attacking journalists over the last decade in Assam, Manipur and Meghalaya.} or from certain classified groups such as militants, Naxalites or terrorists and also increasingly from various political and religious factions in society and the local mafia of almost any part of the country.\footnote{“CMS India, “The State of Newspapers Scene 2007”, Report Submitted to Press Council of India, New Delhi, (2008), www.cmsindia.org, visited on July 11, 2011.} Majority of these assaults have occurred not in situations of strife, war or riot but while reporting day to day issues like sand mining, oil pilferage and adulteration,
environmental crimes, caste related issues, political chauvinism and so on. Scribes are often subjected to attacks by political party workers when they publicize any opinion which may hurt their sentiments or affect their propaganda. They also have suffered manhandling from public sector employees and workers, since their reporting has been critical of their organization.

In spite of being among the largest democracies of the world and guaranteeing fundamental freedoms to all its citizens, India ranks a deplorable 122nd in the Press Freedom Index, 2010. In India, journalists sources are only partially protected by the decisions of the Courts and is not recognized as a legal or constitutional right which they possess.

Although the Press Council records complaints of harassment of media personnel by government or other groups or persons, it does not provide for punitive compensation in cases of violence. On examining the annual reports of the Press Council, even though there have been quite a few complaints regarding assaults on journalists, charges were substantiated only in one or two cases and the others have been discharged on the grounds of lack of evidence or amends were assured to be made by the oppressing party.

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338 Lyla Bavadam, “Midday Murder - Three journalists killed in India in the last six months in the line of duty while reporting daily issues”, Frontline, Vol. 28. Issue 14, 9 (July 2011), Cited in Supra note 332 at 125.
339 The offices of IBN Lokmat and IBN7 were attacked by the Shiv Sainiks in 2009 beating up even women and destroying property, when the editor had commented on Bal Thackeray’s criticism of Sachin Tendulkar for saying Mumbai is for Indians; Staff Reporter, “Shiv Sena Activists attack IBN offices in Mumbai, Pune”, THE HINDU, November 2009, available at http://www.thehindu.com/news/national/Article51940.ece, visited on July 12, 2011.
342 Supra note 332 at 125.
343 Available at http://presscouncil.nic.in/home.htm, Cited Ibid.
Even six decades after independence, the journalist fraternity still awaits a concrete law for their protection and whenever there was an effort to push for such kind of legislation, the politicians have either pushed apart the request or have not shown keen interest about the same. Journalists who strive hard to make accessible information to the people, should be provided with some basic form of protection from manhandling or assaults by anti social elements of society.\(^{345}\)

Protection of journalists sources have either been provided for in the statutes in some countries or have been recognized under the freedom of expression as expounded through judicial decisions.

The English common law did not grant journalists an absolute right to preserve the confidentiality of their sources, although it did recognise that the Court had the discretion to decide as to whether or not to compel journalists to name their sources. The common law position has been reinforced as follows:

No Court may require a person to disclose, nor is any person guilty of contempt of Court from refusing to disclose, the source of information contained in a publication for which he is responsible unless it is established to the satisfaction of the Court that it is necessary in the interests of justice or national security or for the prevention of disorder or crime.\(^{346}\)

Underlining the need to protect journalistic sources, the European Court of Justice has held:

Protection of journalistic sources is one of the basic conditions for press freedom, as is reflected in the laws and professional codes of conduct in a number of

\(^{345}\) Manoj R. Nair, “Special Law to Protect Scribes: To Implement or not to Implement”, Special Correspondent, Daily News and Analysis (DNA), Available at http://www.dnaindia.com/, visited on July 8, 2011.

\(^{346}\) Section 10 of the English Contempt of Court Act, 1981.
Contracting States and is affirmed in several international instruments on journalistic freedoms. Without such protection, sources may be deterred from assisting the press in informing the public on matters of public interest. As a result the vital public watchdog role of the press may be undermined and the ability of the press to provide accurate and reliable information may be adversely affected. Having regard to the importance of the protection of journalistic sources for press freedom in a democratic society and the potentially chilling effect an order of source disclosure has on the exercise of that freedom, such a measure cannot be compatible with Article 10 of the (European) Convention (on Human Rights) unless it is justified by an overriding requirement in the public interest.\textsuperscript{347}

As far as USA is concerned, it is a common practice followed by several Courts in USA that unless absolutely necessary, journalists are not required to disclose their sources and thus are of the view that providing for such an express provision may be futile. In India, on the other hand, such a privilege is not recognized even to a limited extent. Ironically, even in situations when journalists are compelled by Courts to disclose the confidential information, they often choose not to and get subsequently punished for Contempt of Court. The Law Commission of India is of the view that such an absolute right or privilege\textsuperscript{348} would lead to rigidity in the law while certain discretions of use with set conditions and requirements would make the law more elastic.\textsuperscript{349}

\textsuperscript{347} Goodwin \textit{v. United Kingdom}, (1996) 22 EHRR 123.

\textsuperscript{348} The Law Commission Report however, does not prefer using the term “privilege”. Such a privilege has been provided to relationships such as spouses, lawyer-client relationship, etc. as provided under the Indian Evidence Act, 1882. This is because in case of the above protected relationships, one does not know what information they have, whereas, in the case of a newsman or journalist, they may be compelled to give out their source on the information published only.

\textsuperscript{349} \textit{Supra} note 332 at 130, 131.
However, when a particular information is given out by a person not authorized to give it out, i.e., when there is a leak of protected and sensitive information of national importance or such information that falls under the Official Secrets Act, or when such information would disturb public tranquility if leaked, then such a source should not be protected by the journalist.

Thus, streamlining of this protection is required which can be achieved by giving this protection to only reliable and bona fide journalists, amateur newsmen, their support staff, managerial heads, etc.

The demand for making ‘attacks against media men or their property’ a non-bailable offence is being made in light of the recent attacks and their increase as well as the low rate of convictions against these accused persons. This has naturally left the Fourth Estate with no effective grievance redressal mechanism worthwhile to ensure that, if not their safety, that appropriate action shall be taken against the culprits in most of the cases, may at least prevail. Thus, pro-change activists feel that with a provision making such attacks a non-bailable offence, the offenders would at least be put behind bars which would ultimately instill some fear in them.

The work of the press is tough, especially investigative journalism, and it is common knowledge that this entails a lot of danger, but they still fight against all odds to disseminate news so that people are aware of their surroundings and their crude realities. When it is in plain sight that this profession, which is so crucial to the democracy of the country and the rights of not only the journalists to impart news but of the citizens of the

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350 Certain Acts have been put outside the scope of journalists and newsmen to report or comment about and these have been mentioned in the norms of Journalistic ethics given by the Press Council of India i.e. “Norms of Journalistic Conduct”, 2005. Press Council of India. Available at www.presscouncil.nic, visited on July 13, 2011.

351 Supra note 332 at 134.

352 “Only 5-6% of these cases actually result in some favorable judgment”. Special Correspondent, The Hindu, (June 2011) available at www.hindu.com/news/national/Article2113842.ece, visited on July 13, 2011.

country to receive that news,\textsuperscript{354} is under severe attack, it serves as a clear indication that reformatory steps need to be taken to ensure a protected environment for them.\textsuperscript{355}

In India, the Central Government, through the Press Council of India Act, 1978\textsuperscript{356} has given the PCI quasi-judicial powers to hear and dispose complaints against the press and also by the press incases when there is a block on their freedom of expression.\textsuperscript{357} This implies that cases of threat against journalists,\textsuperscript{358} murder, damage to property, etc. which work to hinder the freedom of their expression can be heard before the Council. However, the Council does not have enough members to handle cases from all over the country as cases keep getting carried over to the next year.\textsuperscript{359} Thus, it would seem efficient to have, if not State PCIs\textsuperscript{360} then, a PCI branch in every state, which is adequately equipped with personnel to hear these cases to ensure timely disposal of cases and justice.

Further, if the PCI is to effectively dispose cases then it must be given appropriate powers for the same. With the power to only censure, warn and admonish,\textsuperscript{361} no accused person found guilty would take it seriously. This is the reason why for serious offences, the press approach the Courts, where the case drags on for years. Thus, by equipping them with the power to execute penal punishments and adequate man power, the PCI would become an effective quasi-judicial body for hearing press grievances on timely basis and satisfactorily addressing them.

\textsuperscript{354} It is not only the right of the press for freedom of speech and expression but also the right of the people to freedom to receive such information.
\textsuperscript{355} Supra note 332 at 137.
\textsuperscript{356} The First Press Council of India (PCI) was established in the year 1965 but was dissolved in the year 1976 by the Indira Gandhi Government on the lines that it had failed to perform the function it was established to do.
\textsuperscript{357} Sections 14 and 15 of the PCI Act, 1978.
\textsuperscript{358} One such example is- Shri Rajesh Kumar & Anr. v. The Additional Deputy Commissioner Faridabad & SDM, Ballabgarh, Haryana. Compendium of Adjudications (April 1, 2008- March 31, 2009), PCI.
\textsuperscript{360} However, it is interesting to note that editors such as Shekhar Gupta, N. Ram, and Nikhil Wagle vehemently opposed the setting up of a State Press Council.
\textsuperscript{361} Supra note 357, Section 15.
In India, in the past, the law has been more inclined to compel disclosure rather than protect sources. For instance, the Evidence Act, 1872 provides that all persons who are competent to be witnesses under Section 118 of the Act can also be compelled to give evidence and also to answer relevant questions, unless exempted by law.\textsuperscript{362} Likewise, the Prevention of Terrorism Act, 2002 (which was subsequently repealed in 2004) provided under Section 14 that a person could be compelled to furnish information regarded as useful or relevant for the purpose of the Act.

In \textit{People's Union for Civil Liberties v. Union of India},\textsuperscript{363} arising out of a constitutional challenge to the Prevention of Terrorism Act, 2002, it was held that a journalist or lawyer does not have a sacrosanct right to withhold information regarding crime under the guise of professional ethics. This was justified on the ground that it is the duty of every citizen to assist the State in the detection of crime and bringing criminals to justice.\textsuperscript{364} However, no provision was made for the protection of journalists who were compelled to disclose information about terrorists.\textsuperscript{365}

In the 179\textsuperscript{th} report of the Law Commission of India under the chairmanship of Justice B.P. Jeevan Reddy,\textsuperscript{366} it was recommended that statutes enabling complaints to be made by public servants or individuals or NGOs against other public servants and the grant of protection to such complaints must be enacted.

The Commission is of the view that a statute enabling complaints to be made by public servants, or persons or NGOs or against other public servants and the grant of protection to such complaints is perfectly valid and will not offend the right to privacy emanating from sub-clause (a) of clause

\textsuperscript{362} Such exemptions are contained in:

Section 5 of the Bankers' Books Evidence Act, 1891
Sections 51-52 of the Divorce Act, 1869
Sections 121 to 129 of the Evidence Act, 1872
Supra note 288 at 602-603.


\textsuperscript{364} Prevention of Terrorism Act, 2002 has been repealed with effect from 21\textsuperscript{st} September, 2004.

\textsuperscript{365} Submitted on 14\textsuperscript{th} December, 2001.
(1) of Article 19. The right to privacy has to be adequately balanced against the right to know. Both these rights emanate from same sub-clause in Article 19.

Based on these recommendations, a bill was introduced in Parliament known as ‘the Public Interest Disclosure (Protection of Informers) Bill, 2002’. The bill defines ‘disclosure’ as ‘a disclosure of information that the person making the disclosure reasonably believes, that it tends to show disclosable conduct’.367 ‘Disclosable conduct’ is defined as such conduct as a public servant may engage in or has engaged or is engaging, or proposes to engage in, which amounts to:

1. abuse or misuse of power or discretion vested in him; or

2. an attempt to commit or the commission of an offence under the Prevention of Corruption Act, 1988, the Indian Penal Code, 1860 or any other law for the time being in force; or

3. mal-administration.368

On 21st April, 2004, the Central Government passed a resolution369 empowering the Central Vigilance Commission to receive written complaints on any allegation of corruption or misuse of office by any employee of the Central Government or of any corporation established under a Central Act, government companies, societies or local authorities owned or controlled by the Central Government. The resolution provides that the identity of the complainant will not be revealed unless the complainant has made the details of the complaint public or disclosed his own identity to any other office or authority.

The Central Vigilance Commission is authorised to call upon the CBI or the police authorities to render all assistance to complete the investigation. Where an informant is being victimised for filing a complaint

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367 Section 2 (c), The Public Interest Disclosure (Protection of Informers) Bill, 2002.
368 Id., Section 2 (d).
or making a disclosure, he may file an application before the Central Vigilance Commission seeking redress in the matter whereupon the Central Vigilance Commission may make suitable directions.\textsuperscript{370}

\section*{5.19.1.11 Disclosure of Information and Protection to Informers}

There has been a growing acceptance of the phenomenon of whistleblower. A whistleblower is a person who raises a concern about wrongdoing occurring in an organization or body of people. Usually this person would be from that same organization. The revealed misconduct may be classified in many ways; for example, a violation of a law, rule, regulation and/or a direct threat to public interest, such as fraud, health/safety violations and corruption. Whistleblowers may make their allegations internally (for example, to other people within the accused organization) or externally (to regulators, law enforcement agencies, to the media or to groups concerned with the issues).

Most whistleblowers are internal whistleblowers, who report misconduct on a fellow employee or superior within their company. One of the most interesting questions with respect to internal whistleblowers is why and under what circumstances people will either act on the spot to stop illegal and otherwise unacceptable behavior or report it. There is some reason to believe that people are more likely to take action with respect to unacceptable behavior, within an organization, if there are complaint systems that offer not just options dictated by the planning and controlling organization, but a choice of options for individuals, including an option that offers near absolute confidentiality. However, external whistleblowers report misconduct on outside persons or entities. In these cases, depending on the information’s severity and nature, whistleblowers may report the misconduct to lawyers, the media, law enforcement or watchdog agencies, or other local, state, or federal agencies.\textsuperscript{371}

\textsuperscript{370} Id., at 185.

In the USA, the Whistleblower Protection Act, 1989 provides whistleblowers an individual right of action (IRA) before the U.S. Merit Systems Protection Board (MSPB). The disclosure must be made either to the special counsel, the inspector general of any agency, another employee designated by an agency head to receive such disclosures or any other individual or organisation i.e. a congressional committee or the media provided the disclosure is not specifically prohibited by law and the information does not have to be kept secret in the interest of national defence or the conduct of foreign affairs. Procedures have been prescribed for the protection of witnesses and for the non-disclosure of the identity of the complainant.

Whistleblower protection in India refers to provisions put in place in order to protect someone who exposes alleged wrongdoing. The wrongdoing might take the form of fraud, corruption or mismanagement. Initially, India did not have a law to protect whistleblowers; however, the Public Interest Disclosure and Protection to Persons Making the Disclosure Bill, 2010 was approved by the Cabinet of India as part of a drive to eliminate corruption in the country’s bureaucracy.


This Bill\(^77\) had been basically drafted to provide for the establishment of effective anti-corruption and grievance redressal systems at the centre by creating effective deterrent against corruption and also to provide effective protection to whistleblowers and for matters connected therewith or incidental thereto.

The Act provides for the establishment of an institution known as Lokpal which shall consist of a Chairperson and ten members along with its officers and employees.\(^73\)

\(^77\) See Appendix.

\(^73\) Section 3(1) of the The Anti-Corruption, Grievance Redressal and Whistleblower Protection Bill, 2011.
The Lokpal shall be responsible for receiving,

(a) complaints where there are allegations of such acts of omission or commission which are punishable under the Prevention of Corruption Act, 1988;

(b) complaints where there are allegations of misconduct by a government servant;

(c) grievances; and

(d) complaints from whistleblowers.\textsuperscript{374}

Section 20\textsuperscript{375} of the Act provides for the protection of Whistleblowers. It enables a whistleblower to approach the Lokpal for an appropriate action.

\textsuperscript{374} Id., Section 8 (1).

\textsuperscript{375} It reads as follows:

"20.(1) A whistleblower may write to the Lokpal seeking protection from threat of physical or professional victimization or if he has been subjected to such professional or physical victimization.

(2) On receiving such a complaint, the Lokpal shall take following steps:

(a) On threat of professional victimization the Lokpal shall conduct appropriate inquiries and if, it feels that there is a real threat to the person and the threat is on account of that person having made an allegation under this Act, then the Lokpal shall pass appropriate orders, as soon as possible but in not more than a month of receipt of such complaint, directing appropriate authorities to take such steps as directed by the Lokpal.

(b) If a person complains that he has already been victimized professionally on account of making an allegation under this Act, the Lokpal shall, after conducting inquiries, if he is of the opinion that the victimization is indeed because of that person’s having made an allegation under this Act, pass appropriate orders, as soon as possible but in not more than a month, directing appropriate authorities to take such steps as directed by the Lokpal:

Provided that for clause (a) the Lokpal may, but for clause (b) the Lokpal shall, also issue orders imposing penalties under Central Civil Services Conduct Rules against the officer or officials who issued threats or caused victimization:

Provided further that no such penalties shall be imposed without giving an opportunity of being heard to the affected officials.

(c) On threat of physical victimization, the Lokpal shall conduct appropriate inquiries and if, it feels that there is a real threat to the person and the threat is on account of that person having made an allegation under this Act or for having filed an under the Right to Information, Act, 2005 application to any public authority covered under this Act, then notwithstanding anything contained in any other law, the Lokpal shall pass appropriate orders, as soon as possible but in not more than a week, directing appropriate authorities, including police, to take such steps as directed by the Lokpal to provide

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from threat of physical or professional victimization or if he has been subjected to such professional or physical victimization.

The Whistleblowers Protection Bill had been drafted in the wake of incidents like the murder of Satyendra Dubey, a government engineer who exposed corruption in the national highway building program. Similarly, two years later, Shanmughan Manjunath, a manager at a state-owned oil company, laid bare a scheme to sell impure gasoline. His body was found riddled with bullets in the back seat of his car.
Further, a Karnataka official S.P. Mahantesh, said to be a whistleblower in controversial land allotments by societies was murdered in May 2012. Mahantesh was working as Deputy Director of the audit wing in the state’s Cooperative department and had reported irregularities in different societies involving some officials and political figures.

For enacting such a law, the government had to be dragged every inch of the way by angry public opinion. The Supreme Court did considerable prodding. The Hon’ble Court acted on two public interest litigations seeking a permanent mechanism to protect whistleblowers.

Infact, whistleblowers play an important role in ensuring transparency in the government. Daniel Ellsberg of the USA can easily be said to be the patron saint of modern day whistleblowers. In 1971, a former Marine and Vietnam War veteran, who was working as an analyst at the Rand Corporation — ‘blew the whistle’ on a top-secret Defence Department document on the Vietnam War, which came to be known as the Pentagon Papers. Claiming to be driven by his conscience, Ellsberg revealed to the New York Times and the Washington Post how successive U.S. Presidents had dragged the country into an immoral and unwinnable war, and had lied to Americans about its course and outcomes. His disclosure played a major part in turning the tide of public opinion against the Vietnam War. The U.S. Government responded by prosecuting Ellsberg on 12 charges, leading to a total sentence of 115 years if convicted. That was not all. The dirty tricks department at the Nixon White House launched a smear campaign against Ellsberg; engaged the Watergate burglars to break into his psychiatrist’s office in the hope of finding something defamatory; tapped his telephones; engaged thugs to physically attack him; and tried to influence the trial judge with the offer of the post of FBI Director. When these plots were exposed, the judge had to abandon the trial and acquit Ellsberg. Nixon’s machinations against Ellsberg formed the basis of two of the three Articles of

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impeachment against him. The Guardian recently named Daniel Ellsberg “the most important whistleblower of the past half century”.

The term ‘whistleblowing’ is a relatively recent entry into the vocabulary of public and corporate affairs, although the phenomenon itself is not new. It refers to the process by which insiders ‘go public’ with their claims of malpractices by, or within, organisations — usually after failing to remedy the matters from the inside, and often at great personal risk to themselves (adapted from Nick Perry, 1998). It is this willingness to stand up for a principle and Court risk openly that distinguishes whistleblowing from such related practices as in-house criticism, anonymous leaks, and the like. The whistleblower is considered a hero or a traitor, a do-gooder or a crank, a role model or a non-conformist troublemaker — depending on one’s point of view. Whistleblowing is a universal phenomenon. India has also had its share of prominent whistleblowers from V.P. Singh to Manoj Prabhakar to P. Dinakar.

It is true that under normal circumstances, an organisation is entitled to total loyalty and confidentiality from its employees. But when there is serious malpractice or when people’s lives are at stake – as in corruption and fraud in defence procurement; deaths in ‘encounter’ of innocent persons; toxic leaks from a chemical factory; non-adherence to flight safety standards by an airline; creative accounting and false declarations by a company; cheating and plagiarism in scientific research, for example, the overriding public interest may lie in protecting the public’s right to be told, and the whistleblower’s right not to be punished for doing so. Without whistleblowers, we may not get to learn about problems until it is time to mourn the consequences. In the words of the noted U.S. journalist Reed Irvine:

Coal miners used to carry caged canaries into the mines with them. When the canaries stopped singing, they knew they were in trouble and they had better get out fast. Whistleblowers in government and other large
organisations are, in a way, our canaries. When they are free to 'sing,' those institutions are healthy. When they are silenced, we are in trouble.\textsuperscript{377}

No doubt, audit, ombudsman, vigilance commissions, regulating agencies, the media, civil society, and Courts all play a role in deterring government and corporate transgressions to some extent. But, howsoever formidable their investigative skills, initial inside information provided by a whistleblower is always crucial.\textsuperscript{378}

Thus, The Anti-Corruption, Grievance Redressal and Whistleblower Protection Bill, 2011 was passed by the Lok Sabha on 27\textsuperscript{th} December, 2011. It is worth noting that the government had moved certain amendments which had been incorporated in it. A major amendment cleared by the Cabinet was the inclusion of Ministers, MPs, defence services, intelligence agencies, bank officials and PSUs under the ambit of the bill. The Special Protection Group (SPG) had been kept out of the ambit of the Bill. One of the recommendations of the Committee to include higher judiciary (Judges of Supreme Court and High Courts) was rejected. The definition of “disclosure” had also been amended to include willful misuse of power or willful misuse of discretion which leads to demonstrable loss to the government or demonstrable gain to the public servant or any third party. The definition of competent authority to which a complaint can be made was also expanded.\textsuperscript{379}

5.19.1.13 Reporting Official Information

The access to information is presently being governed by the Official Secrets Act, 1923 which lays down that all disclosures and use of official information is a criminal offence unless expressly authorized. The said Act is modelled on the United Kingdom’s Official Secrets Acts, 1911 which was

\begin{footnotesize}
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\item Ibid.
\end{enumerate}
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drafted at a time when growing hysteria about spies and threat of impending war was looming large.

The Official Secrets Act, 1923 broadly consists of two parts. One deals with espionage or spying activities and the other deals with unauthorized disclosure of official information. The first is dealt with under Section 3 and the second under Section 5 of the Act. Section 5 lays down that if any person having in his possession any document or information which has been entrusted to him in confidence by any Government official, communicates it to any person there than to person to whom he is authorized to communicate it, he shall be guilty of an offence. And also person who receives such document or information knowing or having reasonable ground to believe that this is being communicated in breach of the Act. It also penalizes disclosure of documents or information ‘likely to affect friendly relations with foreign States’.

The words person in’ possession of official information’ under the Act are wide enough to include (1) person in possession information (2) person obtaining information in contravention of the Act (3) person to whom official information has been entrusted in confidence by any person holding office under the Government and (4) person obtaining or having access to information because of holding any office present or past or holding any Government contract or a person holding office under any of these persons. The official information covered under S. 5 is quiet wide. Any information which is ‘secret’ is covered. The words ‘secret’ or ‘official secret’ have not been defined under the Act. Thus it is for the State to decide as to what should be treated as secret and what should not. Under the Act both the person who communicates and the person who receives it are guilty of an offence under Section 5.380

Section 5 of the Official Secrets Act, 1923 is the almost reproduction of Section 2 of the British Official Secrets Act, 1911. Franks committee has condemned Section 2 as the main offence created by it is the unauthorized disclosure of information that is likely to affect friendly relations with foreign States.

communication of the official information including documents by a servant of the Crown. It includes all documents and information. All information learnt by the Crown servant in the course of his official duty is to be treated as official under Section 2 irrespective of its nature. Thus anyone whether news man or lay person who receives such information and any giver of information is liable to punishment which may extend to three years.

Under the Act, the ministers are authorized to decide what to reveal. Similarly civil servants have been given the power to exercise considerable personnel judgement regarding disclosure of official information to be made by them. All the above criticism applies to Section 5 of the Official Secrets Act, 1923. According to the Indian Law Institute study on the subject has pointed out the difference between English and Indian practice. In England it is the Attorney General alone who decides whether to prosecute or not whereas in India it is executive which decides about it. Sir Hari Singh Gaur while participating in debate on Official Secret Bill in the Assembly in 1923, has said that provisions of the Bill are so wide that Government had not difficulty whatever in running anybody even if he was an innocent person.

For suppressing communication of official secrets, the Official Secrets Act, 1923 provides for criminal sanctions. The arrest of two reliance officials for violating the Official Secrets Act is another instance of Government’s use of antiquated laws to suppress the right to information and use ‘national security’ as a cover for arbitrary action. The government’s case was based on the colonial era Official Secrets Act, 1923 which makes giving of information from Government files an offence. The information allegedly found in possession of the executives had appeared in the columns of various newspaper weeks before the documents were seized. The issue

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381 Id., at 890.
382 Manoj Joshi, “Secrets Act is far too arbitrary”, The Times of India, 1 (May 3, 2002).
here is not whether the concerned officials had violated the law but nature of the contemporary relevance of the said Act.\textsuperscript{383}

While commenting on the Official Secrets Act, 1923 Ms. Rani Advani has said that “in its application and interpretation the executive and judiciary have allowed the interest of the State to be read as the interest of the Government currently in power”.\textsuperscript{384}

5.19.1.14 Common-Law Bars against Disclosure of Information

The English common law provides for the following restrictions on disclosure of information:

1. (a) No Member of a Legislature can disclose anything said or done within the House, without the permission of that House.\textsuperscript{385}

(b) A husband or wife may refuse to disclose any communication between them which took place during their marriage,\textsuperscript{386} and may restrain the other spouse from disclosing or publishing domestic secrets passing between them.\textsuperscript{387}

(c) In general, no matter which would endanger national security should be published, irrespective of any breach of the Official Secrets Act.\textsuperscript{388} The principle extends to financial security, hence, the publication of Budget Proposals before it is officially announced would be improper, though it becomes public knowledge and a matter for public comment thereafter.

\begin{itemize}
\item \textsuperscript{383} Ibid.
\item \textsuperscript{384} Quoted in Stephen Rego “Access to Information: Time to Shed Cloak of Secrecy”. The Tribune, 10 (December 6, 1996).
\item \textsuperscript{385} Planckett v. Cobbett, (1804) 5 Esp 136.
\item \textsuperscript{386} Doker v. Husker, (1824) Ry. & M. 198.
\item \textsuperscript{387} Argyll v. Argyll, (1965) 1 All ER 611.
\item \textsuperscript{388} A.G. v. Jonathan Cape, (1975) 3 All ER 484.
\end{itemize}
(d) The Cabinet being jointly responsible to the Legislature, it is in the public interest to maintain the joint responsibility between Members of the Cabinet. Since the premature disclosure of the views of individual Ministers may prejudice the maintenance of that joint responsibility, it may be restrained by the Court. It would be a breach of confidence on the part of an individual Minister to disclose Cabinet discussions so long as such disclosure would undermine the operation of the principle of joint responsibility.389

2. It is clear that if a journalist publishes ‘privileged’ information, it would be no defence to him that such information was given to him by some other person, voluntarily.

3. The Press has no constitutional right to interview or to have access to prisoners for obtaining any information or otherwise.390 The relationship of prisoners with they would at large is regulated by prison regulation in the interests of security of the State,391 which would be valid id in India in view- of Article 19(2). Nor can the prisoner or the Press complain if written correspondence addressed to a prisoner is subjected to censorship provided there is no discrimination.392

5.19.1.15 Confidential Information

1. Next to ‘privileged documents’ comes ‘confidential information, as an exception to the general rule of access of the

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389 Id., at 495.
Press to sources of information. It is now established that both exceptions rest on the public interest against disclosure.  

2. While there is no general rule to exclude all confidential information from disclosure they would be excluded when public interest so requires. If the matter goes to Court, the Court has to balance the competing interests in favour of nondisclosure and of freedom of discussion, where national security is involved. 

3. Nobody shall profit by the publication of information received in confidence; In other words, the law will not allow a person to make an unfair use of commercial secrets transmitted in confidence whether or not a breach of contract is invoked in such publication or there is any contractual relationship between the publisher and the party affected. 

There are certain Acts which prohibit the public officials concerned or any person to disclose certain kinds of information, because they are confidential or because it would be against the public interest to disclose such information. It is obvious that in such cases, the Press would not be entitled to inspect such records or documents even though they may relate to public affairs. As far as the Indian position is concerned Section 128 of the Representation of the People Act, 1951, enjoins all officers who perform any duty in connection with the recording or counting of votes at an election to maintain secrecy of the voting and prohibits them, under pain of penalty, to communicate to any person unless authorised by any law) any information calculated to violate such secrecy. In the result, the Press is not entitled to

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393 Rogers v. Secy. of State (1972) 2 All ER 1057.
394 Id., at 1060-1061, 1071.
395 A.G. v. Guardian Newspaper, (1990) LRC (Cnst.) 938 (944-945; 968-969; 973-975) HL.
396 Prince Albert v. Strange, (1841) 1 M & G 25.
397 Saltman Engineering v. Campbell, (1963) 3 All ER 413.
secure any information relating to voting at an election held under the Act in contravention of the provisions of this Section. ³⁹⁸

The general rule is that at any inquiry or trial before any of the Courts, any member of the public (including a journalist) may have access (Section 327) subject to the following conditions:

(i) Admission may be restricted by the Court if the space in the Courtroom is limited.

(ii) The Court may, at any stage or inquiry or trial, exclude any persons or persons from access or presence in the Courtroom. This is a discretionary power vested in the Court. Which may be exercised:

(a) in the interests or decency³⁹⁹ or morality;

(b) emergency, public safety, or the like.

(iii) But even when an inquiry or trial is held in camera to the exclusion of Pressmen, the judgment in such case must be pronounced in ‘open Court’ (Section 353),⁴⁰⁰ so that the Pressmen shall have a right to be present when the judgment is pronounced, in any case before a Criminal Court.

When the Court sits in camera, the law, in India, prior to the enactment of the Contempt of Courts Act, 1971, was that it would constitute

³⁹⁸ Supra note 41 at 250.
³⁹⁹ It may include the interest of ‘privacy’ [Cf. Hinds v. R., (1976) 1 All ER 353 (368-69) HL]. Cited Ibid.
⁴⁰⁰ See Section 228A I.P.C. and newly introduced provisions of Section 327(2) Cr.P.C. and 327(3) Cr.P.C. in this behalf, which reads:
Section 327 (2)– Notwithstanding anything contained in sub-Section (1) the inquiry into and trial of rape or an offence under Sections 376, 376A, Section 376B, Section 376C or Section 376D of the Indian Penal Code (45 of 1860) shall be conducted in camera.
Provided that the presiding judge may, if he thinks fit, or on an application made by either of the parties, allow any particular person to have access to, or be or remain in, the room or building used by the Court.
Where any proceedings are held under sub-Section (2), it shall not be lawful for any person to print or publish any matter in relation to any such proceedings, except with the previous permission of the Court. [Inserted by Amendment Act (43 of 1983)].
a contempt of Court to publish a report of the proceedings at such sitting (which the Press might have obtained somehow from somebody who was allowed to be present), excepting the formal order of the Court which was considered to be apart from the proceedings. This rule of common law has been altered by the Contempt of Courts Act, 1971 (Section 7), according to which:

a) Publication of the order made at a sitting, in chambers or in camera would not be contempt unless the Court expressly prohibits its publication on grounds of public policy, public order, security of State, non-disclosure of information relating to any secret process, discovery or invention; or in exercise of any other power vested in the Court.

b) Publication of proceedings of the Court at a sitting, in chambers or in camera would be contempt:

(i) if it is not a fair and accurate report;

(ii) if the Court has expressly prohibited its publication on grounds of public policy or in exercise of any power vested in it;

(iii) if the Court has ordered sitting in private on grounds of public order or security of State;

(iv) if it gives information relating to a secret process, discovery or invention;

(v) if such publication would be contrary to the provisions of any enactment for the time being in force.

By virtue of Section 2 of Criminal Law Amendment Act (43 of 1983), Section 228A has been introduced, making it punishable to disclose the

401 Cited in Supra note 41 at 251.
402 Section 228A of the Indian Penal Code reads as follows: "228-A. Disclosure of identity of the victim of certain offences etc."
identity of the victim of certain offences (rape) against women. The Supreme Court held that the name of the victim of rape should not be disclosed in judgment but described as ‘victim’. 403

So far as admission to juvenile proceedings is concerned, no person other than the parties, police officers and other persons directly concerned with the inquiry has any right to attend. Hence, a representative of the Press can attend only with the permission of the authority [Section 28(1)(c)]. Even though initially admitted, he or she may be compelled to withdraw at any subsequent stage if the competent authority directs that in the interest of the child or of decency or morality, any person should be excluded [Section 28(2)].

Admission to and reporting of matrimonial proceedings are dealt in by the personal laws of different communities. The Hindu Marriage Act, 1955 is more elaborate. Section 22 not only provides for in camera hearing

Whoever prints or publishes the name or any matter which may make known the identity of any person against whom an offence under Section 376, Section 376A, Section 376-B, Section 376-C or Section 376-D is alleged or found to have been committed (hereafter in this Section referred to as the victim) shall be punished with imprisonment of either description for a term which may extend to two years and shall also be liable to fine.

Nothing in sub-Section (1) extends to any printing or publication of the name or any matter which may make known the identity of the victim if such printing or publication is—

by or under the order in writing of the officer in charge of the police station or the police officer making the investigation into such offence acting in good faith for the purposes of such investigation; or

by, or with the authorisation in writing of, the victim; or

where the victim is dead or minor or of unsound mind, by or with the authorisation in writing of, the next of kin of the victim:

Provided that no such authorisation shall be given by the next of kin to anybody other than the chairman or the secretary, by whatever name called, of any recognised welfare institution or organisation.

Explanation: For the purposes of this sub-Section, “recognised welfare or organisation” means a social welfare institution or organisation recognised in this behalf by the Central or State Government.

(3) Whoever prints or publishes any matter in relation to any proceeding before a Court with respect to an offence referred to in sub-Section (1) without the previous permission of such Court shall be punished with imprisonment of either description for a term, which may extend to two years and shall also be liable to fine.

Explanation: The printing or publication of the judgment of any High Court or the Supreme Court does not amount to an offence within the meaning of this Section.

as under the Special Marriage Act, 1955, but also prohibits and penalises the printing or publication of any reports of such in camera proceedings.

Section 14 of the Official Secrets Act, 1923, provides that, in addition to such powers as the Court may have in this behalf under 'any other law, a Court may exclude the public from proceedings under the Act, by an order made on the ground that “the publication or any evidence given or any statement to be made in the course or the proceedings would be prejudicial to the safety of the State”, but the passing of the sentence shall ‘in any case take place in public.’

5.19.1.16 Right to be informed and Governmental Privileges

Quoting Jeremy Bentham, on secrecy in the administration of justice:

In the darkness of secrecy, sinister interest and evil in every shape are in full swing. Only in proportion as publicity has place can any of the checks applicable to judicial injustice operate. Where there is no publicity, there is no justice. Publicity is the very soul of justice. It is the keenest spur to exertion and the surest of all guards against improbity. It keeps the judge himself while trying under trial.

In the Judges Transfer case, the Supreme Court adopted a liberal view of the disclosure of official documents under Section 123 of the Evidence Act Bhagwati, J. held:

There is nothing sacrosanct about the immunity which is granted to documents because they belong to a certain class. Class immunity is not absolute or inviolable in all circumstances. It is not a rule of law to be applied mechanically in all cases. The principle upon which

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404 Supra note 41 at 251.
405 Supra note 322.
406 Supra note 259.
class immunity is founded is that it would be contrary to public interest to disclose documents belong to that class, because such disclosure would impair the proper functioning of the public service and this aspect of public interest which requires that justice shall not be denied to anyone by withholding relevant evidence. This is a balancing task which has to be performed by the Court in all cases.\textsuperscript{407}

The Supreme Court concluded:

Freedom of expression, as learned writers have observed, has four broad social purposes to serve: (i) it helps an individual to attain self fulfillment, (ii) it assists in the discovery of truth, (iii) it strengthens the capacity of an individual in participating in decision-making, and (iv) it provides a mechanism by which it would be possible to establish a reasonable balance between stability and social change. All members of society should be able to form their own beliefs and communicate them freely to others. In sum, the fundamental principle involved here is the people’s right to know. Freedom of speech and expression should, therefore, receive a generous support from all those who believe in the participation of people in the administration.\textsuperscript{408}

In the Judges Transfer Case,\textsuperscript{409} a seven-Judge Bench of the Supreme Court followed \textit{State of U.P. v. Raj Narain},\textsuperscript{410} and observed:

\textsuperscript{408} Supra note 32 at 686, (para 68).
\textsuperscript{409} Supra note 259.
\textsuperscript{410} Supra note 316.
Where a society has chosen to accept democracy as its creedal faith, it is elementary that the citizens ought to know what their government is doing. The citizens have a right to decide by whom and what rules they shall be governed and they are entitled to call on those who govern on their behalf to account for their conduct. No democratic Government can survive without accountability and the basic postulate of accountability is that the people should have information about the functioning of the government. It is only if people know how government is functioning that they can fulfill the role which democracy assigns to them and make democracy a really effective participatory democracy.

It is submitted that in a government of responsibility like ours, where all the agents of the public must be responsible for their conduct, there can be but few secrets. The people of this country have a right to know every public act, everything that is done in a public way, by their public functionaries. They are entitled to know the particulars of every public transaction in all its bearing. The right to know, which is derived from the concept of freedom of speech, though not absolute, is a factor which should make one wary, when secrecy is claimed for transactions which can, at any rate, have no repercussion on public security.\footnote{Supra note 316 at 865.} To cover with veil of secrecy, the common routine business is not in the interest of the public. Such secrecy can seldom legitimately be desired. It is generally desired for the purpose of parties and politics or personal self-interest or bureaucratic routine. The responsibility of officials to explain and to justify their acts is the chief safeguard against oppression and corruption.\footnote{Id., at 453 (para 74) ; see also R. K. Jain v. Union of India, (1983) 4 SCC 119.}

Further, disclosure of information in regard to the functioning of government must be the rule and secrecy an exception justified only where the strictest requirement of public interest so demands. The approach of the
Court must be to attenuate the area of secrecy as much as possible consistently with the requirement of public interest, bearing in mind all the time that disclosure also serves an important aspect of public interest.\textsuperscript{413}

5.19.1.17 Right to Information and Legislative Measures

Alexander Bickel\textsuperscript{414} characterized the American approach of protecting national security secrets as “unruly contest” between the government and the press.

The government’s role is to classify information that ought to be kept secret and to stop leaks at the source, but not to take action against the media. The prevailing paradigm is, thus, one of self-regulation - the press checks itself.

But how far this approach is good is a difficult question. Some secrecy is essential to both national security and democracy, but excessive secrecy undermines democratic accountability and decision making and sometimes national security itself.

Disclosure decisions in a democracy, thus, must balance the importance of public knowledge with the need to preserve national security. However, neither the government nor the press can be trusted to strike that balance for both have asymmetric incentives.

The government risks public criticism when it announces a policy but risks little when it is secretive. Likewise, journalists have much to gain from publishing a classified secret and little to lose. However, a balanced approach must be achieved between people’s right to be informed by disclosure of secrets and national security. Criminal prosecution of journalists to deter them from publication doesn’t seem to be a viable approach. Similarly prior restraint is also not a workable alternative. Infact, the de facto approach, in such cases has been media self-regulation to solve the problem of leaks.

\textsuperscript{413} Supra note 259 at 275, (para 67).
\textsuperscript{414} Alexander M. Bickel, The Morality of consent, 87 (1975).
Before the enactment of RTI Act, 2005, there was The Freedom of Information Act, 2003 in India. Taking note of the winds of change blowing across the country the need to enact a law on the right to information was recognized unanimously by the Chief Minister Conference on “Effective and Responsive Government” held at New Delhi on May 24, 1997.

In order to make the Government more transparent and accountable to the public, the Government of India appointed a working group on right to Information and Promotion of Open and Transparent Government under the chairmanship of Sh. H.D. Shourie. The Draft Bill submitted by the Working Group was subsequently deliberated by the Group of Ministers constituted by the central Government to ensure free flow of information was available to the public. The said Bill entitled “The Freedom of Information Bill, 2000^415^ introduced in the Parliament was referred to the Standing Committee of Parliament. It was ultimately passed by both Houses of the Parliament in December, 2002 and was assented to by the President on 6th January, 2003. Thus, the Freedom of Information, 2003 came into being.

However due to its several shortcomings,^416^ this Act was repealed and replaced by the Right to Information Act in 2005.

The right to information is a cherished right. Information and right to information are intended to be formidable tools in the hands of responsible citizens to fight corruption and to bring in transparency and accountability. The provisions of RTI Act should be enforced strictly and all efforts should be made to bring to light the necessary information under Clause (b) of Section 4(1) of the Act which relates to securing transparency and

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^415^ Bill No. 98 of 200.

^416^ For Example- 1) There was no independent appeal mechanism under the Act. It only provided for departmental appeal. 2) Section 15 of the Act expressly barred the jurisdiction of the Courts to “entertain any suit, application or other proceeding in respect of any order made under this Act”. 3) There was no provision for penalty under the Act for officers who withhold information. 4) Private companies, NGO etc. had been kept out of the purview of the Act.
accountability in the working of public authorities and in discouraging corruption.

But in regard to other information (that is information other than those enumerated in Section 4(1)(b) and (c) of the Act), equal importance and emphasis are given to other public interests (like confidentiality of sensitive information, fidelity and fiduciary relationships, efficient operation of governments, etc.).

Indiscriminate and impractical demands or directions under RTI Act for disclosure of all and sundry information (unrelated to transparency and accountability in the functioning of public authorities and eradication of corruption) would be counter-productive as it will adversely affect the efficiency of the administration and result in the executive getting bogged down with the non-productive work of collecting and furnishing information.

The Act should not be allowed to be misused or abused, to become a tool to obstruct the national development and integration, or to destroy the peace, tranquility and harmony among its citizens. Nor should it be converted into a tool of oppression or intimidation of honest officials striving to do their duty. The nation does not want a scenario where 75% of the staff of public authorities spends 75% of their time in collecting and furnishing information to applicants instead of discharging their regular duties. The threat of penalties under the RTI Act and the pressure of the authorities under the RTI Act should not lead to employees of a public authorities prioritizing ‘information furnishing’, at the cost of their normal and regular duties.417

In Chief Information Commr and Another v. State of Manipur and Another,418 the question that arose was whether Information Commissioner would have jurisdiction under Section 18 of Right to Information Act, 2005 in directing disclosure of information. This was an appeal against the order

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417 Supra note 282, (para 37).
of the concerned High Court wherein it was held that Information Commissioner had no power to direct State Information officer to furnish information and directed Commissioner to dispose of the complaints.

In the appeal, the Supreme Court upheld the decision of the High Court and held, that under Section 18(3) of Act, Central Information Commission or State Information Commission, while inquiring into any matter, had same powers as were vested in Civil Court while trying suit in respect of certain matters specified in Section 18(3) (a) to (f) of Act. Therefore, under Section 18(4) of Act, Central Information Commission or State Information Commission may examine any record to which Act applied and which was under control of public authority.

However, under Section 18 of the Act, Central Information Commission or State Information Commission had no power to provide access to information which had been requested for by any person but which had been denied to him. The only order which could be passed by Central Information Commission or State Information Commission, under Section 18 of the Act was order of penalty provided under Section 20 of the Act. However, before such order was passed, Commissioner must be satisfied that conduct of Information Officer was not bonafide. Thus, Commissioner while entertaining complaint under Section 18 of Act had no jurisdiction to pass order providing for access to information. The appeal was, therefore, dismissed as the Court did not find error in impugned judgment of High Court.

Disclosure of information in regard to the functioning of Government must be the rule and secrecy an exception justified only where the strictest requirement of public interest so demands. The approach of the Court must be to attenuate the area of secrecy as much as possible consistently with the requirement of public interest, bearing in mind all the time that disclosure also serves an important aspect of public interest.419

419 Ibid.
The exercise of judicial discretion in favour of free speech is not only peculiar to our jurisprudence; the same is a part of the jurisprudence in all the countries which are governed by rule of law with an independent judiciary. In this connection, Lord Acton said in one of his speeches:

Everything secret degenerates, even the administration of justice; nothing is safe that does not show how it can bear discussion and publicity.\textsuperscript{420}

As its preamble shows the Act was enacted to promote transparency and accountability in the working of every public authority in order to strengthen the core constitutional values of a democratic republic. It is clear that the Parliament enacted the said Act keeping in mind the rights of an informed citizenry in which transparency of information is vital in curbing corruption and making the Government and its instrumentalities accountable.

The Act is meant to harmonise the conflicting interests of Government to preserve the confidentiality of sensitive information with the right of citizens to know the functioning of the governmental process in such a way as to preserve the paramountcy of the democratic ideal.\textsuperscript{421}

5.19.1.19 Submissions

Democracy is founded on the will of the people, which would be hollow unless the public are properly initiated and informed of all matters which are pertinent to the subjects of public discussion. Owing to the expansion of governmental activities, however, Government has become the sole repository of information relating to many branches of the public life, every part of which cannot be withheld in the name of national safety. The greatest vice of the Official Secrets Act is that it does not define ‘secret’ or ‘official secret’. It is, therefore, desirable to clearly define what materials the Government shall be entitled to withhold and to lay down that all the

\textsuperscript{420} \textit{Ibid.}
\textsuperscript{421} \textit{Id.}, (Para 7).
rest shall be available to the public, of course, through a specified process, as has been stated by the Second Press Commission, while secrecy inherent in bureaucracy, ‘open government’ is the basis of democracy. There is thus a good case for referring to a high powered Commission to draw up a list of documents which the Government shall be entitled to withhold, after consulting representative of the Government as well as the Press and the general public, e.g.:

(a) Documents relating to national defence or security of the State;

(b) Documents relating to investigation of crimes, the disclosure of which might be helpful in the commission of offences or facilitate escape from legal custody or impede the detection of crimes or apprehension of offenders;

(c) Trade secrets and other confidential business information.422

It is submitted that the Official Secrets Act is a relic of the British Raj. First enacted in 1889, it was designed to justify suppression of information by the British government from its subjects and thereby stifle any move by the subjects against the government. Its stated object was to ‘prevent the disclosure of official documents and information’. Under the Act of 1889, an act of espionage was punishable with deportation for life, or for five years or imprisonment. The Act of 1889 was replaced by an Act of 1911 and thereafter an Act of 1923. The 1923 Act makes provisions against espionage as also against communication of official information to outsiders. The Act makes it a penal offence for any person holding office under the government to willfully communicate any official information to anyone other than an authorised person. It is equally an offence for any person to receive such information. It is, however, significant that the grounds on which action may be taken under the Official Secrets Act are limited to those specified under Article 19(2).

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422 Supra note 41 at 77.
When trying to ensure that the right to information does not conflict with several other public interests (which includes efficient operations of the governments, preservation of confidentiality of sensitive information, optimum use of limited fiscal resources, etc.), it is difficult to visualize and enumerate all types of information which require to be exempted from disclosure in public interest. In the RTI Act, 2005, the legislature has however made an attempt to do so. The enumeration of exemptions is more exhaustive than the enumeration of exemptions attempted in the earlier Act that is Section 8 of Freedom to Information Act, 2002. The Courts and Information Commissions enforcing the provisions of RTI Act have to adopt a purposive construction, involving a reasonable and balanced approach which harmonizes the two objects of the Act, while interpreting Section 8 and the other provisions of the Act.\textsuperscript{423}

As far as the Whistleblower protection law is concerned, there are certain gaps to be considered. For example, its jurisdiction is restricted to the government sector and encompasses only those who are working for the Government of India or its agencies; it does not cover the state-government employees. Further, the lack of public debate and consultation on the bill seems to indicate the danger of it becoming another “paper tiger”. Typically, ministries proposing draft legislation involve a process of public consultation to give the public an opportunity to carefully critique its provisions. In this case such an opportunity has been denied to the public, which has not gone unnoticed. No penalty has been provided for attacking a complainant. The proposed law has neither any provision to encourage whistleblowing in the form of financial incentives, nor does it deal with corporate whistleblowers; further, it does not extend its jurisdiction to the private sector also. The bill has a limited definition of disclosure, and does not define victimisation.

It is a pity that the government of India has still not passed a strong law to protect whistleblowers though as early as in 2001, the Law

\textsuperscript{423} Supra note 282, (para 34).
Commission had pointed out that in order to curb corruption and protect whistleblowers, a law must be enacted. The Commission had also drafted a model Bill. Unfortunately, nothing happened. It was only in 2011 that under intense public pressure, the Whistleblowers (Protection) Bill was passed in the Lok Sabha. The Bill is now pending in the Rajya Sabha.

It is time our Parliament should pass the Whistleblowers (Protection) Bill, 2011, which remains frozen in the Rajya Sabha. Some MPs claim that the Bill is defective and could be misused. If Parliamentarians recognise that, surely they must also be intimately acquainted with the mechanism to make the draft better. Why the lethargy then? The enactment of the Bill will also prove that the supreme sacrifices of Dubey, Manjunath and countless others to fight corruption did not go in vain.424

No wonder, the public in India have a low level of confidence in fighting corruption because they fear retaliation and intimidation against those who file complaints. Thus, the need of the hour is the enactment of the Whistleblowers’ Bill.

5.19.2 Privacy and Freedom of Speech

Man is a social animal, yet there are certain spheres in which he wishes to be left alone. Privacy may be defined as ‘the state of being free from intrusion or disturbance in one’s private life or affairs.’425 It is the state of being private and undisturbed, or a person’s right to do this;426 or avoidance of publicity.

Respect to one’s privacy is an inherent expectation of a human being. It is normal tendency that individuals need privacy, as a state of physical separateness from others is necessary in order to allow full-fledged growth and development of one’s personality. Privacy is best defined as a condition people maintain by controlling who inter people maintain by controlling

who interferes in their day today activities relating to their movement, their private information, etc. Privacilla, an organization working for the cause of right to privacy defines privacy as:

A condition people maintain by controlling who receives information about them, and the terms on which others receive it. Importantly, privacy is a subjective condition. One person cannot decide for another what his or her sense of privacy should be.427

The notion of privacy mentioned above embodies two kinds of conceptions of privacy. First, it can be viewed as a state of non-access to the individual's physical, psychological self. Second, privacy is capable to be seen as a state in which personal information about an individual is in a state of non-access from others. On unifying, the definition that can be deduced is that privacy is a state of separateness from others.

The concept of privacy is used to describe the extent to which a private citizen (which includes the media and the general public) is entitled to personal information about another individual. Also about the extent to which government authorities can intrude into the life of the private citizen to keep a watch over his movements through devices such as telephone tapping or surveillance. This aspect also concerns the extent to which government authorities can exercise control over personal choices: for instance, by determining whether a pregnant woman has the right to abortion,428 or whether an HIV infected person has the right to marry429 or have children.

5.19.2.1 Kinds of Privacy

Privacy is a relatively very new concept. That is the reason why its scope although seemingly wide, is still undefined. The first publication advocating a right to privacy appeared in 1890 in the form of an Article

written by Warren and Brandeis named as the ‘Right to Privacy’. The right to privacy as an independent and distinctive concept originated in the field of Tort Law, under which a new cause of action for damages resulting from unlawful invasion of privacy was recognized. Privacy creeps in almost every avenue that an individual ventures into. Nevertheless, privacy can be categorized into the following four basic forms.

**Information Privacy**

This involves privacy relating to handling and collection of personal information of an individual. This form constitutes the primary and the most important part of the whole gamut of the concept of privacy.

**Bodily Privacy**

This concerns the protection of people’s physical selves against invasive procedures such as unreasonable detention, drug testing, DNA testing etc.

**Communication Privacy**

This deals with the security of personal information shared through mail, telephones, internet, etc. This form of privacy comes next to that of information privacy and is fast gaining importance with the advent of the internet since information on the internet can be accessed very easily. This has also given rise to the mechanisms of privacy protection on the internet like data protection, etc.

**Territorial Privacy**

This essentially covers the limit to which a person’s family as well as professional environment intruded into. This form although seems to be overshadowed by the preceding facets of privacy is very vital for the study of the concept of privacy. This is because it is essentially territorial privacy

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4 Harvard LR 193 (1890), Cited in Supra note 2 at 118.
that has been given legal recognition at the international level by the universal Declaration of Human Rights.

Civilization is the progress toward a society of privacy. The term ‘privacy’ has been described as ‘the rightful claim of the individual to determine the extent to which he wishes to share himself with others and his control over the time, place and circumstances to communicate with others. It means his right to withdraw or to participate as he sees fit. It also means the individual’s right to control dissemination of information about him; it is his own personal possession’.

5.19.2.2 Is Privacy a Right?

Although there have been many debates, they ultimately boil down to one fundamental question, that is, whether privacy can be given the status of a right like right to life, right to education, etc.? To be able to answer this question one needs to understand as to what is a “right”?

A right is a privilege available to an individual over a certain thing, which he can either exercise or not exercise according to his own will. Also, a right has corresponding duties.

If one applies this general definition of a right to privacy, the result essentially would be that privacy qualifies to be a right. This is because firstly, it is up to a person to claim privacy over his personal information. If he does not want to keep his information private, he can make it public. Thus exercising, claiming and waiving privacy is the privileged choice of the person concerned. Secondly, exercise of privacy comes with the obligation of respecting others claim or privacy too.

Also, the Constitution of India by way of Article 19(2) provides for reasonable restrictions over the fundamental rights. In the case of privacy too reasonable restrictions could be imposed, say for example in the interest of public security at large an individual’s claim over privacy can be negated.

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432 Ayn Rand: *The Fountainhead*, (1943), Cited in Supra note 2 at 112.
As a result of the above-mentioned arguments privacy can very much be called a right.

Not only this, privacy is claimed to be one of the fundamental human rights available to all human beings. An eloquent proof of this is the Universal Declaration of Human Rights, which recognizes right to privacy as a fundamental human right. Further the International covenant on civil and Political Rights and European Convention on Human Rights also recognize right to privacy.

The recognition of privacy as a concept is relatively a modern phenomenon and its acceptance as a right is the product of creative jurisprudence. In the earlier times, the focus was on society, but gradually it shifted to the individual. The framing of English Magna Carta; the incorporation of U.S. Bill of Rights; the formulation of several International Conventions on individual liberties, and the specific inclusion of fundamental rights provisions in various National Constitutions, all stand a testimony to this fact.434

There is a growing trend towards the enactment of comprehensive privacy and data protection legislations around the world. Currently over 40 countries have or are in the process of enacting laws on the right to privacy.435

It is thus settled that privacy is a right. But the situation in India does not seem to be that enterprising. First of all, the Constitution of India does not guarantee privacy as a fundamental right. Moreover, privacy is not even a constitutional right under the Constitution. As this is the case, there is no central legislation governing privacy issues.

434 Magna Carta was signed by King John in 1215 for guaranteeing English political liberties. The Federal Bill of Rights was incorporated in the U.S. Constitution by First Amendment in 1791. The French Declaration of the Rights of man was adopted in 1791. The Universal Declaration of Human Rights came into being in 1948 and the International Covenant on Civil and Political Rights was formulated in 1966.

435 Supra note 427.
5.19.2.3 Privacy- Issues Involved

The law must balance competing claims, i.e. right to one’s personal privacy and the right of the public to be informed about the matters of concern. The role of media assumes importance here because it is the media which keeps the people well-informed and, indeed, a well informed citizenry is the bulwark of a democracy.

Freedom of speech and expression is a fundamental right and equally important is the ‘right to be let alone in one’s family, home and correspondence’ as interpreted by the Indian Judiciary which through its creative interpretation has made right to privacy a part of one’s fundamental right to life and personal liberty. Just as the freedom of speech and expression is vital for the dissemination of information on matters of public interest, it is equally important to safeguard the private life of an individual to the extent that it is unrelated to public duties and matters of public interest.

An attempt to balance these competing claims has led to the development of free speech jurisprudence both, at the national as well as international level. The issues involved are many, viz. publication of confidential information, privacy of public figures vis-à-vis private individuals, privacy in social networks, revealing personal identity, freedom from surveillance etc.

But the fundamental question is whether the legal framework is, actually well-equipped to tackle the multifarious issues that have evolved with the growth of knowledge and technology? Today, an individual wants to be well informed, he wants to excel in every field and he wants to live a life of his own. But what could be done if someone else is more interested in his life, his whereabouts and his personal details? Are their sufficient safeguards available when there is an invasion of one’s privacy? In the era of Information revolution, what restrictions can be imposed on the means of information and communication, i.e. print, visual and electronic media? What control does one have when his private affairs become matters of public interest?
The law must balance competing claims, i.e. right to one’s personal privacy and the right of the public to be informed about the matters of concern. The role of media assumes importance here because it is the media which keeps the people well-informed and, indeed, a well informed citizenry is the bulwark of a democracy. What is significant to mention here is that privacy, freedom of speech, and freedom of the press are all universally treated as human rights and are, thus, included in the Universal Declaration of Human Rights.\textsuperscript{436}

Just as the freedom of the press is necessary for the dissemination of information about public affairs and other matters of public interest, it is equally in the public interest to see that not merely the reputation of an individual but his private affairs, which are unrelated to public affairs, should be protected from unwanted publicity in the Press.

\subsection*{5.19.2.4 Privacy as a Limitation on Freedom of the Press}

The following observations of the Supreme Court in \textit{R. Rajagopal v. State of Tamil Nadu},\textsuperscript{437} are true reminiscences of the limits of freedom of press with respect to the right to privacy:

A citizen has a right to safeguard the privacy of his own, his family, marriage, procreation, motherhood, child bearing and education among other matters. No one can publish anything concerning the above matters without his consent, whether truthful or otherwise and whether laudatory or critical. If he does so, he would be violating the right to privacy of the person concerned and would be liable in an action for damages. Position may, however, be different, if a person voluntarily

\textsuperscript{436} Article 19 of the Universal Declaration of Human Rights, 1948 states that “everyone has the freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers”.

\textsuperscript{437} AIR 1995 SC 264.
thrusts himself into controversy or voluntarily invites or raises a controversy.438

There are certain important propositions to be considered:

1. Since privacy is a recent development in the realm of law and the stream of its development is still flowing, it is difficult to give an exhaustive definition of what ‘privacy’ means in law. It has been described as the right of a person ‘to be let alone’,439 or his right of repose in his private life and home.440

2. Over-industrialization and over-urbanization have, led to a general degeneration of the moral standard, more or less, in all countries. It is a sad fact about human nature that men find pleasure from prying into others’ affairs, even though they may have not bearing on public issues or causes. The problem has been accentuated by the availability of information relating to private matters through the medium of the expanding coverage of newspapers, in response to a popular demand for ‘lusty journalism’; and it has called for legislative and judicial intervention through newer avenues, to meet this serious problem of intrusion into privacy. Mankind always took a sadistic pleasure when men and women are pulled down from the pedestal. The fault may not be that of the press but of the reading public, which wants a juicy anecdote about exalted personages.

In certain circumstances, disclosure of information that is either confidential or private will be unlawful and a duty shall be imposed by the

438 Id., at 270, (para 28).
440 The right to privacy has developed, in recent years, into a fully and legally acknowledged right throughout the world. While police or press has its own rights to elicit out truth or information – a clear cut demarcation line has been drawn between their rights and obligations inter se. [See Govind v. State of M.P., AIR 1975 SC 1378].
law on the recipient of such information to keep it secret. This duty is an obvious constraint on the media industry—generally and on current affairs reporting and investigative journalism in particular.

When subjects of unwanted publicity sue for invasion of privacy or other torts, journalists commonly defend on the ground that the challenged disclosures were privileged because they were newsworthy.

In recent times, there have been spates of incidents which have required the Courts to step in and restrain newspapers and other media from intruding into an individual’s privacy. It is true that newspapers do a commendable job in bringing certain long-buried issues to the forefront. However, at the same time, it needs to be realized that are circumstances in which restraint must be exercised. Every tittle of information or conjecture about individuals cannot be forced into the category of ‘news’.

A right to privacy of an individual may be invaded by the Government (i.e. the State itself) or by another private individual or individuals, including the Press or other mass media of communication.

5.19.2.5 Public figure vis-à-vis Private Individual

Once it is shown that the person whose privacy is alleged to have been infringed was a public official, or a public figure or the report related to a matter of ‘public interest’, then consistently with the guarantee of freedom of expression, the report (even though it related to the family affairs of the plaintiff) could not be punished unless-(a) it was false; (b) the defendant published it with knowledge of its falsity or in reckless disregard of the truth.

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While 'calculated falsehood' falls outside "the fruitful exercise of the right of free speech", the Press could not be punished for 'innocent error' or mere 'falsity', without doing violence to the freedom of the Press.

In the case of a private person who has no public importance or is not a 'public figure', there being no question of public importance (e.g. obscenity) involved, the plea of freedom of expression diminishes, as against the need for protection of privacy.

Thus, even though a Section of the reading public may be interested in sordid stories of adultery in a divorce proceeding, a wife, suing in divorce, cannot be said to have become a 'public figure' by reason of such litigation nor does the report of the matrimonial proceedings assume a 'public interest', so as to shield a journal from libel proceedings for making incorrect reports.

It has, therefore, been assumed that the State may legitimately prohibit the publication of news which intrudes upon the privacy of private individuals, without any public interest being involved in the disclosure. It would, thus, be permissible for a State to make it unlawful to use for advertising purposes, or for the purposes of trade, the name, portrait or picture of any living person without having first obtained the written consent of such person. But it would not be punishable if the person photographed was a public figure. Further, it would not be constitutional for the State to penalize the press for having published accurate information from judicial records which are open to public inspection, even though such publication mentions the name of the victim of a rape, which was available from such records. There cannot be any right of privacy when the news is available from public source and judicial records of proceedings which were not held in camera and which are open to public inspection.

Garrison v. Louisiana, (1964) 379 U.S. 64 at 75.
Cox Broadcasting Corp. v. Cohn, (1975) 420 U.S. 469 at 493-496.
When a private photographer abuses his confidence by keeping the negative and publishing it for gain or otherwise, without the consent of the customer, he might be liable for breach of an implied contract.\textsuperscript{446} But when the person photographed does not sit for the photograph, and he or she has been snapped, or what is published without her consent is a picture looking like the person, in many States of the USA. An action would lie against the publisher for violation of the plaintiff’s right of privacy.\textsuperscript{447} In any case, the Court may impose restrictions upon a photographer if his activities constitute harassments.\textsuperscript{448}

Hence, once it is shown that the person whose privacy is alleged to have been infringed was a public official,\textsuperscript{449} or a ‘public figure’,\textsuperscript{450} or the report related to a matter of ‘public interest’, then, consistently with the guarantee of freedom of expression,\textsuperscript{451} the report (even though it related to the family affairs of the plaintiff) could not be punished unless:

(a) it was false;

(b) the defendant published it with knowledge of its falsity or in reckless disregard of the truth.\textsuperscript{452}

A newspaper or a broadcaster fighting an attempt at restraint for violation of privacy may, in appropriate circumstances, be able to use the defence of ‘public interest’. It must be proved that the public interest in disclosing the information outweighs the interest in preventing disclosure.

Mere fame not render a claimant a public figure and the fact that the public may have an interest in a claimant does not necessarily mean that intrusion into their private lives is justified.

\textsuperscript{446} Pollard v. Photographic Co., (1888) 58 L.J. Ch. (N.S.) 251.
\textsuperscript{447} Flake v. Greensboro News Co., (1938) 22 N.C. 780 at 793.
\textsuperscript{448} Galella v. Onassis, (1973) 487 F. 2d. 986 [the case of Mrs. Kennedy].
\textsuperscript{449} Supra note 441 at 255.
\textsuperscript{452} Ibid.
Where the confidential information involves government secrets or related sensitive information, Courts in foreign jurisdictions have been very wary of and reluctant to restrain publication unless it is clearly in the ‘public interest’ to do so. The following basic tenet needs to be borne in mind:

A government which revels in secrecy in the field of people’s liberty not only acts against democratic decency but busies itself with its own burial. That is the writing on the wall if history was teacher, memory our mentor and decline of liberty not our unwitting endeavour.453

In the case of a private person who has no public importance or is not a ‘public figure’, there being no question of public importance, e.g., obscenity454 involved, the plea of freedom of expression diminishes, as against the need for protection of privacy.455

5.19.2.6 New Media and Privacy

With the advancement in technology, the concept of new media has emerged as a tool of Information and Communication technology (ICT). New media is a broad term in media studies that emerged in the latter part of the 20th century and refers to on-demand access to content anytime, anywhere, on any digital device.

Most technologies described as “new media” are digital, often having characteristics of being manipulated, networkable, dense, compressible, and interactive. Some examples may be the Internet, mobile phones, computer multimedia, video games, CD-ROMS, and DVDs. People use new media technologies to debate various matters in blogs and discussion forums, thereby presenting technological progress as unstoppable. All this is giving

453 As Per V. R. Krishna Iyer, J., in Supra note 54 at 597.
455 Supra note 450.
rise to the emergence of an online public sphere.\textsuperscript{456} Interactivity has become a term for a number of new media use options. By using the latest technology, there has been a convergence of new methods of communication. All these dimensions have given rise to several issues today.

5.19.2.7 Privacy and Media: Need for Reconciliation

New media holds great potential as a resource for press freedom and freedom of expression. Freedom of the press is, after all, an application of the individual human rights principle of freedom of expression. Press freedom and freedom of expression are guiding principles of UNESCO that apply to traditional as well as new media. The UNESCO Constitution states a commitment to fostering “the free exchange of ideas and knowledge” and “the free flow of ideas by word and image”.\textsuperscript{457}

The Declaration of Sofia, endorsed by the UNESCO General Conference in 1997, states “The access to and the use of these new media should be afforded the same freedom of expression protections as traditional media”. More recently, the Fourth Principle of the Declaration of Principles issued by the Geneva session of the World Summits on the Information Society in December 2003 provided a clear confirmation that new forms of communication should be afforded the same freedom of expression rights as traditional news media. The challenge is how to turn these principled commitments into practical reality.\textsuperscript{458}

If new media is to be accorded the same protection as traditional media, then, does it mean that it should be subjected to the same grounds of


\textsuperscript{457} This is in addition to Article 19 of the Universal Declaration of Human Rights, see Supra note 436.

restrictions as freedom of speech and press, which includes both the print as well as electronic media.

The right to free speech includes the freedom to hold opinions without interference and to seek, receive, and impart information and ideas through any media regardless of frontiers. Thus, the medium of communication has gained tremendous significance in modern times for imparting information as well as in the expression of one’s opinion. But what is the limit on seeking, reporting and imparting information about any matter or about any individual?

There are several competing claims and the diverse issues to be addressed are - publication of confidential information, revealing of personal identity, personal privacy, freedom from surveillance, dissemination of information on the internet, social networking etc.

5.19.2.8 Privacy and Media: Legal Scenario

Freedom of speech and expression is a fundamental right and equally important is the ‘right to be let alone in one’s family, home and correspondence’ as interpreted by the Indian Judiciary which through its creative interpretation has made right to privacy a part of one’s fundamental right to life and personal liberty. Just as the freedom of speech and expression is vital for the dissemination of information on matters of public interest, it is equally important to safeguard the private life of an individual to the extent that it is unrelated to public duties and matters of public interest.

Advances in computer technology and telecommunications have exponentially increased the amount of information that can be stored, retrieved, accessed and collated almost instantaneously. An enormous amount of personal information is held by various bodies, public and private- the police, the income tax department, banks, insurance agencies,

\[\text{Supra note 36.}\]
employers, doctors, lawyers and so on. The data, today, is centralised and the boundaries between unconnected systems have been brought down. Technologies often described as “new media” share common characteristics in that they utilize digital data processing, are distributed, and are networked. With the use of latest techniques every bit of valuable information regarding an individual can be extracted and logged. No one knows in what context such information may be used given the fact, that the information can be easily accessed not only by private organisations but also by the public authorities as well.

The emergence of new media, thus, challenges the existing balance between privacy and freedom of expression. New technology facilitates anonymous and cross-border publishing. These developments raise a challenge for media regulation, which aims to strike a balance between privacy and freedom of expression. What need to be resolved are concerns over information privacy regarding “inappropriate access to identifiable information” about an individual.

The Information and Communication revolution in India has, no doubt, made an average individual techno-savvy but the use of hi-tech devices like mobile-phones, web-cameras; internet, Face book, twitter etc. have exposed him to several risks like unwanted publicity, losing his privacy, use of personal details for economic gains etc. Every time an individual uses the Internet, there is data left behind which is tracked by websites and advertising companies to be used for their marketing campaigns. An employer has advanced software with which he can access his employee’s mails. Even if a person takes all safety measures, there are

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460 Supra note 2 at 114.
461 For example, police and tax authorities are known all over the world to rely on the private sector for information about suspects and tax evaders. Similarly, Some Internet fraud schemes also involve identity theft - the wrongful obtaining and using of someone else’s personal data in some way that involves fraud or deception, typically for economic gain.

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certain smart brains which can hack and break in one’s privacy codes. There are location based tracking systems to carry on surveillance of another.

There are certain provisions which take care of these problems; however, their inadequacy is felt in the face of the volume of problems. For example, the Convergence Law aims to promote, facilitate and develop in an orderly manner the carriage and content of communications including broadcasting, telecommunications and multimedia.\textsuperscript{464} It further aims to establish an autonomous commission to regulate carriage of all forms of communication. The law seeks to establish the Communications Commission of India (CCI) as the super-regulator in India in the context of convergence of telecommunications, broadcasting, data communication, multimedia and other related technologies and services.

However, the government of India is in the process of establishing the CCI to hold super-regulatory power in telecom and broadcast sectors.\textsuperscript{465} Similarly, the Information Technology Act, 2000 makes the disclosure of information contained in electronic record; book or register etc. without the consent of the person concerned a punishable offence.\textsuperscript{466} The Right to Information Act, 2005 exempts the disclosure of personal information which has no relation to any public activity or interest which would cause an unwarranted invasion of the privacy of the individual.\textsuperscript{467}

5.19.2.9 Privacy- International Scenario

Though the impetus for recognizing privacy as a specific legal right of the individual has been continuing for about a century,\textsuperscript{468} in no country has such right been so far incorporated in any national Constitutional or statute, notwithstanding the declaration of such right in International

\begin{footnotes}
\item[466] Section 72, IT Act, 2000.
\item[467] Section 8 (1)(j), RTI Act, 2005.
\item[468] This is so since the publication of the Article ‘Right to Privacy by two American scholars’- Warden and Brandeis in 1890; 4 Harv. L.R. 193, cited \textsuperscript{Supra} note 2 at 118.
\end{footnotes}
Characters on Human Rights, such as Article 12 of the Universal Declaration of Human Rights, 1948 and Article 17 of the International Covenant on Civil and Political Rights, 1966.

The result is that the ambit of this right differs in various countries, resting on common law or judicial pronouncement upon other fundamental rights guaranteed by the constitution or fragmentary legislation, and that this ambit is necessarily nebulous and vague.

Article 12 of Universal Declaration of Human Right enunciates—

No one shall be subjected to arbitrary interference with his privacy, family, home or correspondence or to attacks upon his honour and reputation. Everyone has the right to the protection of the law against such interference or attacks.

5.19.2.10 Position in USA

In the USA, the need for a law to protect privacy was articulated as early as 1890 when an Article titled ‘The Right to Privacy’ was published by Warren and Brandeis.469 This Article laid the intellectual foundations for the law on privacy.

The press is overstepping in every direction the obvious bounds of propriety and of decency. Gossip is no longer the resource of the idle and of the vicious, but has become a trade, which is pursued with industry as well as effrontery.

The most well-known American cases on privacy are Griswold v. Connecticut,470 and Roe v. Wade.471 Griswold concerned a constitutional challenge to a law which prohibited the use of contraceptives. Upholding the notion of privacy, Justice Douglas of the U.S. Supreme Court held:

469 Ibid.
470 381 U.S. 479.
471 (1973) 410 U.S. 113.
Government purpose to control or prevent activities constitutionally subject to state regulation may not be achieved by means which sweep unnecessarily broadly and thereby invade the area of protected freedoms. Would we allow the police to search the sacred precincts of marital bedrooms for tell-tale signs of the use of contraceptives? The very idea is repulsive to the notions of privacy surrounding the marriage relationship.\footnote{472}

\textit{Roe v. Wade.}\footnote{473} concerned the right of an unmarried pregnant woman to an abortion. Upholding the woman’s right to make the choice which concerned her private life, the Supreme Court held that although the American Constitution did not explicitly mention any right of privacy, the Supreme Court itself recognized such a right as a guarantee of certain ‘zones or areas of privacy’ and ‘that the roots of that right may be found in the First Amendment, in the Fourth and Fifth Amendment, in the penumbras of the Bill of Rights and in the concept of liberty guaranteed by the Fourteenth Amendment’.

The distinguishing feature of the development of the law of privacy in the USA is that after a prolonged and tenuous struggle with the common law forms of action to insert privacy therein, many of the States have made invasion of privacy a statutory wrong, which would be actionable per se without going through the tortuous process of establishing trespass, libel or the like. But because of the constitutional guarantee of freedom of the Press, the problem has not ended with such legislation; it has yet to be determined how far such legislation would be consistent with the constitutional guarantee.

American Courts have extended the right of privacy from the realm of private law into constitutional law, and recognized the protection of this right as a legitimate public interest for restricting the freedom of expression.

\footnote{472}{\textit{Supra} note 470 at 484.}
\footnote{473}{\textit{Supra} note 471.}
In sum, in the USA, a reconciliation of the need for freedom of the Press and the need for the protection of privacy has been made through the following propositions:

Under the guarantee of freedom of expression, every individual has the right to be informed (or right ‘to know’) about matters of public interest. The freedom of the Press, therefore, extends to all public issues and events, and matters of ‘public interest’, so that political and social changes desired by the people may be obtained by lawful means.

It is noteworthy here that British Columbia (Canada) has gone to the extent of enacting (Privacy Act, 1968) that, in the absence of ‘public interest’, invasion of privacy would be actionable in damages, without proof of damage and irrespective of any trespass having been committed by the defendant.

5.19.2.11 Position in England

In developing the law on privacy, Indian Courts have relied largely on American case law as the American law on privacy has evolved faster than the law in England. One of the earliest cases in England, Albert v. Strange, involved the unauthorized copying of etchings made by Queen Victoria and her husband for their private amusement. The etchings, which represented members of the Royal family and matters of personal interest, were entrusted to a printer for making impressions. An employee of the printer made unauthorized copies and sold them to the defendant who in turn proposed to exhibit them publicly. Prince Albert succeeded in obtaining an injunction to prevent the exhibition. The Court’s reasoning was based on

474 Supra note 451 at 389.
475 Supra note 450 at 164.
476 Supra note 454 at 48.
477 Terminiello v. Chicago, (1949) 337 U.S. 1, see Supra note 75 and 97.
478 Ironically, it was by borrowing from English case law and creatively interpreting it that the law in America developed. And yet, the law of privacy in England has lagged far behind, inviting much criticism from commentators.
479 (1849) 1 McN & G23.
both the enforcement of the Prince’s property rights as well as the employee’s breach of confidence.

Even as late as 1991, the law in England was found to be inadequate in protecting privacy. In that year, the Court of Appeal decided Kaye v. Robertson. The case concerned a well-known actor who had to be hospitalized after sustaining serious head injuries in a car accident. At a time when the actor was in no condition to be interviewed, a reporter and a photographer from the Sunday Sport newspaper unauthorizedly gained access to his hospital room, took photographs and attempted to conduct an interview with the actor.

An interlocutory injunction was sought on behalf of the actor to prevent the paper from publishing the Article which claimed that Kaye had agreed to give an exclusive interview to the paper. There being no right to privacy under English law, the plaintiff could not maintain an action for breach of privacy. In the absence of such a right, the claim was based on other rights of action such as libel, malicious falsehood and trespass to the person, in the hope that one or the other would help him protect his privacy. Eventually, he was granted an injunction to restrain publication of the malicious falsehood. The publication of the story and some less objectionable photographs were, however, allowed on the condition that it was not claimed that the plaintiff had given his consent. The remedy was clearly inadequate since it failed to protect the plaintiff from reserving his personal space and from keeping his personal circumstances away from the public glare. The Court expressed its inability to protect the privacy of the individual and blamed the failure of common law and statute to protect this right.

481 The Human Rights Act, 1998 which imposes a positive obligation to act in accordance with the European Convention on Human Rights is expected to have a positive effect on the development of the law in the U.K.
In *Campbell v. MGN*, 482 Naomi Campbell, an international supermodel brought an action against the Mirror group of newspapers claiming damages for breach of confidence and invasion of privacy for disclosing that she was receiving treatment for drug addiction. Campbell’s claim was not that the disclosure that she had a drug problem was a breach of confidentiality, but that the obtaining and publishing of information relating to her treatment at a rehabilitation centre was in breach of confidence. The trial judge upheld her claim. The order was reversed by the Court of Appeal but subsequently restored by the House of Lords. Following the test of the Australian High Court in *Australia Broadcasting v. Lena Game Meats Pvt. Ltd.*, 483 the Court of Appeal did not find that a reasonable person of ordinary sensibilities, would, on reading that Campbell was a drug addict, find it highly offensive or even offensive that a paper also disclosed that she was attending meetings of Narcotics Anonymous. The peripheral disclosure of her attendance at Narcotics Anonymous was not in its context of sufficient significance to shock the conscience of the Court and justify judicial intervention.

On the contrary, the Court found that the details given and the photographs lent credibility to the newspaper’s claim that she was deceiving the public by claiming that she was not on drugs. There was therefore, no breach of confidence. It was held that if the publication of particular confidential information is in the public interest, the journalist must be given reasonable latitude as to the manner in which that information is conveyed to the public or else his right to freedom of expression would be unnecessarily inhibited.

The House of Lords reversed the verdict of the Court of Appeal holding 3:2, that the details of Campbell’s treatment were private information and imported a duty of confidence. The therapy was at risk of being damaged if there was a breach of the duty of confidence by publication. Article 10 of the European Convention on Human Rights was

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482 (2003) 1 All ER 224.
not absolute and could be restricted in the interests of privacy, the right to which was enshrined under Article 8 of the same Convention.\footnote{484}

In \textit{Douglas v. Hello Ltd.},\footnote{485} international film stars Michael Douglas and Catherine Zeta Jones brought an action against \textit{Hello} Magazine for unauthorized publication of photographs of their wedding. The couple had already signed a deal with a rival magazine, \textit{Ok} (also a plaintiff in the action) for exclusive coverage of the wedding. The Court of Appeal found that there was a strong prima facie case on invasion of privacy, but vacated an interlocutory injunction against \textit{Hello} on the ground that the balance of convenience was not in favour of the plaintiffs. Ledley, L.J. expressly recognized the right to privacy grounded in the equitable doctrine of fundamental rights: the AIDS patient’s right to life which included his right to privacy and confidentiality of his medical condition, and the right of the lady to whom he was engaged to lead a healthy life. The Supreme Court concluded that since the life of the fiancée would be endangered by her marriage and consequent conjugal relations with the AIDS victim, she was entitled to information regarding the medical condition of the man she was to marry. There was, therefore, no infringement of the right to privacy.\footnote{486}

This case may be compared with an English case that arose in the late eighties, \textit{X v. Y}.\footnote{487} A newspaper reporter acquired information about two doctors practicing in the National Health Service despite having AIDS. The information was acquired from hospital records and was supplied by employees of the NHS. Despite the plaintiffs having obtained an injunction against the use of any confidential information from hospital records, the second defendants, owners of a national newspaper published an Article

\footnote{484}{Supra note 482.}
\footnote{485}{(2001) 2 All ER 289.}
\footnote{486}{Interestingly, although the identity of the parties was concealed, a law journal which first reported the judgment disclosed the names of the parties. This was subsequently rectified by the publication of an apology and the rectification of names. But the damage to the privacy of those concerned had already been done. In a subsequent clarification, (Mr. ‘X’ v. Hospital ‘Z’ (2003) 1 SCC 500), the Supreme Court set aside some observations passed in the earlier judgment (supra note 36) while holding that the right of the HIV infected person was not violated by the disclosure of his medical condition to his fiancée’s family.}
\footnote{487}{(1988) 2 All ER 648.}
written by the defendant reporter title ‘Scandal of Docs with AIDS’ and threatened to disclose the identity of the doctors.

While recognizing the public interest in having a free press and informed public debate, the Court took the view that this was outweighed by the public interest that victims of AIDS should be able to resort to hospitals without fear of disclosure and breach of confidence by employees of the hospital. The Court felt that a breach of confidentiality would make patients reluctant to come forward for treatment and counseling and this, in turn, would lead to a spread of the disease, which was contrary to public interest.

Outside such statutory exceptions, which are few in number, the inadequacy of the existing common law categories of torts would be evident from an instance of invasion of privacy by taking photographs from aircraft, which must be reckoned as a growing menace is offered from a recent case from the UK.\textsuperscript{488} Plaintiff brought an action for damages for trespass and invasion of privacy against the defendant for having taken an aerial photograph of the plaintiff’s estate, including his family residence.

Relying on old decisions,\textsuperscript{489} the Court came to the conclusion that no ‘trespass’ was committed by flying over the airspace above one’s land or by taking a photograph. It did not also constitute an actionable ‘nuisance’ because it did not interfere with the user of his land; nor did the plaintiff bring his action on the footing of nuisance.

But the Court observed that even though a single instance of taking a photograph would not be actionable as a nuisance, if this was repeated occasionally to harass the plaintiff in the occupation of his premises, it might constitute actionable nuisance. The conclusions which emerge out of the foregoing decision are that:\textsuperscript{490}

\begin{itemize}
\item \textsuperscript{488} Bernstein \textit{v. Skyviews}, (1977) 2 All ER 902 (QBD).
\item \textsuperscript{489} Saunders \textit{v. Smith}, (1838) 2 Jur 491 at 492.
\item \textsuperscript{490} \textit{Supra} note 265 at 73.
\end{itemize}
(a) Privacy is not an independent wrong under the existing law of torts in England or in India.

(b) If aerial surveillance is repeated, it may give rise to an action for nuisance, but the plaintiff would be helpless if the defendant takes a photograph of the plaintiff’s house without interfering with this enjoyment of the premises and even publishes such photograph so as to aid a terrorist (that was the apprehension of the plaintiff in the cited case) or to publicise the activities of plaintiff private household.

The question is whether the taking of a photograph of one’s premises or household without his permission should not be constituted as a statutory wrong, and, if necessary, to add privacy as an additional limitation, in Article 19(2) of our Constitution, in order to uphold such legislation.

It is submitted that though literature on the subject is not yet sufficient, some broad propositions may be formulated for consideration of the Legislature in case any legislation on privacy is contemplated:

A person who has a public life cannot claim privacy to the same extent as a person who has no public status.

It has been rightly observed:491

Those who seek and welcome publicity of every kind bearing on their private lives so long as it shows them in a favourable light are in no position to complain of an invasion of their privacy by publicity which shows them in an unfavourable light.

But the statute should define the categories of such public interest or status.

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In the absence of any public issue, the Press should not be allowed to make commercial use of materials obtained by invading the privacy of any individual.

5.19.2.12 Right to Privacy and Judicial Response in India

In India, the right to privacy is not a specific fundamental right but has nevertheless gained constitutional recognition. ‘Privacy’ is not enumerated amongst the various ‘reasonable restrictions’ to the right to freedom of speech and expression enlisted under Article 19(2). However, this lacuna has not prevented the Courts from carving out a constitutional right to privacy by a creative interpretation of the right to life under Article 21 and the right to freedom of movement under Article 19 (1)(d). Although, there is no right to privacy in the Indian constitution, nevertheless, the protection of right to privacy becomes an important issue in India because it being a democratic country, individual freedom holds primary importance. Right to privacy being an integral part of one’s to life and personal liberty has to be given due importance.

Part III does not expressly include right to privacy as a fundamental right. Similarly, this is not a guaranteed statutory right. But, it is the initiative of the Hon’ble Supreme Court that right to privacy has been read into Article 19 and Article 21 of the Constitution. This has become possible because a new trend is visible in India, i.e. to relate fundamental rights in India to International Human Rights. The Supreme Court, for example, has made copious references to the Universal Declaration of Human Rights, 1948 and observed:

The applicability of the Universal Declaration of Human Rights and principles thereof may have to be read, if need be, into the domestic jurisprudence.

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492 Supra note 105 at 898.
In *People’s Union for Civil Liberties v. Union of India*, the Supreme Court has implied the right to privacy from Article 21 by interpreting it in conformity with Article 12 of the Universal Declaration of Human Rights and Article 17 of the International Covenant on Civil and Political Rights, 1966. Both of these international documents provide for the right to privacy; India is a signatory to both and these do not go contrary to any part of the Indian Municipal law.

Reiterating the importance of right to privacy, the Supreme Court, in the case of *Ram Jethmalani v. Union of India*, has observed:

Right to privacy is an integral part of right to life. This is a cherished constitutional value, and it is important that human beings be allowed to remain free of public scrutiny unless they act in an unlawful manner. The solution for the problem of abrogation of one zone of constitutional values cannot be the creation of another zone of abrogation of constitutional values. The notion of fundamental rights, such as right to privacy as part of right to life, is not merely that the State is enjoined from derogating from them. It also includes the responsibility of the State to uphold them against the actions of others in the society, even in the context of exercise of fundamental rights by those others.

Thus, there is a right to privacy—right to be let alone.

5.19.2.13 Declaration of Assets by ‘candidates’ Whether a Violation of Right to Privacy

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494 AIR 1997 SC 568 at 574-575.
495 Article 21 of the Indian Constitution provides that no person shall be deprived of his life and personal liberty except according to procedure established by law.
496 Supra note 105 at 1225.
497 (2011) 8 SCC 1.
In *People's Union for Civil Liberties v. Union of India*, the Supreme Court held that electoral candidates were under a duty to disclose information about their antecedents, including about their assets and liabilities, and could not be protected by any right to privacy when it came to disclosing information which the public had a right to know. Where there are competing interests, the right to privacy of the individual and the right to information of the citizen, in the public interest, the former has to yield to the latter. In any event, the disclosures required to be made by an electoral candidate pertaining to assets and liabilities as also the criminal record are matters of public record and there was, therefore, no infringement of the right to privacy. In the instant case, P. Venkatarama Reddy, J. said succinctly:

Privacy primarily concerns the individual. It therefore, relates to an overlaps with the concept of liberty. The most serious advocate of privacy must confess that there are serious problems of defining the essence and scope of the right. Privacy interest in autonomy must also be placed in the context of other rights and values.

By calling upon the contesting candidates to disclose the assets and liabilities of his/her spouse, the fundamental right to information of a voter/citizen is thereby promoted when there is a competition between the right to privacy of an individual and the right to information of the citizens, the former. However, along with ‘right to privacy’ the dimensions of ‘right to know’ are also taking shape side by side and it is quite possible that there may occur a conflict between the two. One’s privacy right may offend other’s information right. And therefore, heavy burden lies upon the judiciary to balance the tilt. It is expected from the judiciary that by playing the role of a “balance wheel”, it should adjudge which interest requires to be

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499 Supra note 304.
500 Id., at 472, (para 121).
501 Id., at 442-443, (para 47).

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comparatively more protected-interest inherent in the “privacy right” or that which is inherent in the “Information right”.

5.19.2.14 Medical Examination and Privacy

In *Sharda v. Dharampal*, the question arose as to whether in the course of divorce proceedings, a person could be subjected to a medical examination and whether such an examination was not an intrusion on the individual’s privacy. The Court held that where divorce was being sought on grounds such as impotency or schizophrenia, without a medical examination it would be impossible to conclude if the ground was justified.

The Court held that no specific right of privacy had been conferred under Article 21 and such a right could therefore not be an absolute one. Some limitations could be imposed to protect the right of the spouse to seek a divorce on specific grounds. Thus, where there is a strong prima facie case, the Court could allow a medical test, and where such a case is made out but the concerned party refuses to undergo the test, an adverse inference may be drawn. The Court observed:

Mental health treatment involves disclosure of one’s most private feelings. In sessions, therapists often encourage patients to identify ‘thoughts, fantasies, dreams, terrors, embarrassments and wishes’. To allow these private communications to be publicly disclosed abrogates the very fiber of an individual’s right to privacy, the therapist-patient relationship and its rehabilitative goals. However, like any other privilege the psychotherapist-patient privilege is not absolute and may only be recognized if the benefit to society

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**Note:**

502 *Supra* note 425.

503 *Id.*, at 523 (para 76).
5.19.2.15 Mental Privacy

In Selvi and Others v. State of Karnataka, the legality of three scientific tests namely narcoanalysis, polygraph test (lie detector test) and Brain Electrical Activation Profile (BEAP) test was challenged, inter alia, on the ground that these tests violate the test subject’s rights under Article 20(3) and 21 of the Constitution and under Section 161(2) of the Criminal Procedure Code, 1973.

In narcoanalysis, intravenous injection of sodium pentothal is given to test subject due to which the test subject enters into hypnotic trance, and answers questions put to him, without having conscious control over the replies which may be incriminating to him. He may reveal information which he may otherwise conceal in a state of full consciousness.

In polygraph test, instruments like cardiographs, pneumographs, cardio-cuffs, sensitive electrodes etc. are attached to test subject’s body. Physiological responses like respiration, blood pressure, blood flow, pulse rate, galvanic skin resistance etc. in his body are measured after putting certain questions to him. Theory behind polygraph test is that when a person is giving false reply to an incriminating question put to him, he would produce physiological responses which are different from the responses given in the normal course.

In BEAP test, electrical waves emitted from test subject’s brain are recorded by attaching electrodes to his scalp. The test subject is exposed to audio or visual stimuli (words, sounds, pictures, videos) that are relevant to the facts being investigated (known as material probes), alongside other irrelevant words and pictures (known as neutral probes). The underlying theory is that in case of guilty suspects, exposure to material probes will

\[504\] Id., at 521, (para 71).
\[505\] Supra note 129.
lead to emission of P300 wave component. By examining records of these wave components, the examiner can make inferences about test subject’s familiarity with information related to crime.\textsuperscript{506}

Holding all three tests to be impermissible, the Supreme Court held that these tests, when conducted under compulsion, violate right against self-incrimination protected under Article 20(3) and right to personal liberty protected under Article 21. These tests have also been held to be violative of the right to remain silent under Section 161(2), Cr.P.C.\textsuperscript{507}

The Court held that testimonial compulsion is prohibited by law. A person has a right to remain silent on questions which may incriminate him. This protection is lost in case of narcoanalysis because the test subject is under the influence of a drug injected into his body and he loses control over his verbal responses and, therefore, cannot decide consciously about the questions which he should not answer.\textsuperscript{508}

Further, the Court held that mental privacy is an aspect of personal liberty under Article 21 and the same is intruded upon because the common feature of these tests is that the test subject’s verbal or physiological responses are extracted in a manner that he has no conscious control over them. Also, such involuntary disclosure of information is cruel, inhuman and a degrading treatment to an individual which is again a violation of Article 21. These tests are also violative of right of an accused to a fair trial because access to legal advice becomes meaningless when test subject is made to reveal information without having conscious control over it.\textsuperscript{509}

\textbf{5.19.2.16 Privacy and Disclosure of Information to Police}

\emph{People’s Union for Civil Liberties v. Union of India,}\textsuperscript{510} concerned a constitutional challenge to the Prevention of Terrorism Act, 2002 (POTA), inter alia, on the ground that Section 14 of the Act which mandates the

\textsuperscript{506} \textit{Ibid.}  
\textsuperscript{507} \textit{Ibid.}  
\textsuperscript{508} \textit{Ibid.}  
\textsuperscript{509} \textit{Ibid.}  
\textsuperscript{510} \textit{Supra note 288.}
Disclosure of information to the police by ordinary people is a violation of the right to privacy. It was held that privacy is not an absolute right and is, in any event, subservient to the security of the State. Further, the concealment of such information could not be traced to the right to privacy.\textsuperscript{511}

5.19.2.17 Search and Seizure

\textit{District Registrar and Collector v. Canara Bank,}\textsuperscript{512} arose out of a challenge to the provisions of the Indian Stamp Act, 1899 as amended by the Andhra Pradesh Act, 17 of 1986. This amendment empowered the Collector to authorize ‘any person’ to enter upon any premises to take notes or extracts from, seize or impound registers, books, records, papers, documents and proceedings.

A number of banks challenged this provision since documents executed between private persons maintained by banks in the course of their loan advancing transactions were inspected and banks were directed to remit the amount of deficit duty on the basis of those documents and to recover these amounts from the parties concerned. Recognizing the importance of confidentiality in the relationship between a bank and its customer, the Court held that the power to inspect documents in private custody was excessive.

Besides the power which enables ‘any person’ not merely a public officer to enter upon and search the home of a person without establishing a reasonable or probable basis was violative of the right to privacy and hence liable to be struck down.\textsuperscript{513}

5.19.2.18 Right of Sexual Autonomy as Part of Privacy Right

\textsuperscript{511} \textit{Ibid.}, at 602-603, (paras 36-39). It is to be noted, however, that the POTA, 2002 has been repealed with effect from 21st September, 2004.

\textsuperscript{512} (2005) 1 SCC 496.

\textsuperscript{513} ibid.
Another aspect of privacy rights was illustrated in Naz Foundation v. Govt. of N.C.T. of Delhi.\textsuperscript{514} This case was based on U.S. Case Lawrence, 539 U.S. 558 (2003). This case has evolved the right of sexual autonomy as part of the right to privacy by expanding the scope of right to life and personal liberty under Article 21. Consensual sexual acts done in private by adults have been criminalized under Section 377 of IPC and such was held in this case as violative of gay’s people right to equality under Article 14 and life, liberty and privacy under Article 21.

It is submitted that freedom of speech and expression also includes one’s right to have control on his body. However, such kind of expression needs state’s recognition. While expressing himself, an individual carries numerous decisional rights on his physical body. Indeed, every civilized state endeavours to recognize individuals’ bodily expressions. For example, abortion, prostitution, live-in relationships, surrogacy, passive euthanasia, etc. has been recognized in many legal systems of the world. On the same basis of freedom of bodily expression, the voice of gays’ and lesbians’ rights has been echoed worldwide. In the instant case,\textsuperscript{515} the Delhi High Court admitted that homosexuality is not a disease or a disorder and is just another expression of human sexuality.\textsuperscript{516} It was observed that Section 377 of IPC disproportionately impacts gays solely on the basis of their sexual orientation. This provision is an intrusion into gays’ sexual privacy. The Court held that Section 377 of IPC, which discriminates a Section of people solely on the ground of their sexual orientation, is a violative of Article 15 of the Indian Constitution. The Court reminded that one Section of people cannot be penalized on the basis of state’s moral disapproval of that class.\textsuperscript{517} Finally, the Court declared Section 377, insofar it criminalizes consensual sexual acts of adults in private, as violative of Articles 14, 15 and 21 of the Indian Constitution.

\textbf{5.19.2.19 Privacy of a Dead Person}

\begin{itemize}
\item \textsuperscript{514} 2010 Cri LJ 94 (Del.).
\item \textsuperscript{515} Ibid.
\item \textsuperscript{516} Id. at 116.
\item \textsuperscript{517} Id. at 129.
\end{itemize}
This is a very significant aspect which is yet to be explored since many times invasions had been there into the private lives of the deceased persons. Even a dead person is entitled to a decent burial and so it flows from it that the privacy and the dignity of a dead person should be maintained. A prominent Indian example which may be quoted here would be of the Arushi murder case. In the case of the brutal and mysterious murder of this teenager in Delhi, all newspaper did not spare any thought before launching into a full-scale offensive against the murdered girl and her parents. The character assassination and more damaging insinuations hurled about with impunity stopped only when the trial Court severely came down on the perpetrators.

Quite sadly, when the investigations were on, the newspapers were flooded with the transcripts of the deceased girl’s emails. Further, lots of aspersions were being cast on her character. In the absence of any legal safeguards, this was a serious invasion on the privacy of a deceased teenage girl. Moreover, the media did not serve any “public interest” by making the contents public, except creating sensationalism.

5.19.2.20 Privacy of a Sleeping Individual

In a one of its kind judgment, the privacy of a sleeping individual has been recognised by the Hon’ble Supreme Court. The Court held that curtailment of the right of sleeping individuals has to be expressed as it indirectly involves the tampering of inviolate rights that are protected under the Constitution.

In this case, Baba Ramdev along with his large number of followers and supporters performed a Shanti Path at about 10.00 p.m. on 4th June, 2011, whereafter, all those who had assembled and stayed back, went to sleep under tents and canopies to again get up in the morning the next day at about 4 p.m. to attend the schedule of Ashtang Yoga training to be

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518 In 2008, Arushi Talwar, the victim, was killed in very mysterious circumstances, and the mystery has not been unraveled till date. The media went into a tailspin and all the conjectures and surmises have caused her and her family irreparable damage.

519 Supra note 153.
conducted by Baba Ramdev. Just after midnight, at about 12.30 a.m. on the 5th June, 2011, a huge contingent of about more than a thousand policemen surrounded the encampments while everybody was fast asleep inside. There was a sizeable crowd of about 20,000 persons who were sleeping. They were forcibly woken up by the Police, assaulted physically and were virtually thrown out of their tents. This was done in the purported exercise of the police powers conferred under Section 144 Cr.P.C. on the strength of a prohibitory order dated 4.6.2011 passed by the Assistant Commissioner of Police.

The manner in which the said order came to be implemented raised deep concern about the tyrannical approach of the administration and the Court took cognizance of the incident calling upon the Delhi police administration to answer this cause. The incident had ushered a huge uproar and an enormous tirade of criticism was flooded, bringing to our notice the said unwarranted police action, that too, even without following the procedure established in law.

The question was whether such an order stands protected under the restriction clause of Article 19 of the Constitution of India or does it violate the rights of a peaceful sleeping crowd, invading and intruding the privacy during sleeping hours? The incident also raises serious questions about the credibility of Police Act, the procedure followed for implementation of a prohibitory order and the justification thereof in the given circumstances.

The Court, relying upon several national and international decisions, observed:

The citizens/persons have a right to leisure; to sleep; not to hear and to remain silent. The knock at the door, whether by day or night, as a prelude to a search without authority of law amounts to be police incursion into
privacy and violation of fundamental right of a
citizen.520

The Courts have always imposed the penalty on disturbing peace of others by using the amplifiers or beating the drums even in religious ceremonies.521 Further, the Court has also issued several directions banning use of fireworks or fire crackers except between 6.00 a.m. and 10.00 p.m. There shall be no use of fire crackers in silence zone i.e. within the area less than 100 metres around hospitals, educational institutions, Courts, religious places.522

The Court further held that right of privacy and the right to sleep have always been treated to be a fundamental right like a right to breathe, to eat, to drink, to blink, etc.523 Thus, in the instant case, the Court ordered appropriate disciplinary action against erring police officials and awarded compensation to the victims injured in the police lathicharge. Further, the Court gave a forewarning to the respondents to prevent any repetition of such hasty and unwarranted act affecting the safe living conditions of the citizens/persons in this country.

5.19.2.21 Privacy of a Public Figure

In A. Raja & another v. P. Srinivasan & another524 certain news item along with photographs of the minister and his family were published in a bi-weekly magazine named “Junior Vikatan” and comments were made regarding improper allocation of the 2G Spectrum services by the government of India. It was held that where the conduct of a person connected to his public office is published in press, the prior verification of facts by the press is not necessary. It is sufficient that the media and press acted after reasonable verification. However, where the family photographs of the Cabinet minister were published without offering any explanation as

521 Supra note 125.
523 Supra note 153,( para 29).
524 AIR 2010 Mad 77 (D.B.)
to why and under what circumstances photographs were published, tantamount to abuse of the right of the child. Further, publishing the photograph of his wife who is neither a public figure nor she is in a public domain amounted to infringement of her right to privacy.

5.19.2.22 Police Surveillance and Right to Privacy

Midnight knocks, shadowing by secret police surveillance, interception of the mail and so on are an invasion of personal liberty by a police State. Police reports, bugging and other curtailments are invasions of man’s free speech and free movement. And when secret files are stored forever in computers and transferred to others, the powerless individual succumbs to electronic injuries to his reputation and livelihood.

In Kharak Singh v. State of Uttar Pradesh,525 the Supreme Court held that police surveillance of a person by domiciliary visits was void. ‘Domiciliary visits’ mean visits by the police in the night to the private house for the purpose of making sure that the suspect is staying at home or whether he has gone out. The Supreme Court held that the domiciliary visits by the policemen were an invasion on the petitioner’s personal liberty. By the term ‘life’ as used here something more is meant than mere animal existence. The inhibition against its deprivation extends to all those limbs and faculties by which life is enjoyed. Hence, the U.P. Police Regulation authorizing domiciliary visits was plainly violative of Article 21 as there was no law on which it could be justified and it must be struck down as unconstitutional.

However, surveillance by way of several measures indicated in a regulation would not always be void but would be valid if the regulation was a “procedure established by law”. This was held by the Apex Court in Govind v. State of M.P.,526 wherein the M.P. Police Regulations authorizing domiciliary visits were held constitutional as they had the force of law. The Court held that these regulations imposed reasonable restrictions on the

525 AIR 1963 SC 1295.
526 AIR 1975 SC 1378.
fundamental right of petitioner guaranteed under Article 21 and, therefore, they had the force of law.

It is worthy to mention here that Article 20 of the Constitution anathematizes self-incrimination. Secret spying and electronic eavesdropping is self-incriminatory time-bomb. Fair procedure when life or liberty is curtailed, is mandated by Article 21 and treacherous recording and storage for later use as evidence is grossly unfair. Reasonableness of restrictions on fundamental rights of free expression, free association, free movement, free thought, free worship, free pursuit of profession or vocation are obligated by Article 19 and contrary provisions and every clandestine wire-tapping into individual privacy is immoral. Arbitrary governmental action, overt or covert, is tabooed by Article 14.

5.19.2.23 Telephone Tapping and Right to Privacy

Right to hold telephonic conversation in privacy is included in freedom of speech.527

As stated earlier the right to privacy is one of the unremunerated rights granted to the citizens of India,528 since the Indian constitution does not recognize the right to privacy. This right has been read into various fundamental rights guaranteed under the Constitution by the Courts.

In a historic judgment in People’s Union for Civil Liberties v. Union of India,529 popularly known as ‘Phone Tapping Case’, the Supreme Court has held that telephone tapping is a serious invasion of an individual’s right to privacy which his part of the right to “life and personal liberty” enshrined under Article 21 of the Constitution, and it should not be resorted to by the States unless there is public emergency or interest of public safety requires.

The petition was filed by way of public interest litigation under Article 32 of the Constitution by the People’s Union of Civil Liberties – a

527 Supra note 494.
529 Supra note 494.
voluntary organization-highlighting the incidents of telephone tapping in the recent years. The petitioners has challenged the constitutional validity of Section 5 of the Indian Telegraph Act, 1885 which authorizes the Central or State Government to resort to phone tapping in the circumstances mentioned therein. The Writ petition was filed in the wake of the report on “Tapping of Politicians Phones” by the Central Bureau of Investigation (CBI).

The Court laid down exhaustive guidelines to regulate the discretion vested in the State under Section 5 of the Indian Telegraph Act for the purposes of telephone tapping and interception of other messages so as to safeguard public interest against arbitrary and unlawful exercise of power by the Government. The Court has expressed displeasure that State has so far not framed rules to prevent misuse of the power. In the absence of just and fair procedure for regulating the exercise of power under Section 5(2) of the Indian Telegraph Act, it is not possible to safeguard the rights of citizens guaranteed under Articles 19(1)(a) and 21 of the Constitution. The CBI investigation has revealed several lapses in the execution of the orders passed by the State while exercising power under the Act.

Section 5(2) of the Act permits the interception of messages in accordance with the provisions of the Act. “Occurrence of any public emergency” or “in the interest of public safety” are the sine qua non for the application of the provisions under Section 5(2) of the Act. Unless a public emergency has occurred or the interest of public safety demands, the authorities have no jurisdiction to exercise the powers under the said legislation.

The Court said public emergency would mean the prevalence of sudden condition or state-of-affairs affecting the people at large calling for immediate action. The expression ‘public safety’ means the state or condition of grave danger or risk for the people at large. The Court held that when, either of these two conditions are not in existence, the Central Government or the State Government or the authorized officers cannot resort to telephone tapping even though there is satisfaction that it is necessary or
expedient so to do in the interest of sovereignty and integrity of the country.\textsuperscript{530}

In other words, even if the Central Government is satisfied that it is necessary or expedient so to do in the interest of the sovereignty or integrity of the country or the security of the State or friendly relations with foreign States or public order or for preventing for incitements to the commission of an offence, it cannot intercept the message or resort to telephone tapping unless a public emergency has occurred or the interest of public safety or the existence of the interest of public safety requires.

The Court has laid down the following procedural safeguards for the exercise of power under Section 5(2) of the Indian Telegraph Act:\textsuperscript{531}

1. An order for telephone tapping can be issued only by the Home Secretary of the Central Government or the State Governments. In an urgent case, the power may be delegated to an officer of the Home Department of the Central and State Government not below the rank of Joint Secretary.

2. The copy of the order shall be sent to the Review Committee within one week of the passing of order.

3. The order shall, unless renewed, cease to have effect at the end of two months from the date of issue. The authority making the order may review before that period if it considered that it is necessary to continue the order in terms of Sections 5(2) of the Act.

4. The authority issuing the order shall maintain the records of intercepted communications, the extent the material to be disclosed, number of persons, their identity to whom the material to be disclosed, number of persons, their identity to whom the material is disclosed.

\textsuperscript{530} Ibid.
\textsuperscript{531} Id., at 575.
5. The use of the intercepted material shall be limited to the minimum that is necessary in terms of Section 5(2) the Act.

6. The Review Committee shall on its own, within two months, investigate whether there is or has been a relevant order under Section 5(2) of the Act.

7. If on investigation the Review Committee concludes that there has been a contravention of the provisions of Section 5(2) of the Act, shall set aside the order. It can also direct the destruction the copies of the intercepted material.

8. If on investigation the Review Committee comes the conclusion that there has been no contravention of the relevant provision of the Act, it shall record the finding to that effect.

The Apex Court, thus, held that when a person is talking on telephone, he is exercising his right to freedom of speech and expression. Telephone tapping, accordingly, infracts Article 19 (1)(a) unless it falls within the grounds of restrictions falling under Article 19 (2).532

The judgement of the Supreme Court delivered by a Division Bench comprising Mr. Justice Kuldeep Singh and Mr. Justice S. Sagir Ahmad will go a long way in protecting the right of privacy of Indian citizens.

5.19.2.24 The UK Tabloid News of the World Case

The News International phone-hacking scandal, dubbed hack gate by the press, was an ongoing controversy involving the defunct News of the World and other British newspapers published by News International, a subsidiary of News Corporation. Employees of the newspaper were accused of engaging in phone hacking, police bribery, and exercising improper influence in the pursuit of publishing stories.

532 Clause (2) of Article 19 provides the grounds on which reasonable restrictions may be imposed on freedom of speech and expression. They are- Security of the State, friendly relations with foreign states, Public order, Decency or Morality, Contempt of Court, Defamation, Incitement of an offence, Sovereignty and Integrity of India.
Investigations conducted from 2005–2007 concluded that the paper’s phone hacking activities were limited to celebrities, politicians and members of the British Royal Family. In July 2011, it was revealed that the phones of murdered schoolgirl Milly Dowler, relatives of deceased British soldiers, and victims of the 7/7 London bombings were also accessed, resulting in a public outcry against News Corporation and owner Rupert Murdoch. Advertiser boycotts contributed to the closure of the News of the World on 10 July, ending 168 years of publication.\(^5\)

British Prime Minister David Cameron announced on 6\(^{th}\) July 2011, that a public inquiry would look into the affair after police investigations had ended. On 13\(^{th}\) July 2011, Cameron named Lord Justice Leveson as chairman of the inquiry, with a remit to look into phone hacking and police bribery by the News of the World, while a separate inquiry was to consider the culture and ethics of the wider British media.\(^6\)

He also said the Press Complaints Commission would be replaced “entirely”. The inquiries led to several high-profile resignations, including Dow Jones chief executive Les Hinton; News International legal manager Tom Crone; and chief executive Rebekah Brooks. The commissioner of London’s Metropolitan Police Service, Sir Paul Stephenson, also resigned his post. Former News of the World managing editor Andy Coulson, former executive editor Neil Wallis, and Brooks were all arrested. Murdoch and his son, James, were summoned to give evidence before the Leveson Inquiry.

The negative attention garnered by the scandal eventually reached the United States, where News Corporation is headquartered and operates multiple media outlets. The Federal Bureau of Investigation launched a probe on 14\(^{th}\) July 2011, to determine whether News Corporation accessed voicemails of victims of the 9/11 attacks. On 15\(^{th}\) July, U.S. Attorney General Eric Holder announced an additional investigation by the


Department of Justice, looking into whether the company had violated the Foreign Corrupt Practices Act.

Over the course of his testimony before the Leveson Inquiry, Rupert Murdoch admitted that a cover-up had taken place within the News of the World to hide the scope of the phone hacking. On 1st May 2012, a parliamentary select committee released a report concluding that Murdoch “exhibited wilful blindness to what was going on in his companies and publications,” and stated that he was “not a fit person to exercise the stewardship of a major international company”.

News International had, meanwhile, also published two full-page apologies in many of Britain’s national newspapers. The first apology took the form of a letter, signed by Rupert Murdoch, in which he said sorry for the “serious wrongdoing” that occurred. The second was titled “Putting right what’s gone wrong”, and gave more detail about the steps News International was taking to address the public’s concerns.

The consequences of the exposure of ethical transgressions that occurred at ‘News of the World’ have also led to concerns that such practices could be happening at other News Corporation titles in Britain. Furthermore there has been speculation that American news companies that are a part of Rupert Murdoch’s media empire may have become implicated.

It is to be noted here that more than 60 lawsuits are filed against Rupert Murdoch’s News International in the phone hacking scandal.

It is submitted that the effect of the phone hacking scandal originating with the ‘News of the World’ raises wider questions about the ethics

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538 “Lawsuits against Murdoch”, The Indian Express, 12 (February 9, 2012).
employed by companies under Murdoch’s ownership, as well as the effects the scandal will have on the ethics employed specifically by print journalists and to some extent the wider world of journalism.  

Murdoch had previously been criticised for building a media empire that lacked any ethical base and replacing responsible journalism with “gossip, sensationalism, and manufactured controversy.”

It is, thus, submitted that nearly every country in the world recognizes a right of privacy explicitly in their Constitution. At a minimum, these provisions include rights of inviolability of the home and secrecy of communications.

5.19.2.25 Nira Radia Tapes Case

In November 2010, OPEN magazine carried a story which reported transcripts of some of the telephone conversations of Nira Radia with senior journalists, politicians, and corporate houses, many of whom have denied the allegations. After getting authorization from the Home Ministry, the Indian Income Tax department tapped Radia’s phone lines for 300 days in 2008–2009 as part of their investigations into possible money laundering, restricted financial practices, and tax evasion.

The Central Bureau of Investigation announced that they have 5,851 recordings of phone conversations by Radia, some of which outline Radia’s attempts to broker deals in relation to the 2G spectrum sale. The tapes

540 Bernstein, Carl, “Is Phone-Hacking Scandal Murdoch’s Watergate?”, Newsweek 11 July 2011, Cited in Ibid.
appear to demonstrate how Radia attempted to use some media persons to influence the decision to appoint A. Raja as telecom minister.\footnote{“JPC on Radia tapes?”, India Today, November 25, 2010, available at http://indiatoday.intoday.in/site/Story/120849/India/jpc-on-radia-tapes.html, visited on November 30, 2010.}

In the recorded conversations between Nira Radia and prominent figures, referred to as the Radia Tapes, several prominent figures are heard in conversation with Radia.\footnote{“Phone gate: India Inc tapped? Copy of a purportedly leaked report says conversations of topmost industrialists, two senior journalists, were tapped with home secretary’s permission”, Mid-day, April 29, 2010, available at http://www.midday.com/news/2010/apr/290410-india-inc-tapped-phone-tapping-leaked-report-ratan-tata-mukesh-ambani-sunil-mittal.htm, visited on November 23, 2010.}

The news gained prominence following sustained pressure on social networking sites Twitter and Facebook against an attempted blackout orchestrated by many prominent Indian TV channels and newspapers.\footnote{“Those living in glass houses”, The Hindu Business Line, available at http://www.thehindubusinessline.com/2010/11/23/stories/2010112350760800.htm, visited on November 30, 2010.}

Initially, only a handful of the mainstream newspapers in India, like The Deccan Herald, Indian Express had openly written about the tapes. Some newspapers like HT Media, Mint (the business newspaper also owned by HT media) and NDTV said “the authenticity of these transcripts cannot be ascertained”.\footnote{“NDTV on defamatory remarks against Barkha Dutt”, NDTV, November 18, 2010, available at http://www.ndtv.com/Article/india/ndtv-on-defamatory-remarks-against-barkha-dutt-67210, visited on November 30, 2010.}

The Radia tapes are seen to have also made a dent in the image of the media in the country.\footnote{“The spotlight is on the media now : The Niira Radia episode raises questions about the boundary between legitimate news gathering, lobbying and influence peddling”, The Hindu (Chennai), November 24, 2010, available at http://www.thehindu.com/opinion/lead/Article907823.ece, visited on November 25, 2010.} “The complete blackout of the Nira Radia tapes by the entire broadcast media and most of the major English newspapers paint a truer picture of corruption in the country,” wrote G Sampath, the deputy editor of the Daily News and Analysis (DNA) newspaper.
The original tapes are now annexure in a Supreme Court petition seeking Raja’s prosecution. The opposition parties in India had demanded a Joint Parliamentary Committee (JPC) probe into the 2G spectrum scam, which could also be extended to include a probe into the Radia tapes to ascertain the media’s role in the controversy. The Government was also accused of selectively releasing merely 10 hours of the 2000 hours recorded of the Radia tapes.\footnote{Harish Gupta, “Outsmarted Congress redraws strategy in Parliament”, Daily News & Analysis (DNA), available at http://www.dnaindia.com/india/report_outsmarted-congress-redraws-strategy-in-parliament_1471196, visited on November 30, 2010.}

Such like instances raise concerns over media ethics and bring out the unholy nexus between the influential people and the media for their personal gains, much to the discomfort of the common man.

Much perturbed by the public outcry, and brought to the verge of collapse after the leakage of the Radia tapes, the government decided to tighten the phone tapping norms through a stringent set of fresh standard operating procedures (SOPs).

The government was, however, unable to find who was behind the leakage of the controversial Nira Radia tapes that had prompted the then Prime Minister Manmohan Singh to set up a committee under the cabinet secretary to tighten phone tapping norms and examine procedures for handling, analysis, storage and disposal of telephonic intercepts.\footnote{Aman Sharma, “Govt to modernise phone-tapping”, available at http://indiatoday.intoday.in/story/govt-to-tighten-phone-tapping-norms/1/135789.html, visited on June 6, 2012.}

5.19.2.26 Proposed Guidelines for Telephone Tapping

The new proposed guidelines were as follows:

- No phone tapping for detecting income tax evasion.

- The Home secretary to get reports on each tapped number from government agency and service provider; to ensure only the number is tapped for which approval is given.
• Biometric identity-based access for approved personnel to the records of such phone tapping to ensure tracking of the culprit in case of any leaks.

• Service providers to provide MHA a monthly list of phones being tapped.

• The state home secretaries - who are authorised to sanction phone tapping at the state level - will also furnish a similar list to the Union home ministry every month.

• Standard time-frame in which all tapped phone records - which are no longer required for probe by the agency - must be destroyed.

A committee, headed by the then cabinet secretary K.M. Chandrashekhar, also decided that the Union home secretary would ask for reports from the government agency requesting the tapping, as well as the service provider, to ensure that the same phone number is being tapped for which permission was sought. These reports would be tallied to ensure no phone is tapped based on any forged approval in the name of the home secretary.

In this regard, service providers and government agencies would have to come up with a standardised system to ensure biometric identity-based access for approved personnel to the records of such phone tapping to ensure tracking of the culprit in case of any leaks.

The new norms also prohibit the tapping of phones for the purpose of detecting any income tax evasion. The government sources said that the Income-Tax department - specifically the Central Board of Direct Taxes (CBDT) - could be removed from the list of authorised government agencies who can ask for phone tapping.
Also, there would be a standard time-frame in which all tapped phone records - which are no longer required for probe by the agency - must be destroyed.

There would be an ombudsman at each service provider-level to curb illegal tapping of phones and every request for phone tapping to the MHA will have to be vetted by a senior officer in the government agency.

The government wanted to completely take over the phone tapping mechanism from the domain of the telecom service providers by 2013 and is working to put a centralised data monitoring system (CDS) in place which will ensure that the connection of the intercepted line can be automatically switched off from the service provider after an approved period.

This would enable perfect monitoring of the entire interception network as there would be a convergence of all intercepted lines at just one location, which will be manned round-the-clock by officials of the government agencies who have been approved to ask for phone taps.

5.19.2.27 Amar Singh Phone tapping Case

The Samajwadi party leader Mr. Amar Singh had knocked the doors of the Supreme Court in January 2006 seeking a judicial probe into an incident of tapping of his phone with top political leaders and Bollywood stars. He had alleged that his phones were intercepted in violation of the guidelines of the Apex Court and the provisions of the Indian Telegraph Act and Rules.551

551 "SC raps Amar Singh in phone-tapping case”. Available at http://indiatoday.intoday.in/story/sc-raps-amar-singh-in-phone-tapping-case/1/129239.html, visited on June 7, 2012. In India, the telephone tapping norms are as follows: Telephone tapping has to be approved by a designated authority. It is illegal otherwise. The Central Government or State Government is empowered to order interception of messages per Section 5 of Indian Telegraph Act 1885. Rule 419 and 419A sets out the procedure of interception and monitoring of telephone messages. There is a provision for a review committee to supervise the order of interception. Phone tapping is permitted based on Court order only and such permission is granted.
The Apex Court terming the unauthorised tapping of telephone of any person as a “very serious matter affecting the privacy of an individual”, had on February 27, 2006, restrained the electronic and the print media from broadcasting and publishing the contents of the taped conversations of anyone, including that of Singh.

The conversations were tapped allegedly unauthorisedly by a private service provider on a forged authorisation. A bench of Justices G.S. Singhvi and A.K. Ganguly asked Singh and the government to file their responses on the plea by an NGO, Centre for Public Interest Litigation, seeking the Court’s direction to vacate the gag order which was ordered by former Chief Justice Y.K. Sabharwal in 2006. The Court had also issued notices to eight telephone companies, both in government and private sector, to make them as parties to a petition by Amar Singh, raising the issue of tapping of his phone “illegally” on two forged letters of Delhi government Home Secretary and a Joint Commissioner (Crime), Delhi Police.552

Quite astonishingly, Amar Singh sought to withdraw his complaint against the central government. At this juncture, the Supreme Court said that Singh had not come clean on the issue. The Court also blasted him for taking the Court for a ride.

Infact, no concrete solutions came out of the case even though many years had passed and many hours were devoted in the case.

only if it is required to prevent a major offence involving national security or to gather intelligence on anti-national/terrorist activities. Though economic offences/tax evasion were initially covered under the reasons for interception of phones, the same was withdrawn in 1999 by the Government based on a Supreme Court order citing protection to privacy of the individual. As per Rule 428 of the India telegraphic rules, no person without the sanction of the telegraph authority, use any telephone or cause or suffer it to be used, purposes other than the establishment of local or trunk calls. The Government of India instructions provide for approved attachments. There is no provision for attachment for recording conversation”.

5.19.2.28 Initiatives to Check Illegal Phone Tapping

The different controversial incidents of the alleged unauthorised telephone tapping cases had compelled the government to take certain steps to check illegal phone tapping.

The government had taken an initiative to modernise the phone tapping capabilities in all the states of the nation to ensure no illegal tapping takes place with its new multi-crore project.

The project, entirely funded by the Intelligence Bureau (IB), to allow state police units to intercept phone calls, text message, multimedia messages, 3G video calls and faxes.

Each service operator to have a modern telephone call interception system (TCIS) installed in order to tap information from suspect individuals. These details to be fed into a central monitoring system (CMS) set up in all the state capitals, Union Territories, and Jammu.

The IB, however, stipulated that the new TCIS systems across all the states need to be “compatible and interoperable” but not inter-linked.

In other words, the states were not required to share information with each other, but the Centre could look at all the intercepted data to see that no illegal tapping is done by any state.

Real-time monitoring of the tapping to be done by the service providers to enable the states to ensure no illegal tapping is being done based on any fake permission.

The new TCIS system would standardise these systems by providing the tapping of all such calls in real-time.

A key feature was an integrated voice separation and recognition system which will identify suspect callers such as a terrorist by matching their voice against the voice sample fed into the system by the government.

\[\text{Supra note 551.}\]
The interception, however, would not interfere with the operation of the telecommunication network or make the target aware that he is being monitored.

To ensure there are no unauthorised leakages of such tapped information, the TCIS system to have a provision of biometric authentication by finger-printing and secured log-in systems to make sure that only authorised personnel get access to such tapped information.

The TCIS would also not have any input or output device like floppy discs or CD drives installed on the servers to eliminate leakages.

5.19.2.29 Data Protection as an Aspect of Privacy Right

Much of the focus in recent years has been the push to improve the protection of data security and integrity. For example, the state of Minnesota had legislation to protect personally identifiable information. The law requires that the ISP “take reasonable steps to maintain the security and privacy of a consumer’s personally identifiable information”. Other states have taken similar steps and 49 U.S. jurisdictions have laws requiring consumer notification of security breaches.\(^\text{554}\)

Similar action has been taken to update the European Privacy Directive regarding data security. Directive 2002/58/EC of the European Parliament and of the Council concerning the processing of personal data and the protection of privacy has recently been cleared for adoption. In the years since the initial EC Privacy Directive has been in operation, concerns have grown regarding the theft of private data and the intrusions suffered as a result of unwanted e-mail or spam. Directive 2002/58/EC addresses these concerns as well as others. Security breaches may go well beyond loss of personal information stored on a laptop computer or financial information

stolen by computer hackers. Data security requires a comprehensive process both inside and outside the data repository.555

Lapses in security can come from hackers, software malfunctions that inaccurately index data, human error, human misconduct, or other external forces that alter, destroy, corrupt or improperly disclose the data. The most common security focus is on hackers, spyware and attacks on the integrity of information from the outside. These are significant threats that must be taken seriously. Software, hardware and other countermeasures should be deployed to protect the integrity of information and data from outside threats.556

The European data protection laws drive from the tradition of valuing privacy as a fundamental human right. The first extension of these protections of interstate transfers of data began in Sweden in 1973. The Swedish system included the creation of a Data Inspection Board which had the authority to review and approve the transfer of any personal file. Germany followed suit in 1977. For U.S. law, the protections of those who are the subject of database law derives primarily from criminal procedure laws aimed at providing protections from illegal searches and seizures. In the U.S. among the most critical early data privacy laws was the U.S. Privacy Act of 1974, which was enacted at roughly the same time as the first data laws in Sweden. Notable for the Privacy Act was the recognition of privacy as a “personal and fundamental right” which could endanger a person’s opportunities “to secure employment, insurance, and credit, and his right to due process”. The U.S. federal law, thereof, from its early inception, has limited the ability of the government to collect data, and has restricted how that data is used. Only later did it begin to also provide safeguards regarding the integrity, security and use of computer data by third parties.557

556 Ibid.
In both continental law and American law, the importance of data protection and security has emerged as a central fixture of national law. The earliest of these international efforts can be traced to the Organization for Economic Co-operation and Development (OECD) Guidelines on the Protection of Privacy and Transborder Flows of Personal Data in 1980. The guidelines provide many of the fundamentals that define the nature of informatics, including limits on data collection, retention, and disclosure as well as safeguards regarding the storage and maintenance of the data. The OECD Guidelines, in turn have had profound international influence in Europe, America and Asia.

The OECD Privacy Guidelines anticipate the efforts made by the European Union through EC directive 95/46 (the EC Privacy Directive). Under the EC Privacy Directive both the protection of “the fundamental right to privacy” and “the free flow of personal data” are values to be balanced and protected. The key aspect of the EC Privacy Directive is to protect personal data. They establish quality controls over the data, requiring that reasonable steps are taken to keep the information accurate and current. The first step requires that regulators in the U.S., Europe, Asia and throughout the world recognize the interconnected nature of the data. Understanding that safety and security issues, data privacy, and copyright protection all flow from the same data management strategy will assist in the understanding of how best to manage the increasing amount of information available. The time to create such a system is upon us. International cooperation must continue around the globe to provide for

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560 Ibid.
561 Supra note 558.
comprehensive and standardized protections both for data and from the misuse of that data.\footnote{Supra note 555 at 61.}

\subsection*{5.19.2.30 Submissions}

The right to freedom of speech and expression and the right to privacy are two sides of the same coin. One person’s right to know and be informed may violate another’s right to be left alone. Just as the freedom of speech and expression is vital for the dissemination of information on matters of public interest, it is equally important to safeguard the private life of an individual to the extent that it is unrelated to public duties or matters of public interest. The law of privacy endeavours to balance these competing freedoms.

Thus, privacy is that sphere of the life of an individual into which the Government cannot interfere. It may at times be a pure right i.e. the right literally to be left alone in the confines of one’s house, so long as no unlawful activity is carried out. It may also be the right to an unhindered exercise of some or the other constitutional right, so long as the right is exercised in a private or personal arena. It is a protection of the basic inviolable nature of the human personality.\footnote{The principle of “inviolate personality” was introduced to the field of legal jurisprudence by what is almost universally considered to be the “pioneering work” in the law of privacy: Samuel D. Warren and Louis D. Brandeis, “The Right To Privacy”, \textit{4 Harvard Law Review} 193, 205 (1890) (hereinafter Warren & Brandeis). But see note, “The Right to Privacy in Nineteenth Century America”, (1981) 94 \textit{Harvard Law Review} (1892), cited in Abhinav Chandrachud, “The Substantive Right to Privacy: Tracing the Doctrinal Shadows of the Indian Constitution”, (2006) 3 SCC (Jour), 31 to 52 at 31.}

In the Indian context, it embodies a freedom from unwarranted, arbitrary and unnecessary surveillance, search and seizure. It signifies the power to decide what kind of personal information may be disclosed, and the choice of whom the disclosure may be made to. It is a safeguard of the
exercise of choice in matters fundamental to our existence. It is not merely an informational right, but a truly substantive right.\textsuperscript{564}

Thus, even though a Section of the reading public may be interested in sordid stories of adultery in a divorce proceeding, a wife, suing for divorce, cannot be said to have become a ‘public figure’ by reason of such litigation nor does the report of the matrimonial proceedings assume a ‘public interest’, so as to shield a journal from libel proceedings for making incorrect reports.\textsuperscript{565}

It has, therefore, been assumed that the state may legitimately prohibit the publication of news which intrudes upon the privacy of private individuals, without any public interest being involved in the disclosure.\textsuperscript{566} It would, thus, be permissible for a state to make it unlawful to use “for advertising purposes, or for the purposes of trade, the name, portrait or picture of any living person without having first obtained the written consent of such person”.\textsuperscript{567}

But it would not be constitutional for the state to penalize the press for having published accurate information from judicial records which are open to public inspection, even though such publication mentions the name of the victim of a rape, which was available from such records.\textsuperscript{568} There cannot be any right of privacy when the news is available from public sources and judicial records of proceedings which were not held in camera and which are open to public inspection.\textsuperscript{569}

The state cannot impose any prior restraint upon the freedom of the press on the ground that the relevant publication would offend the privacy of an individual or would defame a public official; the remedy in all such cases

\textsuperscript{564} \textit{Ibid.}
\textsuperscript{565} \textit{Supra} note 444.
\textsuperscript{566} \textit{Supra} note 451.
\textsuperscript{567} \textit{Supra} note 450.
\textsuperscript{568} \textit{Supra} note 445. The situation has changed in India by introduction of Section 228A I.P.C.
\textsuperscript{569} \textit{Ibid.}
would be for the aggrieved person under the appropriate law after the offending mater is published.\(^{570}\)

Some broad propositions may be formulated for consideration of the Legislature in case any legislation on privacy is contemplated:\(^{571}\)

1. A person who has a public life cannot claim privacy to the same extent as a person, who has no public status. In this regard, it has been observed:

Those who seek and welcome publicity of every kind bearing on their private lives so long as it shows them in a favourable light are in no position to complain of an invasion of their privacy by publicity which shows them in an unfavourable light.\(^{572}\)

But the statute should define the categories of such public interest or status.

2. In the absence of any public issue, the press should not be allowed to make commercial use of materials obtained by invading the privacy of any individual.

It is submitted that right to privacy cannot be abridged except when the larger interest of nation requires otherwise. The private life of public figures, even political leaders may become exception, if public interest is at stake. Public disclosure of their assets and other doings may have to be public property. Here no exception must be made. Judges, bureaucrats, political leaders and others who handle public business must fall within the net. Those who wield the power, whether governmental, corporate or other, cannot hide from the public, on the alibi of private life, their private action, which bears upon the public interest.

\(^{570}\) Supra note 437 at 632, [paras 22, 26(4), (6)].
\(^{571}\) Supra note 41 at 89.
\(^{572}\) Supra note 265 at 74.
The unbridled power of the media can become dangerous if checks and balances are not inherent in it. The role of the media is to provide to the readers and the public in general with information views tested and found as true and correct. This power must be carefully regulated and must reconcile with a person’s fundamental right to privacy. Any wrong or biased information that is put forth can potentially damage the otherwise clean and good reputation of the person or institution against whom something adverse is reported. Pre-judging the issues and rushing to conclusions must be avoided. The exponential growth of the media, particularly the electronic media in recent years has brought into focus issues of privacy. The media has made it possible to bring the private life of an individual into the public domain, exposing him to the risk of an invasion of his space and his privacy. At a time when information was not so easily accessible to the public, the risk of such an invasion was relatively remote. In India, newspapers were, for many years, the primary source of information to the public. Even then, newspapers had a relatively limited impact given that the vast majority of the population was illiterate. This has changed today with a growth in public consciousness, a rise in literacy and perhaps most importantly, an explosion of visual and electronic media which have facilitated an unprecedented information revolution.  

Advances in computer technology and telecommunications have exponentially increased the amount of information that can be stored, retrieved, accessed and collated almost instantaneously. An enormous amount of personal information is held by various bodies, both public and private- the police, the income tax department, banks, insurance agencies, credit rating agencies, stock brokers, employers, doctors, lawyers, marriage bureaus, detectives, airlines, hotels and so on. Till recently, this information was held on paper; the sheer volume and a lack of centralization made it hard to collate, with the result that it was very difficult for one body or person to use this information effectively. In the internet age, information is...

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\[Supra\ note 2 at 113.\]
so centralized and so easily accessible that one tap on a button could throw up startling amounts of personal information about an individual. 574

Coinciding with this technological revolution is the enactment of a law on the right to information. The Right to Information Act, 2005 creates rights of access to information relating to public affairs and proceeds on a presumption in favour of openness. The availability of camcorders on mobile phones means that anyone could be clicking you or recording you or recording your conversation without your knowledge. Recent instances which kicked up a storm in the media include: (i) The MMS case involving the circulation and sale of a video clip showing a Delhi school girl indulging in a sexual act with a fellow student; (ii) the purported expose of Bollywood’s casting couch showing an aging actor propositioning a journalist posing as a Bollywood aspirant. 575

In no country does the right to privacy enjoy the status of a specific, constitutionally inviolate legal right. Privacy law has evolved largely through judicial pronouncement. Despite the lack of specific constitutional recognition, the right to privacy has long held a place in international charters on human rights. 576

In an age of revolutionised communications and aggressive voyeurism, the individual’s privacy is under siege. But the law makers in India have shown scarce concern on the issue. While in many other

574 Id., at 114.
575 Id., at 115.
576 Article 17 of the International Covenant on Civil and Political Rights, 1966 which India has ratified, reads: (1) No one shall be subject to arbitrary or unlawful interference with his privacy, family, human or correspondence, nor to lawful attacks on his honour and reputation. (2) Everyone has the right to the protection of the law against such interference or attacks.
Article 8 of the European Convention of Human Rights, 1950 reads: (1) Everyone has the right to respect 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 law and is necessary in a democratic society in the interests of national security, public safety, for the prevention of disorder and crime or for the protection of health or morals.
countries, there are now a variety of statutes in place\textsuperscript{577} which seek to protect these rights; but the Indian laws on the subject lag far behind.

Recent enactments do make some limited provision for the protection of the individual's privacy, but these are inadequate. For instance, the Information Technology Act, 2000\textsuperscript{578} makes the disclosure of information contained in an electronic record; book or register etc. without the consent of the person concerned a punishable offence. However, oddly there is no protection against obtaining illegal and unauthorised access to such information. The recent Right to Information Act, 2005 exempts the disclosure of personal information which has no relation to any public activity or interest which would cause an unwarranted invasion of the privacy of the individual.\textsuperscript{579}

Digital records are inherently vulnerable. Wikileaks is just one prominent example on the government security.\textsuperscript{580} The result is, now, the governments and companies will be warier about what they put online. Diplomats would be cagier about what they put in cables. The risk of leaks may encourage more official integrity. For example, America has tightened the rules that once gave some 2.5 million people- including the alleged leaker, Bradley Manning, an army private- access to everything classified secret” and below. Most other rich-world governments were already more careful than America was; they are even more so now. As a result of Wikileaks scandal, people will be more careful now because there will be more ways to leak secrets and people will have to think even harder whom

\begin{flushleft}
\textsuperscript{577} Such as the Privacy Act, 1988 (Commonwealth) and the Data Protection Act, 1988 in the UK. \\
\textsuperscript{578} Section 72, The Information Technology Act, 2000. \\
\textsuperscript{579} Section 8(I)(j), The Right to Information Act, 2005. \\
\textsuperscript{580} Around 2,51,000 American diplomatic cables were published online. The cause of the fiasco was that Wikileaks’ founder, Julian Assange, let multiple copies of a master file containing all the cable proliferate online, all encrypted with the same password that he had given to David Leigh, a Guardian journalist. Mr. Leigh later published the passphrase in a book (he said he thought it was no longer valid). People, including estranged former supporters of Mr. Assange, started dropping hints until the secret was out. Wikileaks later joined other sites in publishing the cables in full.
\end{flushleft}
to entrust the secrets—especially media outfits that claim to be tech-savvy and trustworthy.\textsuperscript{581}

The human animal needs a freedom seldom mentioned, freedom from intrusion. He needs a little privacy quite as much as he wants understanding or vitamins or exercise or praise. A man has the right to pass this world, if he wishes without having his pictures published, his business enterprises discussed, his successful experiments written up for the benefit of others, of his eccentricities commented upon whether in handbills, circulars, catalogues, newspapers or periodicals.\textsuperscript{582}

The best definition of the ‘right to privacy’ is found in the report by a panel in 1967 to the U.S. President’s Office of Science and Technology:

The right to privacy is the right of the individual to decide for himself how much he will share with others his thoughts, his feelings and the fact of his personal life . . . . Actually what is private varies from day to day and setting to setting.\textsuperscript{583}

Quite clearly, one man’s art is always going to be another’s pornography. Inherent in the freedom of expression is the freedom to offend and so is inherent in the freedom to know the freedom to intrude into another’s privacy. Caustic but true observations made by Martin Luther King Jr. are relevant:

The means by which we live have outdistanced the ends for which we live. Our scientific power has outrun our spiritual power. We have guided missiles and misguided men.\textsuperscript{584}

\textbf{5.19.2.31 Need for Specific Legal Provisions}

Though a number of legal provisions are there, but the need to be better equipped to deal with the above said competing claims has been felt. A few submissions may be made.

\begin{itemize}
\item \textsuperscript{581} “Swept up and away”, \textit{The Indian Express}, 13 (September 14, 2011).
\item \textsuperscript{582} Naveen Thakur, “Right to Privacy”, \textit{AIR 1998 (Journal)} 145-150 at 147.
\item \textsuperscript{583} \textit{Id.}, at 146.
\item \textsuperscript{584} \textit{Supra} note 312 at 147.
\end{itemize}
Being a living organ, the Constitution is ongoing and with passage of time, law must change. The freedom of speech, thus, can be restricted on the grounds of “personal privacy” of an individual, besides the other grounds of restrictions. Thus, suitable amendments need to be made in Article 19(2). Further, the law which takes away the right to privacy of an individual must be interpreted very strictly and evasion of privacy should be the last resort.

Recent enactments do make some limited provision for the protection of the individual’s privacy, but these are inadequate. For instance, the Information Technology Act, 2000\textsuperscript{585} makes the disclosure of information contained in an electronic record; book or register etc. without the consent of the person concerned a punishable offence. However, oddly there is no protection against obtaining illegal and unauthorized access to such information. The recent Right to Information Act, 2005 exempts the disclosure of personal information which has no relation to any public activity or interest which would cause an unwarranted invasion of the privacy of the individual.\textsuperscript{586}

Further, in India, since the Constitution enumerates the permissible grounds of restriction on the freedom of expression in Article 19(2), it will not be possible for the Courts to add ‘privacy’ to that list till the legislature does the same in its own wisdom by way of an amendment. But such exposure of private affairs as might be called ‘obscene’ or indecent can be legitimately suppressed by the State on the ground of ‘morality’ or decency. Perhaps the ground of ‘public order’ may also be resorted to in cases where such exposure might lead to an apprehension of breach of the peace between the persons involved.

So far as the law of Torts is concerned, it is still based on English law, so that it can be expanded to make any species of invasion of privacy

\textsuperscript{585} Supra note 578.
\textsuperscript{586} Supra note 579.
actionable, only by enacting statues, in conformity with constitutional limitations, just discussed.

Invasion of privacy done by video surveillance and such surveillance is generally carried out by media persons for sting operations or by detectives for providing proof to their clients. All these mechanisms need to be monitored so as to avoid any unpleasant incident like the UK News of the World case. The only compelling ground for allowing the same should be “Public Interest”, and as far as possible, it should not come into conflict with the corresponding rights of others.

A few submissions need to be made with respect to certain specific legislations-

5.19.2.32 Indian Telegraph Act, 1885

In the present context, it is worthy to mention that the Indian Telegraph Act, 1885 is an archaic law and not competent to address the problems of hi-tech age. More so, such laws have to be drafted, implemented and adjudicated by high profile, technologically competent brains, otherwise the wicked and the spooks will have the last laugh and the law will remain a paper tiger only.

5.19.2.33 Information Technology Act, 2000

Section 69 of the IT Act, 2000 has been amended after Mumbai terror blasts. It now contains certain provisions whereby a designated governmental agency to monitor and collect internet traffic data or information generated, transmitted, received and stored in any computer. Security agencies can block any website for security reasons. However, it may be submitted that before taking such measures, the reasonableness of such restrictions must be effectively balanced against freedom of speech.

There is a need to amend Section 66E of the IT Act, 2000 by increasing the punishment for violation of privacy from 3 years to 10 years
and awarding exemplary compensation. Further, the offence needs to be made non-bailable.

5.19.2.34 Data Protection Principles

An individual’s data received manually or in e-form must be protected. The following are the “Data Protection Principles” which must be kept in mind by the private individuals, private organisations, government or its agencies while receiving the data: 587

(a) The data should be processed fairly and lawfully,
(b) The data should be obtained for specific and lawful purpose,
(c) The data should be adequate, relevant and not excessive,
(d) The data should not be kept for longer than necessary,
(e) The data should be processed in accordance with the rights of data subjects, and
(f) Measures should be taken against unauthorized or unlawful processing.

5.19.2.35 Need for Specific Legislation

Besides this, the Indian legal system requires various new legislations like Privacy Act, 1988 (Commonwealth) and Data protection Act, and 1988 (U.K.). Further, it must be ensured that the Communications Commission of India may be formed as soon as may be as a regulatory body on convergence issues. The legal provisions should be effective enough to tackle the unauthorised disclosure and illegal access to the private information. Further, the effective implementation of laws is the need of the hour. Besides all this, the judiciary can also keep an eye on the matter and interpret the laws to meet the just claims.

5.19.3 Copyright and Freedom of Speech

Copyright is a property right in an original work of authorship (such as a literary, musical, artistic, photographic, a film work or a computer programme) fixed in any tangible medium of expression, giving the holder the exclusive right to reproduce, adapt, distribute, perform and display the work.\textsuperscript{588}

The Universal Declaration of Human Rights recognises not only the right to protection of original works but also the protection of the economic benefits attached to it.\textsuperscript{589}

Copyright protects the expression of ideas, the particular words (or images) used. But it does not protect ideas themselves. This is an important distinction. What this means is that you are not free to speak or write someone else’s words, though you are in many circumstances free to paraphrase them. The ideas can be expressed in other words, but you may not quote at length in public without the rights holder’s permission. The law of copyright is intended to prevent plagiarism and unfair exploitation of creative work. It is a natural extension of the freedom of speech and expression protected under Article 19(1)(a) of the Constitution. If an

\textsuperscript{588} ‘Copyright’ has been so defined under Section 14 of the Copyright Act, 1957: “14. For the purposes of this Act, ‘copyright’ means the exclusive right subject to the provisions of this Act, to do or authorise the doing of any of the following acts in respect of a work or any substantial part thereof, namely,—
(a) in the case of a literary, dramatic or musical work, not being a computer programme:—
(i) to reproduce the work in any material form including the storing of it in any medium by electronic means;
(ii) to issue copies of the work to the public not being copies already in circulation;
(iii) to perform the work in public, or communicate it to the public;
(iv) to make any cinematographic film or sound recording in respect of the work;
(v) to make any translation of the work;
(vi) to make any adaptation of the work”.

\textsuperscript{589} Article 27 of the Universal Declaration of Human Rights reads as follows:
(1) Everyone has the right freely to participate in the cultural life of the community to enjoy the arts and share in scientific advancement and its benefits.
(2) Everyone has the right to the protection of the moral and material interests resulting from any scientific, literary or artistic production of, which he is the author.
individual enjoys the freedom of speech and expression, he must also be
guaranteed protection of the intellectual property in his expression, be it in
the form of a literary, dramatic, musical or artistic work, a film or a sound
recording.  

There is a vital public interest in copyright protection. Writes G. Davies in ‘Copyright and the Public Interest’:  

Copyright serves the public interest in freedom of expression. By enabling the creator to derive a financial reward from the work, his artistic independence and right to create and publish according to his own wish and conscience is assured. Alternative methods of rewarding creators such as patronage, whether by the State or by individuals, carry the risk of control or censorship.  

5.19.3.1 Copyright-Issues Involved  

The communication revolution in recent years, particularly the advent of information technology has resulted in rampant transborder piracy and its impact has been felt most drastically in the entertainment industry, films and music in particular. Today, India is the world’s largest producer of films and has the potential to become an international hub for the sourcing of all kinds of inputs for the international entertainment industry. But this potential cannot be optimally realised unless piracy can be effectively contained. Piracy is eating into not only the profits legitimately due to this industry but is also depriving the government of substantial revenue. Piracy of Bollywood films in the UK and the USA is so widespread that it is estimated to cause a loss of over 40% of all overseas sales.

Copyright is not a positive right to do something but confers a negative right which restricts others from copying the original work of an author. A right for one person is thus a restriction on another. Since the law

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590 Supra note 2 at 128.
591 11C Studies, Munich, 1994 XIV 173, Cited Id. at 129.
of copyright protects the right of one person and restrains another from exercising corresponding rights, the question naturally arises as to whether the right of the copyright owner infringes the freedom of expression of another under Article 19(1)(a) of the Constitution or the freedom of business of another guaranteed under Article 19(1)(g). Unlike defamation, contempt, morality, decency, incitement to an offence and the like, copyright is not one of the specified restrictions under Article 19(2). However, the law of copyright is an incident of the general law of property. The right to free expression or free trade cannot be stretched to mean that a person can be entitled to benefit from another’s property or the fruits of another’s labour whether tangible or intangible.593

5.19.3.2 Copyright and Entertainment Industry

The 1994 Amendment to the Copyright Act conferred special rights on broadcasting organisations and on performers.594 Broadcasting organisations enjoy a special ‘broadcast reproduction right’ in respect of its broadcasts which subsists for twenty five years.595

In R.G. Anand v. Deluxe Films,596 Fazal Ali, J. laid down the following tests for infringement of copyright:597

1. There can be no copyright in an idea, subject matter, themes, plots or historical or legendary facts and violation of the copyright in such cases is confined to the form, manner and arrangement and expression of the idea by the author of the copyrighted work.

2. Where the same idea is being developed in a different manner, it is manifest that the source being common, similarities are bound to occur. In such a case the Courts should determine whether or not the similarities are on fundamental or
substantial aspects of the mode of expression adopted in the copyrighted work. If the defendant’s work is nothing but a literal imitation of the copyrighted work with some variations here and there it would amount to violation of the copyright. In other words, in order to be actionable the copy must be a substantial and material one which at once leads to the conclusion that the defendant is guilty of an act of piracy.

3. One of the surest and the safest test to determine whether or not there has been a violation of copyright is to see if the reader, spectator or the viewer after having read or seen both the works is clearly of the opinion and gets an unmistakable impression that the subsequent work appears to be a copy of the original.

4. Where the theme is the same but is presented and treated differently so that the subsequent work becomes a completely new work, no question of violation of copyright arises.

5. Where however apart from the similarities appearing in the two works there are also material and broad dissimilarities which negative the intention to copy the original and the coincidences appearing in the two works are clearly incidental no infringement of the copyright comes into existence.

6. As a violation of copyright amount to an act of piracy it must be proved by clear and cogent evidence after applying the various tests laid down by the case-law discussed above.

7. Where, however, the question is of the violation of the copyright of stage play by a film producer or a Director the task of the plaintiff becomes more difficult to prove piracy. It is manifest that unlike a stage play, a film has a much broader prospective, wider field and a bigger background where the defendants can by introducing a variety of incidents give a
colour and complexion different from the manner in which the copyrighted work has expressed the idea. Even so, if the viewer after seeing the film gets a totality of impression that the film is by and large a copy of the original play, violation of the copyright may be said to be proved.598

Measures that could be taken to clamp down on piracy of films and music both in India and abroad include:599

1. Organised action from the film industry including through the setting up of a piracy prevention fund to tackle piracy both in India and overseas through litigation, through governmental and intergovernmental co-operation in ensuring enforcement of copyright laws. One possibility for the purposes of augmenting resources for this fund is to get the government to contribute a small fraction of the service tax collection from the entertainment and media sector towards the piracy prevention fund. The government itself loses out on huge amounts of revenue on account of piracy and it would therefore make practical economic sense to ensure that the government itself contributes to the piracy prevention fund. This fund should be utilised towards initiating litigation both in India and in foreign countries against the offenders.

2. At the international level, particularly in countries such as the United Kingdom and the USA where piracy of Bollywood films and music is rampant, measures could be taken by Indian

598 Supra note 596 at 140-141, (para 46). See also Zee Telefilms Ltd. v. Sundial Communications Pvt. Ltd., (2003) 5 Bom CR 404 (DB). Also see Star India Pvt. Ltd. v. Leo Barnett (India) Ltd., (2003) 2 Bom CR 655, where it was held that production by another person of the same cinematographic film does not constitute infringement of a copyright in a cinematograph film. It is only when an actual copy is made of a film by the process of duplication that it falls within Section 14(1)(d) of the Act. It was held, it is submitted incorrectly, that if the film is shot separately, even if it resembles the earlier film, it does not amount to copying under the Copyright Act.

599 Supra note 2 at 150.
copyright societies with the co-operation of their international counterparts.

3. Within India itself, stringent regulation of cable operators is necessary through a more effective enforcement of the cable laws under the Cable Television Networks (Regulation) Act, 1995. Although the Act has been in force for over ten years already, enforcement has been extremely tardy. Rule 6(3) of the Cable Television Networks Rules, 1994 which sets out a Programme Code for programmes shown by cable operators, prohibits the carriage of programmes on cable service without a licence from the owner of the copyright of the programme under the provisions of the Copyright Act. Section 5 of the Cable Act provides that all programmes shown must be in conformity with the Programme Code under Rule 6. A violation of this provision can lead to seizure and confiscation of equipment used to operate the cable television network.\footnote{Section 11-15, The Cable Television Networks (Regulation) Act, 1995.}

Offences under the Act are also punishable with fines and imprisonment.\footnote{Id., Sections 16-18.} The difficulty is that these provisions are observed most often in their breach. It is only through organized action by the film industry in creating better awareness and ensuring enforcement through legal action that could make a difference.\footnote{Supra note 2 at 151.}

5.19.3.3 Copyright Protection and Free Speech Rights

With the development of the society and civilisation the scope of the law of copyright also broadened coping with the innovations in the field of science and technology. From the field of literacy and artistic works it has spread to dramatic, musical works, cinematographic films and sound recordings. In the last couple of years it has further advanced with the development and access to the computer programmes. As such, computers,
audio-video recordings reprography, cable television, programmes through satellite changed our lives dramatically as this new and advanced communication system is being used widely by individuals to create, store and transmit information in the electronic form instead of traditional paper documents. This development and phenomena growth also attracted to grave problem, that is, infringement in cyber space as the copyright owner generally chooses the cyberspace as his medium of expression. Hence the necessity arose to protect this.\textsuperscript{603}

Some copyrights are regarded as worthy of protection, because they contribute to the free discussion, say, of the quality of a play or a work of art (fair dealing for the purpose of criticism or review). Quite apart from these legal rules, some infringing works should be regarded as an exercise of free speech rights because they are integral to the development of its author or because they enhance the general public understanding of literature or the arts. This is clearly the case with parodies, satire, and appropriation art, all of which may quote or in other ways exploit existing work, and thereby infringe copyright. Indeed, their effectiveness as a parody or appropriation art depends on reproduction or adaptation of significant parts of the earlier work. Copyright infringement in these circumstances is inevitable.\textsuperscript{604}

So it is wrong to treat a parody as an infringement of copyright without considering the implications for the infringer’s own freedom of speech as an author or artist. Similar arguments may apply to the reproduction of documents or letters subject to copyright in an infringing work. The reproduction of such material should often be treated as covered by a freedom of speech clause, because it may provide the public with valuable information and so contribute to public discourse. In the absence of free speech arguments (or adequate statutory fair use or fair dealing

\textsuperscript{603} Dr. Sukanta K. Nanda, “Information technology Act and applicability of intellectual property right with special reference to law of copyrights”, (2002) 2 SCJ 44-48 at 44.


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defences), rights-holders could use copyright to withhold important information from the public to the impoverishment of political debate.

The arguments for free speech guarantees, therefore, suggest that at least some infringing works are covered by the guarantee. The case for coverage is strongest when the infringement is a work of satire or a parody or reproduces information or images of political or social importance. It is much weaker, or non-existent, in straightforward commercial piracy, when the copier aims solely to exploit the artistic skills of others for financial advantage. In those circumstances it is easy to persuade the Court that there is no real free speech interest at stake, or alternatively that any free speech interest should be trumped by that of the rights-holder. But it is wrong to derive principles from those circumstances and apply them automatically to all instances of conflict between copyright and freedom of speech or expression. Moreover, the importance of free speech suggests there should be a strong presumption in favour of coverage of any communication of ideas or information; without such a presumption there is a danger that valuable speech may be stifled by enforcement of copyright law.605

Copyright law asserts that publishers are entitled to communicate an idea or to provide information or news, as long as they do not use the exact words or expression of a rights-holder. It is questionable whether copyright law always promotes speech. It is reasonable to doubt, for example, whether authors and publishers need the range of rights conferred by copyright, or a term of protection as long as life plus seventy years, to encourage them to produce literature and other works or to reward them for their past efforts. And even if copyright law promotes the production of work, it equally clearly inhibits its distribution. The impact of copyright law on freedom of expression raises complex economic and cultural issues. The Courts treat

copyright as a special case, giving it ‘talismanic immunity’ from appropriate First Amendment scrutiny.\textsuperscript{606}

5.19.3.4 Submissions

The coverage of some copyright infringements by freedom of speech provisions does not mean that copyright is unenforceable. It means only that enforcement of copyright should be subject to free speech scrutiny, when this freedom is clearly engaged. That would not be the position in the standard case of commercial piracy, probably because Courts would rightly not ascribe free speech rights to those infringers. On an alternative perspective, their rights are entitled to little or no weight when balanced against copyright. But satirists, appropriation artists, and news reporters can often claim to be exercising free speech rights, which should be weighed against the intellectual property right when they make use of copyright works.

Freedom of expression challenges to the enforcement of copyright should only be sustained when copyright law is used to suppress the dissemination of information of real importance to the public or to stifle artistic creativity, parody, or satire, and moreover, when the legislation itself does not provide adequate safeguards for that freedom. But there are circumstances in which Courts should intervene to protect free speech, for example, cases where a writer or artist creates a work of real originality, but incorporates substantial elements of another work and therefore infringes copyright. Further, copyright should not be enforced when to do so would censor speech, the publication of which could not be prevented by other remedies.\textsuperscript{607}

Publicity rights protect celebrities against the unauthorized use of their name, image, voice, or other attribute, which would damage their own ability to exploit aspects of their personality commercially. Unlike the rights

\textsuperscript{606} The phrase ‘talismanic immunity’ is taken from Brennan J.’s Judgment for the Court in \textit{New York Times v. Sullivan} 376 U.S. 254 at 269 (1964), holding that libel was not entitled to immunity from the First Amendment. See \textit{Supra} note 441.

\textsuperscript{607} Supra note 605 at 261.
to reputation and privacy, it is a property right, which may in most states be asserted by the celebrity’s heirs, and which can be assigned. In England and Australia, the tort of passing off may sometimes protect endorsement rights against unauthorized use of a celebrity’s name, when that use wrongly gives consumers the impression that the celebrity is lending his name to a particular product. This is much narrower than the publicity right recognized in the United States.608

However, it is submitted that the publicity rights should be given no stronger protection than reputation or privacy rights when they are balanced against freedom of speech. Indeed, they should be given much less protection than those basic human rights which are closely connected with human dignity. Further, unlike the position in copyright, there is no free expression case for protection of the publicity right when it is balanced against the free speech interests of the media, parodists, and (to a lesser extent) advertisers. Moreover, the fact that publicity rights have been characterized as property rights so they can be assigned and passed on at death, should not give them more weight. Free speech should often, though not always, trump broad publicity rights. Admittedly, in some circumstances the free speech argument may be weak. Advertisers who use the image of a celebrity without his consent to endorse a product, and so mislead consumers, do not have a strong claim. It may be legitimate in those instances to protect a publicity right, or, in English law to allow a passing-off action to protect the celebrity’s goodwill. But those rights do not deserve protection when there is little risk that the public will be deceived, or when the infringement forms part of a parody or a political or social commentary and is as a result covered by freedom of speech.609

A recent attempt at banning flag burning rested on the argument that the flag is the intellectual property of the United States, and that flag desecration thus violated property rights.610 Each of these property rights,
though, would remain a speech restriction. A property right is among other things the right to exclude others; an intellectual property right in information is the right to exclude others from communicating the information— a right to stop others from speaking.\textsuperscript{611}

However, what remains to be decided is that whether personal information should be treated as property at all—whether some “owner” should be able to block others from communicating this information, or whether everyone should be free to speak about it.

5.19.4 Freedom of Speech and Electronic Media

The freedom of speech includes freedom of press, both print media as well as extends to the electronic media subject to the reasonable restrictions.

The freedom of speech and expression includes the right to seek, receive and impart information and ideas of all by all available means regardless of frontiers.\textsuperscript{612}

The liberty to express one’s self freely is important for a number of reasons for its role in facilitating individual freedoms, epistemology, democracy and artistic and scholarly pursuits.\textsuperscript{613} The obvious connection between press freedom and freedom of speech is that the press is a medium for broadcasting information and opinion. Not only is it a tool of personal autonomy, it also aids cultural, scientific and artistic development.

5.19.4.1 Electronic Media and Judicial Response

The freedom of speech includes freedom both of print and electronic media. This interpretation has been made possible because of the judicial craftsmanship and liberal approach. In the present times, the growth of the electronic media is much the result of Information and communication technology. As a result, several concepts like new media, broadcasting,
communication convergence etc. have come up. No doubt, it has been the constant endeavour of the legal framework to keep pace with the growing technology. However, still certain lacunas remain and there the judiciary steps in to make a balance between the technological advancements and societal interest. Besides, it also checks arbitrary exercise of powers and harmonises it with individual liberties.

5.19.4.2 Government has no Monopoly over Electronic Media

In a historic judgement in *Secretary, Ministry of I and B v. Cricket Association of Bengal (CAB)*,\(^{614}\) the Supreme Court has considerably widened the scope and extent of the right to freedom of speech and expression and held that the Government has no monopoly on electronic media and a citizen has under Article 19(1)(a), a right to telecast and broadcast to the viewers/listeners through electronic media, television and radio any important event. The Government can impose restrictions on such a right only on grounds specified in clause (2) of Article 19 and not on any other ground. State monopoly on electronic media is not mentioned in clause (2) of Article 19.

The Court directed the Government to set up an independent autonomous broadcasting authority which will free Doordarshan and Akashvani from the shackles of Government control and ensure conditions in which the freedom of speech and expression can be meaningful and effectively enjoyed by one and all.

Facts- In the instant case, the petitioner, the Cricket Association of Bengal (CAB) wrote a letter to the Director General of Doordarshan that a six Nations International Cricket Tournament would be held in November, 1993 as a part of its Diamond Jubli Celebration and requested the DD to make necessary arrangements for telecasting of all matches in the Tournament in India. The CAB made it clear that the foreign TV rights would remain with it. The CAB had agreed to pay the requisite royalty

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\(^{614}\) *Supra* note 36.
amount to the DD. Meanwhile the CAB without permission from the Government entered into an agreement with a foreign TV-TWI (Trans World International) for telecasting all the matches out of India and asked the DD to make available its signals for telecasting the matches. The TWI had agreed to pay more royalty to the CAB. The DD refused the permission. The CAB filed a writ petition in the Calcutta High Court and requested the Court to issue a direction for telecasting the matches in India and also to provide signals to foreign TV for telecasting the matches to foreign viewers. The Court directed the DD to provide all the facilities for telecasting the matches by the Agency appointed by the CAB.615

The Government filed an appeal in the Supreme Court against the order. It contended before the Court that it had monopoly on it under Section 4 of the Telegraph act 1885. The word ‘telegraph’ includes telecast. It was submitted that the CAB had obtained no licence or permission under the Telegraph Act and therefore they cannot telecast the matches from any place in Indian Territory. The CAB argued that the game of cricket provides entertainments to public. It is a form of expression and therefore included within the expression of speech and expression guaranteed by Article 19(1)(a) of the constitution. The right includes the right to telecast and broadcast the matches and this right belongs to the organizers which cannot be interfered with anyone. The organizer is free to choose any agency as it thinks appropriate for this purpose.

The Supreme Court, confirming the order of the Calcutta High Court, held that the fundamental right to freedom of speech and expression includes the right to communicate effectively and to as large a population not only is this country but also abroad. There are geographical barriers on communication. A citizen has a fundamental right to use the best means of imparting and receiving communication and as such have an access to telecasting for the purpose. At present electronic media viz., TV and radio is

615 Ibid.
the most effective means of communication. However, signals always are public property and they must be used for public good. They are, therefore, subject to certain limitations. The Court directed the government to establish an independent autonomous public authority representing all Sections of society to control and regulate the use of airways. A monopoly over electronic media is inconsistent with the right to freedom of speech of expression. Broadcasting media must be under the control of public. Justice Reddy in his concurring judgement suggested that suitable amendments should be made to the Indian Telegraph Act keeping in view of modern technological developments in the field of information and communication.616

Referring to the Prasar Bharti Broadcasting Corporation of India Act, 1990 the Judge said that it could not be brought into force because the Governments did not choose to issue a notification for its enforcement. Further, the case raised an important question as to whether the permission to uplink to the foreign satellite, the signal created by the CAB either by itself or through its agency can be refused except on the ground stated in the law made under Article 19 (2).

The Court held that firstly, the airwaves or frequencies are public property and their use has to be controlled and regulated by a public authority in the interests of the public and to prevent the invasion of their rights. Since the electronic media involves the use of the airwaves, this factor creates an in-built restriction on its use as in the case of any other public property. Secondly, the right to impart and receive information is a species of the right of freedom of speech and expression guaranteed by Article 19 (1)(a) of the Constitution. A citizen has a fundamental right to use the best means of imparting and receiving information and as such to have an access to telecasting for the purpose. If the right to freedom of speech and expression includes the right to disseminate information to as

616 Ibid.
wide a Section of the population as is possible, the access which enables the right to be so exercised is also an integral part of the said right.617

Thus, broadcasting is a means of communication and a medium of speech and expression within the framework of Article 19(1)(a). However, this right to have an access to telecasting has limitations on account of the use of the public property, viz., the airwaves involved in the exercise of the right which can be controlled and regulated by the public authority. This limitation imposed by the nature of the public property involved in the use of the electronic media is in addition to the restrictions imposed on the right to freedom of speech and expression under Article 19 (2) of the Constitution. Thirdly, the Central Government shall take immediate steps to establish an independent autonomous public authority representative of all Sections and interest in the society to control and regulate the use of the airwaves.618

This judgment was one of the first cases to examine the monopoly of broadcasters, organizers and as a contrast, the Government. Interestingly, the judgment is extremely forward thinking. The Court in the present case as far back as 1993 (decided by the Supreme Court in 1995) understood the complexities of broadcasting rights despite only being exposed to (at that time) the Government controlled monopoly of Doordarshan. Herein the Court firstly, correctly established that the right to electronic media would include the right to communicate effectively through mass media. This was of course, not subject to any constitutional limitations unless the same came within the purview of Article 19 (2) of the Constitution of India.619 Interestingly, the Court also recognized that the Telegraph Act was not the correct legislation to be examined for a situation such as this. Identifying

617 Id., at 227, (para 78).
618 Supra note 2 at 141.
that a more dynamic legislation was needed as against the outdated Telegraph Act, the Court in the present case has recommended the same.\(^{620}\)

Another important case to be mentioned here is *Citizen, Consumer and Civic Action Group and Another v. Prasar Bharati and Others*.\(^{621}\) The present case revolved around the allotment of terrestrial rights to telecast live cricket matches between India and Pakistan in 2006. TEN Sports, a business concern, has acquired the broadcasting rights of the series from Pakistan Cricket Board for the duration of the series across the world, including India for a whopping sum of 10 million dollars. They subsequently agreed on a price with the Pakistan Television (PTV) and granted them broadcasting rights as well. However, in India, a situation still continued where the Union Government and its agent, Prasar Bharati through Doordarshan were unable to agree on a price for the broadcast of such matches and, in fact, pleaded helplessness to intervene in the matter. The Court first examined the position of ‘Airwaves’ as property in India. Stating that “Airwaves are a public property and their transmission is regulated by the Government and now it is entrusted with an Authority”, the Court preliminarily concluded that the right to possess such property vested in the Indian public. This they claimed was in accordance with the relevant statutes of the Indian Telegraph Act, 1885, Prasar Bharati Act 1990 and the Telecom Regulatory Authority of India Act, 1997. Based on such initial premise, the Court further opined that any rights given to an intermediary to transmit or re-transmit are rights only secondary.\(^{622}\)

The Court held that right to have access to the electronic media is a fundamental right to speech and expression coming within the ambit of Article 19 (1)(a) of the Constitution and which can be restricted reasonably only for the reasons enumerated in Sub-Article (2) of Article 19 of the Constitution. Thus, holding that no grounds of Article 19 (2) of the

\(^{620}\) *Supra* note 2 at 142.

\(^{621}\) (2006) 5 Comp. LJ 74 (Mad).

\(^{622}\) *Ibid.*
Constitution were made out in the present case and that airwaves being public property and therefore belonging to the Indian citizens, primary rights could not be curtailed by allowing Ten Sports “to claim exclusivity even though it holds only secondary rights to cater to the needs of only a specialized class of viewers through satellites and by pay channels”.623

Where the matches had been played and further allowed to be telecasted live and further when those rights were sold for transmission or re-transmission, the Court was of the view that prima facie a case of fundamental rights of freedom of speech had been made out by the petitioners. This, however, was not enough to grant the relief. Additionally, observing that the interest of the Broadcaster TEN Sports is not harmed, the Court examined the balance of convenience and held this lay in directing the transmission of the Indo-Pak cricket series as scheduled through Indian Doordarshan, by retaining Ten Sports’ logo and also availing all other modes of transmission through satellites and honouring the advertisement contracts in all modes of transmission whether terrestrial or satellite. Furthermore, the Court also excused the laches on part of the Government in approaching Ten Sports or the Pakistan Cricket Board for a bid citing “public interest”. Holding that the live telecast of the Indo-Pak Matches which were not played for the past 15 years was in public interest, the Court held that the laches on the part of the Government could be condoned.624

Three years after the judgment the Indian Government looked at the decision more carefully and enacted the Sports Act, 2007 (Mandatory sharing of signal)625 which compels private broadcasters to license their broadcast rights to DD in the case of a sporting event of national interest. Therefore, while the judgment can be considered as an important milestone in determining public interest as an integral component in all broadcasting,

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623 Ibid.
624 Ibid.

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the judgment still fails to accord for other procedural details— all of which are essential in delivering a sound judgment.626

5.19.4.3 Right to Exhibit Films on Doordarshan

In *Odyssey Communications Pvt. Ltd. v. Lok Vidayan Sanghatana*,627 the Supreme Court held that the right of citizens to exhibit films on Doordarshan, subject to the terms and conditions to be imposed by the Doordarshan, was a part of the fundamental right of freedom of expression guaranteed under Article 19(1)(a), which could be entailed only under circumstances set out in Article 19(2).

The Court held that this right was similar to the right of a citizen to publish his views through any other media such as newspapers, magazines, advertisements, hoardings and so on. In this case, the petitioners challenged the exhibition on Doordarshan of a serial titled ‘Honi Anhoni’ on the ground that it encouraged superstition and blind faith amongst viewers. The petition was dismissed as the petitioner failed to show evidence of prejudice to the public.

The right to broadcast was also recognised in *LIC v. Manubhai D. Shah*,628 Doordarshan refused to telecast a documentary film on the Bhopal Gas Disaster titled Beyond Genocide, on the ground that the film had lost its relevance and that it criticised the action of the State Government. The Supreme Court held that the film maker had a fundamental right under Article 19(1)(a) to exhibit the film and the onus lay on the party refusing exhibition to show that the film did not conform to the requirements of the law. It was held that Doordarshan, a State-controlled agency that was dependent on public funds was not entitled to refuse telecast except on grounds under Article 19(2).

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626 Supra note 619 at 86.
627 AIR 1988 SC 1642.
628 Supra note 34.
5.19.4.4 Electronic Media and Cinematographic Films

The importance of freedom of speech and expression with reference to cinematographic films was the subject matter of Supreme Court decision in S. Rangarajan v. P. Jagjivan Ram.629 The comments made by Supreme Court in this case may go a long way in laying down guidelines as far as freedom of expression is concerned.

The facts which led to the appeal to the Supreme Court were briefly as follows. The petitioner – S. Rangarajan, the producer of the film applied on August 7, 1987 for certificate to exhibit the film “Ore Oru Gramathile” (In just one village).630 As the Examination Committee unanimously refused to grant a certificate, Rangarajan applied for a review by the first Revising committee consisting of 9 members. The committee reviewed the film. Eight members were in favour of granting a “U” certificate and one opposed to it. The Chairman of the Censor Board referred the film to a Second Reviewing Committee for review and recommendation. By a majority of 5 to 4, the committee recommended the issue of a “U” certificate subject to deletion of certain scenes. The minority was of the view that the reservation policy of the government was depicted in a highly biased and distorted manner and that the appeal in the film that India was ‘one’ was a hollow appeal. The majority said that the theme of the film was the reservation policy of government, and the film suggested that the reservation should be made on the basis of economic backwardness, and not on the basis of caste. Such a view could be expressed in a free country and it did not violate any guidelines.

On December 7, 1987, a “U” certificate was granted for exhibition of the film.631 The grant of the certificate was challenged before the High Court by a writ petition which was dismissed by a single judge. His judgement was...

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629 Supra note 79.
630 The draft of the story was that to reserve seats by reference to caste was backwardness and not caste should be the basis of reservation. The film contained some “songs, dance and side attraction to make the film more delectable”. see Id., at 579-580 where the story of the film has been fully set out.
631 Supra note 79 at 580, (para 4).
reserved by a Division Bench on appeal. The Division Bench largely
depended on the minority view of a second Revising Committee. Against
this judgment, Rangarajan and the Government of India appealed to the
Supreme Court. The film had since been given a National Award by the
Directorate of Film Festivals of the Government of India.632

Mr. Justice K. Jagannatha Shetty delivered the judgement for himself,
K.N. Singh and Kuldip Singh, JJ. The learned judge after pointing out that
First Amendment to the U.S. Constitution conferred freedom in absolute
terms and it casts a heavy burden on the state to justify imposing restrictions
on that freedom, a burden which was increased by the test propounded by
Justice Holmes of “clear and present danger”. Therefore, the American
decisions were not helpful except for the broad principles underlying the
importance attached to the freedom of speech.633

Shetty, J., then considered various objections which had been raised
against the film. Since it is not necessary to go into the details of the
Supreme Court’s criticism of the various observation made by High Court,634
only important points are being taken up here.

The High Court was of the opinion that public reaction to the film
which sought to change the system of reservation was bound to be volatile
and the people of Tamil Nadu who had suffered for centuries would not
allow themselves to be deprived of the benefits intended for them on a
particular basis. On this Shetty, J., made the following important
observation:635

It seems to us that the reasoning of the High Court runs
afoul of the democratic principles to which we have
pledged ourselves in the constitution. In democracy, it is
not necessary that everyone should sing the same song.
Freedom of expression is rule and it is generally taken

632 Id., at 580-581, (para 5).
633 Id., at 581-82, (para 7).
634 Id., at 591-92, (paras 30 to 35).
635 Id., at 592, (para 35).
for granted. Everyone has a fundamental right to form his own opinion on any issue of general concern. He can form and inform by any legitimate means.

Emphasizing the importance of public discussion on issues relating to administration, in a democratic form of government, the Hon’ble Supreme Court learned judge observed:

The democracy is a government by the people viz., open discussion. The democratic form of government itself demands from its citizens an active and intelligent participation in the affairs of the community. The public discussion with people’s participation is a basic feature and a national process of democracy which distinguishes it from all other forms of government. The democracy can neither work nor proper unless people go out to share their views. The truth is that public discussion on issues relating to administration has positive value.

The learned judge, however, observed that a balance must be preserved between the interest of freedom of speech and the various social interests.

We cannot simply balance the two interests as if they are of equal weight. Our commitment to freedom of expression demands that it cannot be suppressed unless the situations created by allowing the freedom are expressing and the community interest is endangered. The anticipated danger should not be remote, conjectural or farfetched. It should have proximate and direct nexus, with the expression. The expression of though should be intrinsically dangerous to the public interest.

The learned judge, finally laid down the guidelines regarding restricting the freedom of expression as:

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636 Id., at 592, (para 36).
637 Id., at 595-96, (para 45).

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• Freedom of expression which is legitimate and constitutionally protected cannot be held to ransom by an intolerant group of people.

• The fundamental freedom under Article 19(1)(a) can be restricted only for the purposes mentioned in Article 19(2) and the restriction must be justified on the grounds of necessity and not of convenience or expediency.

• Open criticism of government policies and operations is not a ground for restricting expression.

• We must practice tolerance to the views of others. Intolerance is as much dangerous to democracy as to the person himself.

Concluding the case, the Supreme Court allowed the appeal of the film procedure reversing the judgement of the High Court.\textsuperscript{639} Commenting upon this case, Mr. Justice Krishna Iyer says\textsuperscript{640} that in this case the Supreme Court “reinforced the right of free speech” and “went into the root rules of democratic politics”. He further says that “the creed of free speech is expressed in lively diction by Shetty, J’s words, “... in democracy it is not necessary that everyone should sing the same song...”

In \textit{K.A. Abbas v. Union of India},\textsuperscript{641} is the first case in which the question whether prior censorship of films is included in Article 19(2) came for the consideration of the Supreme Court of India. The petitioner had challenged the validity of censorship as violative of his fundamental right to freedom of speech and expression as according to him it imposed unreasonable restriction.

Under the Cinematograph Act, 1952 films are divided into two categories, i.e. ‘U’ and ‘A’ certificate. He also contended that there were

\textsuperscript{638} \textit{Id.}, at 599, (para 53).

\textsuperscript{639} \textit{Id.}, at 599, (para 54).

\textsuperscript{640} \textit{Supra} note 307 at 165.

\textsuperscript{641} AIR 1971 SC 481.
other forms of speech and expression besides the films and none of them were subjected to any prior restraint in the form of pre-censorship and claimed equality of treatment with such other forms. The Court, however, held that precensorship of films was justified under Article 19(2) on the ground that films have to be so treated separately from other forms of art and expression because a motion picture was able to stir up emotions more deeply than any other product of art. Hence classification of films between two categories i.e., ‘A’ (for adults only) and ‘U’ (for all) was held to be valid.

In *Bobby Art International v. Om Pal Singh Hoon*, popularly known as “Bandit Queen Case”, the respondent filed a writ petition in the Court for quashing the certificate of exhibition given to the film “Bandit Queen” and restraining its exhibition in India. In the instant case, the Supreme Court drew a distinction between nudity and obscenity. The petition was filed by a member of the Gujjar community seeking to restrain the exhibition of the film, ‘Bandit Queen’ on the ground that the depiction in the film was ‘abhorrent and unconscionable and a slur on the womanhood of India’ and that the rape scene in the film was ‘suggestive of the moral depravity of the Gujjar community’. The Supreme Court rejected the petitioner’s contention that the scene of frontal nudity was indecent within Article 19(2) and Section 5-B of the Cinematograph Act and held that the object of showing the scene of frontal nudity of the humiliated rape victim was not to arouse prurient feelings but revulsion for the perpetrators.

*Star India Pvt. Ltd. v. Union of India,* is another important decision in this regard. In this case, Star India Private Limited (SIPL) challenged an order dated 27th November 2009 issued by the Ministry of Information and Broadcasting (I&B Ministry), Government of India, administering a warning to Star Plus Channel (SPC) in exercise of powers under Section 20 of the

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643 For details see Supra Chapter-4.
644 Supra note 642.
Cable Television Networks (Regulation) Act, 1995 (CTNR Act) to strictly adhere to the Programme Code (PC) in terms of Section 5 CTNR Act read with Rule 6 of the Cable Television Networks Rules, 1994 (CTN Rules). The warning was with reference to the telecast/re-telecast by the SPC of a program titled ‘Sach Ka Samna’ (SKS) on 17th and 21st July 2009.646

SIPL stated that it was engaged in the business of producing and supplying content to various channels operated under the name ‘STAR’ including SPC. SPC is stated to have a wide viewership. The television programme SKS was stated to have been adapted from a widely watched international show titled ‘The Movement of Truth’ (TMOT), which is watched in India and over twenty other countries. It was stated that TMOT has been broadcast in India since 2008, through a sister channel of SPC, Star World, at the 9pm. It was stated that there were repeated telecasts of the programme from January to March 2009. According to SIPL SKS was a medium to encourage people to speak and confess solemn truths relating to their lives “even if it means facing some embarrassing situations for which they themselves are responsible”.647

It is stated to be an attempt to help the willing contestants to shed their masks and inhibitions, and bring forth their integrity and strength of character. It was claimed that the programme seeks to reward honesty and truthfulness, and provide a public platform from which “contestants may openly reflect on those aspects of their lives which they are not particularly proud of so that they may start life afresh with a clean conscience. It was stated that prior to the filming of the programme, the contestants expressly consent to being asked personal and confidential questions pertaining to their lives and agree to give true answers in respect of the same. As a result, the answers of the contestants are then filmed and telecast under the belief and understanding that the contestant will speak the truth. The contestants were given the option of leaving the programme at any time including even after the polygraph test is conducted. Care was taken through the entire

646  Ibid.
647  Ibid.
process to ensure that the contestant always has the option to quit if he/she does not wish to go further in the programme.648

SKS was telecast by SPC from 15th July 2009 to 18th September 2009, involving a total of forty-eight episodes. On 22nd July 2009, a show cause notice was issued to SIPL by the I &B Ministry in regard to the content of the two episodes of SKS telecast on 17th and 21st July 2009. The show cause notice (SCN) stated that the content of the said episodes was vulgar, indecent and against good taste and decency.

In the first paragraph of the SCN it was stated that the anchor of the above programme seeks replies to questions regarding infidelity, incest and other taboo subjects that are not suitable for unrestricted public exhibition especially keeping in view the Indian ethos and culture. These questions and their replies are followed by a polygraph test, the results of which are at times contrary to the replies given resulting in great embarrassment not only to the participants and their families but also to the viewers watching the programme along with their families. These, therefore, appear offending against good taste, decency; apparently contain obscene words, appear to malign and slander segments of social, public and moral life of the country and are not suitable for unrestricted public exhibition.649

On 27th July 2009, the SIPL replied to the SCN asking the I&B Ministry to share with it the source and the details of the complaints. Its detailed reply adverted inter alia to the background of SKS, the process prior to the taping of the programme, the process while shooting the episode, and the objective of the programme. SIPL maintained that it had not violated any of the rules, and that it did not defame its contestants or their family members nor did it propagate false and suggestive innuendos or half truths about them. It was asserted that the concept of the program or its

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648 Ibid.
649 Ibid.
portrayal “is not offensive to Indian ethos and cultural sensibilities and does not slander, criticize or malign the moral fabric of the country.650

The Court further held, the core content of SKS is the public display of private moments of personal embarrassment. Whether this could be termed as ‘unabashed’ or ‘uninhibited’ is a matter of individual perspective. It would require a mature audience to not think of such display as an invitation to invade the privacy of others. Informed viewers of rational choice might be able to ‘switch off’ or ‘surf away’ from SKS when they find that it offends their sensibilities. But that cannot be said of every viewer. By running scrolls, tickers and advisories warning viewers of the adult content of SKS, SIPL acknowledged that it was not meant for unrestricted public viewing. In other words, it was conscious that the programme attracted Rule 6 (1) (o) CTN rules. Yet, it took a chance by slotting SKs at prime time in order to maximize on the unrestricted public viewership. Faced with the protests, voiced through MPs in the Rajya Sabha, SIPL shifted SKS to a non-prime time slot. SIPL also constituted its own advisory panel to avoid future breaches by it of the PC. SIPL cannot be heard to say that what was being objected to was not known to it. The Court further held that for telecasting the episodes of SKS which were not suitable for unrestricted exhibition at prime time on 17th and 21st July 2009, thus violating Rule 6 (1) (o) CTN Rules, the warning administered to SPC by the I&B Ministry by the impugned order was justified as a valid exercise of statutory power by the regulatory authority. The writ petition was consequently dismissed.651

Freedom from Pre-Censorship

While the media in our country is free, our censorship regime is one of the more stringent among the successful vibrant democracies, within which fraternity India proudly takes its place. However, the moderating hand of an enlightened film censorship regime is needed in view of the fact that it is in the general interest of the discerning film-going public to

650 Ibid.
651 Ibid.
examine the product of critical film-making before it goes out for public consumption, because of the effect that the visual medium can have on people, which usually wields much more influence than on the public, than the print media. Film certification is thus the end product of a process of previewing of the film and it leads to a decision either to not public viewing for a particular film, or to allow its public exhibition with certain deletions, or alterations. Intelligent and thoughtful censorship ensures that members of the public are not exposed to psychologically damaging material.

Jagannatha Shetty J. observed:652

Cinema motivates thought and action and assures a high degree of attention and retention of the sight and sound in the semi-darkness of the theatre with elimination of all distracting ideas. Therefore films have as much potential for good as for evil, and have an equal potential to encourage and influence good or violent social behaviour.

It is submitted that the films cannot be compared to other media solely due to the fact that the reach and influence of films is incomparably more effective than other forms of mass media. What can therefore be suggested is that the present censorship regime which conforms to a strict structure of issuing ratings653 of “U”, “U/A”, “A” and “S”, whereas a more flexible and relevant system of ratings need to be evolved. Section 8 (1) of the Cinematograph Bill which provides for a new rating system based on age of the viewers654 is an important step in the correct direction for remedying the strictures of the anachronistic rating system of the old Act. More varied and age-based ratings usually provide film-makers with the opportunity to

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652 Supra note 79 at 574, (para 10).
653 Expansion of the Ratings; U – Unrestricted Public Exhibition; UA – Unrestricted Public Exhibition, but with a word of caution that parental discretion is required for children below the age of 12; A – Restricted to Adults; S – Restricted to any special class of persons. See supra note 79.
654 Section 8 (1), The Cinematograph Bill, 2010.
fine-tune the contents and style of delivery of their films, so as to ensure that they can reach their intended target audience.

The Cinematograph Bill, 2010 has been lying in Parliament for quite some time now. It is a timely exercise and an extremely relevant one. With the Ministry of Information and Broadcasting seeking the participation of civil society and the general public in suggesting and incorporating changes in the Bill, it is hoped that the Bill and the subsequent amended Act shall serve to be an empowering piece of legislation that shall allow Indian filmmakers to build upon the base of excellence that they have already created for themselves, and to experiment in newer and more thought-provoking types of cinema.655

While the media in our country is free, our censorship regime is one of the more stringent among the successful vibrant democracies, within which fraternity India proudly takes its place. However, the moderating hand of an enlightened film censorship regime is needed in view of the fact that it is in the general interest of the discerning film-going public to examine the product of critical film-making before it goes out for public consumption, because of the effect that the visual medium can have on people, which usually wields much more influence than on the public, than the print media. Film certification is thus the end product of a process of previewing of the film and it leads to a decision either to not public viewing for a particular film, or to allow its public exhibition with certain deletions, or alterations. Intelligent and thoughtful censorship ensures that members of the public are not exposed to psychologically damaging material.

In the case of Anand Patwardhan v. Union of India,656 Doordarshan refused to telecast the petitioner’s film, ‘In Memory of Friends’, which was about the violence in Punjab. The Bombay High Court, while dealing with the objection to screening of a movie, held:

656 AIR 1997 Bom 25.
The film maker may project his own message which the other may not approve of. But he has a right to ‘think out’ and put the counter appeals to reason. The State cannot prevent open discussion and open expression, however, hateful to the policies.657

The Court further held that the petitioner’s film must be judged in its entirety. The film has a theme and it has a message to convey.

The same film maker, in Anand Patwardhan v. Union of India,658 approached the Bombay High Court seeking a direction to Doordarshan to telecast his documentary ‘Raam-Ke-Naam’. Objection was taken to certain scenes in the film where a kar sevak justified the assassination of Mahatma Gandhi by Nathuram Godse. Rejecting the point of view that the film provoked commission of offence, it was held that “viewed from the healthy and common sense of point of view, it is more likely that it will prevent incitement to such offences in future by extremists and fundamentalists”.

Anand Patwardhan also challenged an order of the Film Certification Appellate Tribunal (FCAT), in Anand Patwardhan v. CBFC,659 which had directed changes to his documentary ‘War and Peace’ (Jang aur Aman) that showed a Dalit leader questioning in his speech why the bomb had exploded on Buddha Jayanti day and not on Lord Rama’s birthday. The Bombay High Court held that it is only in a democratic form of government that the citizens have a right to express themselves fully and fearlessly as to what their point of view is towards the various events that are taking place around them.

The case of F.A. Picture International v. CBFC,660 was regarding the film ‘Chand Bujh Gaya’, which depicted the ordeal of a young couple - a Hindu boy and a Muslim girl - whose lives were torn apart in the State of

657 Ibid.
658 1997 (3) Bom CR 438.
659 2003 (5) Bom CR 58
660 AIR 2005 Bom 145.
Gujarat. The CBFC held that “the Gujarat violence is a live issue and a scar on national sensitivity. Exhibition of the film will certainly aggravate the situation”. The Bombay High Court held that no democracy can countenance a lid of suppression on events in society and stability in society can only be promoted by introspection into social reality, however grim it may be.

In *Ramesh Pimple v. CBFC*,Footnote 661 the documentary film ‘Aakrosh’ focused on the communal riots in Gujarat. The CBFC sought to curtail the screening of the movie on the ground that such exhibition would incite suppressed communal feelings. However, overruling this objection, the Court gave the opinion that it is when the hour of conflict is over that it may be necessary to understand and analyse the reason for strife. We should not forget that the present state of things is the consequence of the past; and it is natural to inquire as to the sources of the good we enjoy or for the evils we suffer.

The case *Sony Pictures Releasing of India Ltd. v. State of Tamil Nadu*,Footnote 662 dealt with objection to the screening of ‘Da Vinci Code’, as the movie was considered to be offensive to the beliefs of Christians. Allowing the screening of the film, the Madras High Court held that the issue is whether there can be a work of art or literature or a film which propounds such interpretations, and whether the public have the right to decide whether to accept or reject such alternative interpretation. The issue is whether the state is bound to protect the person whose fundamental right is sought to be violated by people who threaten to breach peace, or whether the state will mutely watch such threats.

“When men differ in opinion, both sides ought equally to have the advantage of being heard by the public,” wrote Benjamin Franklin. If one is allowed to say that a certain policy of the government is good, another is with equal freedom entitled to say that it is bad. If one is allowed to support

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a governmental scheme, the other could as well say that he would not support it. The different views are allowed to be expressed by proponents and opponents not because they are correct or valid, but because there is freedom in this country to express differing views on any issue. The ultimate good in a society is better reached by free trade in ideas — the best test of truth is the power of the thought to get itself accepted in the competition of the market. Courts must be ever vigilant in guarding perhaps the most precious of all the freedoms guaranteed by our Constitution.

Out of the several instances of censorship of expression, one unique instance that can be quoted may be of banning of certain protest songs composed by the legendary composer of India, Salil Chaudhary by the British Government during India’s freedom struggle. Infact, those songs have now been released in the form of an album after about six decades.663

In *Mid-day Multimedia Ltd. v. Mushtaq Moosa Tarani*,664 permission was sought for release of the film “Black Friday”. The high Court had refused permission to release, screen and exhibit the film until the pronouncement of judgment in the Bombay Bomb Blasts case. The Apex Court disposed of the appeal with the direction not to release the film till such time as the trial Court pronounced its judgment on guilt or otherwise of the concerned accused.

In another case, it was held that right to exhibit film is a part of Article 19(1)(a). No offence was committed by the author of the book “Shivaji- Hindu King in Islamic India” under Sections 153, 153-A, 505(2), and 34 of IPC, 1860 as the author had exercised his skill and reason before choosing such a literature.665

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664 2006 (10) SCALE 141.
The Apex Court has time and again reiterated that the requirement of the Cinematograph Act requiring Certificate for film exhibition is a reasonable restriction.666

5.19.4.5 Censorship in Western Democracies

Blackstone considered that freedom of the press ‘consists in laying no previous restraints upon publications, and not in freedom from censure for criminal “matter when published”.667 While the second part of that definition has often been criticized, the first has been treated as gospel, particularly in the United States where prior restraints are rarely countenance.

In Germany, censorship is outlawed by Article 5(1) of the Grundgesetz. While the European Court of Human Rights has held that prior restraints on publication are not as such incompatible with Article 10 of the European Convention on Human Rights and Fundamental Freedoms (ECHR), it has emphasized that they do call for careful examination. English law appears to adopt a more pragmatic approach. Films and video; are subject to statutory censorship, while the government has retained a controversial power to direct broadcasters not to transmit a particular programme or include a class of material in their schedules. Both in England and in other countries, even including the United States, conveners may be required to notify a local authority or the police of their intent to hold a meeting or procession, or to obtain a permit; without a permit the meeting or other form of protest may be illegal. Further, in many jurisdictions Courts may grant injunctions to stop the issue of publications which, it is argued, would amount to a breach of confidence, infringe personal privacy, or constitute a contempt of Court.668

At various times, the live theatre and the cinema have been seen as presenting special problems, which justify some measure of previous restraint. This is now almost unknown in Western democracies in the case of

666 Supra note 50.
668 Supra note 605 at 117.
stage play cinema censorship is still common, and in the United Kingdom received the approval of the Williams Committee on Obscenity and Film Censorship. It is, however, far from clear that plays and films are so different from books or newspapers that this special means of control can be justified. To some extent the reasons for their separate treatment may be historical. New forms of expression may initially be thought more dangerous than those which have enjoyed traditional acceptance.669

Additionally, these means of communication may be regarded as providing entertainment earlier than disseminating political and social ideas. So it would be inappropriate to bring them under the protection of freedom of speech. This was a common perspective on the cinema in the first decades of the twentieth century. In contrast, these arguments hardly applied to live drama, a much more ancient art form than the novel or the press column. Nevertheless, theatre has at times been regarded as subversive and a vehicle for the spread of radical ideas, all the more dangerous because of the immediacy of its impact on the audience. That was certainly true in the eighteenth century, when theatre was a popular medium and could be used to satirize or ridicule political figures and institutions.670

Film censorship remains a common feature of other Western legal system. In France, for example, a permit (visa) must be obtained from a government minister, currently the Minister of Culture, for a film to be shown or exported, while in exceptional circumstances a local authority may ban the showing a film to prevent disorder, even though a visa has been issued. Germany has a system of self-regulation operated by bodies that are representative of the film industry, since formal legal censorship is prohibited by Article 5 of the Basic Law. The greatest contrast with the system in the United Kingdom is now provided in the United States, where film censorship is in effect a dead letter. It has in fact never been ruled

670 Supra note 605 at 129.
unconstitutional, though the cinema has always enjoyed First Amendment protection.671

5.19.4.6 Broadcasting Media

An eminent political thinker Mr. Pattabhi Sitaramayya presented a note to the Constituent Assembly on April 28, 1947, pleading concurrent justification over Broadcasting in the Constitution of Free India. He wrote:

Broadcasting has to play a very great part in future India particularly as a medium of educating and informing the masses. Its value is greater to rural than the urban areas. While to the urban people it may be an instrument of entertainment, to the rural population, it will be a powerful medium education through entertainment. As such, Broadcasting in India has to be partly revenue-getting and partly social. The rural service which need necessarily be free should be based on community listening in the early period and should be treated as social service”. 672

The Copyright Act, 1957 defines the meaning of the term ‘broadcast’ to mean communication to the public:

(i) by any means of wireless diffusion, whether in any one or more of the forms of signs, sounds or visual images; or

(ii) by wire, and includes a re-broadcast.673

The Act further contemplates the possibility of exclusive licences674 being granted by the Copyright Board upon application by interested parties. These very provisions were under the severe gaze of the Supreme Court

671 Id., at 130.
673 Section 2 (dd), Indian Copyright Act, 1957.
674 Id., Section 2(j), ‘exclusive licence’ means a licence which confers on the licensee or on the licensee and persons Page 2197 authorized by him, to the exclusion of all other persons (including the owner of the copyright), any right comprised in the copyright in a work, and “exclusive licensee” shall be construed accordingly.
recently, when they were examined in the light of the grant of a licence—both voluntary and compulsory. Especially, while granting a compulsory licence, the Copyright Board may grant the licence in favour of the applicant, where the re-publication of such work has been refused or where the communication of the copyrighted work to the public by broadcast has been stopped. The grant of such compulsory licence must be in the manner so as to serve the interests of the general public. The Copyright Act, 1957 must be read in conjunction with the Copyright Rules that also provide circumstances and procedure to be followed by broadcasters, or aspiring broadcasters in the country.

The Prasar Bharati (Broadcasting Corporation of India) Act, 1990 defines broadcasting thus:

Broadcasting means the dissemination of any form of communication like signs, signals, writing, pictures, images and sounds of all kinds by transmission of electro-magnetic waves through space or through cables intended to be received by the general public either directly or indirectly through the medium of relay stations and all its grammatical variations and cognate expressions shall be construed accordingly.675

A Draft of the proposed Broadcasting Services Regulation Bill, 2007676 defines broadcasting thus:

Broadcasting means assembling and programming any form of communication content like signs, signals, writing, pictures, images and sounds, and either placing it in electronic form on electro-magnetic waves on specified frequencies and transmitting it through space or cables to make it continuously available on the

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675 *Supra* note 672.
carrier waves so as to be accessible to single or multiple users through receiving devices either directly or indirectly; and all its grammatical variations and cognate expressions.

The Supreme Court held that Internet service providers (ISPs) cannot be characterized as ‘broadcasters” or “broadcasting undertakings” when they provide access through internet to “broadcasting” requested by end users. ISPs do not select or originate programming or package programming services, which is the necessary requirement for qualifying as “broadcaster”. ISPs merely act as a conduit for information provided by others, and cannot be held to communicate the programming themselves.677

5.19.4.7 Growth of the Broadcasting Sector

Television is relatively a young medium in India, restricted until the early 1990s to the State owned broadcaster, Doordarshan (DD). Even DD began national telecasts only in the mid-1980s, when indigenous satellite technology made it possible.

Private television channels relying on satellites for transmission and on cable networks for dissemination began to make their presence felt by the early 1990s. It was only towards the end of the 1990s that 24-hour news channels catering specifically to Indian audiences – in English, Hindi and other languages – emerged at the national as well as regional levels.

Nowhere else in the world have television viewers been spoilt with so much choice as in India – there are over 500 television channels on air in the country and applications for approximately another 100 odd await the government’s nod.

The spurt in the launching of satellite television channels, initially through the so-called “invasion from the skies” by international TV networks in the early 1990s, changed the situation quite dramatically.

677 (2012) 2 SCC (FJ) 53, as reported in The Practical Lawyer, No. 147 (April, 2012).
The subsequent proliferation of channels has naturally led to intense competition. In the absence of digitization and addressability – especially in the cable sector – the broadcasters are forced to rely on ad revenues for their survival in the business.

Even though there are all round criticisms of the way the television channels dish out content the fact that there are several positive aspects namely, (1) Indian television is the reservoir of information. It gives us information about the nation, world, science, art, health, finance and sports; (2) Television promotes awareness among people due to which the practices like dowry, child marriage, prejudice about communities, languages, caste and creed are on the decline; (3) The Indian television industry grooms new talents and provide platforms and employment to millions of people. (4) Television plays a great role in the globalization of culture and, as a result, India is viewed with lot of interest in global arena and (5) it creates a pan-Indian approach and caters to the diverse entertainment needs of the Indian masses much the same way the Indian Railways connects people.678

5.19.4.8 Latest Developments

Certain important developments have taken place in the field of communications which become important to be considered since freedom of speech involves communication by all available means of communication. The issue to be tackled is to find out whether all the latest developments in the field of electronic media be contained within the existing legal framework.

5.19.4.9 New Media

With the advancement in technology, the concept of new media has emerged as a tool of Information and Communication technology (ICT). New media is a broad term in media studies that emerged in the latter part of

the 20th century and refers to on-demand access to content anytime, anywhere, on any digital device.

Most technologies described as “new media” are digital, often having characteristics of being manipulated, networkable, dense, compressible, and interactive. Some examples may be the Internet, mobile phones, computer multimedia, video games, CD-ROMS, and DVDs. People use new media technologies to debate various matters in blogs and discussion forums, thereby presenting technological progress as unstoppable. All this is giving rise to the emergence of an online public sphere.679

5.19.4.10 Internet Protocol Television (IPTV) Services

IPTV (Internet Protocol Television) is a system where a digital television service is delivered using the Internet Protocol over a network infrastructure, which may include delivery by a broadband connection. A simpler definition would be, television content that, instead of being delivered through traditional format and cabling, is received by the viewer through the technologies used for computer network. In case of IPTV, it requires either a computer and software media player or an IPTV set top box to decode the images in real time. International Telecommunication Union has defined IPTV services as follows:680

An IPTV service (or technology) is the new convergence service (or technology) of the telecommunication and broadcasting through QoS controlled Broadband Convergence IP Network including wire and wireless for the managed, controlled and secured delivery of a considerable number of multimedia contents such as Video, Audio, data and applications processed by platform to a customer via Television, PDA, Cellular,

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679 Supra note 456.
and Mobile TV terminal with STB module or similar device.

These Guidelines are being issued with the objective of bringing clarity on various platforms capable of providing IPTV services, the regulatory provisions and licensing requirements and other issues to encourage stakeholders to launch IPTV services.681

The IPTV services are usually provided by the Telecom service providers and the Cable operators. The Cable operators while providing IPTV services will continue to be governed by the provisions of the Cable Television Networks (Regulation) Act, 1995, The Telecom Regulatory Authority of India Act, 1997 and any other laws as applicable and as such shall be able to provide such content on their IPTV service which is permissible as per the Cable Act and which is in conformity with the Programme and Advertisements Codes prescribed there under.

5.19.4.11 Existing Regulatory Framework

Media regulation in India is currently a labyrinth with multiple agencies involved in formulating and implementing policy, drafting and enforcing legislation. Among the official organisations currently involved in regulation of broadcast media are the following:682

- **Union Ministry of Information & Broadcasting** (MIB), which functions as policy-maker and content regulator.

- **Telecom Regulatory Authority of India** (TRAI) is involved primarily with issues of technology, such as carriage regulation and pricing.

- **Telecom Disputes Settlement & Appellate Tribunal** (TDSAT) which, as the name implies is the body to which

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681 Ibid.
682 Ibid.
appeals can be made for problems relating to broadcast regulation.

- **Ministry of Communications & Information Technology (MCIT)**, which has responsibility for licensing transmission equipment (e.g. radio through the Wireless Planning & Coordination or WPC wing), satellites, Internet Protocol Television (IPTV) and, potentially, Mobile TV.

- **The Courts** – in the absence of an independent regulator, the Courts are often called upon to adjudicate on broadcast-related issues and they are playing an increasingly proactive role in matters of media regulation.

- **Head post offices** in various cities, given responsibility for registering cable TV networks.

- **State/District level Monitoring Committees** and Authorised Officers, entrusted under the Cable Television Act with the responsibility to prevent the transmission of “certain programmes in public interest” (NB: The Authorised Officer is empowered to seize broadcast equipment)

- **The Inter-Ministerial Committee (IMC)** constituted by the Ministry of Information & Broadcasting to look into complaints regarding violations of the programme and advertisement codes connected to the Cable Television Act and Rules.

- **National Commission for Women (NCW)**: It intervenes and sends notices to media under the Indecent Representation of Women Act (relating to the depiction of women in the media) aimed at expanding the scope of the Act to include electronic and digital media, besides broadening the definition of
‘indecent representation,’ and making punishment for infringements more stringent.

• **National Commission for the Protection of Child Rights** (NCPCR): Whenever it receives complaints or based on news reports it initiates suo motto action against television channels for exploiting children. In an effort to determine whether or not children’s participation in TV programmes, including reality shows, should be viewed as child labour and thereby violative of laws against the economic exploitation of children it sought the views of the Ministry of Labour.

• Recently, in late-2009, the Ministry of Information & Broadcasting formed a nine-member task force to deliberate and formulate a decision on setting up an exclusive body to regulate the broadcasting sector called Broadcast Regulatory Authority of India (BRAI). The task force consists of representatives from the government as well as those from television industry bodies such as the Indian Broadcasting Foundation, Broadcast Editors Association and the News Broadcasters Association. While the secretary Information and Broadcasting has been appointed the chairperson of the task force, two other senior ministry officials are also on board.

The task force had been interacting with different stakeholders including academicians, media experts, consumer organizations, state government representatives, members’ civil society, social activists, NGOs as well as other broadcasting industry associations for cable, DTH, radio and IPTV, among others. The ministry mandates that the task force has to discuss the need, scope, jurisdiction, organizational structure and powers and functions of an independent Broadcast Regulator.  

683 Supra note 678.
5.19.4.12 Statutory Framework and Electronic Media

There are several legislations dealing with regulation and monitoring of the electronic media.

5.19.4.12.1 The Indian Telegraph Act, 1885

This Act authorises the Central or State Government, on the occurrence of any public emergency, or in the interest of public safety, to take possession of any licensed telegraphs. Further, if the Government is satisfied that in the interest of the security of state, sovereignty and integrity of the country, public order, friendly relations with foreign states or to prevent commission of offences etc., it may order the interception of any message received by the telegraph. Further, it provides certain penalties for unauthorised intrusion into signal room, trespass or causing obstruction in the telegraph office. The Act is often criticised for being a relic of the British Raj and there is many a times a demand for the repeal of the said law.

5.19.4.12.2 The Prasar Bharti Act, 1989

The demand to remove the control of Government from electronic media and to make them mouthpiece of people of India and to provide autonomous status to the official electronic media is age old.

Pt. Jawaharlal Nehru favoured a semi-autonomous corporation for the electronic media in his reply to debate on external publicity in the Constituent Assembly on March 15, 1948.

Since then, no remarkable progress was made in the matter of autonomy to the electronic media. Chanda Committee was constituted by Government on December 4, 1964. On October 14, 1965 the Bhagvantam Committee submitted its report to Government. It recommended that there

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684 Section 5(1), The Indian Telegraph Act, 1885.
685 Id., Section 5(2).
686 Id., Section 23.
should be a corporation for T.V. with a large degree of autonomy built in to its constitution. Whether T.V. should be separated from radio is left to the government, as a policy decision to be taken at the highest level.

Chanda Committee said in its interim report submitted to Government on April 18, 1966, that All India Radio can be liberated from present Government control. It recommended constitution of two separate corporations for All India Radio and Doordarshan.  

On August 17, 1977 another committee was constituted by the Ministry of Information and Broadcasting under the Chairmanship of Sh. B.G. Verghese. It strongly recommended autonomy for the electronic media in its two-volume report. Consequently, Prasar Bharati Bill, 1979 was submitted to Lok Sabha on May 16, 1979 to provide autonomy to the electronic media.

The Bill provided inter alia the setting up of an independent corporation known as “Prasar Bharati” both for Radio and Television. The corporation was supposed to be consisting of 11 to 15 members. It’s Chairman and ‘Director General was to be full time. The Governing body would also have seven to eleven non-official members with secretaries of the Ministries of Information and Broadcasting and Finance as non-official members. The nominating panel was also reshaped. The Bill substantially altered the basic structure of the proposed corporation and turned down the proposal of constitutional safeguard to Broadcasting.

The Bill remained pending due to the change in the Union Government. After 10 years of abeyance the Prasar Bharati Bill was resubmitted to the Lok Sabha on December 29, 1989 with certain modifications: However, it had lost some of its brightness because of a controversial provision which allowed the Government to supersede the Board of the Prasar Bharati Corporation by getting a resolution passed with

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688 Report of Committee on Broadcasting and Information Media, Published by Ministry of Information and Broadcasting, New Delhi, 244 (1966).
689 Akash Bharati Report, Published by Ministry of Information and Broadcasting, New Delhi, 6 (1978).
a simple majority in Parliament although the Bill contained certain safeguards too.

After a marathon discussion, nationwide seminars, symposia and unprecedented volley of suggestions from different walks of life, Lok Sabha passed the Prasar Bharati Bill on August 30, 1990 and Rajya Sabha on 5.9.1990. The final Act No. 25 of 1990 was assented by the President of India on September 12, 1990.

The Act provides a very important feature in the context of autonomous character of the Corporation, it authorises Constitution of a Parliamentary Committee consisting of twenty two Members of Parliament, of whom fifteen from the House of People to be elected by the Members thereof and seven from the Council of States to be elected by the Members thereof in accordance with the system of proportional representation by means of the single transferable vote, to oversee that the Corporation discharges its functions in accordance with the provisions of this Act and, in particular, the objectives set out as above and submit a report thereon to Parliament.

However, the provision of 22 members Parliamentary Committee was murmuring by a Section of media expert since long. The then Chairman of the Press Council of India, Justice P.B. Sawant, who was a nominated member of the three member selection committee for the Prasar Bharati Board, had suggested scrapping of such a Parliamentary Committee and also sought dilution of some other clauses which he felt threatened the autonomy of the proposed board. Press Trust of India (PTI) quoting official sources said it was felt that existence of a Parliamentary Committee with overriding powers would make it difficult for the board to function independently. The

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690 Special advertisement to invite suggestion, Published in Indian Express Daily, (Ahmedabad), February 7, 1990, cited in Supra note 672 at 90.
691 Indian Express Daily (Ahmedabad), (August 31, 1990), Ibid.
692 Ibid.
sources said that the Act had been revamped to make it operational and in line with the current situation in the media.  

In that scenario an ordinance, effecting significant changes in the 1990 Act, was promulgated by President K.R. Narayanan on 29th October 1997. The main purpose of the ordinance was to repeal the provision of a 22 member parliamentary committee proposed in the Act to oversee the functions of the Prasar Bharati (Broadcasting Corporation of India). It was decided that a Bill to replace the ordinance will likely to be introduced in the winter session of Parliament.

However before the ordinance could get passed in Parliament, mandate of new general election came against the ruling party, and B.J.P. lead collusion has resumed the power of the Union Government. In that scenario the Ministry of Information and Broadcasting was in belief that the new government may just replace the ordinance, which has to be tabled when Parliament convenes, with another Bill, for it may not want the order to lapse whole hog.

In this regard, an editorial published in Indian Express gave a wide assessment which stated as follows:

Even before it assumed office in its National Agenda document, the BJP government made it clear that a reappraisal of the Prasar Bharati Act is inevitable.

Ultimately, a new bill was introduced into the Lok Sabha on 1.5.1998 by the than Minister of Information and Broadcasting Mrs. Sushma Swaraj. The bill containing some very important provisions like (1) To maintain continuity in the administration of the Prasar Bharati Corporation, bill provides that 1/3 members of the Board will be retired one after another in proper turn. (2) To assess the quality of programme broadcast by the Prasar Bharati Corporation, one authority called Broadcasting Council will be

\[\text{\textsuperscript{694}} \text{ Indian Express (Vadodara), (October 31, 1997), cited in Supra note 672 at 103.} \]
\[\text{\textsuperscript{695}} \text{ Cited in Supra note 672 at 106.} \]
reintroduced in the Act. (3) The upper age limit of the Chief Executive Officer of the Board will be 62 years. (4) Provision regarding appointment of full time member (Finance) and member (Personnel) instead of part-time Ex-officio member. The bill also stated that, this bill is introduced to nullify the effect of the ordinance issued last year.696

The bill was submitted in the Lok Sabha by the then Minister of Information and Broadcasting Mrs. Sushma Swaraj and got it approved, as the approval of Rajya Sabha’s concerned, the Government has not introduced the bill in the upper House of Parliament. To implement the Government’s perception in the media, the provisions containing in the bill were very important, so legal status of the provisions was very essential. At this juncture the Government has decided to issue an ordinance. Ultimately the ordinance containing same provisions of the bill was cleared by the Union Cabinet on 26th August 1998 and promulgated by the President Sh. K.R. Narayan on 29th August 1998.

Opposition members asserted that the Government had deliberately not introduced the Prasar Bharati Bill in the Rajya Sabha because it was not sure of its majority. A delegation of 124 Rajya Sabha members also met the President in this connection. But the president returned it with his assent only on late night of 29th August 1998. The Government has justified the Prasar Bharati ordinance and submitted before the Delhi High Court that no “illegality” had been committed in restoring the 1990 Prasar Bharati Act passed by Parliament.

5.19.4.12.3 The Cable Television Networks (Regulation) Act, 1995

Cable Television Networks is the talk of the day. In each and every corner of the country people talk about it. In urban area, they have the privilege to enjoy the cable television. In the recent past even in the some remote comers of the country cable television has spread its wings with the result that there has been a haphazard mushrooming of cable television

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696 Gujarat Samachar (Surat), (May 2, 1998), Cited Ibid.
networks all over the country due to availability of signals of foreign television via satellites. The programmes which are being projected on the satellite channels are predominantly western and are alien to our culture and way of life. On these cable television networks lot of undesirable programmes and advertisements are also being screened without any fear of being checked. To check this tendency it has been considered necessary to regulate the operation of cable television networks in the country so as to bring about uniformity in their operation.\(^{697}\)

Cable networks are a recent phenomenon in India. It started in India in 1984, patronized first by tourist hotels.\(^{698}\)

Sh. S.Y. Khan, former Deputy Director of Staff Training Institute (Akashvani) Delhi, has stated that “today, cable television is a stupendous rage and poses a fatal threat to the very existence of Indian national network”. The number of operators have multiplied from a mere 100 in 1985 to 3460 in May 1990 according to a report released by the Ministry of Information and Broadcasting.\(^{699}\)

In May 1991, the Hong Kong bases STAR TV began beaming channels into India via the ASIASAT-1 satellite with its South Asian footprint.\(^{700}\)

In October 2, 1992, Zee TV, a satellite Hindi Channel, began telecasting in India. Three years later on October 8, 1995, Soni, another Hindi TV Channel has entered in the Broadcasting scenario of India.\(^{701}\)

According to a private survey, the number of cable television operators were 25000 in March 1993. The fact of the matter was that the cable networks were successful in cornering a large number of commercials especially aimed at middle class income groups.\(^{702}\) Looking to the cultural

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\(^{697}\) See The Cable Television Networks (Regulation) Act, 1995.

\(^{698}\) Uma Joshi, Text Book of Mass Communication and Media, 98 (1999).

\(^{699}\) Supra note 693 at 256.


\(^{701}\) Supra note 672 at 161.

\(^{702}\) Supra note 693 at 256.
invasion and other related threats the Government of India decided to establish a Committee to look into the matter. Ultimately the Government appointed a Committee for studying the issue and suggest methods to regulate Cable Television by “Suitable Regulatory Mechanism”.

5.19.4.12.4 The Damodaran Committee

The Committee has stated in its report that Cable programmes contain items which are morally degrading and offensive, harmful to the national interest and sometimes offend religious susceptibilities.

The Committee recommendations:

“The legislation would need to ensure that adequate technical standards are available to see that the cable television systems do not create interference with broadcast and other existing and planned telegraph systems. The legislation will also have to see that the contents of programmes which are disseminated through cable systems do not offend rational sensibilities or violate generally acceptable systems and values. The legislation will have to define the authorities responsible for issuing these regulations and licences”. The cable television’s attack on culture and religion from the sky’s has got to be opposed at all costs.⁷⁰³

Cable networks fall under the purview of the Indian Telegraph Act 1885, which lays down no restrictions except for requiring a licence when cables are to be laid across public property.

An Inter-departmental Committee on Introducing Competition in the Electronic Media, under the Chairmanship of Sh. K.A. Vardan, Additional Secretary in the Ministry of Information and Broadcasting, was constituted in 1991. Some of the important recommendations of the Committee are:

The Committee recognises the importance of introducing competition in the Electronic Media to provide additional outlets to the creative talent, to strengthen the democratic fabric of the nation and help better in meeting

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⁷⁰³ Id., at 257.
the cultural aspirations of different regions. There is need to guard against the Dangers of unrestrained commercialism which may follow the establishment of additional channels financed solely through advertising. The dangers of control of these media falling into the hands of unscrupulous or anti-national elements also should not be discounted.704

The Committee had suggested that the Broadcasting Council of India be constituted through a legislation amending the relevant Sections in the Prasar Bharati Act, be entrusted with the functions of licensing, monitoring of programmes and quality rating.

The Committee had recommended that a new legislation be enacted to govern the setting up and operation of additional broadcast channels and has outlined the areas where such legislation will be required.705

In India, what is termed ‘Cable TV’ is in fact closed circuit television. Flats in skyscrapers, for instance, are wired up to central control rooms from where Video players transmit programmes tapes abroad, and Indian and foreign films on videotapes. Around one hundred skyscrapers are believed to be wired up, numerous housing colonies in Bombay’s suburbs, and in other cities have been cabled. Cable owners had been restrained by the Bombay High Court from screening Indian films for which they have not received permission from the holders of copyright. Film producers have argued that ‘home viewing’ is distinct from the public viewing that cable facilitates.706

The President repromulgated the ordinance which seeks to regulate the operation of cable television networks in the country.

In that scenario there was no regulation of these cable television networks, lot of undesirable programmes and advertisements were available to the viewers without any kind of censorship.

704 Supra note 672 at 162-163.
It was also felt that the subscribers of these cable television networks, the programmers and the cable operators themselves were not aware of their rights, responsibilities and obligations in respect of the quality of service, technical as well as content-wise, use of material protected by copyright, exhibition of uncertified films, protection of subscribers from antinational broadcast from sources inimical to our national interest, responsiveness to the genuine grievances of the subscribers and a perceived willingness to operate within the broad framework of the laws of the land, e.g. the Cinematography Act, 1952, the Copyright Act, 1957, Indecent Representation of Women (Prohibition) Act, 1986.\textsuperscript{707}

It was, therefore, considered necessary to regulate the operation of cable television networks in the entire country so as to bring about uniformity in their operation. The expectation was that it enables the optimum exploitation of this technology which has the potential of making available to the subscribers a vast-pool of information and entertainment.\textsuperscript{708}

The Government of India subsequently introduced the legislation the Cable Television Networks (Regulation) Bill in the Parliament in August, 1993. The Bill was containing a registration authority, resources to the programme code and advertisement code, etc.\textsuperscript{709}

The Cable Television Networks (Regulation) Bill, having been passed by both the Houses of Parliament received the assent of the President on 25th March, 1995. It came on the Statute Book as The Cable Television Networks (Regulation) Act, 1995 (7 of 1995).\textsuperscript{710}

With a view to ensure a good quality reception of Doordarshan channels through the Cable Networks, the Central Government has notified the Cable Television Networks (Amendment) Rules, 1999. Hence it has been mandatory for the cable operators to transmit at least one Doordarshan channel of his choice through the cable serial. However, it has been felt that

\textsuperscript{707} Supra note 697.
\textsuperscript{708} Ibid.
\textsuperscript{709} Supra note 698 at 100.
\textsuperscript{710} Supra note 697.
the thrust of the proposed legislation is towards making it a tool for regulation rather than providing approach to develop cable television as a social and economic resource.\footnote{Supra note 698 at 100.}

As per the Cable Television Networks (Regulation) Amendment Act, 2000 (w.e.f. 1.9.2000), it is compulsory for cable operators to retransmit at least two Doordarshan terrestrial channels and one regional language channel of a State in the prime band.\footnote{Supra note 698 at 4.}

5.19.4.12.5 Programme Code and Advertising Code

The Cable Act brought into force a Programme Code\footnote{See Appendix.} and an Advertising Code\footnote{See Appendix.} in respect of programmes and advertisements transmitted by cable operators.\footnote{Supra note 697, Section 5 and 6.} Both codes\footnote{Rules 6 and 7, The Cable Television Networks Rules, 1994. These Codes are based, broadly, on the Doordarshan and All India Radio programmes and advertising Code.} are haphazardly drafted and contain wide and loosely worded restrictions, most echoing those contained in Article 19(2): restrictions in the interest of the integrity of the nation, friendly relations with foreign States, morality, decency, defamation, contempt of Court or incitement to an offence and the like. However, some restrictions are wider and not strictly within the scope of Article 19(2). For instance, Rule 7(3) of the Cable Television Network Rules, 1994, prohibits advertisements with a religious or political object. The restriction on religious advertisements is also something of an irony considering that a large number of channels are devoted to religious preaching and propagation and there appears to be no fetter on such activity under the Programme code.

Political advertisements are also prohibited under the same rule.\footnote{Id., Rule 7(3).} However, these have been flouted with impunity. The Advertising Code also provides that the goods and services advertised shall not suffer from any defect or deficiency under the Consumer Protection Act, 1968.\footnote{Id., Rule 7(4).} How a
cable operator can be expected to ascertain or test the quality of goods or services advertised on television is anybody’s guess.\textsuperscript{719}

Another provision in the Advertising Code prohibits advertisements which promote ‘directly or indirectly’ the production, sale or consumption of cigarettes, tobacco products, wine, alcohol, liquor or other intoxicants, infant milk substitutes, feeding bottles or infant foods.\textsuperscript{720} Surrogate advertisements ostensibly promoting products such as sodas and apple juice but really intended at promoting alcoholic products abound. Also, advertisements of tobacco products, pan masala and gutkhas are a frequent and common feature on television. To that extent, this provision has been followed in its breach.

The Advertising Code prohibits advertisements which ‘in its depiction of women violates the constitutional guarantees to all citizens’ and ‘which projects a derogatory image or women. Women must not be portrayed in a manner that emphasizes passive, submissive qualities and encourages them to play a subordinate, secondary role in the family and society’.\textsuperscript{721} This provision attempts to ensure gender quality in the representation of the social status of women.

The Programme Code lays special emphasis on the protection of children from the exhibition of programmes unsuited to their age.\textsuperscript{722} The code prohibits the carriage or programmes that are ‘not suitable for unrestricted public exhibition’,\textsuperscript{723} an expression that is found in the Cinematograph Act, 1952.\textsuperscript{724} This effectively means that no adult film or film bearing an ‘A’ certificate can be shown on cable television at any time.

Interestingly, under the Cable Act, there is no power to take action against television channels or broadcasters but only cable operators. To overcome this hurdle, the Bombay High Court by its orders dated 1\textsuperscript{st}

\textsuperscript{719} Supra note 2 at 253.
\textsuperscript{720} Supra note 716, Rule 7(2)(viii).
\textsuperscript{721} Id., Rule 7(2)(vi).
\textsuperscript{722} Id., Rules 6(1)(i), 6(1)(o), 6(4), 6(5).
\textsuperscript{723} Id., Rule 6(1)(o), introduced vide GSR 710 (E) w.e.f. September 8, 2000.
\textsuperscript{724} Section 5-A, The Cinematograph Act, 1952.
December, 2004\textsuperscript{725} and 12\textsuperscript{th} January, 2005 (unreported), directed the Central Government to formulate guidelines on down linking of television channels.

The transmission of a programme or channel may be prohibited not merely for violation of the Programme Code or the Advertisement Code but also in the ‘public interest’.\textsuperscript{726}

5.19.4.12.6 Conditional Access System

The Cable Television Networks (Regulation) Amendment Act, 2002 introduced what is popularly known as the Conditional Access System (CAS). The 2002 amendment inserted Section 4A in the Cable Television Networks (Regulation) Act, 1995 providing for ‘Transmission of programmes through addressable system’.\textsuperscript{727}

The 2002 amendment was introduced with a view to address a number of difficulties relating to the working of the cable industry which the Cable Act of 1995 had failed to address. Some of these problems are summed up below:\textsuperscript{728}

(i) There were complaints by subscribers of frequent and indiscriminate hikes in subscription rates by cable operators. Pay channels initially came as free-to-air channels but increasingly became pay channels resulting in rising consumer bills.

(ii) There were complaints by cable operators that MSOs or multi-service operators were forcing them to increase their subscription rates. The MSOs in turn, blamed the pay channels for the increase in subscription rates.\textsuperscript{729}

\textsuperscript{725} Pratiba Naithani v. Union of India, Writ Petition No. 1232 of 2004 (Bombay High Court).
\textsuperscript{726} Supra note 697, Section 19 and 20.
\textsuperscript{727} Section 2, The Cable Television Networks (Regulation) Amendment Act, 2002.
\textsuperscript{728} Supra note 2 at 256.
\textsuperscript{729} Interestingly, often times, MSOs are subsidiaries of pay channels. For instance, Hathway, an MSO is the subsidiary of the pay channel, Star Television and City Cable of Zee Television.
(iii) There were complaints by broadcasters that cable operators were under-declaring their collections from subscribers as also the actual number of subscriptions. An important object of the CAS was to introduce transparency in the dealings of cable operators and broadcasters.

(iv) The prevailing system offered little choice to the consumer. A whole package of channels was thrust on the consumer/subscriber and he was made to pay for all of those, irrespective of whether he desired to have access to all of those channels. CAS was introduced in order to provide the consumer with the right to subscribe to channels of his choice rather than be saddled with a host of channels he may not want to watch and thus have to bear the burden of paying not only the subscription rates for the entire package of pay channels but also the entertainment tax on such subscription.

The amendment made it obligatory for every cable operator to transmit or retransmit programmes of pay channels through the addressable system.

The amendment empowered the Central Government to specify one or more free-to-air channels or other channels to be compulsorily included in the package of channels forming the basic service tier so as to provide a mix of entertainment, information and education. It further empowered the Central Government to specify the maximum amount that a cable operator

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730 Supra note 697, explanation (f) defines ‘pay channel’ as a ‘channel the reception of which by the subscriber would require the use of an addressable system’.

731 Id., Section 4-A, explanation (e) defines a ‘free-to-air’ channel as a channel the reception of which would not require the use of any addressable system to be attached with the receiver set of a subscriber.

732 Id., Section 4-A, explanation (b) defines ‘basic service tier’ as ‘a package of free-to-air channels provided by a cable operator, for a single price to the subscribers of the area in which his cable television network is providing service and such channels are receivable for viewing by the subscribers on the receiver set of the type existing immediately before the commencement of the Cable Television Networks (Regulation) Amendment Act, 2002, without any addressable systems attached to such receiver set in any manner.

733 Id., Section 4-A (2); Section 4-A(3).
was entitled to charge from the subscriber and these amounts could be fixed at varying rates for different states, cities or towns.\textsuperscript{734}

All cable operators were required to submit a report to the Central Government stating the total number of subscribers, the subscription rates, the number of subscribers receiving transmission under the basic service tier and those under pay channels, and the amount payable by the cable operator to a broadcaster.\textsuperscript{735}

The implementation of CAS ran into severe difficulties. A number of writ petitions were filed in the Delhi High Court and the Mumbai High Court challenging the amendment. There were many reasons for these difficulties:

(i) Although the amendment was intended at rationalising consumer bills, it had the effect of increasing the financial burden on consumers by compelling them to invest in set top boxes if they wished to view pay channels.\textsuperscript{736}

(ii) A major grievance of consumer groups has been that broadcasters operating pay channels (unlike free-to-air channels) earn enormous revenue from advertising sponsorship and are still unjustly allowed to recover subscriptions from consumers.

(iii) The set-top boxes (STB) were non interoperable. Consumers apprehended that their STB would be of no use if they changed their address or their service provider. STBs were not easily available on rent.

(iv) Most broadcasters, MSOs and cable operators were not able to arrive at revenue sharing arrangements amongst themselves.

\textsuperscript{734} Id., Section 4-A(4) and Section 4-A(5).
\textsuperscript{735} Id., Section 4-A(9).
\textsuperscript{736} Currently, even channels showing educational and scientific programmes such as National Geographic, Discovery and Animal Planet are pay channels and under CAS a consumer would have to invest in a set-top box to be able to subscribe to these channels.
State governments had not been consulted at the decision making stage and therefore, there was little support from these government at the implementation stage.

Of the four metros where CAS was sought to be introduced, Chennai was the only one where it was successfully implemented. This is attributed to the fact that in Chennai, free-to-air channels were the main interest of a large majority of subscribers and CAS which reduced tariffs for free-to-air subscribers was, therefore, welcomed. There was a need for a regulatory body to oversee the implementation of CAS.\textsuperscript{737}

In response to such a situation, on 9\textsuperscript{th} January 2004, the Government of India issued a notification\textsuperscript{738} whereby under Section 2(1)(k) of the Telecom Regulatory Authority of India Act, 1997 (TRAI Act), the scope of the expression ‘telecommunication services’ was expanded to cover broadcasting and cable services. Thus, broadcasting and cable services came within the purview of the TRAI Act.

The TRAI was directed to make recommendations on the terms and conditions on which the ‘addressable systems’ should be provided to customers and the parameters for regulating maximum time for advertisements in pay channels as well as other channels TRAI was also assigned the function of specifying the standard norms for, and periodicity of revision of rates of pay channels, including interim measures. The TRAI was given the power to determine the ceiling rate at which charges would be paid by cable subscribers to cable operators and by cable operators to MSOs and MSOs to broadcasters.

On 1\textsuperscript{st} October, 2004, the TRAI submitted to the Government of India, its recommendations on broadcasting and distribution of cable television.\textsuperscript{739} The gist of these recommendations was:

\textsuperscript{737} Order dated December 26, 2003 in Civil Writ Petition Nos. 8993 and 8994 of 2003.
(i) CAS should be implemented in Mumbai, Delhi and Kolkata after consulting the State Governments and the local stakeholders. In Chennai where CAS has already been implemented, no change was contemplated. For other cities, the Central Government could notify an area for mandatory introduction of CAS only after consulting the concerned State Government and the local stakeholders.

(ii) The Government could notify areas where new pay channels may be introduced only through a STB and such channels should be designated as premium channels. Existing pay channels or free-to-air channels could move to the premium range if they chose. This would require an amendment of the Cable Act to give the Central Government powers to notify the date after which a new pay channel must only come via the introduction of a STB. This date could be staggered for different areas of the country. The decision in respect of the precise system in each area could be taken after consultations with the State Governments and the local stakeholders. Three different models were suggested depending on the local conditions, each having their relative advantages and disadvantages.

On 31st December, 2004, the TRAI issued a regulation on Register of Interconnect Agreements requiring broadcasters to register with the TRAI, agreements with service providers under different platform. Subsequently, on 10th March, 2006, the regulations were further amended requiring DTH service providers to file with the TRAI, interconnect agreements entered into with broadcasters. This amendment was carried out in order to facilitate better monitoring of DTH operators. In order to ensure better competition among service providers and to prevent anti-competitive

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740 The Register of Interconnect Agreements (Broadcasting & Cable Services) Regulation, 2004.
741 The Register of Interconnect Agreement (Broadcasting and Cable Services) (Third Amendment) Regulation, 2006, (3 of 2006).
activities, the TRAI issued the Telecommunications (Broadcasting and Cable Services) Interconnection Regulation, 2004. These regulations also prohibit broadcasters and multi-service operators from connecting television channels without one month’s notice accompanied by reasons for the proposed disconnection.\footnote{Id., Regulation 4.1.}

Traditionally, communication services were distinct; these operated on different networks and used distinct means or platforms: television sets, telephones, and computers. Each of these media has been regulated by separate laws and separate regulators. Digital technology today, allow a substantially higher capacity of traditional and new services to be transported over the same networks and to use integrated consumer devices for purposes such as telephony, television or personal computing. Examples of convergent services include internet services delivered to television sets via systems like web television using the internet for voice telephony, email and world wide web access via digital television decoders and mobile telephone Convergence plays a crucial role in the democratic and social process by enabling the citizen to act both as a recipient and a generator of information. It also facilitates electronic commerce and contributes to faster economic growth. There is a pressing need for a comprehensive legal framework to cover the convergence of technologies and services.\footnote{Supra note 2 at 267.}

5.19.4.12.7 The Communication Convergence Bill, 2001

The Communication Convergence Bill, 2001 was introduced to promote, facilitate and develop in an orderly manner the carriage and content of communications, including broadcasting, telecommunication and multimedia. The objects of the proposed legislation are to facilitate the development of national infrastructure for an information based society and to enable access thereto; to provide a choice of services to the citizen; to promote plurality of views and information; establish a regulatory framework for carriage and content of communications in the wake of
converged technologies and services and establish a single regulatory and licensing authority and an appellate authority. The preamble to the Bill reads:

A Bill to promote, facilitate and develop in an orderly manner the carriage and content of communications (including broadcasting, telecommunications and multimedia), for the establishment of an autonomous Commission to regulate carriage of all forms of communications, and for establishment of an Appellate Tribunal and to provide for matters connected therewith or incidental thereto.

The Bill prohibits the use of spectrum without assignment from the Central Government or the Communications Commission of India, an autonomous commission established under the proposed Act. The Bill also makes it mandatory to obtain a licence in order to own or provide any network infrastructure facility, any network service, application service, or content application service, unless specifically exempted by the Central Government. A licence is also required for the possession of any wireless equipment unless specifically exempted by the Central Government.

The Communication Commission of India is empowered to use regulations to ensure competition and prevent monopoly in the provision of network infrastructure facilities and communication services.

The Communication Convergence Bill empowers the Central Government, the State Government or their authorised officers to intercept communications on the occurrence of any public emergency or in the interest of public safety where it is necessary or expedient to do so in the interest of the security, sovereignty and integrity of India, friendly relations with foreign States or public order or to prevent incitement of the commission of an offence. The Central Government is further empowered in

745 Id., The Preamble.
746 Id., Section 3.
747 Ibid.
748 Ibid.
the public interest to at any time request the Commission to direct any licensee or grantee to transmit in his broadcasting service specific announcement in the manner considered necessary by the government or stop any broadcasting service which is prejudicial to the security, sovereignty and integrity of India, friendly relations with foreign States or to public order, decency or morality or communal harmony.749

The Bill introduces provisions in the nature of anti-siphoning provisions in respect of live broadcasting of a national or international event of general public interest to be held in India. The Bill makes it mandatory that such an event be carried on the network of a public service broadcaster.750 The Commission is given the power to determine the principles and terms for access to the network of the public service broadcaster.751

The new law is to replace and render inoperative the Telegraph Act, 1885, the Wireless Telegraphy Act, 1933 and the Cable Television Networks (Regulation) Act, 1995.

5.19.4.12.8 TRAI Recommendations on Convergence

On 20th March, 2006, the Telecom Regulatory Authority of India made its recommendations on issues relating to convergence and competition in broadcasting and telecommunications. The gist of its recommendations are:

(i) A converged regulatory regime is essential to deal with various issues arising out of the convergence of technologies and services.

(ii) The converged regulator should have powers of tariff regulation, interconnection as well as laying down quality of

749 Id., Section 77(2).
750 Id., Section 31 read with Section 2 (25).
751 Id., Section 31(3).
service standards for broadcasting and telecommunication sectors.

(iii) The power of issuing unified or converged licences should remain with the government. Spectrum management should continue to be controlled by the government.

(iv) There may be no need for a separate Communications Appellate Tribunal in view of the establishment of the Telecom Disputes Settlement and Appellate Tribunal (TDSAT).

(v) The regulation of carriage and content should be separated since the skills required for the two are significantly different. While regulation of carriage is largely concerned with technical and economic aspects, content regulation has to take into account the impact of content on moral sensibilities and social values.

(vi) A unified licence regime must be adopted at the earliest.

(vii) There should be flexibility in spectrum allocation to take full advantage of new services and technologies for existing services that may evolve with time.

(viii) Spectrum allocation should be technology and service neutral to the extent possible so as to avail of the full benefits of a converged licensing regime.

(ix) The differences in the customs duty regime should be rationalised so as to promote effective competition amongst telecom and cable operator.
The government ought to take steps to encourage institutional funding to support projects to build up the country’s communication infrastructure.\textsuperscript{752}

Direct-to-Home television is defined as the reception of satellite programmes with a personal dish in an individual home. DTH does away with the need for the local cable operator and puts the broadcaster directly in touch with the consumer. A DTH network consists of a broadcasting centre, satellites, encoders, multiplexers, modulators and DTH receivers. DTH has the advantage of being able to reach the remotest of areas since it does away with the intermediate step of a cable operator and the wires (cables) that come from the cable operator to the home. Also, with DTH, a user can scan hundreds of channels. DTH offers better quality picture than cable television. This is because cable television in India is in analogue mode while DTH is in the digital mode. DTH also allows for interactive television services such as movie-on-demand, internet access, video conferencing and e-mail. DTH enables the broadcaster to know the exact number of subscribers.

Satellite television channels are using digital technology. DTH is in digital format. A few cable operators also provide CAS through the digital mode. The advantages of digitalization may be summarised thus:

(i) At present, most cable systems operating in the analogue mode are able to offer only 60 to 90 channels. With digital techniques, cable operators will be able to offer much greater choice and better quality.

(ii) Digitalization also creates a two way link with subscribers. The addition of a modem to a set-top box (STB) provides a range of interactive services including betting, games, shopping, information and even internet access. More advanced set-top

boxes support more personalized television services or personal video recorders (PVRs).

(iii) The additional availability of channels of cable systems made available in the digital mode would automatically increase competition amongst broadcasters.

(iv) The quality of picture and sound would improve with digitalisation.753

While the Telecom Regulatory Authority of India, to whom regulatory powers have been delegated, is with its technical expertise, in a position to deal with issues of carriage, it is not equipped to deal with issues of content. This is an area which remains unaddressed and is of pressing relevance. The content of news and entertainment has a profound impact on social mores and sensibilities and has the power to mould and manipulate the minds of over a billion people. With a broadcasting industry that has gone largely unregulated for years, consumerism and sensationalisation of news have overtaken newsworthiness and intellectual debate. While moral policing in the broadcasting industry is undesirable, there must be, either effective self regulation or as the Supreme Court directed in the Hero Cup judgment,754 a truly autonomous regulator—as free from the shackles of government as from private monopolies and agendas.

5.19.4.13 International Perspective

5.19.4.13.1 Committee on the Peaceful Uses of Outer Space (UN)

Since direct broadcast via satellite is different and more far-reaching in effect than the traditional forms of broadcasting, the overwhelming majority of States within Committee on the Peaceful Uses of Outer Space have stated that they will not acquiesce to foreign Direct Broadcast via Satellite entering into their countries in the same manner as for radio and traditionally transmitted television programmes. On the one hand, invoking

753 See TRAI’s Consultation Paper on Digitalisation of Cable Television; Cited Ibid.
754 Supra note 36.
the principle of absolute sovereignty, it is asserted that sending States need the prior agreement of receiving States before they may carry out direct broadcast activities. On the other hand, on the basis of Article 19 of the Universal Declaration of Human Rights and provisions of other international human rights agreements, it is stressed that the freedom of information (broadcasting) should also be applied to Direct broadcast television via satellite. The traditional concept of absolute sovereignty has been considerably eroded as has consequently the concept of absolute freedom. States are under obligation, as provided for in international agreement such as the UN charter, the International Telecommunication Union and the Outer Space Treaty, to cooperate with one another, to share natural resources equitably, and to exploit outer space for the benefit and in the interests of all mankind. The freedom of use of outer space is not absolute but is to be exercised in such a way that the freedom of use of others is not jeopardized. It must also be realized that there is need to protect the cultural, political and social values of individuals and to promote a more liberal exchange of such values. Both these aspects should be given effect through cooperation and appropriate arrangement to solve the problems posed by direct broadcast satellites.

Further, an International Convention concerning the use of Broadcasting in the cause of peace was signed at Geneva, September 23rd, 1986. The twenty countries including India participated and signed the Agreement.

5.19.4.14 Self-Regulatory Mechanism

Any complaint regarding content carried on TV Channels is addressed by Ministry of Information and Broadcasting, as per the extant provisions under the Cable Television Networks (Regulation) Act, 1995, the rules thereunder and the Uplinking and Downlinking Guidelines. However, a need was also felt to put in place a system of self-regulation of content by the Broadcasting industry.
The Indian Broadcasting Foundation (IBF), thus, adopted with suitable modifications the Ministry of Information Broadcasting Self Regulation Guidelines for Broadcasting Sector draft version of 2008, which has been formulated after a comprehensive consultative process by over 40 stakeholders from across the Government, civil society, NGO’s, Industry.

These Self Regulation Guidelines (Guidelines), Content Code & certification rules sets out principles, guidelines and ethical practices, which shall guide the Broadcasting Service Provider (BSP) in offering their programming services in India so as to conform to the Programme Code prescribed under the Cable Television Networks (regulations) Act 1995, irrespective of the medium/platform used for broadcasting of the programme.\(^{755}\)

These Guidelines have been drafted to introduce greater specificity and detail with a view to facilitate self regulation by the broadcasting industry and minimize scope for subjective decision by regulatory authorities or the broadcasting service providers.

The basic underlying principle of these Guidelines is that the responsibility of complying with the provisions of the Certification Rules vests with the BSP. The principles in these Guidelines are sought to be implemented at the first instance through a self-regulatory mechanism of the BSP. Regulation by “forbearance”, at present in the telecommunications industry, shall guide the Broadcasting Content Complaints Council (BCCC) whilst enforcing adherence by the BSP, with the guidelines. Such self-regulatory mechanism shall be subject to a credible and time bound default/grievance redressal mechanism, which shall function under the guidance of the BCCC.\(^{756}\)

The BSP has to adhere to the Certification Rules under the Cable Television Networks (Regulation) Act, 1995, which are in addition and not in derogation of the Drugs and Cosmetics Act 1940, the Emblems and

\(^{755}\) See Appendix.

\(^{756}\) Ibid.

These Guidelines, basically, provide for a two-tier mechanism for ensuring compliance to the Content Code & Certification Rules under the aegis of the Programme Code by the GEC. Non news and current affairs Channels and redressal of consumer grievances at the industry level.

The self-regulation at the individual TV Channel (TVC) level would be the responsibility of the Standards and Practices Department of the concerned Broadcasters. At the next higher industry level, a Broadcasting Content Complaints Council (BCCC) has been established which would examine complaints about television programmes, received from the viewers or any other sources, including NGOs, RWAs, Ministry of Information and Broadcasting etc., and ensures that the programmes are in conformity with the Content Guidelines. This mechanism, however, does not cover films, movie videos, film trailers or any other production that can be telecast only after obtaining a certificate from Central Board of Film Certification (CBFC).[^551]


5.19.4.14.1 Broadcasting Content Complaints Council

The BCCC is an independent Council set up by the Indian Broadcasting Foundation. The Council comprises of a thirteen member body consisting of a Chairperson being a retired Judge of the Supreme Court or
High Court and 12 other members. The composition of other members includes four non-broadcaster members, four members from any national level Statutory Commissions and four broadcaster members.

The BCCC examines complaints about television programmes received from the viewers or any other sources, including NGOs, RWAs, and Ministry of Information & Broadcasting etc. and ensures that the programmes are in conformity with the Self Regulatory Content Guidelines.

Any person or a group of persons, may, either individually or jointly, file a complaint against any programme broadcast on any of the IBF member TV Channels.758

Any person or a group of persons, may, either individually or jointly, file a complaint directly to BCCC against any programme broadcast on any of the TV Channels within 14 (fourteen) days from the date of the first broadcast.

The complaint redressal mechanism does not cover films, movie videos & film trailers as these programmes are currently being pre-certified by Central Board of Film Certification. The mechanism does not cover advertisements. All advertisement related complaints should be addressed to The Advertising Standards Council of India.

If the complaint is substantiated, the respective channel will be asked to provide their views on the offending content within one working week of receipt of letter from BCCC. On the request from BCCC, the Electronic Monitoring Media Centre (EMMC), Ministry of I & B shall provide the tape/CD on the offending content within two working days.

If BCCC is not satisfied with the response of the concerned Channel and consider that the channel has violated the Guidelines, BCCC shall direct

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758 The complaints may be made of any breach of the Self Regulatory Content Guidelines for Non News & Current Affairs TV Channels including the following Principles of Self Regulations: - National Interest ;Racial & Religious Harmony; Children & Generally Accessible Programmes; Social Values ;Kissing, Sex & Nudity; Violence & Crime Gambling ;Horror & the Occult; Drugs, Smoking, Tobacco, Solvents & Alcohol; Libel, Slander & Defamation; Harm & Offence.
the concerned Channel to modify or withdraw such content as desirable within a week from the date of receipt of direction from BCCC. In case of non-adherence of the directions of BCCC by the TV Channel, it may initiate an appropriate action.\\footnote{559}

Since its inception in June, 2011, within six months the Broadcast Content Complaints Council (BCCC) had received 3,441 complaints; with maximum against a Rakhi Sawant hosted programme and appearance of porn star Sunny Leone in reality show ‘Big Boss’. A majority of the other complainants also objected to depiction of sexuality in television programmes. BCCC took action ranging for advising channels to not telecast programmes during general viewing hours to prohibiting telecast in some cases.\\footnote{560}

\section*{5.19.4.15 Pitfalls in the Existing Legal Framework}

In the age of information and communication technology (ICT), the government appears to have been taken unawares by the sudden emergence and upsurge of television channels and cable networks, possibly lulled into complacency by the decades-long tradition of State control over the electronic media. The sudden onslaught of satellite television, initially through the so-called “invasion from the skies” by international TV networks in the early 1990s, changed the situation quite dramatically but the official response to the altered circumstances has been slow, hesitant and somewhat confused.

\\footnote{559} Any one or a combination of the following actions may be initiated by BCCC-
- Issue a warning to implement the direction within next forty-eight hours.
- Air an apology in such manner as may be decided.
- Issue a Directive to the IBF not to consider the outstanding of that Channel for processing till the matter is resolved.
- Issue a Directive to the IBF to take necessary action to expel the concerned member.
- In exceptional cases of a Television Channel not carrying out the directions of the BCCC, the BCCC may recommend to the Ministry of Information and Broadcasting for appropriate action against the Channel, as per the law. Any Directive issued by the BCCC to the IBF shall be binding and must be implemented with immediate effect.

The broadcasting media has made its presence felt in a dramatic way. Undoubtedly, the society has been benefitted by the multifarious advantages of the media; however, there are certain loose ends which need to be tied.

The furore over media coverage of the deadly and dramatic terrorist attacks in Mumbai in November 2008 was only one in a series of media-related controversies that have surfaced with remarkable regularity through the past couple of years, with much of the criticism directed at the broadcast media in general and television news channels in particular. For example, media coverage of the double murder of 14-year-old Aarushi Talwar and her family’s domestic help, Hemraj, in May 2008 had also drawn flak, not only from media critics, but also Sections of the public and even the judiciary. The Supreme Court of India went so far as to declare that it would lay down norms for media coverage of ongoing criminal investigations.

The August, 2007 instance of a fake sting operation telecast by a private television channel falsely implicating a school teacher in a sex work racket which was not only slanderous but even led to mob violence generated widespread outrage against media malpractices and seriously eroded the credibility of the media. The High Court of Delhi even proposed prior permission from a government-appointed committee for broadcast of programmes involving “stings”.

The fact that television news has been the focus of much of the recent debate on media regulation in India is perhaps only natural in view of the nature and impact of television as a medium. However, there may be more to it than that.

The government’s first attempt to regulate the non-governmental broadcast media focused on cable operators and resulted in the Cable Television Networks (Regulation) Act, 1995, framed after the government reached an understanding at the all-India level with the Cable Operators Federation of India in 1993. The new law was an attempt to regulate the burgeoning cable market that had emerged a few years earlier by enabling
some control of the cable system that enabled mass distribution of television signals.

The Cable Television Networks Rules include a Programme Code that imposes some restrictions on the content of both programmes and advertisements shown on cable TV. These Rules were amended in March 2008 and there is talk every now and again of further amendments.

Cable operators contended that, as the only segment of the broadcasting chain currently subject to regulation, they had to bear a disproportionate burden of responsibility for controlling the content of television channels. At the same time, with networks spread across the country, implementation of the law was no easy task. Further, the Cable Act brought into force a Programme Code and an Advertising Code in respect of programmes and advertisements transmitted by cable operators. However, it is submitted that both codes are haphazardly drafted and contain wide and loosely worded restrictions, most echoing those contained in Article 19(2).

5.19.4.16 National Media Policy- A Distant Dream

The comprehensive national media policy that has been discussed over the years is still hanging fire, as is the independent broadcasting authority called for by the Supreme Court in 1995 in the context of its landmark judgment on the airwaves.

However, the Union Ministry of Information and Broadcasting has periodically attempted to introduce legislation to regulate the rapidly growing broadcast sector.

The Broadcast Bill of 1997 was one such attempt. Its statement of objects and reasons observed that its purpose was “to establish an autonomous Broadcasting Authority for the purposes of facilitating and regulating broadcasting services in India so that they become competitive in

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761 Supra note 697, Section 5 and 6.
762 Supra note 716, Rules 6 and 7.
terms of quality of services, cost of services and use of new technologies". The proposed legislation apparently intended to establish an independent authority and to create a level playing field for indigenous broadcasters.

However, the Bill never saw the light of day. In fact, it did not get past a joint parliamentary committee set up to examine the legislation after it was tabled in Parliament.

The government's next attempt at regulation took the form of the Communications Convergence Bill, 2000, which aimed to create a single regulatory authority (the Communications Commission of India) to deal with advancements in information and communications technology. It proposed to repeal the Indian Telegraph Act, 1885, the Indian Wireless Telegraphy Act, 1933, the Telegraph Wire Unlawful Possession Act, 1950 and the Telecom Regulatory Authority of India Act, 1997. This legislation, too, remained a dead letter.

It is submitted here that the Indian Telegraph Act, 1855 was introduced by the Britishers. The motto behind the Act was to control the recently introduced highly sophisticated communication system. The control was to remain in the hands of the Government or the licence holder. We should remember that the Act was introduced only to safeguard the rights and privileges of the British Crown within the policy of the political strategy.

Meanwhile, broadcasting era began in the late 19th century. Gradually regular broadcasting came into existence in our country but the Government did not think of introducing another Act to regulate the new media except the Indian Wireless Telegraphy Act, 1933. It was merely focused on the revenue collection from radio apparatus. The All India Radio and Doordarshan have been enjoying monopoly over the broadcasting and telecasting media since their birth.

Our listeners and viewers have witnessed the rise and fall of so many political leadership but none of them have ever thought of releasing the
psychological grip by granting them freedom in the true sense of the term autonomy.

In many parts of Europe and all over America they are private radio stations, TV stations and satellite channels.

At the most what we have achieved is the Prasar Bharati Act of 1989. Its principal goal is to grant a limited autonomy. The historic feature of this Act is that after so much of hue and cry, it has passed the ordeal of addition and omission finally reaching the President’s office for promulgation.

The Government has sustained its monopoly of the media, i.e. AIR and DD on the basis of the Indian Telegraph Act 1885 which is 121 years old. Today, science has changed the lifestyle and information, super highway has converted the world into the Global village through highly sophisticated communication network. But due to political apathy, we are compelled to be bound by this relic of the past.

As far as the censorship of films is concerned, that also does not present a very satisfactory picture. Despite the power of regulating the content of films being vested in the Censor, the Central Board of Film Certification (CBFC) has often failed in the task entrusted to it by either stifling creativity or hijacking morality and trying to substitute it with the morality of certain vested interests. It is at times like these that the Courts have to step in as the saviour of freedom, safeguarding different forms of expression against the censorial instincts of the state.

The censorship regime in India, besides being state controlled is also, many a times, influenced by social pressure. Though laws are there to govern and guide those in charge of executing the legal censorship, but once the masses resort to protests, attacks, verbal and physical, on those making the expression then the rule of law gives up. Often, either the State buckles to public pressure to impose some sort of ban on the expression, or those making the expression themselves step down. In rare circumstances, the
expression is allowed to prevail. Thus, in this area of extra-legal censorship, strict policies and regulations are required, so that censorship is governed by reason and not by popular sentiments.

Further, The Broadcasting Services Regulation Bill, 2006, which came to public notice in July of that year, was widely criticised for draconian provisions that gave sweeping powers to the government and its representatives to cripple the media through pre-censorship and a particularly severe and potent form of ‘inspector raj’. No process of public consultation and discussion preceded the drafting of the legislation.

One of the issues the 2006 draft legislation attempted to tackle was “concentration of media ownership” i.e., the worldwide trend of ownership of media increasingly concentrated in a decreasing number of conglomerates. However, unlike in mature democracies where restrictions on ownership have been important features of media regulation, in India there has been little public discussion on the implications of media concentration. It is, therefore, not surprising that most comments on this aspect of the proposed legislation emanated from representatives of the media industry and its allies, who appeared more concerned about the impact of the Bill on business than its threat to freedom of expression. In any case, this draft law, too, was eventually shelved. In July 2007 there was yet another effort to introduce legislation to regulate the burgeoning broadcast sector in the country. The Union Ministry for Information and Broadcasting posted the Broadcasting Services Regulation Bill, 2007 (and Self-Regulation Guidelines for the Broadcasting Sector on its website and announced a two-week deadline for responses to the draft documents.

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The broadcast industry was quick to voice its vehement opposition to certain provisions in the Bill and several Sections of the Code, particularly those referring to news television. The ministry repeatedly reiterated its intention to table the proposed law in Parliament during the imminent monsoon session. The controversy raged on for a few weeks, generating substantial media coverage. A truce was finally called; with the two organisations representing television channels (the Indian Broadcasting Foundation and the News Broadcasters Association) undertaking to draft their own guidelines for self-regulation and the ministry agrees to postpone further action on the legislation until then. Consequently, media coverage of the subject also abated.

Public debate was conspicuously absent throughout this process. A few individuals and civil society organisations who submitted considered responses to the draft Bill and Code in August 2007 received no acknowledgement of their efforts, let alone further communication, from the ministry. Neither the government nor the industry showed much inclination to encourage real public discussion, despite the fact the media ‘especially broadcast media’ now constitute an integral part of people’s daily lives and have a major impact on contemporary society. The ministry’s frequent references to “stakeholders” appeared to exclude citizens.

Subsequent events and issues related to media regulation have been sporadically reported in the media, but with little attempt to contextualise developments, connect the dots, and thereby enable citizens to fully comprehend their meaning and significance. Periodic statements by politicians and bureaucrats, ‘again reported with little reference to background’ have further muddied the waters.

On February 18, 2009 the Minister of State for I&B (Information and Broadcasting) stated in the Lok Sabha that steps had been taken to sensitise the media on key issues involving the security and safety of the country. Claiming to be in favour of self-regulation by media houses, the minister
affirmed that there was no plan to control the content of news media and ruled out any blanket ban on live coverage of sensitive incidents. In the face of protests by members of parliament against live coverage of the “26/11 terror attacks”, he reiterated that self regulation was the best option and explained that the NBA (News Broadcasters Association) had already drafted a self regulatory code of ethics and established an emergency protocol to be followed during coverage of such incidents.

Within a couple of days, the ministry had set up its proposed media consultative committee, under the chairmanship of the secretary, Ministry of Information and Broadcasting. The committee is supposed to function as a forum for regular consultations between the government and professional media bodies.

According to the ministry, committee members would be drawn from, among others, the Press Council of India, the Editor’s Guild, the Indian Newspapers Society, the News Broadcasters’ Association, the Indian Broadcasting Foundation, the All India Newspapers Editors’ Conference, the All India Small and Medium Newspapers Federation, the Indian Language Newspapers’ Association and the Indian Women Press Corps, besides noted journalists. It would also reportedly include representatives of civil society, NGOs and other stakeholders, including educationists, child rights activists and the National Commission for Women.

Of late, the ministry’s standard answer to questions about the status of the Broadcast Bill ‘ raised by members of Parliament, judges hearing media-related cases and others ‘ is that a decision will be taken after comments on the proposed legislation are received from all states and union territories. So, while the Bill may be on the backburner, it has obviously not been taken off the stove.

It remains to be seen whether or not the recently set up Media Consultative Committee will address the question of what is to be done about the Bill and/or revive the long pending and occasionally discussed
proposals for a comprehensive national media policy, a Media Council or Commission to oversee all the various sectors of media in these days of convergence, and/or the independent broadcasting authority mandated by the Supreme Court.766

Despite the judgment, however, media policy with far-reaching implications is still being formulated without the knowledge, let alone the participation, of even the cognoscenti among media professionals and users, not to mention the ever-growing number of citizens who are consumers in the burgeoning media market. In the absence of people’s participation it is hardly surprising that it is, primarily, the broadcast industry that engages with the government on the wide range of issues relating to the electronic media.

Undoubtedly, there are a number of regulatory bodies viz. MIB (Ministry of Information and Broadcasting), TRAI (Telecom Regulatory Authority of India) etc. engaged in the task of media regulation, but this very fact is a loophole in itself. Media regulation in India has currently become a maze, with multiple agencies involved in formulating and implementing policy, drafting and enforcing legislation. To make matters worse, they often appear to be unaware of each other’s interventions and seem to work at cross purposes.

In mid-December 2008 the Committee on Petitions of the upper house of Parliament (Rajya Sabha) focused its 132nd report on a petition regarding the alleged misuse of the right to freedom of speech and expression by both print and electronic media and the need to restrict this under Article 19 (2) of the Constitution. Giving its opinion on a variety of media issues the Committee came out in favour of statutory regulations to cover the media both print and electronic in the larger interests of society.


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According to the Committee:

Self-regulation is an ideal situation but it may not be effective to regulate the media, particularly in the scenario of growing competition amongst the channels for supremacy in the business of ratings. The Committee is, therefore, in favour of having statutory regulations in place covering the print and electronic media, in the larger interest of the society, on the model of the Press Council of India vested with more powers. The Committee understands that the Government has proposed to put in place the Broadcasting Regulatory Authority of India (BRAI) under an Act of Parliament and a new Content Code to be issued thereunder. The Committee expects the Government to address all the issues raised by it, while going ahead with the proposed legislation. The Committee hopes that the proposed Broadcasting Services Regulation Bill will incorporate the views of all concerned and the same introduced in Parliament without further delay. 

Lack of transparency and dialogue is clearly a fundamental flaw, especially since media regulatory authorities are meant to be public institutions, accountable above all to citizens. But the irony of the situation is that citizens’ involvement in the whole process of media regulation has been minimal.

Though the setting up of BCCC is a very good initiative in the field of self-regulation by the broadcasting industry, yet certain loopholes are there. For example, there is no mechanism to check that the content of programmes slated to be shown during late hours is also being re-aired during general hours. Secondly, the whole procedure of complaint and action on the content takes at least two working weeks and, meanwhile, the

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767 Ibid.
content continues to be aired. There is no intermediate remedy to regulate the same.

Further, it is unfortunate that complaints to BCCC can be made once the objectionable contents are aired and there are no prior censors to prevent the first broadcasting of the same. The broadcasters and advertisers need to understand that many of the viewers of television are children and the objectionable contents in a TV show, news, advertisements etc. at times comes without any forewarning.

Moreover, certain content may be suitable for being viewed by adults only and the situation becomes embarrassing, particularly, when the whole family is watching some programme and they are caught unaware in the midst of some objectionable content.

It is to be noted that the BCCC primarily acts on complaints addressed by others and is essentially a responsive body and not one that takes proactive steps itself.

It is submitted that there are so many guidelines of media regulation, but they lack the essential legal sanction which is necessary to ensure their compliance. They are more in the nature of self regulatory guidelines. Further, there are so many organisations prescribing moral code of conduct for the media but no single centralised body having the authority of law for regulating the media, electronic or broadcasting.

5.19.4.17 The Print and Electronic Media Standards and Regulation Bill, 2012

A private member bill has been introduced in the Lok Sabha by Congress M.P. Meenakshi Natarajan to regulate the media, both print and electronic and named as The Print and Electronic Media Standards and Regulation Bill, 2012. Her proposed bill seeks “to provide for the constitution of the Print and Electronic Media Regulation Authority with a view to lay down standards to be followed by the print and electronic media and to establish credible and expedient mechanism for investigating suo
moto or into complaints by individuals against print and electronic media, and for matters connected therewith or incidental thereto”. 768

Incidentally, the bill is proposed at a time when the Supreme Court has indicated its intent to lay down “guidelines” for the media. A five Judge Constitution Bench of the Supreme Court headed by Chief Justice of India, Justice S.H. Kapadia said its attempt to frame guidelines for covering Court proceedings was aimed at making clear the “limitations” of journalists under the constitutional scheme. However, the Editor’s Guild of India told the Apex Court that the laying down of guidelines would endanger free speech and the Court had no power of jurisdiction to do so.769

It is ironical that the proposed bill introduced by Congress M.P. has not been supported fully by her own party members. So much so that the Congress distanced both Rahul Gandhi and the party from the so called controversial bill moved by Meenakshi Natarajan saying that “the bill was based on her views” and that Natarajan’s views are “not necessarily the government’s or the party’s thinking”.770

Several members of the Parliament have opposed the bill holding that media should be independent and have self-regulation. Any government regulator or authority will only be authoritative and abusive in exercising the powers. The media groups should formulate a code of conduct and follow it in letter and spirit. In a democracy, there should be no attempt to curb the media.771

The proposed Bill provides for a media regulatory authority- part selected by the I & B minister and three government nominees- with a sweeping set of powers that include imposing a “ban” or “suspending coverage” of an event or incident that “may pose a threat to national

769 Id., at 2.
770 “Congress Distances Rahul from Censor Bill”, The Indian Express, 1 (May 2, 2012).
security from foreign or internal sources”. The ban shall be “sanctioned and reviewed in writing” on a day-to-day basis “as long as the threat persists”. The authority has the power to impose a fine of upto Rs. 50 lakh suspending a media organisation’s operations for up to 11 months, and recommending the cancellation of its licence.

According to the Bill, this Authority is exempt from the Right to Information Act and can even order the search and seizure of documents or records of a media organization.

The Bill lays down standards which it says the media must follow. These include: prohibition of reporting any news item based on unverified and dubious material; exercising due care while reporting news items related to judiciary and legislature; clearly segregating opinions from facts; maintaining complete transparency and impartiality in internal functioning and prohibition of reporting any news items which are obscene, vulgar or offensive.

It also lays down that the electronic media shall not showcase clippings from entertainment programmes or from those aired on entertainment channels for more than 15 minutes of its daily broadcast time.

The bill says that while the freedom of speech and expression has to be respected, there appears no other option but to regulate the print and electronic media and impose on it certain crucial reasonable restrictions, which are needed for the purpose of protecting national interest.

The seven member Authority, which would have the powers of a civil Court, would comprise a chairman who is a former Chief Justice of India or a Supreme Court judge, and members– “persons of impeccable integrity and outstanding ability having special knowledge and expertise of not less than 10 years in matters relating to media”– nominated by a selection committee.

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773 Id., at 2.
774 Ibid.

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comprising of the Chief Justice of India, the union minister of information and broadcasting and three members appointed by the Union Government.

The stated objective of the Bill is to “ensure good quality reporting, which does not only feed news according to television rating points but also, in accordance with issues of prime national importance”.

To assist the regulatory Authority in dealing with complaints, the Bill proposes a scrutiny panel and an investigation panel.

In the statement of objects and reasons, behind the proposed law, it claims that live coverage of the 26/11 Mumbai terror attacks “compromised the police operation”, and adds that the media has “forgotten” that the freedom of speech and expression under Article 19 of the constitution comes with the caveat of “reasonable restrictions”. It further provides that:

The right conferred by the constitution are sacrosanct and should be respected. However, news valve has been dwindling every passing day while the freedom of speech and expression has to be respected, there appears no other option but to regulate the print and electronic media and impose on it certain crucial reasonable restrictions, which are needed for the purpose of protecting national interest.⁷⁷⁵

5.19.4.18 Societal Response to the Bill

This bill has not found much favour from any corner including parliamentarians, media persons, legal persons as well as jurists. Some people have termed it an attempt at censorship.

Former Chief Justice of India J.S. Verma, who also heads the News Broadcasting Standards Authority, the self-regulatory initiative of the News Broadcasters Association, feels such attempts are aimed at curbing the fundamental rights of the citizens. He observes:

There is no way a government appointed body can be allowed to regulate the media. It must be self-regulation alone. While Parliament has the right to pass any law, as a citizen of this country, it will be a sad day if such legislation is passed. Instead of such kind of regulation, government should facilitate a self-regulation mechanism. It would be more dignified. Since the TV Channels put in place a system of self-regulation, there has been a considerable improvement in the content.\textsuperscript{776}

The opposition parties including the BJP and left maintained that freedom of speech is the essence of democracy and any attempt to curb media would throttle freedom of expression. Government control would only lead to censorship of media and is unwarranted.

Indeed, there are certain wrong trends like paid news which need to be tackled but freedom of expression could not be compromised by any form of external control over the media.

Senior Supreme Court lawyer Rajeev Dhavan, on behalf of the Editor’s Guild of India, said:

These knee-jerk reactions have to be deplored. A free fair media has played an important role in keeping democracy functional in this country.\textsuperscript{777}

Press Council of India Chairperson Justice Markandey Katju said he was in favour of regulation but not control of Media. He remarked:

There is a difference between regulation and control. When there is control, there is no freedom; but when there is regulation there is freedom but is subject to reasonable restrictions in the public interest. But there can’t be any government control.\textsuperscript{778}

Former Delhi High Court Chief Justice A.P. Shah, who is Chairman of Indian Broadcasting Federation’s, Broadcasting content complaint council said, “This would be the death-knell for Indian democracy”. Senior Supreme

\textsuperscript{776} Maneesh Chhibber and C.G. Manoj, “Regulating Media a bad idea: Jurists”, \emph{The Sunday Express}, 3 (April 29, 2012).
\textsuperscript{777} Ibid.
\textsuperscript{778} Ibid.
Court Lawyer and Vice Chairperson for the Law Commission of India KTS Tulsi said, “It would be nothing but censorship. In this day and age, such a law is ill conceived and unconstitutional”. 779

The Proposed Bill has not seen the light of the day and it is unclear as to what shall be the fate of the said bill.

5.19.4.19 Submissions

The media censorship regime in India, besides being state controlled is also, many a times, influenced by social pressure. Though laws are there to govern and guide those in charge of executing the legal censorship, but once the masses resort to protests, attacks, verbal and physical, on those making the expression then the rule of law gives up. Often, either the State buckles to public pressure to impose some sort of ban on the expression, 780 or those making the expression themselves step down. In rare circumstances, the expression is allowed to prevail. Thus, in this area of extra-legal censorship, strict policies and regulations are required, so that censorship is governed by reason and not by popular sentiments.

While censorship in India severely limits onscreen physical affection, sexuality is omnipresent and emphasized through innuendo at every opportunity. It is true that India has strict censorship laws governing the certification and distribution of films within its borders, as well as the foreign films imported, but this does not preclude sexuality by any means. 781 Filmmakers and censors are in a constant struggle, each testing the limits of the other. Since the first censorship laws were passed in 1918, 782 producers and directors have made an art of integrating sexuality into scenes without actually including sex.

Despite the lack of overt physical sexuality onscreen, Bollywood’s films are brimming with sexuality. The sexuality within Bollywood’s films

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779 Ibid.  
780 However, this ban could be challenged and lifted, as was evidenced in Da Vinci Code case in India.  
is presented in a methodical manner tailored to fit each specific film. Filmmakers often utilize such aspects as religion, setting, and the inevitably ubiquitous song and dance sequences as media through which sexuality can be displayed. All Indian films are subject to the Cinematograph Code and the Central Board of Film Certification, which ensures that the code is upheld. Film censorship first appeared legally in India in 1918 under the Cinematograph Act, set in place by the ruling British Empire. Today, the 1952 Cinematograph Code serves as the law governing film regulation. It specifically prohibits “relations between the sexes” that “lower the sacredness of the institution of marriage,” or “suggest that illicit sexual relations are ordinary incidents of life”. “Excessively passionate love scenes” and “indelicate sexual situations” are not allowed either.  

As a result of the strictures placed upon them by the government, India’s filmmakers have found many loopholes to the laws they are bound to follow. Some filmmakers have even, over the years, developed such political connections and influence that they can get a film certified by the censors that would not ordinarily be distributed were it produced by another. However, most filmmakers must expertly work around the Cinematograph Code. Censors may demand anything from the editing of a single shot to the deletion of entire scenes, yet the differing interpretations of the Cinematograph Code by members of the Central Board of Film Certification can cause widespread imbalances in the representation of sexuality across Indian cinema. In the end, while the censors may be more lenient as time passes, basic regulations must be conformed to.

It is submitted that the aim of censorship is closely tied to the idea of creating an ideal citizen-viewer. The task of censorship is to teach the

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The Cinematograph Code actually forbids the exhibition of the body “indecorously or suggestively clothed”. It is also against the Code to show a film that “is likely to arouse disrespect of a foreign country or is liable to be looked upon by a foreign country as derogatory to itself”.


viewer to become a citizen and, in turn, it is the citizen-viewer who determines the specific content of censorship laws.

Further, the classification of books and magazines into ‘U’ and ‘A’ categories will not avail, and even if some shops are specially earmarked for stocking and selling ‘A’ category material, it will not be possible to prevent the young from gaining access to the goods stocked in an ‘A’ category shop. The responsibility of protecting the young must be assumed by parents and to a lesser extent by teachers. Parental guidance will prove truly effective if offered with understanding and affection.

Another form of censorship which deserves mention is the provision contained in Section 194 of the Sea Customs Act which empowers customs officials to open and examine any package borough by sea, shipped or brought for shipment at any customs port, and to confiscate any obscene book, pamphlet, paper, drawing, painting, representative figure or Article. It is the Customs officer and not an expert in literature, the arts or cultural values, who makes an assessment of obscenity. The likelihood is that he knows so little of matters literary, artistic or aesthetic that he cannot be expected to arrive at a just and acceptable judgment.

The only other type of censorship which the state can usefully and justifiably impose is film censorship. The peculiar nature of the film medium, the vivid and the immediate impact it makes on the viewer and its vast potential to reach out to millions of people within a brief space of time, place the motion picture is a class by itself. If a film can cause harm to its viewers, the only way to prevent the harm is by pre-censorship. The ordinary process of taking the matter to a Court of law and prosecuting the producer, the director, or exhibitor for making of disseminating obscene or immoral matter will be self-defeating, for a great deal of incalculable harm will have been done before the case is brought to judgment. In addition to the censorship of films which have no saving virtue, there should be classification of films into three categories: (i) ‘U’, suitable for universal exhibition, (ii) ‘A’ which can be screened before adult audiences only and
(iii) ‘X’ which can be seen only by special people, like doctors scientists, psychologists etc.\textsuperscript{786}

The statutory principles of film censorship are set out in Section 5B of the Cinematograph Act of 1952.\textsuperscript{787} It is to be noted that the wording of sub-Section (1) contains a reproduction of a part of the phraseology of Article 19(2) of the Constitution of India and this renders Section 5 B a valid law.

Under sub-Section (2), the Central Government laid down the following general principles:

1. No picture shall be certified for public exhibition which will lower the moral standards of those who see it. Hence, the sympathy of the audience shall not be thrown on the side of crime, wrong-doing, evil or sin.

2. Standards of life, having regard to the standards of the country and the people to which the story relates, shall not be so portrayed as to deprave the morality of the audience.

3. The prevailing laws shall not be so ridiculed as to create sympathy for violation of such laws.

It will be seen that these general principles are as vague as the principles laid down by the Supreme Court and, earlier, by Chief Justice Cockburn in the Hicklin case. But the matter is made worse by the list

\textsuperscript{787} \textit{Supra} note 724.

Section 5B(1) reads as under:

1. A film shall not be certified for public exhibition if, in the opinion of the authority competent to grant the certificate, the film or any part of it is against the interests of the security of the State, friendly relations with foreign states, public, order, decency or morality or involves defamation or contempt of Court or is likely to incite the commission of any offence.

2. Subject to the provisions contained in sub-Section (1), the Central Government may issue such directions as it may think fit setting out the principles which shall guide the authority competent to grant certificates under this Act in sanctioning film for public exhibition.
appended with the general principles which purports to be a practical application of these general principles.\(^{788}\)

To sum up, the various laws and codes aimed at censoring pornography are most unsatisfactory. The constitution permits the enactment of laws in the interest of morality and decency, but the present laws fail to achieve this objective, because they are uncertain, frequently oppressive and are prone to curb the legitimate expression of literary, artistic and cultural ideas. The laws are mostly administered by executive officers who are not familiar with literary and aesthetic values, and are not aware of modern trends in creative art, and the psychological impact of erotic matter on the majority of people.

\(^{788}\) The items which are to be excluded on the grounds of indecency or morality are thus those that:

(a) Deal with vice or immorality in such a manner as to--
   (i) extenuate vicious or immoral acts;
   (ii) undermine the accepted cannons of decency;
   (iii) depict vice or immorality as attractive;
   (iv) cast a halo of success or glory round the vicious or immoral;
   (v) enlist the sympathy or admiration of the audience for vicious or immoral characters;
   (vi) suggest that the attainment of a laudable end is justified by vicious or immoral means or improver motives;
   (vii) create the impression that vice and immorality are not to be reprobated.

(b) Deals with the relations between the sexes in such a manner as to--
   (i) lower the sacredness of the institution of marriage;
   (ii) suggest that illicit sexual relations are ordinary incidents of life and not to be reprobated;
   (iii) depict--
      a) rape, premeditated seduction, or criminal assaults on women;
      b) immoral traffic in women;
      c) soliciting prostitution or procreation;
      d) illicit sexual relations;
      e) excessively passionate love scenes;
      f) indecent sexual situation;
      g) scenes suggestive of immorality;

(c) exhibits the human form, actually or in shadowgraphs:
   (i) in a state of nudity;
   (ii) indecorously or suggestively clothed;
   (iii) indecorous or sensuous posture:
      and--
   (i) the unnecessary exhibition of feminine under clothing;
   (ii) indecorous dancing;
   (iii) indecent dress, conduct, speech, song or theme, or indecent portrayal of national institutions, traditions, customs or culture;
   (iv) importunation of women.

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Censorship being a clog on the right of free expression, the law-
making authority as also the executive must be extremely careful and
circumspect in taking action. It is better to err on the aide of liberality than
on the side of undue strictness. It has already been pointed out that
censorship on grounds of morals is a recent development, and in past times
the only censorship applied was on political grounds. The monarch or the
ruling authority did not want any of his subjects to rise openly against him
or his government or to give expression to sentiments which might spread
disaffection and endanger the security of the State. It is only in more recent
times that references, whether oral or written, which are concerned with sex
morals or sexual relations have also come to be regarded as fit matters for
control.

It is submitted that the standard to be applied by the Censor Board or
Courts for judging a film should be that of an ordinary man of common
sense and prudence and not that of an out of the ordinary or hypersensitive
man. The Board should exercise considerable circumspection on movies
affecting the morality or decency of our people and cultural heritage of the
country. The moral values in particular, should not be allowed to be
sacrificed in the guise of social change or cultural assimilation. The part of
right conduct shown by the great sages and thinkers of India and the concept
of “Dharam” (righteousness in every respect), which are the bedrock of our
civilization, should not be allowed to be shaken by the unethical standards.
But this does not mean that the censors should have an orthodox or
conservative outlook. Far from it, they must be responsive to social change
and they must go with the current climate. However, the censors may dispel
more sensitivity to movies which will have a markedly deleterious effect to
lower the moral standards of those who see it. 789

It is further submitted that in order to ensure that the free speech and
expression goals are achieved, it is important for the State to implement
positive and enabling legislation or guidelines to prevent domination.

789 Supra note 641 and 79.
control and/or censorship by a government or public authority, on the contrary, the media should be accountable to the public as distinct from the government. Even after 15 years of Supreme Court’s judgment on “airwaves”, an independent autonomous regulatory body continues to remain illusory. In fact far from freeing the “airwaves” and ensuring that the broadcast medium is free from government control and censorship, successive governments have instead many a time through various versions of the Broadcast Bill, Convergence Bill, Cable TV Act & Rules and licensing conditions attempted to do the exact opposite i.e. exert control over the Broadcast Media.

It has therefore been left to the efforts of the Broadcast Media to continue to resist any Government, or quasi-Government attempt to censor media by invoking grounds such as obscenity, morality, decency, public interest, race or religion.

Here it is heartening to note that the Indian judiciary has time and again come to the rescue of the Broadcast Media on the above issues and has displayed maturity and reasonableness while evolving jurisprudence around the subject of freedom of speech and expression in keeping with evolving contemporary standards of society.

However, an effective legal framework coupled with effective implementation mechanism is needed to tackle the expanding scope of the electronic media and for checking its possible abuse.

5.19.5 Trial by Media

An attempt was made by the Supreme Court in *R.K. Anand v. Registrar, Delhi High Court,* to define the ubiquitous term in the following manner:

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790 Supra note 36.
791 Supra note 678.
792 (2009) 8 SCC 106.
It is the impact of television and newspaper coverage on a person’s reputation by creating a widespread perception of guilt regardless of any verdict in a Court of law. During high publicity Court cases, the media are often accused of provoking an atmosphere of public hysteria akin to a lynch mob which not only makes a fair trial nearly impossible but means that, regardless of the result of the trial, in public perception the accused is already held guilty and would not be able to live the rest of their life without intense public scrutiny.\(^\text{703}\)

5.19.5.1 Trial by Media: Print Media and Electronic Media

Freedom of expression comprehends not only the liberty to propagate one’s views but also the right to print matters which have either been borrowed from someone else or are printed under the direction of that person.\(^\text{704}\) It also includes the liberty of publication and circulation,\(^\text{705}\) through any medium of expression, including printing.\(^\text{706}\) The importance of media in spreading information cannot be undermined, similarly its overstepping of the constitutional limits cannot be overlooked.

5.19.5.2 The Problem of Trial by Media

The foremost branch of the law of contempt of Court which the press or media should take care of is the publication of news and comments about case ‘pending’ before a Court in such manner as would result in a trial by a newspaper’ or a ‘trial by publicity’, instead of by the Court whose function is to administer justice.

This branch of the law has created a ‘problem’ because it involves a tug of war between two conflicting principals’ free press and free trial, in both of which the public are vitally interested.

\(^\text{703}\) Id., at 108.
\(^\text{704}\) Supra note 26.
\(^\text{705}\) Supra note 4 at 607.
\(^\text{706}\) Supra note 34.
There is a need for the freedom of the Press, which is necessary to supply the public with information and views which relate to matters of public interest, and which the public has a right to know, in a modern democratic State.\textsuperscript{797}

In fact this freedom of the Press stems from the right of the public, in a democracy, to be informed on the issues of the day, which affect the public. This investigator function of the Press has been found to be useful not only against governmental maladministration but also against crimes and other unlawful acts committed by individuals. It has been pointed out that but for such investigation by the Press; many of the offences against the society would not have come to light at all. It has been judicially observed:\textsuperscript{798}

It is sometimes largely because of the facts discovered and brought to light by the press that criminals are brought to Justice. The private individual is adequately protected by the law of libel should defamatory statements published about him be untrue, or if any defamatory comment made about him is unfair.

Of course, the right of the public to know and the freedom of the Press to impart information are confined to matters of public interest. But the expression ‘public interest’ has no fixed connotation and its contents may be widening with the growth of the civilization and the multiplication of the issues which affect people in their lives or property or government and the like. Thus, the adulteration or introduction of a drug with latent injurious after-effects may involve danger to human lives and thus raise a matter of public interest.

The financial affairs of an industrial or insurance company may affect public property and raise a public issue. When an insurance company fails and its policy holders are left stranded, this is undoubtedly a matter of

\textsuperscript{797} Supra note 197.
\textsuperscript{798} R.v. Sarundranayagan, (1968) 3 All ER 439 (441) C.A.
Lords, writing shall have such tendency if it has discussed any of the issues in the case, in favour of either of the parties.

As Lord Hewart had observed, whatever be the public utility from the aid offered by newspaper in investigating crimes, they must take care to refrain from publishing ‘matter which the law forbids,” evidence being given at the trial”; or, as the House of Lords has said, themselves judging any of the issues for trial by the Court. In the words of Lord Hewart:

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Supra note 798 at 64, 69.

Before parting with this case, it should be pointed out that the protracted controversy which this case raised did not end with the decision of the House of Lords, the supreme tribunal of England. Thalidomide was a dangerous drug, manufactured by the Distillers Co. As a result of use of this drug by mothers during pregnancy, numerous babies were born with deformity, on account of which some parents of such deformed children brought an action for negligence against the Co. The Sunday Times sough to take up the case of these parents and to bring pressure upon the Co. to come to a settlement in damages with the parents, by publishing an Article which suggested negligence on the part of the Co., in manufacturing the drug, discussing evidence relating to the issue of negligence. On the round that the Article, if published, would constitute contempt’s of Court, the Attorney-General obtained in injection against the Times Newspaper Ltd. restraining publication of the Article. The order of the discussion bench was weighed any potential injury to the defendants in the action of negligence, by way of way of interference with the due course of justice (1973) 1 All ER 815 (C.A.). The decision of the Court of Appeal, again, was reversed by the House of Lords (1973 3 All ER 54) that where the alleged contemnor (in this case the Press) sough to judge the very issue which was to be decided by the Court in the pending case, the likelihood of prejudice to the party to the litigation outweighed the public interest involved in the publication. The injection issued by the trial Court was, accordingly, restored. After the House of Lords decision, aforesaid, the Newspaper took the matter to the European Court of Human Rights, on the ground that its freedom of expression, guaranteed by the injunction affirmed by the House of Lords. The European Court of Human Right has upheld this contention of the Newspaper and held that, in enforcing the injunction granted by the House of Lords, the State, e.g., the U.K., had violated Article 10(1). Certain exceptions are acknowledged in Cl.(2) of Article 10, of which the relevant exception was “maintaining the authority and impartiality of the judiciary”. But, according to the European Court, the publication in question did not involve any threat to the authority of the judiciary of England (ECHR, A. Vol. 30, dt. 26.4.1979; Bailey, Civil Liberties, 1980. p. 262). It should be carefully noted that the actual division of European Court rests on the fact that there was no specific exception was authority of the judiciary. Once it is held that in a case of interference with a pending case, the direct injury is to a private party and that the affront to the authority of the Court in such a case is not as direct as in a case of scandalization of the administration of justice, the decision of the European Court could not be otherwise. Even from before the decision of the European Court, there was a strong current of public opinion in England, and this has been accentuated by the decision of the European Court that Act, 1971, which uses the words – “prejudices, or interferes or tends to interfere with, the due course of any judicial proceeding”. If the Legislature takes up any drastic change in this statutory provision, it will, of course, take account of the education of the masses and the conditions of litigation in this country, which are different from those in the European countries or the USA.


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It cannot be concerned that while the police or the Criminal Investigation Department were to pursue their investigation in silence, being careful to say nothing to prejudice the trial of the case, whether from the point of view of the prosecution or the point of view of the defence, newspapers publish to the whole world from time to time the results of these investigations, and by so doing to cater for the public appetite for sensational matter.\textsuperscript{806}

Though we have so far referred to the problem with reference to a criminal trial, which, because of the sensation caused thereby, offers greater inducement to a Journalist to publicize, the law of contempt with reference to a pending proceeding relates to both civil and criminal cases.

It may be contempt not only if the writer seeks to impute guilt to the accused in the pending proceeding, but also where he pleads for his innocence or publishes his would be defence.\textsuperscript{807} It may also be contempt to publish an interview with the accused or a potential witness,\textsuperscript{808} because in all such cases there is a likelihood of the trial being prejudiced or influenced by the publication.

Briefly speaking, there is immunity from contempt so long as the investigation by the Police is not complete. The starting point of pendency of the case before the Court, for purposes of contempt in a case where a Magistrate takes cognizance of an offence after investigation by the Police, is the submission of the final report (known as ‘charge-sheet’) to the Magistrate by the investigating officer, under Section 173, Cr.P.C., 1973.

This blanket cover against liability from contempt during the period of investigation has been allowed on the principle that just as it is in the public interest to ensure that the trial info an accusation is made by the

\textsuperscript{806} Ibid.
\textsuperscript{808} Supra note 798 at 439.
Court and not by newspaper or other media of publicity, it is similarly in the public interest: tile there should be a full investigation and detection of a crime and there are many instances where the Press has done good service to the society by unravelling conspiracies to commit crimes or the concealment of evidence after a crime has been committed.

Even after a criminal proceeding is ‘pending’ before the Court in the manner just explained, and even though the comment of the newspaper would have otherwise constituted contempt, the journalist would be immune from liability if it is an “innocent publication” within the meaning of Section 3(1) of the Contempt of Courts Act, 1971, that is, if he, at the time when the published the offending statement or comment, had “no reasonable grounds for believing that the proceeding was pending”, provided that this immunity shall not be available if the book or newspaper has been published without complying with the requirements of Section 3 or Section 5 of the press & Registration of Books Act, 1867.

The intention of the writer to interfere with the administration of justice or not, or the knowledge of the contents of the Article published by a publisher, or the truth of the facts stated therein, or whether the Court was actually influenced by such writing are all immaterial for determining whether the writing constitutes contempt of Court. The test is the reasonable tendency of the writing to prejudice the Court.

Such tendency may be caused in various ways. But the most common instance is where the publication prejudices or discusses any of, the issues in the case, in favour of either of the parties, e.g., suggesting that the accused is guilty of the murder with which he was charged.

Even the publication of reports of judicial proceedings may constitute contempt of Court where such proceedings are held in camera, and the public, including the Press, are excluded.

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5.19.5.3  Media Trial- International Efforts

In 1994, a group of 39 distinguished legal experts and media representatives, convened by the International Commission of Jurists, its Centre for the Independence of Judges and Lawyers and the Spanish Committee of UNICEF, met for three days in Madrid, Spain. The objectives of the meeting were: to examine the relationship between the media and judicial independence and to formulate principles to help the media and the judiciary develop a relationship that serves both freedom of the expression and the judicial independence.812

The participants came from Brazil, Sri Lanka, United Kingdom, Sweden, Jordan, Australia, Ghana, France, India, Spain, Germany, Austria, Netherlands, Norway, Poland, Portugal, Switzerland, Senegal, Palestine, Bulgaria, Croatia and Slovakia. The following are the principles drawn up at the meet:

1. The Madrid Principles on the Relationship between the Media and Judicial Independence.
2. Freedom of the media, which is an integral part of freedom of expression, is essential in a democratic society. It is the responsibility of judges to recognize and give effect to freedom of the media and applying a basic presumption in their favour and by permitting only such restrictions on freedom of the media as are authorised by the International Covenant in civil and Political Rights (International Covenant) and are specified in precise laws.
3. The media have an obligation to respect the rights of individuals, protected by the International Covenant and the independence of the judiciary. These principles are drafted as minimum standards and may not be used to detract from existing higher standards of protection of the freedom of expression.

The Basic Principle

1. Freedom of expression (including freedom of the media) constitutes one of the essential foundations of every society which claims to be democratic. It is the function and right of the media to gather and convey information to the public and to comment on the administration of justice, including cases before, during and after trial, without violating the presumption of innocence.
2. The principle can only be departed from in the circumstances envisaged in the International Covenant in Civil and Political Rights, as interpreted by the 1984 Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights.
3. The right to comment on the administration of justice shall not be subject to any special restrictions.
4. The basic principle does not exclude the preservation by law of secrecy during the investigation of crime even where investigation forms part of the judicial process. Secrecy in such circumstances must be regarded as being mainly for the benefit of persons who are suspected or accused and to preserve the presumption of innocence. It shall not restrict the right of any such person to communicate information to the press about the investigation of the circumstances being investigated.
5. The basic principle does not exclude the holding in camera of proceedings intended to achieve conciliation or settlement of private cause.

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812 The participants came from Brazil, Sri Lanka, United Kingdom, Sweden, Jordan, Australia, Ghana, France, India, Spain, Germany, Austria, Netherlands, Norway, Poland, Portugal, Switzerland, Senegal, Palestine, Bulgaria, Croatia and Slovakia.
C.P. Scott, the founder editor of the Manchester Guardian, once said: “Comment is free but facts are sacred”. The judicial process represents an effort to adjudicate individual case according to law. Trial by media revolves around the mantra ‘feed what the public is interest in’ and not ‘what is in public interest’. The expression trial-by-media’ describes the impact of television and newspaper coverage on a person’s reputation by creating a widespread perception of guilty regardless of any verdict in a Court of law. According to Ray Surette, ‘trial-by-media’ have “three basic flavours”: “Sinful Rich Type”, “Evil Stranger, psychotic killers” and “Abuse of Power trial”.

6. The basic principle does not require a right to broadcast live or recorded Court proceedings. Where this is permitted, the basic principle shall remain applicable.

Restrictions

7. Any restriction to the basic principle must be strictly prescribed by law. Where any such law confers a discretion or power, that discretion or power must be exercised only by a judge.

8. Where a judge has the power to restrict the basic principle and is contemplating the exercise of that power, the media (as well as any other person affected) shall have the right to be heard for the purpose of objecting to the exercise of that power and, if exercised, a right of appeal.

9. Laws may authorize restrictions of the basic principle to that extent necessary in a democratic society for the protection of the minors and of members of other groups in need of special protection.

10. Laws may restrict the basic principle in relation to criminal proceedings in the interest of the administration of justice to the extent necessary in a democratic society for the prevention of serious prejudice to a defendant, and for the prevention of serious harm to or improper pressure being placed upon a witness, a member of a jury or a victim.

11. Where a restriction of the basic principle is sought on the group of national security, this should not jeopardize the right of the parties, including the rights of the defence. The defence and the media shall have the right, to the greatest extent possible, to know the grounds on which the restriction is sought (subject, if necessary, to a duty of confidentiality if the restriction is imposed) and shall have the right to contest this restriction.

12. In civil proceedings, restrictions of the basic principle may be imposed if authorized by law to the extent necessary in a democratic society to prevent serious harm to the legitimate interest of a private party.

13. No restriction shall be imposed in any arbitrary or discriminatory manner. No restriction shall be imposed except strictly to the minimum extent and for the minimum time necessary to achieve its purpose, and no restriction shall be imposed if a more limited restriction would be likely to achieve that purpose. The burden of proof shall rest on the party requesting the restriction.


The Andhra Pradesh High Court in *Labour Liberation Front v. State of Andhra Pradesh*, held that the writ petition filed to force the authorities to investigate relied upon incorrect facts that should have been verified. The Court observed that “once an incident involving prominent person or institution takes place, the media is swung into action, virtually leaving very little for the prosecution or the Courts”. The media clamour created in the Jessica Lall and Priyadarshini Mattoo cases would be illustrations of the ‘Sinful Rich type’ and ‘Abuse of Power trial’.

The Chief Justice of India has remarked, “Freedom of press means people’s right to know the correct news”, but he admitted that newspapers cannot read like an official gazette and must have a tinge of “sensationalism entertainment and anxiety”. In the Bofors Case, the Supreme Court recounted the merits of media publicity:

Those who know about the incident may come forward with information, it prevents perjury by placing witnesses under public gaze and it reduces crime though the public expression of disapproval for crime and last but not the least it promotes the public discussion of important issues.

Two important core elements of investigative journalism envisage that (a) the subject should be of public importance for the reader to know and (b) an attempt is being made to hide the truth from the people. It must, nevertheless be stated that sometimes accuracy of the news is sacrificed at the cost of providing more sensational news. The Indian media should be reminded that while comment is free, facts are sacred.
Trial by Media: Issues Involved

In view of the foregoing considerations, it becomes imperative to consider the importance of the freedom of press and the media, its possible abuse and the required safeguards. It is well established that in a democracy, the freedom of speech and of the press is indispensable. The framers of our Constitution recognized the importance of safeguarding this right since the free flow of opinions and ideas is essential to sustain the collective citizenry. In the political scenario, an informed citizenry is a precondition for meaningful governance, similarly in the societal attitudes; a culture of open dialogue must be promoted. However, the likelihood of abuse of a freedom also can’t be ignored and there is always a possibility that if left unbridled, freedom of speech can do more harm than good.

Whether freedom to spread information means a license to speak and disclose everything? Should reporting include reporting of judicial proceedings and if so, should press be allowed to start up a parallel trial of the accused? The questions may be many and well-founded as well, however, it is important to state here that since the freedom of Press flows from the freedom of expression which is guaranteed to all “citizens” by Article 19(1)(a), the press stands on no higher footing than any other citizen, and cannot claim any privilege unless conferred specifically by law. Similarly it cannot be subjected to any special restrictions which are otherwise not warranted by the Constitution. Thus, the press, in India, is subjected to the constitutional limitations laid down under Clause (2) of Article 19 which also limits the freedom of speech and expression under Article 19(1).

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823 Supra note 13 at 862 (SCR).
824 Article 19(2) provides that “Nothing in sub-clause (a) of clause (1) shall affect the operation of any existing law, or prevent the State from making any law, in so far as such law imposes reasonable restrictions on the exercise of the right conferred by the said sub-clause in the interests of the sovereignty and integrity of India, the Security of the State, friendly relations with Foreign States, public order, decency or morality or in relation to contempt of Court, defamation or incitement to an offence.
It should be pointed out that when there is a conflict between the public interest behind free press and any other competing interest, it is for the Courts to strike the balance between the two interests. But in the present context, the Court has to safeguard its own interests vis-a-vis a free press. Thus, it requires a holistic analysis of the system.

To begin with, the possibility of state monopoly of the media has to be ruled out because it would mean state’s control over one’s mind which is the very antithesis of democracy. In the words of Pt. Jawahar Lal Nehru:

I would rather have a completely free press with all the dangers involved in the wrong use of that freedom than a suppressed or a regulated press.\textsuperscript{825}

It is noteworthy that because of the press and the media, in a democratic India, we boast of being an informed electorate. The media has always kept the people well informed about the issues of the day. It is an open truth that had media not brought up the important cases of the murders of Jessica Lal, Aarushi Talwar, Nitish Katara, Priyadarshini Mattu etc. to the knowledge of the common people, justice would have been almost denied to them.

In this regard, it is significant to mention that the extensive coverage of crime and information about suspects, accused, victims and witnesses, both in the print as well as in electronic media prompts a person to go into the legal nuances of trial by media. When a sensational criminal case comes to be tried before the Court, public curiosity experiences an upsurge.

Newspapers –most of them- compete with each other, in publishing their own version of the facts. Some of them employ their own reporters, to unearth the details not otherwise available. Besides, the coming of electronic media has created even a more wide circulation of information, generating more and more public opinion about an issue which is sub-judice. This enthusiasm is understandable. The thirst for sensational news is

\textsuperscript{825} Supra note 41 at 48.
a natural human desire. However, investigatory journalism has its risks. The law does not prohibit it in abstract. But the law does require the players in this activity to keep within certain limits. These limits primarily flow from: 826

(a) the right to reputation;
(b) the right to privacy; and
(c) the law of contempt of Court.

Right to reputation requires that an allegation casting an adverse reflection on the character of an individual should not be published unless the publication falls within one of the exceptional situations, recognized in this regard by the law. If the situation does not fall within this list of “privileged” or protected situations, then the publisher would be guilty of defamation.

Similarly, right to privacy of one’s self, family, procreation etc. is an important right read into Article 21 of the Constitution 827 and one has to be extremely cautious so that the reporting of certain information must not infringe the other’s “right to be let alone”.

However, the law of Contempt of Court operates on a slightly different plane. The paramount considerations here are dignity of the Court and fairness of trial. Hence, it follows that once a case has reached the Court, no one is allowed to publish his own version of the facts because such an attempt often interferes with the basic legal premise on which the criminal legal philosophy is based i.e. presumption of innocence of the accused until proved guilty. Violation of this rule amounts to contempt of Court because the protection of fair administration of justice is the prerogative of the Contempt of Courts Act, 1971. 828

827 *Supra* note 429.
828 The punishment for contempt of Court, that is, scandalization of a judge individually or the administration of justice, in general, is contained in Section 12 of the Contempt of Courts Act, 1971.
5.19.5.5 Trial by Media: Social Implications

In modern times, due to increase in the literacy rate, there is a rapid increase in readership of newspapers and magazines and hence they have a wide circulation. An increasing demand of newspapers gives to the media organizations a coveted role of shaping the popular beliefs and opinions. This leads one to apprehend that whether these organizations, at all times, are carrying on their work conscientiously. There may be many factors playing their roles, be it political influences, commercial interests or personal gains. In such a scenario, it becomes all the more important to put a bridle on such a freedom.

Today is an era of liberalization wherein private players have also entered the market and the competition is increasing. In such a corporatization of the mass media, what is essential is that even if a few large establishments hold an upper hand in the market for disseminating news, it is essential to protect the rights of smaller players, especially those who represent dissenting views.\(^{829}\)

The second dimension is that of preventing a “race to the bottom” in the standards of reporting which may occur in an atmosphere of intense competition between media establishments. It has been noted that in the race for grabbing the attention of viewers and readers, reporting often turns to distortion of facts and sensationalisation. The pursuit of commercial interests also encourages intrusive newsgathering methods which frequently impede upon the privacy of the people who are the subject of such coverage.

In respect of Court proceedings, the problem finds its worst manifestation in the coverage of sub judice matters where the reporting can be clearly prejudicial to the interests of the litigating parties. This problem is heightenened in instances of high profile criminal investigations and trials,

especially in matters involving celebrities wherein media reporting can shape popular sentiments and hence create undue pressure on judges and lawyers. In such a scenario, there is an utter need for the members of the press to respect the balance between the constitutional guarantee of “freedom of press” on the one hand and the “right to fair trial” on the other.830

5.19.5.6 Trial by Media: Constitutional and Legal Safeguards

Like the freedom of speech, the media is also subjected to the restrictions given under clause (2) of Article 19. Consequently, “contempt of Court” as a reasonable restriction on the freedom of speech affects media also, both print and electronic, in a like manner. In relation to the freedom of speech and expression, there are three sorts of contempt of Court: (a) one kind of contempt is scandalizing the Court itself; (b) there may be likewise a contempt of Court in abusing parties who are concerned in causes in the Court: (c) there may also be a contempt in prejudicing mankind against persons before the cause is heard. But the above classification is by no means exhaustive.831 Broadly speaking, it consists of any conduct that tends to bring the administration of justice into disrespect or to obstruct or interfere with the due course of justice.832 However, there is another important proposition which has to be reconciled with the strict interpretation of contempt of Court, which provides that “Justice” and not judge should be the keynote and creative journalism and activist statesmanship for judicial reform cannot be jeopardized by an undefined apprehension of contempt action.833 Moreover, the positive aspects of reporting of judicial proceedings by the media cannot be overlooked completely. Therefore, in this regard, it is important that the notions of contempt of Court, fair trial and media trial are well postulated.

830 Ibid.
831 Id., at 14.
832 The proposition is codified in Section 2(b) (iii) of Contempt of Courts Act, 1971.
The expression "contempt of Court" comprises of two kinds of contempt, - civil and criminal\textsuperscript{834} and since Article 19(2) of the Constitution lays down a limitation on the freedom of speech, it is obvious that Article 19(2) refers to criminal contempt only because where civil contempt deals only with wilful disobedience to any judgment, order etc. of the Court or wilful breach of any undertaking given to a Court, criminal contempt means the publication (whether by words, spoken or written, or by signs or by visible representation or otherwise) of any matter or the doing of any other act whatsoever which:\textsuperscript{835}

(a) scandalizes or tends to scandalize or lowers or tends to lower the authority of any Court; or

(b) prejudices or interferes or tends to interfere with, the due course of any judicial proceeding; or

(c) interferes or tends to interfere with or obstructs or tends to obstruct the administration of justice in any other manner.

The liability of the media for criminal contempt rests on the premise that where any communication is likely to interfere with the administration of justice, anybody who is responsible for publishing such matter will be liable for contempt of Court unless he can come under any of the defences provided for in the Act.\textsuperscript{836} It is pertinent to ascertain here whether publications in the media affect the judges?

The American view appears to be that judges are not liable to be influenced by media publication, while the Anglo-Saxon view is that judges, at any rate may still be sub-consciously influenced and because certain members of the public may think that judges are influenced, therefore, such

\textsuperscript{834} Section 2(a)(c) of Contempt of Courts Act, 1971.

\textsuperscript{835} \textit{Ibid.}

\textsuperscript{836} \textit{Supra} note 829.
a situation attracts the principle that ‘justice must not only be done but must be seen to be done’.  

The Anglo Saxon view appears to have been accepted by the Supreme Court as can be seen by a close reading of the judgment in *Reliance Petrochemicals v. Proprietor of Indian Express.* Thus, every care must be taken by the media so that any reporting by it of a matter pending before a Court must not result in a trial by public, instead of by the Court whose function is to administer justice.

### 5.19.5.7 Trial by Media: Judicial Response

An unprecedented growth in the powers and role of Judiciary in recent years has, in fact, pushed it into the public glare. It is the people themselves who repose their faith in the judiciary for every issue, be it a matter of admission of children in schools or banning smoking in public places etc by filing public interest litigations. However, so much intervention by the Judiciary into the domains of the Executive and the Legislature has often led to sharp confrontation between the judiciary and the public (often members of the media) which has, in turn, prompted the Courts to invoke the contempt jurisdiction.

The law of contempt requires the balancing of two vital but often, competing democratic values- the right to free speech and the necessity to preserve public confidence in the judicial system. In a democracy where individuals have a freedom of speech and expression, even the Judiciary, like any other institution, is not free from criticism. The right to criticize judgments has been many times recognized. However, there is also a need

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838 *Supra note 294.*
839 *Supra note 2 at 65, 66.*
840 *Supra note 110.*
to protect the judiciary from indignity so that the public continues to repose its faith in the judicial system.  

The Punjab High Court in *Rao Harnarain v. Gumori Ram*,\(^4\) stated that ‘Liberty of the press is subordinate to the administration of justice. The plain duty of a journalist is the reporting and not the adjudication of cases’. The Orissa High Court in *Bijoyananda v. Bala Kush*,\(^3\) observed that:

> The responsibility of the press is greater than the responsibility of an individual because the press has a larger audience. The freedom of the press should not degenerate into a licence to attack litigants and close the door of justice nor can it include any unrestricted liberty to damage the reputation of respectable persons.

It is pertinent to note here that even the media is bound by its constitutional responsibilities and is accountable to the public. If the media demands greater freedom to criticize the administration of justice, there is also a corresponding duty on the media to report with a much greater degree of responsibility.\(^4\) In *Rajendra Sail v. M.P. High Court Bar Association*,\(^5\) the Supreme Court held that criticism must always be dignified and that motives must never be attributed.

It is submitted that the most important virtue in a democracy is the public interest and it shall be equally affected whether there is an undue curtailment of freedom of press as it shall be when there is an unreasonable criticism of the judicial system.

In this regard, a reconciliation seems to have been achieved by the Apex Court when it has recently maintained that though judges are human beings, not automatons, but it is imperative for a judicial officer, in whatever capacity he may be functioning, that he is not guided by any factor

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\(^{3}\) AIR 1958 Punjab 273.

\(^{4}\) AIR 1953 Orissa 249.

\(^{4}\) *Supra* note 49.

\(^{5}\) *Supra* note 840.
other than to ensure that he shall render a free and fair decision, which according to his conscience is the right one on basis of materials placed before him. 846 Further, the Courts are only bound by law and its own judicial conscience. Till today, media cannot influence the decision making process. Indian Courts and judicial system is very strong. If media is able to influence the judgments of the Indian Courts, then there cannot be independence of judiciary. The Courts work on the basis of legal evidence available on record. Nobody should apprehend that media trial can influence the decision of the Courts. 847

In State of Maharashtra v. Rajendra Jawanmal Gandhi, 848 the Supreme Court held that there is procedure established by law governing the conduct of trial of a person accused of an offence. A trial by press, electronic media or public agitation is very antithesis of rule of law. It can well lead to miscarriage of justice. A judge has to guard himself against any such pressure and he is to be guided strictly by rules of law. If he finds the person guilty of an offence he is then to address himself to the question of sentence to be awarded to him in accordance with the provisions of law.

In another case of M.P. Lohia v. State of W.B and Another, 849 decided on February 4, 2005, the appellants were charged for offences punishable under Section 304-B, 406 and 498-A read with Section 34 IPC. Their applications for the grant of anticipatory bail were rejected by the lower Courts.

In this case, the daughter of the complainant, Chandni (since deceased) was married to the appellant. It was the case of the appellants herein that the deceased was a schizophrenic psychotic patient with cynic

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847 As per Additional District and Sessions Judge Gurbir Singh in “It was battle of unequals: Court”, reported by The Tribune, 22 (May 26, 2010). The observations were made in the context of judgment delivered in Ruchika case in which a teenage girl was molested by a former Haryana DGP.
848 Supra note 113.
depression and was under medical treatment. Though she was living in the matrimonial home, she often went to Calcutta to reside with her parents and she was also being treated by doctors there for the abovementioned ailments.

Meanwhile, the death of Chandni took place on 28.10.2003 and the complaint in this regard was registered and the investigation was in progress. During that time, an Article appeared in a magazine called “saga” titled “Doomed by Dowry” written by one Kakoli Poddar based on her interview of the family of the deceased, during version of the tragedy and extensively quoting the father of the deceased as to his version of the case. The facts narrated therein were all materials that were be used in the forthcoming trial.

The Court deprecated the practice and cautioned the publisher, editor and the journalist responsible for the said Article against indulging in such trial by media when the issue is sub-judice.

The Court held that where a young wife committed suicide at her parents’ home within two years’ of her marriage, Articles appearing in the magazine based on interview of the family of the deceased giving version of tragedy amounted to interference with administration of justice. Practice of holding trial by media, when the matter was sub-judice was deprecated by the Court.

In Zahira Habibullah Sheikh v. State of Gujarat, the Supreme Court explained that denial of a fair trial is as much injustice to the accused as is to the victim and the society. Fair trial obviously would mean a trial before an impartial judge, a fair prosecutor and atmosphere of judicial calm. Fair

850 Ibid.
trial means a trial in which bias or prejudice for or against the accused, the witnesses, or the cause which is being tried is eliminated.\footnote{Markandey Katju, “Ideal and reality: Media’s role in India”, available at http://www.hinduonnet.com/thchindu/thscrip/print.pl?file=200808195330900.htm&date=2008/08/19&prd=th, visited on September 21, 2010.}

5.19.5.8 Media Trial- Negative Aspects

Justice Katju and P. Sainath have attacked the media for focusing attention on “non-issues” and “trying to divert attention of the people from the real issues to non-issues”\footnote{P. Sainath, “Lost the Compass? Rural India is a giant canvas that is begging the media to do a portrait”, available at http://www.outlookindia.com/full.asp/fodname=20051017&fname=CP+Sainath&sid=1, visited on September 21, 2010.} and “stifling of smaller voices”.\footnote{Ramachandra Guha, “Watching the Watchdog: Time for the press to look within”, The Telegraph, May 10, 2008, available at http://www.telegraphindia.com/1080510/jsp/opinion/story_9244220.jsp, visited on September 22, 2010.} Who will watch the watchdog as it abdicates its role as an educator in favour of being an entertainer?\footnote{Navajyoti Samanta, “Trial by Media-Jessica Lall Case”, available at http://ssrn.com/abstract=1003644, visited on September 20, 2010.} A line between informing and entertaining must be drawn. Due to extensive media propaganda, justice and rule of law are no longer about the process but the outcome. It is submitted that public opinion may exercise an indirect influence over the criminal justice system. Justice should not only be done, it should manifestly and undoubtedly be seen to be done. Psychological pressures stemming from media scrutiny could possibly taint verdicts to conform to public opinion rather than the evidence offered at trial. Further, the credibility of a judge is at stake when a trial by media declares a person guilty but the judge gives a differing opinion based on facts.\footnote{Id., para 36.}

Right to a fair trial is absolute right of every individual within the territorial limits of India vide Articles 14 and 20, 21, and 22 of the Constitution. Needless to say right to a fair trial is more important as it is an absolute right which flows from Article 21 of the constitution to be read with Article 14. Freedom of speech and expression incorporated under Article 19 (1)(a) has been put under ‘reasonable restriction’ subject to
Article 19 (2) and Section 2 (c) of the Contempt of Court Act. One’s life with dignity is always given a priority in comparison to one’s right to freedom of speech and expression. Media should also ponder upon these facts. Fair trial is not purely a private benefit for an accused, but the public’s confidence in the integrity of the justice system is also crucial. The right to a fair trial is at the heart of the Indian criminal justice system. It encompasses several other rights including the right to be presumed innocent until proven guilty, the right not to be compelled to be a witness against oneself, the right to a public trial, the right to legal representation, the right to speedy trial, the right to be present during trial and examine witnesses, etc.

Earlier, journalism was not under pressure to push up TRP ratings or sales. So the journalists did their work with serious intent and conviction, with courage and integrity. They did not pronounce people guilty without making a serious attempt to study the charges, investigate them, and come to their own independent conclusions, without fear or favour.

They did not blindly print what law enforcers claimed, what the bureaucracy said or what politicians planted on to them. That is why people trusted them. But now we are seeing a different self-acquired role of media. Today, the print and electronic media have gone into fierce and ruthless competition. It is basically concerned with the commercial value of the stories to be telecasted or printed; sometimes these are concocted ones also. The press council of India issues guidelines from time to time and in some cases, it does take action. But, even if ‘apologies’ are directed to be published; they are published in such a way that either they are not apologies or the apologies are published in the papers at places, which are not very prominent.

The most objectionable part and unfortunate too, of the recently incarnated role of media is that the coverage of a sensational crime and its adducing of ‘evidence’ begins very early, mostly even before the person

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Gisborne Herald Co. Ltd. v. Solicitor General, 1995 (3) NZLR 563 (CA).
who will eventually preside over the trial even takes cognizance of the offence, and secondly that the media is not bound by the traditional rules of evidence which regulate what material can and cannot be used to convict an accused. In fact, the Right to Justice of a victim can often be compromised in other ways as well, especially in Rape and Sexual Assault cases, in which often, the past sexual history of a prosecutrix may find its way into newspapers. Secondly, the media treats seasoned criminal and the ordinary one, sometimes even the innocents, alike without any reasonable discrimination. They are treated as a ‘television item’ keeping at stake the reputation and image. Even if they are acquitted by the Court on the grounds of proof beyond reasonable doubt, they cannot resurrect their previous image. Suspects and accused apart, even victims and witnesses suffer from excessive publicity and invasion of their privacy rights. Police are presented in poor light by the media and their morale too suffers. Such kind of exposure provided to them is likely to jeopardize all these cherished rights accompanying liberty.\(^{858}\)

Sensational journalism has also had an impact on the judiciary. For instance a ‘trial-by-media’ began almost immediately after Afzal’s arrest in the attack on the Indian Parliament case. Only one week after the attack, on 20\(^{th}\) December 2001, the police called a press conference during the course of which Afzal ‘incriminated himself’ in front of the national media.\(^{859}\) The

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\(^{859}\) Publication of confessions is contemptuous: Though a confession to police is inadmissible in law still publications of confessions before trial are treated as highly prejudicial and affecting the Court’s impartiality and amount to serious contempt. (See also, 200\(^{th}\) Report of the Law Commission of India on “Trial by Media-Free Speech and Fair Trial Under Criminal Procedure Code, 1973 (Amendments to the Contempt of Court Act, 1971), August 2006, 199). In \(R\ v.\ Clarke\), (Ex p Crippen: (1910) 103 LT 636), Crippen was arrested in Canada but not formally charged, but a publication appeared in England in Daily Chronicle, as cabled by its foreign correspondent, that “Crippen admitted in the presence of witnesses that he had killed his wife but denied the act of murder”. The publication was treated as contempt. Darling J. observed, “Anything more calculated to prejudice the defence could not be imagined”. In new South Wales, a police officer was found guilty of contempt in \(AG\ (NSW)\ v. Dean\), (1990) 20 NSWLR 650, when, in the course of police media conference following the arrest of a suspect in a murder inquiry, he answered a journalist’s question with a statement which suggested that the person confessed to the police. He was held to be in contempt but was let off without fine. From the
media played an excessive and negative role in shaping the public conscience before Afzal was even tried. This can be demonstrated by the observations of Justice P. Venkatarama Reddy in upholding the imposition of the death penalty on Mohammed Afzal.

The incident, which resulted in heavy causalities, had shaken the entire nation and the collective conscience of the society will only be satisfied if the capital punishment is awarded to the offender.\textsuperscript{860}

Recently\textsuperscript{861} the Supreme Court has begun to frame guidelines for reporting of cases in Media and it has taken up hearing in this matter before a Constitution Bench from 27\textsuperscript{th} March, 2012 onwards. In this case, an eminent senior counsel Fali S. Nariman appearing for Sahara India complained to the Apex Court Bench regarding telecast of a news on a leading business news channel concerning the two parties. The channel allegedly aired the contents of a proposal sent by two real estate companies of the Sahara group through their counsel to Securities and Exchange Board of India (SEBI) although the same was at a very nascent or preliminary stage. The Court expressed its distress over increase of such unfortunate incidents where \textit{sub-judice} matters are improperly (mis)reported in the media thus affecting both the business sentiments as well as interfering with the administration of justice.\textsuperscript{862}

The final verdict of the Court is awaited and, truly, it shall be a benchmark for everybody to follow. Till any specific legislation, these guidelines would be the law on this subject. The Hon'ble Chief Justice has also directed that any party, who desires to make submissions in the matter,

\textsuperscript{861} Sahara India Real Estate Corporation Ltd. \& Others, Etc. v. Securities and Exchange Board of India \& Anr., Civil Appeal no. 9813/2011 and Civil Appeal no. 9833/2011.  
\textsuperscript{862} \textit{Supra} note 69 at 17.
may do so by way of intervention. Further, this information has been put on the website for the notice of everyone.

The lives of witnesses are compromised. In *State (N.C.T. of Delhi) v. Navjot Sandhu*, the Court deprecated the practice of exposing the accused persons to public glare through TV and in case where Test Identification Parade or the accused person being identified by witnesses (as in the present case) arise, the case of the prosecution is vulnerable to be attacked on the ground of exposure of the accused persons to public glare, weakening the impact of the identification. Due to media propaganda, lawyers of unpopular accused persons are subjected to public derision. Every person has a right to get himself represented by a lawyer of his choice and put his point before the adjudicating Court and no one has the right to debar him from doing so. For an instance, when eminent lawyer Ram Jethmalani decided to defend Manu Sharma, a prime accused in a murder case, he was subject to public derision and ridicule by the media.864

Another example of this would be the serial-killings in Noida. Due to extensive media coverage of police investigations, the owner of the house where the corpses were found, Mohinder Singh Pandher and his domestic help Surendra Kohli, the prime suspects of having committed these crimes bore the brunt of sensational journalism. Influenced by media coverage, much of it proclaiming that the two men had already confessed to the killings, the local Bar Association announced that it had decided that no advocate from Noida would defend Pandher and Kohli in Court.865 The

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863 Supra note 860, (para 139).

864 Quoting Rajesh Chopra, the creator of LiveIndia.com: “It is surprising to see the behaviour of Mr. Ram Jethmalani. I remember that statement of Ex-Prime Minister Mr. Atal Behari Vajpayee that ‘Ram Jethmalani doesn’t think before speaking anything’. This man who used to be idol for whole country’s upcoming advocates has shocked the nation by supporting Manu Sharma. Everyone knows who is guilty. But somehow influence and money of some people is posing hurdle to bring justice to this case. I personally request Mr. Ram Jethmalani not to entangle himself in this case to which whole nation’s emotions are attached and would request him no to play legal games”, available at http://www.liveindia.com/news/1c.html, visited on September 20, 2010.

media forgets that right to have a lawyer of one’s choice is a fundamental right under the Indian Constitution.866

A trial by press, electronic media or public agitation is the very antithesis of the rule of law. It can only lead to miscarriage of justice.867

In M. P. Lohia v. State of West Bengal,868 the Apex Court, admonishing the media, stated:

We have no hesitation that this type of Articles appearing in the media would certainly interfere with the administration of justice. We deprecate this practice and caution the publisher, editor and the journalist who was responsible for the said Article against indulging in such trial by media when the issue is sub-judice.869

5.19.5.9 Media Trial- A Balanced View

Before publishing a news item about Court proceedings, it would be appropriate for the correspondent and editor to ascertain its authenticity and correctness from the records so that the concerned person can be held guilty and accountable for furnishing incorrect facts or wrong information about the Court proceedings. It is rightly remarked:

A lot remains to be done to ensure that two of the strongest pillars of our democracy i.e. the judiciary and the media work in tandem to promote the democratic secular principles enshrined in our constitution.870

Criticism of judicial decisions in a healthy manner, if used effectively, is a powerful weapon in the hands of the masses and can have far reaching consequences. The best example of this is the Mathura Rape

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867 Supra note 113.
868 Supra note 849.
869 Id., (para 10).
Case.\textsuperscript{871} The Supreme Court’s decision in this case acquitting the accused policemen who allegedly raped a poor girl in the police station raised hue and cry. Public criticism provided an impetus for the law to be amended. Higher punishment for custodial rape was included in the IPC and provisions in favour of the victim were added to the Indian Evidence Act.

In \textit{Ruchika Murder Case},\textsuperscript{872} the Court got 400 hearings, 40 adjournments and the case continued for 9 long years. It was media’s intervention which brought relief to the parents of the victim. Similarly in \textit{Jessica Lall Case},\textsuperscript{873} the accused Manu Sharma was acquitted of all charges in 2006. However, he was sentenced to life imprisonment owing to intense media and public pressure. Further, in \textit{Priyadarshini Mattoo Case},\textsuperscript{874} a 25 years old law student was found raped and murdered at her house in New Delhi in 1996. The accused was Santokh Singh, son of a Police Inspector General and was earlier acquitted by the trial Court in 1999. This decision, however, led to a massive public outcry and the Court sentenced Santokh Singh to death in 2006.

It is often contended that the centrality of the issue is often lost in the way the media sometimes treats certain incidents. There is no law which can compel a media outlet to give full and fair information or prevent suppression, varnishing, garbling and distortion of facts, or motivated reportage or mixing comments with facts. Only journalistic ethics may be invoked against such misconduct.\textsuperscript{875} However, there is another side to it also.

Freedom of the press stems from the right of the public, in a democracy, to be informed on the issues of the day, which affect the public.\textsuperscript{876} It is sometimes largely because of facts discovered and brought to

\textsuperscript{871} (1972) 2 SCC 143.
\textsuperscript{872} Cri Rev. No. 1558 of 2010.
\textsuperscript{873} (2001) Cri LJ 2404 (Del).
\textsuperscript{874} (2007) Cri LJ 946.
\textsuperscript{876} Supra note 797.
light by the press that criminals are brought to justice. The private individual is adequately protected by the law of libel should defamatory statements published about him be untrue, or if any defamatory comment made about him is unfair.\textsuperscript{877}

Thus, even though the Supreme Court has tacitly admitted that adverse publicity may deny the accused person a fair trial, it denied Vikas Yadav’s plea for transfer of appeal against the conviction by the Delhi High Court to the Allahabad High Court in the Nitish Katara murder case.\textsuperscript{878} In the Priyadarshini Mattoo murder case, when the Delhi High Court convicted Singh, seven years after a trial Court had acquitted him, the deceased father, Chaman Lal Mattoo, the woman’s father, wrote in the Indian Express newspaper:

I can’t thank the media enough. If it was not for the media, we would have lost the spirit and the battle.\textsuperscript{879}

During the hearing of the public interest litigation filed by advocate Surat Singh in the Aarushi Talwar Murder case before the Supreme Court, Justices Altamas Kabir and Markandey Katju remarked:

Nobody is trying to gag the media. They must play a responsible role. By investigation, the media must not do anything which will prejudice either the prosecution or the accused. Sometimes the entire focus is lost. A person is found guilty even before the trial takes place. See what happened in this [Aarushi] case. Till today what is the evidence against anyone? We will lay down guidelines on media coverage. We are not concerned about media criticizing us. Let media say anything about us, we are not perturbed. Our

\textsuperscript{877} Supra note 798 at 441.


shoulders re brad enough and we will ignore it [the criticism). We are for media freedom. What we are saying is there is no absolute freedom.\footnote{J. Venkatesan, “Apex Court to lay down coverage norms”, available at \url{http://www.thehindu.com/2008/08/19/stories/2008081957360100.htm}, visited on September 28, 2010.}

In \textit{Praful Kumar Sinha v. State of Orissa},\footnote{AIR 1989 SC 1783.} a writ against sexual exploitation of blind girls in school was filed before the Supreme Court on the basis of an Article published in a newspaper. Even though sexual assault was difficult to prove, the Apex Court, on the basis report submitted, gave directions to the institution for proper management. In \textit{Sheela Barse v. Union of India},\footnote{Supra note 110.} the journalist, through a letter addressed to the Chief Justice of India, made the Apex Court take cognizance of the deplorable conditions of the mentally challenged woman locked up in the Presidency jail, Calcutta. Due to this initiative, Commissioners were appointed to investigate and report on the conditions of prisons where women and children were detained.

In \textit{D.K. Basu v. State of West Bengal},\footnote{(1997) 1 SCC 416.} the Supreme Court took cognizance of the existence of custodial violence after a letter was sent to the Chief Justice of India drawing attention to newspaper reports regarding death in police lock-ups and custody.

The Supreme Court has stated in \textit{Naresh Shridhar Mirajkar v. State of Maharashtra},\footnote{(1966) 3 SCR 744.} that “public trial in open Court is undoubtedly essential for the healthy, objective and fair administration of justice. Trial held subject to the public scrutiny and gaze naturally acts as a check against judicial caprice and vagaries, and serves as a powerful instrument for creating confidence of the public in the fairness, objectivity and impartiality in the administration of justice. Public confidence in the administration of justice is of such great significance that there can be no two opinions on the broad proposition that in discharging their functions as judicial Tribunals, Courts
must generally hear causes in open and must permit the public admission to the Court-room". 885

There are though limits on the freedom of the press. In *Mother Dairy Foods and Processing Ltd. v. Zee Telefilms*, 886 it was recognised that while journalists and media are ‘distinctive facilitators’ and they must follow the virtues of accuracy, honesty, truth, objectivity and fairness. The Court finally concluded that often the media conveys what the ‘public is interested in’ rather than what is in ‘public interest’. The freedom of the press should not degenerate into a licence to attack litigants and close the door of justice nor can it include any unrestricted liberty to damage the reputation of respectable persons”. 887

In another important case, *R.K. Anand v. Registrar, Delhi High Court*, 888 a criminal trial arose from a hit and run accident on a cold winter morning in Delhi in which a car travelling at reckless speed crashed through a police check post and crushed to death six people, including three policemen. Facing the trial, as the main accused, was a young person called Sanjeev Nanda coming from a very wealthy business family. According to the prosecution, the accident was caused by Sanjeev Nanda who, in an inebriated state, was driving a black BMW car at very high speed. The trial, commonly called as the BMW case, was meandering endlessly even after eight years of the accident and in the year 2007, it was not proceeding very satisfactorily at all from the point of view of the prosecution. The status of the main accused coupled with the flip flop of the prosecution witnesses evoked considerable media attention and public interest. To the people who watch TV and read newspapers it was yet another case that was destined to end up in a fiasco. It was in this background that a well known English language news channel called New Delhi Television (NDTV) telecast a programme on May 30, 2007 in which one Sunil Kulkarni was shown meeting with IU Khan, the Special Public Prosecutor and RK Anand, the

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885 Ibid.
886 AIR 2005 Delhi 195.
887 Bijoyananda v. Bala Kush AIR 1953 Orissa 249.
Senior Defence Counsel (and two others) and negotiating for his sell out in favour of the defence for a very high price. Kulkarni was at one time considered the most valuable witness for the prosecution but afterwards, at an early stage in the trial, he was dropped by the prosecution as one of its witnesses. Nearly eight years later, the trial Court had summoned him to appear and give his testimony as a Court witness. The telecast came a few weeks after the Court order and even as his evidence in the trial was going on. According to NDTV, the programme was based on a clandestine operation carried out by means of a concealed camera with Kulkarni acting as the mole. What appeared in the telecast was outrageous and tended to confirm the cynical but widely held belief that in this country the rich and the mighty enjoyed some kind of corrupt and extra-constitutional immunity that put them beyond the reach of the criminal justice system. Shocked by the programme the Delhi High Court suo moto initiated a proceeding. It called for from the news channel all the materials on which the telecast was based and after examining those materials issued show cause notices to R. K. Anand, I. U. Khan and Bhagwan Sharma, an associate advocate with R.K. Anand why they should not be convicted and punished for committing criminal contempt of Court as defined under Section 2(c) of the Contempt of Courts Act. On considering their show cause and after hearing the parties the High Court expressed its displeasure over the role of Bhagwan Sharma but acquitted him of the charge of contempt of Court. As regards R.K. Anand and I.U. Khan, however, the High Court found and held that their acts squarely fell within the definition of contempt under clauses (ii) and (iii) of Section 2 (c) of the Contempt of Courts Act. It, accordingly, held them guilty of committing contempt of Court.\footnote{Ibid.}

Consequently, appeals by R. K. Anand and I.U. Khan respectively were filed under Section 19 (1) of the Contempt of Court Act against the judgment and order passed by the Delhi High Court. NDTV came under heavy attack from practically all sides for carrying out the stings and airing
the programme based on it. On behalf of R.K. Anand the sting programme was called malicious and motivated, aimed at defaming him personally.

However, the Court held that the stings and the telecast of the sting programme by NDTV, in fact, rendered valuable service to the important public cause to protect and salvage the purity of the course of justice. The Court opined that it is not desirable to lay down any reformist agenda for the media. Any attempt to control and regulate the media from outside is like to cause more harm than good. Nevertheless, the norms to regulate the media and to raise its professional standards must come from inside.890

It is submitted that cases like the Jessica Lall and Nitish Katara murder cases, which involve high profile and powerful people as the accused persons, do benefit from such incessant media exposure. The public hue and cry created in the Jessica Lall murder case by the media forced the Delhi Police to file an appeal in the High Court against the acquittal of Manu Sharma by the Trial Court. The expose by NDTV, telecasted on May 30, 2007, showing the prosecution witness, Sunil Kulkarni, negotiating his testimony for monetary considerations to bail out Sanjeev Nanda, the accused in the hit and run case, propelled the Delhi High Court to suo moto initiate contempt action against R. K. Anand and I.U. Khan.

Recently, the Supreme Court dismissed the petition filed by the dentist couple Rajesh and Nupur Talwar to transfer the trial of their murdered daughter Arushi from Ghaziabad to Delhi because they apprehended that the trial judge was hearing the case in a pre-determined manner. The bench held that the conduct of Talwars showed “impertinence magnified manifold” for the rule of law and if needed, the Ghaziabad Magistrate was free to take ‘coercive measures’ against the couple.\footnote{Krishna Das Rajagopal, “SC rejects Talwar’s plea to shift trial”, \textit{The Indian Express}, 6 (March, 3, 2012).}

The role of the media in such cases is laudable as the disempowered and marginalized get access to justice in matters that have been brushed

\footnote{\textit{Ibid.}}
under the carpet. This gives rise to the question as to which is the greater evil—the intrusive role of the media, which disregards all norms of propriety, or its role as the facilitator of justice. However, a trial by media may amount to travesty of justice if it causes impediments in the accepted judicious and fair investigation and trial.

Admittedly, the media has the right to be present and report Court proceedings, which presumably is based on the media’s role as a conveyor of information. It is no secret that the content presented to the public is often inextricably laced with opinions, bias and subjective notions of justice. Every effort should, therefore, be made by media to maintain the distinction between trial by media and information media. Trial by media should be avoided particularly, at a stage when the suspect is entitled to constitutional protections. Invasion of his rights is bound to be held as impermissible.

5.19.5.10 Pervasive Media Coverage Whether Affects Professionally Trained Judges

Unlike the American legal system among others which provide for “trial by jury”, our judicial system relies exclusively on the competence of the Judge. One argument for allowing unrestrained media coverage can be that the same will not affect the decisions of professional judges. Lord Denning opined that a professional Judge will not be influenced by media coverage which affects laymen; Lord Dilhorne rebutted this conception of “judicial superiority”. In John D. Pennekamp v. State of Florida, Justice Flex Frankfurter had observed:

No Judge fit to be one is likely to be influenced consciously except by what he sees or hears in Court.
and by what is judicially appropriate for his deliberations. However, judges are also human and we know better than did our forefathers how powerful is the pull of the unconscious and how treacherous the rational process. And since Judges, however stalwart, are human, the delicate task of administering justice ought not to be made unduly difficult by irresponsible print.

Cardozo, one of the greatest Judges of the American Supreme Court in his ‘Nature of the Judicial Process’ referring to the “forces which enter into the conclusions of Judges” observed that “the great tides and currents which engulf the rest of men do not turn aside in their curse and pass the Judges by”. It is submitted that the American view appears to be that jurors and judges are not liable to be influenced by media publication. The U.S. first Amendment is more or less couched in absolute terms. However, Justice Frankfurter in his dissenting opinion has emphasized that a judge may be “subconsciously” affected. In this, the Indian Supreme Court is more influenced by the Anglo-Saxon view represented in the judgments of Lord Scarman and Lord Dilhorne of the House of Lords. It is quite clear that freedom of speech in India guaranteed by Article 19(1)(a) is not in absolute terms and that the “real and present” danger test of the U.S. first amendment could not be applied in the Indian case laws.898

The Indian free speech law is different and has been restricted by Article 19(2). Regarding media reporting, the Supreme Court899 has been reiterating the view that the judges may be subconsciously affected in their judgments the frailty of the judicial system stems from the fact that judges are human beings and undue influence of irresponsible expression may taint the rational process of adjudication. This limitation has been admitted by the Supreme Court of India, wherein it ruled:

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898 Supra note 103.
Prejudice, a state of mind, cannot be proved by direct and positive evidence. Therefore, it cannot be judged on the basis of an objective standard.\textsuperscript{900}

In \textit{Balakrishna Pillai v. State of Kerela},\textsuperscript{901} the Apex Court stated that the grievance relating to trial by press would stand on a different footing. Judges do not get influenced by propaganda or adverse publicity. Another example is the case of \textit{Zee News v. Navjot Sandhu}\textsuperscript{902} in which the Supreme Court held that media interviews do not prejudice judges.

\textbf{5.19.5.11 Recommendations of the Law Commission of India}\textsuperscript{903}

Recognizing and acknowledging the threat of unreasonable influence of media sensationalism on the judicial process, the Law Commission in its 200\textsuperscript{th} report has set forth the following recommendations:

1. Enlarge the term ‘Publication’- In order to avoid a possible lacuna in the law arising merely out of technicality it is necessary to widen the term publication to include publications in print, electronic media, radio broadcast cable television and the World Wide Web. This can be done inserting an explanation to clause (c) of Section 2 stipulating the same.

2. Application of reasonable restrictions- Although traditionally the restrictions contained under Article Administration of justice. The reference under Article 19 (2) that restrictions can be imposed for the purpose of Contempt of Court Act clearly indicates that they can be applicable in such a case.

3. Pendency of proceedings- The Law Commission recommends that the word ‘pending’ used in Section 3 shall be substituted by the word ‘active’ similar to that of the UK Act of 1981 and

\textsuperscript{901} AIR 2000 SC 2778.
\textsuperscript{902} 2003 (1) SCALE 113.
\textsuperscript{903} Supra note 837 at 29-35.
the Bill annexed to the NSW Law Commission report 2003, as it stipulates the date of arrest as the point of commencement of a criminal proceeding and thereby brings the Act into conformity with the judgment of A. K. Gopalan.

4. Which Court may punish for criminal contempt- A noteworthy problem which the Law Commissions has discerned in the existing law is that in the case of criminal contempt of subordinate Courts such Courts have no power to punish for contempt and can only make a reference to the High Court under Section 15 (2). This process is cumbersome and time consuming and threatens to delay the course of justice.

5. Postponement Orders- In order to bring the present law up to date of the UK Act of 1981 and the Bill annexed to the NSW law commission report. The Commission has recommended insertion of a provision for postponement orders under Section 14 (A) and 14 (B) of the Act. Since these are essentially prior restraints great care must be taken in their implementation. As observed by the Supreme Court in Reliance Petrochemicals, any prior restraint is a serious encroachment on the freedom of the press and therefore requires the imposition of stringent condition on its implementation. In this regard, the Commission has recommended that the initial restraint be for a period of 7 days following which the order maybe either varied or cancelled on application. Furthermore, it is essential that news of the order be published in the media so as to make them aware of the compulsory restraint.

6. Media persons to be trained in certain aspects of Law- The law Commission opines that it is essential in order to strike an adequate balance between free speech and the administration of justice that the media be sufficiently educated as to what their rights are under Article 19 (1)(a) and what constitutes offences...
such as defamation and contempt of Court. To this end they recommend that the syllabus in journalism should cover various aspects in law and that it is also necessary to have diploma and degree courses in journalism and law. 904

5.19.5.12 Submissions

The 200th Law Commission of India report, in its recommendation, includes that the point of start of pendency of criminal proceeding shall be ‘arrest’, like it is under the U.K. Act, 1981. In absence of protection from prejudicial publication on and after the time of arrest, a great threat is posed to the freedom of the accused. By operation of Article 22 (2) of the Constitution, an arrestee must be produced before the magistrate within 24 hours. Any prejudicial publication might and does adversely affect the outcome of a bail hearing.

In the absence of any backbone legislation, the efforts of the judiciary in protecting the rights of fair trial from the wrath of the media are commendable. The considerable delay in implementing and discussing the 200th Law Commission report tends to show the legislative indifference to the issue, which must change.

A logical interpretation of the Contempt of Courts Act read with the Article 19 (2) limits the scope of Contempt of Courts to matters relating to the Court. Much of pre-trial publicity which is not covered cannot under our current constitutional regime be restricted. In the grounds included in Article 19 (2) the ground of ‘administration of justice’ is a notable absentee. 905

These issues of parallel investigations and publicity done much before the initiation of criminal proceedings cannot be reasonably covered by the term ‘contempt of Court’. Since ‘administration of justice’ is not included as one of the grounds under Article 19 (2) even a reasonable restriction to

904 Id., at 189-215.
preclude the interference of administration will be held invalid until ‘administration of justice’ is included in the list of grounds. In absence of such amendment the hands of the legislature are tied with respect to regulating media investigation and trials. Therefore, a Constitutional recognition of the phenomenon of trial by media is the need of the hour.

Backbone legislation with a constitutional sanction will effectively deal with the menace of media trial. Besides the long term solution in this respect lies in self-regulation by both the media and the judiciary.906

Every effort should be made by the print and electronic media to ensure that the distinction between trial by media and informative media should always be maintained.907 Trial by media should be avoided, particularly, at a stage when the suspect is entitled to the constitutional protection. Despite the significance of the print and electronic media in the present day, it is not only desirable but least that is expected of the persons at the helm of affairs in the field, to ensure that trial by media does not hamper fair investigation by the investigating agency and more importantly, does not prejudice the right of defence of the accused in any manner whatsoever. Article 19(1)(a) of the Constitution has to be carefully and cautiously used and there is a need that all modes of media must extend their cooperation to ensure fair investigation, trial, defence of accused and non-interference in the administration of justice in matters sub-judice.908 It will serve the dual purpose of upholding one’s freedom of speech, on the one hand, and promoting the administration of justice, on the other.

It is evident that for the administration of justice, the media and judiciary are inextricably bound. Each of these being a hallmark of democratic society, it is essential to ensure that one does not over shadow the other, nor obstruct its functioning. To facilitate this, a fine balance must be struck between the two. Responsibility rests on both the judiciary and the

907 Supra note 893 at 2357.
908 Ibid.
fourth estate alike. The Courts of law must be tedious in their approach while curtailing free speech and expression, while at the same time the media must recognize its duty and debt towards society insomuch as fair and responsible reporting is concerned. Judicial precedent has been the main source in terms of the parameters set for the commencement of a proceeding. However, growth and evolution is never too far away with the law Commission making several recommendations on its report on media trials.

Thus, in the ultimate analysis, it may be maintained that respect for the law of the land is a virtue that needs to be inculcated and practiced by every individual. Our Constitution rests on the principles of checks and balances. The people enjoy fundamental rights as well duties. There is separation of powers amongst various organs of the state and everything is ultimately bound together in the common framework of our great Constitution. Statutory laws are there, the only need is to implement and interpret them in their true spirit.

Freedom of speech as well as control by the judiciary is both important facets of our system. What is required are self constraint and a balanced approach from both these important institutions in order to maintain the basic features of the Constitution i.e. free press, an independent judiciary and above all a democratic polity.

5.19.6 Freedom of Speech and Advertisements

An advertisement is an information that producer provides about its products or services and tries to get consumers to buy a product or a service. An advertisement is generally of goods and services and information intended for the potential customers and not a mere display of the name of the company unless the same happens to be a trademark or trade name.  

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When an advertisement is used purely for commercial purposes, it would not come within the protection of freedom of speech, but is regarded as an incidence of freedom of business profession.¹⁰

An advertisement is undoubtedly a form of speech. But every form of advertisement is not a form of speech or expression of ideas. Advertisements when it takes the form of commercial advertisement no longer falls within the concept of freedom of speech for the object of such advertisements is not the promotion of ideas—social, political or economic or furtherance of literature or human thought. An advertisement of 'commercial nature' is not protected under Article 19(1)(a). Such advertisements have an element of trade and commerce.

There are various kinds of advertisements, as for instance:¹¹

(i) comparative advertising which compares the advertised brand with another brand of the same product;

(ii) competitive advertising which contains little information about the advertised product and is used only to help a producer maintain a share of the market for the product;

(iii) information advertising which gives information about the suitability and quality of a product;

(iv) ambush advertising where an official sponsor for an event is outdone by a rival, typically through the sponsorship of individual stars;¹²

(v) political advertising to garner votes for a political candidate or party;¹³

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¹⁰ Valentine v. Chestenson (1941) 316 U.S. 52.
¹¹ Supra note 2 at 186.
¹² For instance, in 1996, the soft drinks giant Coca Cola paid a fortune for the rights to call itself the official sponsor of the World Cup but its rival, Pepsi, tried to outdo Coke by launching a massive advertising blitz with the catch line, ‘Nothing official about it’.

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telemarketing where business is solicited from potential consumers over the telephone.\textsuperscript{914}

5.19.6.1 Advertisements and Judicial Response

Publication of advertisements has been held to be “commercial speech” protected by Article 19(1)(a).\textsuperscript{915} This was not, however, so till the Supreme Court’s ruling in \textit{Tata Press v. Mahanagar Telephone Nigam Ltd.}\textsuperscript{916} Till this time, advertisements were excluded from the realm of Article 19(1)(a). In \textit{Hamdard Dawakhana v. Union of India},\textsuperscript{917} the Supreme Court held that although an advertisement was a form of speech, it ceased to fall within the concept of ‘free speech’ when it took the form of a commercial advertisement seeking to promote trade or commerce.

In a significant judgment in \textit{Tata Press Ltd. v. Mahanagar Telephone Nigam Ltd.},\textsuperscript{918} a three Judge bench (Kuldip Singh, B.L. Hansaria and S.B. Majumdar, J.J.) has held that commercial speech (advertisement) is a part of the freedom of speech and expression guaranteed under Article 19(1)(a) of the constitution. It can only be restricted on the grounds specified in clause (2) of Article 19, such as, in the interest of the security of state, friendly relations with foreign states, public order, decency or morality, or an incitement to an offence. The Court, however, made it clear that the commercial advertisements which are deceptive, unfair, misleading and untruthful could be regulated by the Government.\textsuperscript{919}

\textsuperscript{913} The India Shining campaign launched by the NDA government just a few months before the 2004 general elections was really a political advertising campaign for the party in power and cost the national exchequer Rs. 63 crores.

\textsuperscript{914} In India so far there is no law to regulate or control telemarketing. However, the Telecom Regulatory Authority of India is empowered under Section 11(1) of the TRAI Act, 1997 to protect the interest of consumers and is, therefore, within its powers to prevent cellular companies from divulging personal information about consumers and their phone numbers without their express consent.

\textsuperscript{915} \textit{Supra} note 277.

\textsuperscript{916} \textit{Ibid.}

\textsuperscript{917} AIR 1960 SC 554.

\textsuperscript{918} \textit{Supra} note 277.

\textsuperscript{919} \textit{Ibid.}
In this case the facts were as follows-

The Mahanagar Telephone Nigam is Government Company controlled by the Government of India. The Nigam is a licensee under the Act and as such is required to establish, maintain and control the telecommunication service within the territorial jurisdiction of the Union Territory of Delhi and the Municipal Corporations of Bombay, New Bombay and Thane. Till 1987, Nigam used to publish and distribute the telephone directory itself consisting of white pages only. However, from 1987 the Nigam started to entrust the publication of its telephone directly to outside contractors. The Nigam permitted to such contractors to raise revenue for themselves, by procuring advertisements and publishing the same as “yellow pages” appended to the telephone directory. Thus, the telephone directory published and distributed by the Nigam consists of the “White Pages” which contains list of Telephone Subscribers and also “Yellow Pages” consisting of advertisements procured by the contractor to meet the expenses incurred by the contractor in printing, publishing and distributing the directory. Tata Press Ltd. was engaged in publication of the “Tata Press Yellow Pages”. The Nigam and the Union of India field a civil suit before Civil Court at Bombay for a declaration, that they alone have the right to print’ publish the list of telephone subscribers and Tata Press Ltd. have not right to print or publish without its permission as it was violate of the Indian Telegraph Act and they should therefore, of the Indian Telegraph Act and they should therefore, the restrained by permanent injunction from publishing the ‘Yellow Pages’.

The city Civil Court dismissed the suit. But a single judge of the Bombay High Court allowed the appeal. Tata’s Letters Patent Appeal was dismissed by the Division Bench of the High Court. Tata’s filed an appeal in the Supreme Court. The Supreme Court held that the Union Government and the Nigam have no right to restrain the appellant Tata Press Ltd. from publishing “Tata Yellow Pages” comprising paid advertisements from businessmen, traders and professionals.

920 Id., at 139, 140.
The Court said that the advertisement as a “Commercial speech” has two facets:921

- Advertising which is no more than a commercial transaction is nonetheless dissemination of information regarding the product advertised. The public at large is benefited by the information made available through the advertisements. In a democratic economy, free flow of commercial information is indispensable. There cannot be honest and economical marketing by the public at large without being educated by the information disseminated through advertisements. The economic system in a democracy would be handicapped without there being freedom of “Commercial Speech”.

- Examined from another angle, the Court said that the public at large has a right to receive the “commercial speech”, Article 19(1)(a) of the Constitution not only guaranteed freedom of speech and expression, it also protects the rights of an individual to listen, read and receive the said speech.

Referring to the Supreme Court’s Judgment in Hamdard Dawakhana case, the Court said that the holding was a limited one prohibiting an obnoxious advertisement and cannot be accepted in view of the wider importance of the advertisement. All commercial advertisements cannot be denied the protection of Article 19(1)(a) (as was held in Hamdard Dawakhana case) of the Constitution merely because the same has been issued by businessmen.

In Indian Express Newspapers v. Union of India,922 the Supreme Court observed on the conclusions in Hamdard Dawakhana case:923

We feel that the observations made in the Hamdard Dawakhana case are too broadly stated and the

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921 Id., at 145.
922 Supra note 32.
923 Supra note 917.
Government cannot draw much support from it. We are of the view that all commercial advertisements cannot be denied the protection of Article 19(1)(a) of the Constitution merely because they are issued by businessmen.\textsuperscript{924}

In *Hamdard Dawakhana v. Union of India*,\textsuperscript{925} the validity of the Drugs and Magic Remedies (Objectionable Advertisements) Act, which puts restrictions on advertisement of drugs in certain cases and prohibited advertisements of drugs having magic qualities for curing diseases was challenged on the ground that the restriction on advertisement abridged the freedom of speech.

The Supreme Court held that an advertisement is no doubt a form of speech but every advertisement is not a matter dealing with the freedom of speech and expression of ideas. In the present case the advertisement was held to be dealing with commerce or trade and not for propagating ideas. Advertisement of prohibited drugs would thus not fall within the scope of Article 19(1)(a).

In view of the Supreme Court decision in *Tata Press Ltd. v. Mahanagar Telephone Nigam Ltd.*,\textsuperscript{926} the ruling in *Hamdard Dawakhana case* has now a limited application that is prohibiting an obnoxious advertisement and cannot be applied to general advertisement as such. In this case, the Court has held that commercial speech is a part of the freedom of speech and expression guaranteed under Article 19(1)(a) of the constitution. Commercial speech cannot be denied the protection of Article 19(1)(a) if issued by a businessman.

Advertising enables the citizen to make well-informed and intelligent economic choices. More important than the right of expression of the

\textsuperscript{924} Supra note 32, at 701-702, (para 93).
\textsuperscript{925} Supra note 917.
\textsuperscript{926} Supra note 277.
advertiser is the right of the recipient to the information which he receives from the advertisement.

Recently, in an important case NOVVA ADS *v.* Secretary, Department of Municipal Administration and Water Supply, the Court rightly held that the right to commercial speech guaranteed under Article 19(1)(a) and the right to carry on any trade, occupation or business guaranteed under Article 19(1)(g) cannot take precedence over the right of the State to regulate advertisements by erection of hoardings, which are visible on public roads and public places whether such hoardings are constructed on public roads and buildings or on private buildings.

This decision truly balances the competing claims of citizen’s right to free speech and the public interest in securing public safety.

Pasayat, J., in NOVVA ADS observed that “very narrow and stringent limits have been set to permissible legislative abridgment of the right of free speech and expression and this was, doubtless, due to the realization that freedom of speech and of the press lay at the foundation of all democratic organizations, for, without free political discussion no public education, so essential for the proper functioning of the processes of popular government is possible”.

### 5.19.6.2 Advertisements and Public Good

If there is suppression of facts in the reporting of news, it would deprive the citizens of forming their opinion on day-to-day happenings in the world. In India, there is the possibility of suppression of facts either by the government or by private proprietors or at the dictates of the advertisers. There is a great need for the press to be independent as it helps in the formulation of public opinion.

In their constant quest to attract consumers and associate products with “cool” or luxurious and hedonistic lifestyles, some advertisers have

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927 (2008) 8 SCC 42.
consistently pushed the boundaries of what is ethically and socially acceptable. American advertising has always embraced erotic suggestiveness while usually staying clear of full nudity and explicit sexuality. Campaigns that blur that distinction often arouse controversy and even protest.

Due to decline in standards, the Press appears to have become more concerned with better circulation and larger profits and not always motivated by the spirit of public service.\(^{929}\)

## 5.19.6.3 Advertisements and Revenue Generation

The newspapers serve as a medium of exercise of freedom of speech. The right of its shareholders to have a free press is also fundamental right. Advertisements in a newspaper have direct nexus with circulation.

The Supreme Court reiterated the importance of advertising and its nexus with the circulation of newspapers in *Hindustan Times v. State of U.P.*\(^{930}\) In the instant case, the Executive orders issued by State Government under Article 162 directing deduction of an amount of 5% from the bills payable to newspapers having circulation of more than 25,000 copies for publication of government advertisements for implementation of its “Pension and Social Security Scheme for Full time Journalists” had been held to be *ultra vires*.

The Court held that advertisements in newspapers play an important role in generating revenue and have a direct nexus with circulation. Advertising revenues enable newspapers to meet the cost of newsprint and other financial liabilities. Advertising also enables the reader to purchase a newspaper at an affordable price. \(^{931}\)

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\(^{929}\) Supra note 276.

\(^{930}\) (2003) 1 SCC 591.

\(^{931}\) Id., at 601-604, (para 33-38).
5.19.6.4 Election Campaigns and the Problem of Paid News

In India, the Constitution incorporates elaborate provisions for a fair process of election to central and state legislatures. On the basis of these provisions, there are two statues—The Representation of People Act, 1950 (Act 43 of 1950) and the Representation of People Act, 1951 (Act 43 of 1951).

Despite the constitutional and statutory stipulations there are no express provisions in either for regulating the relationship between the elected and the electorate although they do regulate the process of election. They do not spell out as to the matters that the candidates should place before the electorate.

In this backdrop, a phenomenon which is highly witnessed in the election campaigns is that of paid news.

This phenomenon of ‘paid news’, where newspapers and other media, in return for large amounts of money, virtually become the de facto mouthpieces of political parties and their leaders, has been like a festering wound which has come out into the open only now, and emerged as a serious peril to Indian democracy.

It had been going on for years, but a public scandal erupted in 2009-10 when the Maharashtra State Assembly Elections were underway. It came to the notice of the general public that more than Rs. 10 crores worth of advertisements and Articles lavishing praise on the ‘era of development’ ushered in and nurtured by the then Chief Minister, and a candidate in the same elections, were published in various vernacular dailies.

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933 Supra note 41.
Opposition parties were up in arms, contending that a blatant fraud had been perpetrated on the electorate. The election law—The Representation of the Peoples Act, 1951 is not equipped to deal with such situations, because it is very easy to circumvent the restriction of the limit on election expenditure. Moreover, Section 77 of the Act, which deals with ‘corrupt practices’ does not even envisage such a situation of fraud by proxy. None of those writings, singing paeans to the present incumbent, were labelled as ‘advertisements’, because that would have given the game away. Instead, all the items were labelled as news.

In the broadcasting media, the issue of political advertisements masquerading as news has created ripples on a number of occasions.

During the general elections of 2004, it led to quite a huge controversy. The Cable Television Network (Regulation) Rules, 1994, prohibit advertisements of a political nature. This issue was raised before the Andhra Pradesh High Court, which suspended the operation of Rule 7(3) of the Cable Television Network (Regulation) Rules, 1994, relating to the prohibition of political advertisements.

The matter went to the Supreme Court, which, by its order modified the High Court’s order and directed the Election Commission to monitor such advertisements on television and cable networks during the 2004 general elections. The Supreme Court clarified that the Code for Commercial Advertising on All India Radio prohibits advertisements of a political nature.

Today, the paid-news syndrome is no more an issue of impropriety, but it is a case of massive perpetration of crimes under Representation of People Act, 1951 and Indian Penal Code, 1860.

The concept of democracy as visualized by the Constitution presupposes the representation of people to the Parliament and State

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Legislatures through election. Any influence that hijacks public opinion and affects the exercise of the right to vote in a free and fair manner eats at the roots of democracy. Though political parties and candidates are free to propagate for voting support, they are precluded from misguiding, spreading falsity, selling impossible promises, using caste, religion or regional feelings, using public money and power to influence the voter with allurements of money and sedation of liquor. All these unreasonable influencing factors are declared illegal. Punishments and disqualifications are also prescribed.

Undoubtedly, the media proprietors have freedom and authority to chose the contents of their page or channel or decide the portion of their space for advertisements. The Supreme Court of India has stuck down the statutes and executive orders of the Government when the State tried to introduce controls on the content of newspapers, and restrict the space allotted to advertisement by saying at least 60 per cent should be of news. It was considered as the State’s unreasonable interference with the autonomy of newspaper to decide how to fill their pages, which was violation of the freedom of press guaranteed by the Constitution.

The syndrome of “Paid News” that crept up into poll scene during 2009 is the equivalent of ‘criminalization of political parties’, ‘massive booth rigging’, ‘electronic voting machine manipulation’, or ‘massive distribution of liquor and money a few hours before polling’.

It is wrong to say that money for a news item is just an unethical practice of camouflaging advertisement as news, or passing off a ‘falsity’ as a news event. Heavy monetary packages to campaign for candidate is more than an election crime in which the media men were hand in glove with criminal politicians.

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938 Supra note 13.
939 Supra note 14 at 64.
The trend reflects the fatal combination of a trinity of the "Media, Money and Mafia". Now candidates are training media pens instead of mafia guns to 'rig' the minds of people with constant opinion bombarding to constrain them to vote them.

The old classification of media content was as under\(^{940}\):

(i) News

(ii) Views

(iii) Advertisement

Presently, the classification has changed to the following:

(a) Advertorial (no more editorial)

(b) News (events)

(c) News as advertisements and

(d) Advertisements

The thin line between 'news' and 'advertisement' was blurring till recently but totally disintegrated. News was supposed to be regarded as factual reporting of events, and generally the newspaper would not be liable for the truthfulness of the contents of the advertisement unless they contain defamatory or obscene material. Now untruthful news is appearing as 'event coverage', which in fact is an advertisement.\(^{941}\)

The much advanced Andhra Pradesh media has dubious distinction of being the pioneer in paid news syndrome. In 2004 elections the traces of this cancer was noticed in some districts, where in the reporters and advertisement executives collected huge amounts of money to write favourable stories. Where the subeditors or little higher position holders notice the 'treachery' they were also given the share. Earlier, it was limited

\(^{940}\) Supra note 937, at 64.

\(^{941}\) Ibid.
to a couple of newspapers in a few districts. By 2009, this corruption was institutionalized, newspapers fixed targets for each district bureau, collected huge amounts of money, depriving the reporters of the benefit of exclusively claiming the proceeds without any information. Each and every political party candidate was forced to enter into some package deal with the tabloid newspapers as the continuous campaign of winning stores of their rival candidates created a psychological edge and left a worrying factor in their cadre. Every candidate had to shell out a minimum of Rs. 5 lakhs for not writing adverse reports and for publishing favourable reports. The space and frequency of exaggerated or false ‘favourable reports’ is directly proportional to the size of the package money.\footnote{942}

The Election Commission has prohibited exit-poll opinion survey by any media before the polling process is completed. This is based on the principle that winning news of one party at one place should not influence voters in different part of the state to favour winning party. If the media takes money to say a particular candidate is receiving unprecedented support from the people, it could send an influencing signal to others to vote for him. This frenzy campaign based on fabricated stories of increasing people’s support is misuse of freedom of expression both by candidates and journalists. Thus there is a need to take serious action against paid-misinformation during the polls. What must be realized is that while generally reporting falsity is question of ethics, circulating falsity on payment during polls is an offence.\footnote{943}

The newspapers had offered different packages such as:\footnote{944}

(a) regularly writing favourably on front page;

(b) writing favourably in regular succession on front page with a colour photo;

\footnote{942} Supra note 937 at 65.  
\footnote{943} Ibid.  
\footnote{944} Id., at 66.
(c) writing regularly with colour photos all through the campaign session, i.e. from date of nomination to date of polling with interviews, news analysis, campaign trials etc.;

(d) a package to write favourably and also to do negative campaign against his rival candidates;

(e) an informative interview of the candidate with photos on condition that they should purchase 25,000 copies of the newspapers besides some consideration.

Selling space or time (by print and electronic media) to propagate falsity is something far above the unethical practice which puts the media on par with poll-criminals. It is not only a transgression against professionalism and ethics but a crime against democracy besides being a punishable offence under both, the Representation of People’s Act and the Indian Penal Code. The syndrome is not just the concern of Press Council of India but a real challenge to the Election Commission, whose aim is to conduct free and fair polls. With extremely rich candidates contesting elections or enriched legislators seeking re-election, who have no dearth of money, the media’s targets are easily achieved.  

The Hindu reported on this during the Lok Sabha elections, where Sections of the media were offering low-end “coverage packages” for Rs. 15 lakhs to Rs. 20 lakhs. “High-end” ones of course, cost of lot more.  

It is noteworthy that under Section 123 of Representation of People Act, 1951, bribery, undue influence, appeals made on the ground of religion, caste, etc., publication of false statement relating to a candidate, free conveyance of voters, incurring of election expenditure in excess of the prescribed limit and seeking assistance of government servants are “corrupt

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445 P. Sainath, in The Hindu, 6 (December 6, 2009); Sainath quotes National Election Watch 2009, stating that there was 38 percent asset growth of legislators, and that there was 70 percent increase in crorepati candidates in 2009.

446 “News Report,” The Hindu, 8 (April 7, 2009).
practices". Later, in 1989 booth capturing was also added as another such corrupt practice. In the present context, media sold space and time to perpetrate undue influence, publication of false statement relating to winning chances of a candidate, and in the process the candidates spent huge amounts of money for coverage packages which is certainly a corrupt practice. These aspects have to be considered, investigated and prevented by the machinery of Election Commission of India. The Commission should not leave it to be decided at the time of hearing of election petition, which means that the state would have allowed perpetration of corrupt practices and then waited for ‘proof’ of the same before the election tribunals. If this is allowed elected politicians who purchase ‘news’ will take great advantage.

Further, unduly influencing of voters by the media is an election crime. Such propaganda, done for consideration, and camouflaged as a news item must be examined to see whether it unduly influences the free exercise of electoral right, which is defined as a crime under Section 171 of the Indian Penal Code and as “undue influence” under the Representation of People Act, 1951.

Thus, media, receiving money to influence the minds in this context either interfered with or attempted to interfere with, along with the paying candidate. This is sufficient to make the newspaper guilty under the RP Act and IPC. Paid news containing false reporting might lead to violation of

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947 Section 123(4) of the Representation of People’s Act, 1951 defines corrupt practice as under:
“The publication by a candidate or his agent or by any other person which the consent of a candidate or his election agent (this expression include media which publishes statement taking money which amounts to consent of candidate or his agent), of any statement of fact which is false, and which he either believes to be false or does not believe to be true, in relation to the personal character or conduct of any candidate or in relation to the candidature, or withdrawal, of any candidate, being a statement reasonably calculated to prejudice the prospects of the candidate’s election”.

948 Supra note 14, at 69.

949 Section 171 reads, thus- “Whoever with intent to affect the result of an election makes or publishes any statement purporting to be a statement of fact which is false and which he either knows or believes to be false or does not believe to be true, in relation to the personal character or conduct of any candidate shall be punished with fine”.

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several other legal provisions, such as Section 123(4) of the Representation of People’s Act, 1951.

The sold news columns often involve exchange of illegal money between the political parties or candidates and journalists. The income tax authorities have enough power to demand for accounts and tax for this amount. The political party or candidate has to reflect this expenditure in his election expenditure. After adding this expenditure for purchasing news columns if the amount spent exceeds the limit prescribed on expenditure, the consequential legal actions should be taken against such a candidate as per Section 77 of Representation of People’s Act 1951. This outlines the need for implementation of such provisions which empower the Election Commission of India to prevent unhealthy criminal practices like ‘paid news’.950

In the second phase, the false reporters could be convicted and election could be declared invalid. This is because the ‘corrupt practice’ of candidate through newspaper reporter or publisher by ‘sold news column’ has materially affected the prospects of a candidate or adversely affected the prospects of rival candidate, it could become a ground for declaring election as void under Section 100 of RP Act, 1951. On proof of this corrupt practice of the candidate, he would be disqualified from contesting elections, according to Section 8A of RP Act, and along with him, those who committed this corrupt practice would forfeit the right to vote under Section 11-A of the same Act. Besides being criminal, it is also breach of prescribed codes under the Cable Television Networks Rules 1994.951

5.19.6.5 The Phenomenon of Ambush Marketing

Ever since sponsorship of individual television programmes was first introduced, the idea of programmes being “in association with” or “brought to you by” has been very much part of the viewing experience.952 Many

950 Supra note 937 at 72, 73.
951 Ibid.
researchers have noted the extraordinary growth in sponsorship over the last two decades and it increasingly commercial orientation. Television sponsorship offers sponsors an opportunity to be associated with the content of television programmes and channels and is therefore seen as a powerful marketing option. As sponsorship’s popularity has increased, so too has competition to secure and protect sponsorship rights. The practice of ambush marketing of “parasitic advertising” is by no means new, but nevertheless has not been heavily litigated-mainly because, in most countries, it is essentially legal.\(^{953}\)

Ambush marketing is an amorphous concept. This uncertainty is hardly surprising because, until comparatively recently, these marketing practices could only be prevented by using a broad range of legal rights and remedies, including intellectual property laws, planning law, advertising regulation and contract and real property laws.\(^{954}\) Definitions have been proposed by supporters of the interests of event organizers and sponsors; by supporters of the rights of ambushers; and by other who take a more or less balanced view of the various rights and relationships. The term has been defined in many ways ranging from an international effort to weaken or ambush a competitor’s official association with a sports organization which acquired its rights through payment of sponsorship fees to the ‘ability to reasonably confuse’ the consumer regarding the ambushing company’s status as an official sponsor.\(^{955}\)

It is “a practice whereby companies attempt to make the consumer think their product or service is somehow affiliated with a popular sporting event or league” even though the companies have not paid to sponsor that sporting event or league. In its most offensive form, ambush marketing

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refers to the intentional efforts of one company to weaken, or ‘ambush’, a competitor’s official association with a sports organization, which has been acquired through the payment of sponsorship fees.\textsuperscript{956}

Most often, an ambush marketing campaign is designed to intentionally confuse the buying public as to which company is in fact the official sponsor of a certain sports organization. Such conduct directly conflicts with the officially sanctioned company within the ambusher’s product or service category. It is seen as giving ambushers the benefits of association with an event, without the burden of paying licensing fees to become an official sponsor. This is argued to be unfair to event organizers, who should be able to internalize income flowing from their event. Furthermore, these activities may involve the use of rights that have been purchased legitimately and at considerable expense.\textsuperscript{957}

For example, Fuji was the worldwide sponsor of the 1984 Olympic Games in Los Angeles. Kodak sponsored the ABC’s television broadcast of the event and became the ‘official film’ of the U.S. track team.\textsuperscript{958} In the subsequent 1988 Seoul Olympic Games, Kodak was the worldwide sponsor, and Fuji sponsored the U.S. swimming team. These activities have been cited as one of the first examples of ambush marketing.\textsuperscript{959}

There is no doubt that the practice of ambush marketing is an unethical business practice, and the past two decades have shown how important it is to have more stringent intellectual property protection besides what is provided for in the current regime. Ambush marketing affects event organizers considerably and possesses a substantial threat to their economic interests. Ambush marketing decreases the value of a

\textsuperscript{957} Ibid.
\textsuperscript{958} Id., at 104.
\textsuperscript{959} Id., at 108.
sponsorship, as companies may no longer be willing to pay the sky-high fees required to call themselves “official sponsors”. ⁶⁰⁰

The actual laws of most countries are not adequate to prevent ambushing activities and seem to be ineffective in most cases, due to the creativity of the ambushers and the way they circumvent those regulations as well as the reluctance of Courts. Remedy is available under common law principles of unfair competition. This remedy allows recovery for the misappropriation of goodwill and reputation of a sports organization. ⁶⁰¹

With respect to the first category of ambush marketing, namely, piracy; the law of trademark and copyright provide adequate protection. Here, not only consumers are protected from deception but also business goodwill remains protected. ⁶⁰²

However, in India, the Delhi High Court refused to accept ambush marketing as a plea for infringement of intellectual property when the International Cricket Council brought a suit against Britannia during the World Cup. ⁶⁰³ In *ICC Development International Ltd. (ICCDIL) v. Arvee*, the subject of dispute was a contest which was organized by Arvee to win tickets to World Cup. The catch phrase used to publicize the contest was the same as what the ICC had got registered. Arvee was therefore, sued on the grounds of passing off and ambush marketing. Again the claim of ambush marketing was not recognized by the Court and the Acts of defendants were not considered misuse. ⁶⁰⁴

This shows that in absence of a specific legislation for ambush marketing, defendants get away thereby leaving the plaintiff with no

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⁶⁰¹ Supra note 937 at 111.
⁶⁰³ Supra note 937 at 117.
guaranteed remedy. In light of various international events being organized in the country, where the probability of corporations taking advantage is very high especially in the absence of any law to prevent ambush marketing, there is need for India to introduce a specific legislation against ambush marketing.65

5.19.6.6 Legal Control of Advertisements

A Press is not only a medium of expression but also a business, in so far as it publishes advertisements from advertisers of different categories, for monetary consideration. This may bring the Printer and Publisher of a newspaper or other journal under legal control, where the matter which is advertised is illegal and the act of publishing it makes the publisher liable, under the relevant statute, besides the advertiser himself.

An advertisement, then, is any ‘document’, which announces or proclaims to the public the production, availability or the like of something. Since an advertisement is also a publication like an editorial or news story, the publisher and printer of a newspaper may be held liable for an advertisement which is illegal, e.g., because it is obscene or defamatory or relates to an Article injurious to public health, even though such advertisement had been sent by a third party, and the Press was not in any way responsible for its authorship.66

5.19.6.7 Statutory Provisions

There are various statutes, which prohibit and penalise the printing and Publication of advertisements, which relate to the commission of crimes or statutory offences, e.g., inciting persons to bet or to purchase injurious drugs and remedies.

65 Supra note 937, at 118.
66 Supra note 41, at 179.
• Section 292 (2)(d) of Indian Penal Code, 1860 makes it a punishable offence to advertise any obscene publication or its distribution, sale, hire or circulation.967

• Section 294-A of Indian Penal Code, 1860 also makes it an offence to publish advertisements relating to any lottery which is not a state lottery or which is not authorised by the state government.968

• The offence of cheating, as defined in Section 415, I.P.C. may be committed, if a person or group of persons publish false advertisements relating to a bogus scheme, and dishonestly induce the public to make deposits with them.969

• In India, causing miscarriage in its various forms is an offence under various Sections of the Indian Penal Code (Sections 312-315), but an exception has been engrafted by enacting the Medical Termination of Pregnancy Act, 1971.

Hence, a private advertiser cannot claim that an abortion to be carried out at a private place would be lawful. An advertisement of abortion by a private advertiser would, either be an offence under the aforesaid Sections of the I.P.C. or an abetment thereof.

The keeper, printer or publisher may be held liable under this provision for the publication of an obscene advertisement. See In re, D. Pandurangan, AIR 1953 Mad 418; Kherode Chandra Roy Chowdhury v. Emperor, (1911) ILR 39 Cal 377; Public Prosecutor v. Mantripragada Markondeyulu, AIR 1918 Mad 1195; Emperor v. Hari Singh, (1905) ILR 28 All 100. In Pratibha Natithani v. Union of India, (Writ Petition No. 1232 of 2004), a public interest petition filed in the Bombay High Court to control obscenity in the print and electronic media, by an order dated 8th December, 2004, the High Court restrained newspapers and periodicals from publishing advertisements which amount to an invitation to prostitution, advertisements which have sexual overtones and those which violate Section 3 of the Indecent Representation of Women (Prohibition) Act, 1986. For such unauthorised lottery, not only the maker of the advertisement but also the proprietor, printer or publisher of the newspaper would be liable, whether or not the lottery is actually held. See Chimanjil Pranjivanand Gheewala v. Emperor, AIR 1925 Bom 243.

The printing, publication or distribution of any advertisement of any 'prize competition', 'prize chit' or 'money circulation in the nature of gambling, not involving any scheme, is Punishable under the Prize Competitions Act, 1955 and the Prize Chits and Money Circulation Schemes (Banning) Act, 1978.

Where the publication of an advertisement constitutes defamation of a third person because of any wrong statement in the advertisement or because the matter is contemptuous of the person referred to, the publisher may be held liable for publication of the defamatory advertisement.970 The use of a person's photograph in advertisement for commercial purposes may constitute such libel, either because it is a caricature or otherwise puts the person photographed to ridicule.971

On the other hand, there is no liability, whether of the advertiser or the publisher, where:

(i) the advertisement or publication of the photograph is not defamatory, though it may cause annoyance to such person;972

(ii) The photograph gives a true representation, raising a plea of justification; even though it may give rise to a cause of action for breach of contract, where the publication has been made in breach of an express or implied agreement with the person photographed that it would not be published. 973

An advertisement may constitute contempt of Court if it tends to interfere with the due course of a pending judicial proceeding, e.g., by discouraging witnesses from

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971 Tolley v. Fry, (1931) AC 333.
giving evidence in the case for either party, or to influence the Court by discussing the merits of the case or anticipating the decision.  

- Section 3 of the Young Persons (Harmful Publication) Act, 1956 makes it a punishable offence to advertise a ‘harmful publication’. A ‘harmful publication’ is a publication portraying the commission of offences, acts of violence or cruelty or incidents of a repulsive or horrible nature, in such manner as would tend to corrupt a young person.  

- Section 3 of the Emblems and Names (Prevention of Improper Use) Act, 1950 prohibits the use, for professional or commercial purposes, of select emblems and names of national or international significance. An advertiser who makes commercial use of such emblems and names would be liable under the Act.  

- Section 3, 4 and 5 of the Drugs and Magic Remedies (Objectionable Advertisements) Act, 1954 prohibits advertisements of drugs for certain purposes and of treatment of certain diseases and disorders. The Act also prohibits misleading advertisements relating to drugs and advertisement of magical remedies for the treatment of certain diseases and disorders.  

- Section 3 of the Indecent Representation of Women (Prohibition) Act, 1986 prohibits the publication of advertisements containing an indecent representation of women.

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975 Goulard v. Lindsay & Co., (1887) 4 PC 189 at 190.
976 See also Section 4, 6 and 7.
977 Id., Section 2(a).
978 See Supra note 917.
• Section 22 of the Prenatal Diagnostic Techniques (Regulation and Prevention of Misuse) ct, 1994 prohibits advertisements relating to prenatal determination of sex.

• Section 19 (f) of the Transplantation of Human Organs Act, 1994 makes it a punishable offence to issue advertisements inviting persons to supply, for payment, a human organ.

• Section 29 of the Drugs and Cosmetics Act, 1940 makes it an offence to use any report of a test or analysis made by the central drugs laboratory or by a government analyst for the purpose of advertising any drug or cosmetic.

• Section 4 of the Prize Competition Act, 1955 prohibits the publication or distribution of advertisements of price competitions where the prize or prizes offered exceeds Rs. 1000 in any month.970

• Section 116(4) of the Motor Vehicles Act, 1998 entitles the State Government to empower the police to direct the removal of any sign or advertisement which could obscure a traffic sign from view or any misleading advertisement that appears to be a traffic sign or which could distract the attention or concentration of the driver.

• Hoardings on heritage buildings are subject to heritage regulations under town planning laws.980

• Section 5 of the Cigarettes and other Tobacco Products (Prohibition of Advertisement and Regulation of Trade

970 See also Section 11.

- Under Section 14(1)(f) of the Consumer Protection Act, 1986, the appropriate consumer forum has the power to discontinue an ‘unfair trade practice’ or a ‘restrictive trade practice’. The forum also has the power to issue a corrective advertisement to neutralise the effect of a misleading advertisement.981

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981 Id., Section 14(1)(c). The expression ‘unfair trade practice’ is defined in Section 2(r) of the Act as a ‘trade practice which, for the purpose of promoting the sale, use or supply of any goods or for the provision of any service, adopts any unfair method or unfair or deceptive practice including any of the following practices, namely:

1. the practice of making any statement, whether orally or in writing or by visible representations which:
   (i) Falsely represents that the goods are of a particular standard, quality, quantity, grade, composition, style or model;
   (ii) Falsely represents that the services are of a particular standards, quality or grade;
   (iii) Falsely represents any re-build, second-hand, renovated, reconditioned or old goods as new goods.
   (iv) represents that the goods or services have sponsorship, approval, performance, characteristics, accessories, uses or benefits which such goods or services do not have;
   (v) represents that the seller or the supplier has a sponsorship or approval or affiliation which such seller or supplier does not have;
   (vi) makes a false or misleading representation concerning the need for, or the usefulness of, any goods or services;
   (vii) gives to the public any warranty or guarantee of the performance, efficacy or length of life of a product or of any goods that is not based on an adequate or proper test thereof:
      Provided that where a defense is raised to the effect that such warranty or guarantee is based on adequate or proper test, the burden of proof of such defense shall lie on the person raising such defense;
   (viii) makes to the public a representation in a form that purports to be a warranty or guarantee of a product or of any goods or services; or
      (a) a promise to replace, maintain or repair an Article or any part thereof or to repeat or continue a service until it has achieved a specified result, if such purported warranty or guarantee or promise is materially misleading or if there is no reasonable prospect that such warranty, guarantee or promise will be carried out;
      (ix) materially misleads the public concerning the price at which a product or like products or goods or services, have been or are, ordinarily sold or provided, and, for this purpose, a representation as to price shall be deemed to refer to the price at which the product or
The Representation of People Act, 1951 prohibits political advertising forty eight hours prior to polling time.\textsuperscript{982} The Act also requires all election pamphlets and posters to bear the names of the printer and publisher.\textsuperscript{983}

The Cable Television Networks (Regulation) Act, 1995 prohibits the transmission of advertisements on the cable network which are not in conformity with the Advertisement Code.\textsuperscript{984} The Advertisement Code is set out under Rule 7 of the Cable Television Network Rules.

\textsuperscript{982} The Representation of People Act, 1951, Section 126
\textsuperscript{983} The Representation of People Act, 1951, Section 127-A. During the campaign for the 2004 general elections, the Supreme Court directed all political parties to get prior approval from the Election Commission for the telecast of political advertisements. See Secretary, Ministry of Information and Broadcasting v. Gemini T.V. (P) Ltd., (2004) 5 SCC 714.
\textsuperscript{984} \textit{Ibid.}
Contravention of these provisions attracts liabilities under Sections 16 and 17 of the Cable Act.

5.19.6.8 Regulatory Framework Regarding Advertisements

There is no single regulatory body in India for the regulation of advertisements. Depending on the nature of the case, the power to regulate advertisements may be exercised by a vast variety of authorities—the Courts, Central and State Governments, tribunals, or the police authorities. In addition to these authorities, is the Press Council of India established under the Press Council of India Act, 1978 which is empowered to regulate advertisements. The Council is guided by its ‘Norms of Journalistic Conduct’ in the regulation or advertisements.

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985 See Appendix.
986 As for instance, under the Young Persons (Harmful Publications) Act, 1956; the Cable Television Networks (Regulation) Act, 1995.
987 For instance, the Copyright Board for a violation under the Copyright Act, 1957 or the consumer for a constituted under the Consumer Protection Act, 1986.
988 Under the Cable Television Networks (Regulation), Act, 1995 or the Indian Penal Code, 1860.
989 The Norms of Journalistic Conduct evolved by the Press Council of India in respect of advertising reads:

"(56) Commercial advertisements are information as much as social, economic or political information. What is more, advertisements shape attitude and way of life at least as much, as other kinds of information and comment. Journalistic propriety demands advertisements must be clearly distinguishable from editorial matters carried in the newspaper.

(57) Newspaper shall not publish anything which has a tendency to malign wholesale or hurt religious sentiments of any community or Section of society.

(58) Advertisements which offend the provisions of the Drugs and Magical Remedies (Objectionable Advertisement) Act, 1954, should be rejected.

(59) Newspapers should not publish an advertisement containing anything which is unlawful or illegal, or is contrary to taste or journalistic ethics or proprieties.

(60) Newspapers while publishing advertisements, shall specify the amount received by them. The rationale behind this is advertisements should be charged at rates usually chargeable by a newspaper since payment of more than the normal rates would amount to a subsidy to a paper.

(61) Publication of dummy advertisements that have neither been paid for, nor authorised by advertisers, constitute breach of journalistic ethics.

(62) Deliberate failure to publish an advertisement in all the copies of a newspaper offends against the standards of journalistic ethics and constitutes gross professional misconduct.

(63) There should be no lack of vigilance or a communication gap between the advertisement department and the editorial department of a newspaper in the
The advertising industry has a reasonably effective self regulation mechanism. The Advertising Standards Council of India (ASCI) is a non-statutory tribunal comprising an association of advertisers which was set up in 1985 and incorporated into a company under Section 25 of the Companies Act, 1956. ASCI entertains and disposes of complaints based on its Code of Advertising Practice.\textsuperscript{990}

An important provision in the Advertisement Code under the Cable Television Networks Rule, 1994 provides that no advertisement which violates the standards of practice approved by the Advertising Agencies Association of India, Bombay shall be carried in the cable service.\textsuperscript{991}

A very recent development in this regard is the TRAI notification called “Standards of Quality of Service (Duration of Advertisements in Television Channels) Regulations, 2012”,\textsuperscript{992} issued in May, 2012 on

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\textsuperscript{990} Rule 7 (9), Cable Television Networks Rules, 1994.
\textsuperscript{991} It lays down in Section 3 as under:
\textsuperscript{992} “3. Duration of advertisements in TV channels- (1) No broadcaster shall carry in its broadcast of a programme, advertisements exceeding twelve minutes in a clock hour and any shortfall of advertisement duration in any clock hour shall not be carried over.
\end{flushleft}
regulating the duration of advertisements on television during programmes with a view to strike a balance between giving a consumer a good TV viewing experience, and protecting the commercial interests of broadcasters. There had been several complaints, mainly from the consumers raised at various fora, regarding overplaying of advertisements, long duration of advertisements, overlaying of advertisements on the screen, increased audio level during advertisements etc. It was often pointed out that the advertisements are played/repeated several times in between the programmes, which break the continuity of the programme and often done at crucial stages of a programme. In this context, there had been requests to at least restrict and regulate the duration, frequency and timings of the advertisements. Thus, TRAI \textsuperscript{903} issued the aforementioned regulation.

It is noteworthy here that the extant provisions concerning the duration and format of advertisements in the TV channels, as provided in sub-clause (11) of clause 7 of the Cable Television Networks Rules, 1994, as amended, prescribe that no programme shall carry advertisements

\begin{enumerate}
  \item The advertisements in the clock hour shall include all types of advertisements including advertisements promoting the channel(s) of the broadcaster.
  \item In case of live broadcast of a sporting event, the advertisements shall be carried only during the breaks in the sporting action.
  \item The time gap between end of one advertisement session and the commencement of next advertisement session shall not be less than fifteen minutes.
  \item Every broadcaster shall ensure that the audio level of the advertisements carried in its channel shall not be higher than the audio level of the programs being broadcast in that channel\textsuperscript{903}.
\end{enumerate}

\textsuperscript{903} The Telecom Regulatory Authority of India (TRAI), established under the Telecom Regulatory Authority of India Act, 1997 (24 of 1997) has been entrusted with discharge of certain functions, \textit{inter alia}, to regulate the telecommunications services and to protect the interests of service providers and consumers of the telecom sector. Government of India, in the Ministry of Communication and Information Technology Gazette Notification No. 39, dated 9th January 2004, has notified the Broadcasting Services and Cable Services to be Telecommunication Services thereby bringing the regulation of Broadcasting and Cable TV services under the ambit of TRAI.
exceeding 12 minutes per hour, which may include up to 10 minutes per hour of commercial advertisements, and up to 2 minutes per hour of a channel's self-promotional programmes. It is also provided in sub-clause (10) of clause 7 of the said rules that all advertisement should be clearly distinguishable from the programme and should not in any manner interfere with the programme viz., use of lower part of screen to carry captions, static or moving alongside the programme.

It is a well-known fact that advertisements provide for a significant portion of the revenue of the television industry. The broadcasters of the free to air channels\(^9\) rely solely on the advertisements as their source of revenue, while the pay channel\(^5\) broadcasters have twofold source of revenue in the form of advertisement and subscription revenues.

The consumers are fed with content feeds interlaced with the advertisements within and in-between the various programmes aired by the broadcasters in their channels as well as MSOs and local cable operators in their local/video channels. The majority of television advertisements consist of advertising spots, info-commercials and self promotional campaign in various formats ranging in length from a few seconds to several minutes. Thus, these regulations balance a good TV viewing experience of consumer with the commercial interests of broadcasters.

Initially, such regulations were criticised by the broadcasting sector as it was in favour of self-regulations and against any regulations by the government. There were arguments like any restriction on advertisements would have the impact of sharp increase in subscription charges; limited availability of advertising time will imply jacking up of advertisement rates by many folds and this will be detrimental to the small and medium enterprises (SMEs); advertisements increases consumption of goods and

\(^9\) FTA Channel: A channel for which no fees is to be paid to the broadcaster for its retransmission through electromagnetic waves through cable or through space intended to be received by the general public either directly or indirectly.

\(^5\) Pay channel: A channel for which fees is to be paid to the broadcaster for its retransmission through electromagnetic waves through cable or through space intended to be received by the general public either directly or indirectly.
services which then drives the growth of employment and economic development etc. On the other hand, consumer organisations and cable operator associations had, in general, supported these regulations. Nevertheless, these regulations have been notified on 14th May, 2012.

It must be submitted here that the imposition of these regulations has been facilitated presently due to the Cable Networks Amendment Act, 2011 which shall come into effect on 1st July, 2012. The Amendment makes digitisation of channels compulsory. The digitisation is advantageous to the consumers as it gives them a lot of choice in choosing from different channels, is cost-effective and brings the entire TV network under a uniform regulatory framework.

5.19.6.9 Emerging Trends

Movies today seem to explore explicit themes of sex and violence unabashedly, and not surprisingly, attract an audience too. But how these are advertised in the public space needs to be examined. Gun holding and scruffy hooliganism have become sexy, cool and commonplace in our movies. And randomly shooting at people is seen as fun. It is, undoubtedly, true that one can decide on not watching or taking one’s children to watch such movies. But when newspapers, traditionally seen as family reading give pride of place to such ads and posters, it makes it much harder to explain

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997 The Cable Television Networks (Regulation) Amendment Act, 2011 has made it mandatory for switch-over of the existing analogue Cable TV networks to Digital Addressable System (DAS) by December 2014, in a phased manner. In respect of four metros of Delhi, Mumbai, Kolkata and Chennai, the digital switch-over is to be completed by June 30, 2012. Concerns had been raised by some stakeholders regarding the quality of Set Top Boxes (STBs) and the redressal of grievances of the cable TV subscribers. Necessary provisions have been incorporated in the Cable Television Networks (Amendment) Rules, 2012 to take care of these concerns. As per these Rules, the STBs to be supplied by the Multi System Operators (MSOs) must conform to the quality standards specified by the Telecom Regulatory Authority of India (TRAI). The MSOs are also required to devise a mechanism for grievance redressal, as specified by the Authority (TRAI), and inform the details thereof to the subscribers, available at http://www.digitalindiamib.com/Press_Release_-_Quality_and_Standards.pdf, visited on April 23, 2012.
why being rowdy and using guns is not right. Besides, the problem of paid news, misleading claims and surrogate advertisements add to the menace thereby highlighting the flaws in the existing framework.

The trend of media houses reporting murders, rapes and burglaries accompanied by graphic descriptions that outshadow much of the other news. An unfamiliar reader might even believe that we are a nation of bad governance punctuated by perverted and violent actions. And one shudders to think what children who read these newspapers might be thinking. It is, no doubt, difficult to raise one’s children totally sheltered from the negative influences of the world; but to be forced into believing that violence is a natural way of life is undesirable and wrong.

5.19.6.10 Submissions

The film industry and media need to review the present situation with more responsible intentions. Sensational headlines that insinuate excessive sex and violence are irresponsible attempts to garner readership or viewership, and influence impressionable minds. Surely, there is a lucrative market for such content. But there must be a way so as not to bring it so openly into the public sphere and to stop glorifying it. Should media too start getting ratings of A, U/A and U? Or can we introduce some regulations for how headlines and movie posters and advertisements appear in newspapers? The Indian Broadcasting federation has made a positive attempt to address public opinion on the objectionable content. Can the print media dare to follow a self-regulated code of ethics?

As far as the problem of paid news is concerned, all the newspapers must voluntarily disclose as to how much money they made and amount of space they sold to the political parties. They have to account that money and pay income tax and declare it before the Chief Election Officer or District Magistrate.

999 Ibid.
The Election Commission of India should act stringently against those committing electoral corrupt practices and crimes at two stages:

(a) During the election process the EC is immune from Judicial, Legislative and Executive interference. It assumes all the three positions. It has to prevent over spending, spread of falsity and undue influence.

(b) After the polls are over, the EC should continue to direct the officers through the Governments to prosecute the offenders before the Courts of law, even if no one filed election petitions for the same.

It is the responsibility of the Election Commission of India to curb this undue influence perpetuated by the Political Parties and candidates through the Media because it is their constitutional obligation to facilitate free and fair poll.

Besides, the PCI (Press Council of India) has to keep on admonishing unethical media during elections. The PCI should constitute a special task force in each district during elections, to receive complaints, make preliminary study and report to the EC to allow it to take action. The wide publicity of that censure might bring a feeling of shame, at least. However the prosecution would be more effective. However, the IPC provisions need to be amended to enhance punishment and amount of fine for the electoral offences and corrupt practices. Ethics is something which has to come from within and an issue of integrity of journalist and honesty of media organization.

5.19.7 Freedom of Speech and Hate speech

I disapprove of what you say, but I will defend to the death your right to say it.
This slogan, attributed to Voltaire, is frequently quoted by defenders of free speech. Yet it is rare to find anyone prepared to defend all expression in every circumstance, especially if the views expressed incite violence. So where do the limits lie? What is the real value of free speech? Should we be free to offend other people's religion?

There are grounds for abridging expression not only when the speech is intended to bring about physical harm, but also when it is designed to inflict psychological offence, which is morally on a par with physical harm, provided that the circumstances are such that the target group cannot avoid being exposed to it. It will be argued that in either case, when physical harm or psychological offence is inflicted upon others, four considerations are pertinent:

• the content of the speech.
• the manner in which the speech is expressed.
• the intentions and the motives of the speaker.
• the circumstances in which the speech takes place.

When no consideration is paid to these aspects, then freedom of speech might be abused in a way that contradicts, to use Dworkin’s phraseology, fundamental background rights to human dignity and equality of concern and respect, which underlie a free democratic society.

Skokie exemplifies the democratic ‘catch’ in a vivid manner: the same liberty that is granted to Nazis to exercise their belief that espouses hatred and malicious speech might endanger their target group that wishes to

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[1000] Voltaire was a French writer, born on Nov. 21, 1694 and died on May 30, 1778. He studied law but abandoned it to become a writer. He became acclaimed for his tragedies and continued to write for the theatre all his life. He was twice imprisoned in the Bastille for his remarks and in 1726 was exiled to England, where his philosophical interests deepened; he returned to France in 1728.


maintain their peaceful life and protect what they conceive as a fundamental right not to be harassed by hate mongers.\textsuperscript{1003}

5.19.7.1 Hate Speech vis-à-vis Religious Blasphemy

In England and Wales, blasphemy against Christianity (but, inconsistently, not towards other religious) was officially a common law offence. The common law offence was only abolished in June 2008. In fact the law was even more specific than protecting Christianity: it only applied to the established Church, the Church of England. It would not in law have been blasphemy to make defamatory remarks about, say, some aspect of Baptists’ belief unless that particular belief was shared by Anglicans. A consequence of this law was that a Muslim could have been prosecuted for making disparaging comments about objects or ideas sacred to the Church of England, but a member of the Church of England would have been free before the law to make similarly disparaging remarks about objects or ideas sacred to Islam. This asymmetry led to arguments that the existing blasphemy laws should be extended so that they no longer discriminated against adherents of particular religions.

Most defenders of free speech see all blasphemy laws as a historical relic of an earlier age and not particularly relevant to a largely secular society. Whereas some defenders of such laws believe the law serves the practical purpose of preventing activities that would tend to destroy the fabric of society.

One of the few successful cases of a conviction under blasphemy laws in the United Kingdom in the last fifty years was brought in 1977 by the campaigner Mary Whitehouse against Denis Lemon, editor of the magazine Gay-news, for publishing a poem, “The Love that dares to speak its Name”, by James Kirkup. In this poem, a Roman centurion fellates the recently crucified Jesus Christ, ejaculates into his wounds, and is finally penetrated. The persona of the Centurion also suggests that Christ has previously had

\textsuperscript{1003} \textit{Supra} note 1001 at 16.
sex with all twelve of the apostles. The poem was essentially a homoerotic fantasy and was published in a magazine specifically targeted at gay readers. Whitehouse’s argument was that to portray Christ in this way was so deeply offensive to Christians that the full force of the law should be brought against it. The poem was ‘it blasphemous libel’ and vilified Christ. The Courts sentenced Lemon to nine months’ suspended sentence and £500 fine, and Gag News’s publisher was fined a further; £1,000: a judgment upheld on appeal by the House of Lords. This was a case of legal prohibition on a piece of writing specifically because of its offensiveness to a particular group who had special protection in law.1004. Despite this ruling, a defiant open public, reading of the poem in 2002 in London by humanists, including George Melly and Peter Tatchell, was not prosecuted.1005

The underlying question is whether or not a blasphemy law has any rational underpinning, particularly in any society that is composed of people with a wide variety of religious and non-religious outlooks. The immediate difficulty with broadening a historically specific law that only protects one Christian Church from such offence is that were it to be broadened to protect all other religions it would be totally unenforceable. The range of sacrosanct topics and figures for Christianity is large, but not as large as the range of Christianity plus Islam plus Judaism plus Hinduism. Many other religions, too, would need to be included in this list. Religious, quasi-religious, and many non-religious groups each have a range of sacred objects, places, people, myths, and ideas they cherish. To protect all of these from blasphemous mention would be absurd to try and impossible to achieve.

1004 Nigel Warburton, _Free Speech: A Very Short Introduction_, 44-45 (2009). Tatchell wrote at the time: Why should the Christian religion be given privileged protection against criticism and dissent?” No other institution enjoys such sweeping powers to suppress the expression of opinions and ideas. In the name of free speech, the right to protest and artistic freedom, the offence of blasphemy should be abolished.
The idea that religious beliefs but not others should receive special protection is bizarre. In fact, all types of belief should be open to scrutiny, criticism, parody, and potentially ridicule in a free society.1006

Perhaps the main justification for prohibiting offence against religious beliefs is to prevent deliberate offensiveness for its own sake. There are people who delight in offending religious believers. The argument is that deliberate attacks on what believers hold most dear should be forbidden. This is because deliberate offence is not conducive to good social relations. For example, a cartoonist who produced a cartoon of Muhammad, but who had no idea that Islam prohibits the representation of its prophet, would be in a different category from one who set out to stir up defenders of Islam by producing a caricature of Muhammad because she knew that Islam had this prohibition which she considered ridiculous and wanted to make this point visually.1007

Aayan Hirsi Ali’s film made in 2004 with Theo van Gogh, Submission Port one, depicted verses of the Quran written on a woman’s body to make a point about how she believed Islamic teaching could be and had been used to justify immoral treatment of women. The film was shown on Dutch television. Her intention was not to attack Islam but to attack what she saw as a failing of Islamic teaching that did not allow adaptation to modern circumstances.

Some Muslim leaders thought it all an act of sacrilege and it deliberate provocation and denounced it. From Ali’s point of view, however, this was not her intention in the film. In a response to those who criticized her film, she responded that - it was a plea for self-reflection within Islam, and that every form of self-expression should be allowed except for physical and verbal abuse in the pursuit of this self-reflection. Her aim was not to turn Muslims into atheists, but ‘to expose the blemishes of the culture, particularly in its cruel treatment of women.

1006 Supra note 1004 at 50.
1007 Id., at 52.
In November 2004, Theo van Gogh, the film’s director, was shot and killed as he cycled down a street in Amsterdam. His murderer Muhammad Bouyeri pinned a five-page letter quoting the Qur’an and threatening Ali to his chest. Ali was forced to go in to hiding for her self-protection.\textsuperscript{1008}

It bears many similarities to the Islamic reaction to Salman Rushdie’s novel The Satanic Verses, a reaction that symbolizes an impasse between those who believe in individuals’ freedom of expression on matters of religion and many other issues as a non-negotiable aspect of civilized democratic society, and those who insist that their religion should he held sacrosanct, that no one should be permitted to express anything that is in their view blasphemous.

Christianity and Islam are not the only religions capable of intolerance towards criticism or what their adherents perceive as sacrilege. In 2004 Sikh protests against Gurpreet Kaur Bhatti’s play Behzti culminated in a crowd of over a thousand people storming the Birmingham Repertory theatre and three police officers being injured. The playwright had to go into hiding for her own safety. Like Aayan Hirsi Ali, Bhatti was explicit that she was not deliberately offensive in her work.\textsuperscript{1009}

Nevertheless, the simple outline of the plot was sufficient to offend many of the protestors the danger of such episodes is that they cause writers to self-censor for fear of, violence. In a democratic society, while tolerance for dissenting and contradictory expression of opinion need protection on the pretext of individual right of self-expression, but aggressive mode of expression likely to cause social disruption, spread hatred and violence in the community, cannot be allowed to be propagated. For larger social good, a little curtailment on individual freedom is permissible.\textsuperscript{1010}

\textsuperscript{1008} Id., at 53.
\textsuperscript{1009} “I did not write Behzti to offend. It is a sincere piece of work in which I wanted to explore how human frailties can lead people into a prison of hypocrisy”, Cited Ibid.
A repeated refrain in recent years has been that free speech is only truly free speech if it is used responsibly. Some writers claim that an act of giving offence should not be protected by any free speech principle. In other words, when someone sets out to offend an individual or a group, or even does so inadvertently, he should not try to hide behind the shield of free speech. They should be polite and respect other people’s sensitivities. To criticise this view is simply a denial of any principle of free speech. Free speech is for bigots as well as for polite liberal intellectuals. It is not clear why a principle would merit the name ‘free speech’ if it only protected the views of those we find sympathetic.\textsuperscript{1011}

Hate speech is expression that aims to cause extreme offence and to vilify its target audience. This is speech or writing, or other expression that is so insulting that it is tantamount to a form of harm and should not be immune from censorship in the way that other less offensive expressions should be. In other words, hate speech is often presented as a special category which does not merit free speech protection in the way that other speech does. Some blasphemy might easily be re-described as hate speech directed at the religious, though some is simply a matter of failing to recognize or give special treatment to symbols that others hold dear or sacred.

Hate speech typically degrades people on the basis of their race, religion, or sexual orientation. The choice of language or other form of expression and the context in which it is uttered or written are all organized to achieve insult and humiliation of a group or individual. It is an expression of contempt that gets its effect from hitting the mark: the target group needs to hear, read, or otherwise be aware of the message for it to fulfill the speaker’s or writer’s intentions. This is not a matter of private expression of loathsome views, but rather of acts of extreme insult provocatively delivered.\textsuperscript{1012}

\textsuperscript{1011} Supra note 1004 at 42.
\textsuperscript{1012} Id., at 55.
Often the hate speech is intended to be contagious—part of the desired effect is to encourage others to express similarly venomous views. The targets of hate speech are often particularly vulnerable and in its minority. The cost for them of freedom of speech would be potentially high in that their dignity and self-respect may be threatened.

5.19.7.2 Hate Speech: Issues Involved

Hate speech that has now become a fashion and a short cut to get publicity, poses vexing and complex problems for contemporary constitutional rights to freedom of expression.

Hate speech is speech perceived to disparage a person or group of people based on their social or ethnic group such as race, gender, age, ethnicity, nationality, religion, sexual orientation, gender identity, disability, language ability, ideology, social class, occupation, appearance (height, weight, skin colour, etc.), mental capacity, and any other distinction that might be considered by some as a liability. The term covers written as well as oral communication and some forms of behaviour in a public setting.\textsuperscript{1013}

In the present age of faster mode of communications and social networking hate speech can now almost instantaneously spread throughout the world, and as nations become increasingly socially, ethnically, religiously and culturally diverse, the need for regulation becomes ever more urgent. In view of these important changes the State can no longer justify commitment to neutrality, but must embrace pluralism, guarantee autonomy and dignity, and strive for maintenance of a minimum of mutual respect.

The regulation of hate speech is largely a post-World War II phenomenon. Prompted by the obvious links between racist propaganda and the Holocaust, various international covenants\textsuperscript{1014} as well as individual

\begin{footnotesize}
\textsuperscript{1013} Supra note 1010.
\textsuperscript{1014} Article 20 of the United Nations International Covenant on Civil and Political Rights (ICCPR) (1966) which provides in relevant part: "Any advocacy of national, racial or
countries such as Germany and even, in the decade immediately following the War, the United States excluded hate speech from the scope of constitutionally protected expression.

Tsesis equates hate speech with three other phrases: ‘hate propaganda’, ‘destructive messages’, and ‘biased speech’. He defines hate speech as antisocial oratory that is intended to incite persecution against people because of their race, colour, religion, ethnic group, or nationality, and has a substantial likelihood of causing such harm. He believed that this definition does not include verbal attacks against individuals who incidentally happen to be members of an out-group.

Hate speech commonly relies on stereotypes about insular groups in order to influence hostile behaviour towards them. Supremacist and outright menacing statements deny that targeted groups have a legitimate right to equal civil treatment and advocate against their equal participation in a democracy. Destructive messages are particularly dangerous when they rely on historically established symbolism, such as burning crosses or swastikas, in order to kindle widely shared prejudices.

Messages that are meant to hurt individuals because of their race, ethnicity, national origin, or sexual orientation have a greater social impact

religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law”.

Beauharnais v. Illinois, 96 L Ed 919; 343 U.S. 250 (1952) (upholding constitutionality of a statute criminalizing group defamation based on race or religion). Although Beauharnais has never been formally repudiated by the Supreme Court, it is fundamentally inconsistent with more recent decisions on the subject.


Ibid.


than those that attempt to draw out individuals into pugilistic conflicts.\textsuperscript{1020} Establishing a broad consensus for large-scale harmful actions, such as those carried out by supremacist movements, relies on a form of self-expression that seeks the diminished deliberative participation of groups of the population.\textsuperscript{1021} Hate speech extols injustices, devalues human worth, glamorises crimes, and seeks out recruits for anti-democratic organisations.\textsuperscript{1022}

\subsection*{5.19.7.3 International Standpoint}

Freedom of speech is protected as a fundamental right under all the major international covenants on human rights adopted since the end of World War II. A particularly strong stand against hate speech, which includes a command to States to criminalise it, is promoted by Article 4 of the 1965 International Convention on the Elimination of All Forms of Racial Discrimination (CERD).\textsuperscript{1023}

International bodies charged with judicial review of hate speech cases have, by and large, embraced positions that come much closer to those prevalent in Germany than to their United States counterpart. For example, The European Court of Human Rights has upheld convictions for hate speech as consistent with the free speech guarantees provided by Article 10 of the ECHR. An interesting case in point is \textit{Jersild v. Denmark}.\textsuperscript{1024} The Danish Courts had upheld the convictions of members of a racist youth group who had made derogatory and degrading remarks against immigrants, {}

\begin{itemize}
\item \textsuperscript{1022} \textit{Supra} note 1002.
\item \textsuperscript{1023} Article 4 provides, in relevant part, that State parties condemn all propaganda and all organisations which are based on ideas or theories of superiority of one race or group of persons of one colour or ethnic origin, or which attempt to justify or promote racial hatred and discrimination in any form.
\item \textsuperscript{1024} (1994) 19 EHR 1.
\end{itemize}
calling them among other things, “niggers” and “animals” and that of a television journalist who had interviewed the youths in question and broadcast their views in the course of a television documentary, which he had edited. The journalist appealed his conviction to the European Court, which unanimously stated that the convictions of the youths had been consistent with ECHR (European Convention on Human Rights) standards, but which by a 12 to 7 vote held that the journalist’s conviction violated the standards in question. The convictions of the youths for having treated a segment of the population as being less than human were consistent with the limitations on free speech for “the protection of the reputation or rights of others” imposed by Article 10 of the ECHR.\footnote{1025}

Some international law advocates believe that hate speech violates customary international law. ICCPR (International Covenant on Civil and Political Rights), in fact forbids “any advocacy of national, racial, or religious hatred that constitutes incitement to discrimination, hostility or violence.”\footnote{1026} Louise Arbour, the former UN Commissioner for Human Rights, opened an investigation of whether Denmark’s willingness to permit cartoons of Prophet Mohammed violated international law against hate speech. She also argued that international law bans xenophobic arguments in political discourse.\footnote{1027}

Many democracies throughout the world consider free speech to be a fundamental human right.\footnote{1028} The common trend is, nevertheless, to enforce criminal laws prohibiting the public dissemination of discriminatory messages.\footnote{1029} These policies are driven by the conviction that hate speech tends to incite conduct that is violent and otherwise harmful to human dignity. A non-exhaustive list of countries that have restricted hate speech

There is a big divide between the democracies. In the United States, hate speech is given wide constitutional protection while under international human rights covenants and in other Western democracies, such as Canada, Germany, and the United Kingdom it is largely prohibited and subjected to criminal sanctions.

5.19.7.4 Position in United States of America (USA)

Freedom of speech is not only the most cherished American constitutional right, but also one of its foremost cultural symbols. Free speech rights in the United States are conceived as belonging to the individual against the State, and they are enshrined in the First Amendment to the Constitution as a prohibition against Government interference rather than as the imposition of a positive duty on Government to guarantee the receipt and transmission of ideas among its citizens.

Even beyond hate speech, freedom of speech is a much more pervasive constitutional right in the United States than in most other constitutional democracies. American theory and practice relating to free speech is ultimately complex and not always consistent. Current judicial treatment of hate speech in the United States is of relatively recent vintage. Indeed, less than fifty years ago, in *Beauharnais v. People State of Illinois*, the Supreme Court upheld a conviction for hate speech emphasising that such speech amounted to group defamation, and reasoning that such defamation was in all relevant respects analogous to individual defamation, which had traditionally been excluded from free speech protection.

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1030 *Id.*, at 16.
1032 343 U.S. 250 (1952).
In *Schenck v. United States*,1033 Schenck was accused of printing and circulating a pamphlet declaring that forced conscription violated the Thirteenth Amendment’s prohibition against involuntary servitude.1034 The Court found Schenck’s intent was to influence men not to participate in the draft.1035 Therefore, the Court upheld Schenck’s conviction.1036

In *Chaplinsky v. State of New Hampshire*,1037 the Supreme Court upheld Chaplinsky’s conviction for violating a statute that forbade persons from using “offensive, derisive, and annoying” words and “derisive” names against persons in public places.1038 Writing for the majority, Murphy, J. concluded that certain types of speech, such as “fighting words”, are not, and have never been, protected by the Constitution.1039 Fighting words are epithets reasonably expected to provoke a violent reaction if addressed toward an “ordinary citizen”1040 [S]uch utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality.1041

The United States Federal Government and State Governments are broadly forbidden by the First Amendment of the Constitution from restricting speech. Generally speaking, the First Amendment prohibits Governments from regulating the content of speech, subject to a few recognised exceptions such as defamation and incitement to riot. Even in cases where speech encourages illegal violence, instances of incitement qualify as criminal only if the threat of violence is imminent.1042

Perhaps the most infamous such case in the USA, and one that has become synonymous with the idea that free speech involves protection of
the speech you hate, occurred in 1977 when a First Amendment defence was used to protect a planned neo-Nazi march through a village Skokie in Illinois. This village was occupied by many Jewish refugees from Nazism—approximately one in six inhabitants were either Holocaust survivors or related to Holocaust survivors. The marchers were to wear their uniforms and carry swastikas in a parade that would undoubtedly cause great anguish to those whose friends and relatives had been murdered in Nazi concentration camps. The local village board, anticipating the march, had banned parades in military uniforms and required that a $350,000 indemnity bond be paid in advance of any march. Controversially, the American Civil Liberties Union took up the case as a free speech issue (losing many members in the process); as a result the Court of Appeals declared the Skokie council measures unconstitutional because they contravened the First Amendment. The march, however, didn’t take place in Skokie, but was moved to a park in nearby Chicago. Since then, despite the distasteful nature of the march, many free speech activists have taken Skokie to be a symbol of what a commitment to free speech should mean in practice, namely extreme toleration.\textsuperscript{1043}

The rationale for such toleration is at least twofold: first, many believe that the best way to combat hate speech is with further speech: counter-speech as it is often called. Preventing others expressing extreme opinions has long-term consequences for society, and their frustrations may find expression in other even less desirable ways. Secondly, the danger of a legal prohibition on some forms of speech is that it makes further prohibitions that much easier, and that, gradually, individuals will be likely to have their freedom of expression limited to a greater and greater degree.\textsuperscript{1044}

In a landmark American judgment, the expression ‘hate speech’ was described by Justice Murphy as:

\begin{itemize}
  \item \textsuperscript{1043} Supra note 605, at 171.
  \item \textsuperscript{1044} Id., at 172.
\end{itemize}
Fighting words are those which by their very utterance inflict injury or tend to incite an immediate breach of peace. It has been observed that such utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order morality. 1045

The U.S. Supreme Court has recently declared that individuals who publicly burn a cross to express racial hatred are engaged in a form of “lawful political speech at the core of what the First Amendment is designed to protect”. 1046

5.19.7.5 Position in United Kingdom

In the United Kingdom, the legal stance is that there are justifiable limits to freedom of speech in relation to hate speech, particularly when others’ lives may be blighted by some kind of expression, and that it is for the Courts to draw the line between acceptable and unacceptable forms of expression, taking account of a wide range of factors. Laws against racial discrimination, for example, can be used to prosecute those who use racist hate speech.

In the United Kingdom, the Public Order Act, 1986 prohibits, by its Part 3, expressions of racial hatred, which is defined as hatred against a group of persons by reason of the group’s colour, race, nationality (including citizenship) or ethnic or national origins. Section 18 of the Act says:

A person who uses threatening, abusive or insulting words or behaviour, or displays any written material

1045 Per Murphy, J. in Chaplinsky v. New Hampshire, 315 U.S. 568 (1942), Cited in Supra note 2, at 199.
which is threatening, abusive or insulting, is guilty of an offence if—

(a) he intends thereby to stir up racial hatred, or

(b) having regard to all the circumstances racial hatred is likely to be stirred up thereby.

Offences under Part 3 carry a maximum sentence of seven years imprisonment or a fine or both.

In 1986, however, Parliament added Section 5 of the Public Order Act, which made hate speech punishable if it amounted to harassment of a target group or individual, and in 1997 it enacted the Protection from Harassment Act.\[1047\] These provide more tools in the British legal arsenal against hate speech, but have not thus far led to any clearer or more definitive indication of the ultimate boundaries of punishable hate speech in the United Kingdom.

In England in *Chief Metropolitan Stipendiary Magistrate ex p Chaudhary*,\[1048\] an attempt to prosecute the author and publisher of ‘The Satanic Verses’ for blasphemy and sedition failed. The Court held that the common law of blasphemy was confined to protecting only the Christian religion. The allegation that the publication of the book was calculated to create hostility between Muslims and other classes of citizens was, even if true, insufficient to constitute the offence of sedition since there was required proof of incitement to violence against the State.

The Court rejected an attempt to have the publisher, Penguin Books, prosecuted under the Public Order Act, 1986 for provoking violence by distributing copies of the book to shops that later suffered bomb attacks. It was held that unless the unlawful violence was the direct and immediate result of the publication of the insulting words there was no case for

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\[1047\] See, Section 5-6, Public Order Act, 1986; Section 7, Protection from Harassment Act, 1997.

\[1048\] (1991) 1 All ER 306.
prosecution under Section 4 of the Public Order Act, 1986. The act of distributing a book to retail outlets could not be regarded as the immediate and direct cause of unlawful violence to which the bookseller may later be subjected by fanatics or terrorists.\textsuperscript{1049}

In many other countries too, including Australia, Germany, France, Canada, and New Zealand, there are laws protecting racial groups from certain sorts of targeted expressions of hatred.

Very recently, a cartoon of a famous Italian football striker Mario Balotelli published in the Italian daily newspaper \textit{Gazzetta dello sport} received a lot of criticism from the readers. The cartoon of the black Italy striker portrayed him as King Kong on top of London’s Big Ben swatting away footballs, showing the striker who had conquered England in the quarter final football match of Euro Cup 2012. The incident raised a lot of hue and cry in Europe as it was considered a racist comment on the Italian player. However, the newspaper later published an apology for the same.\textsuperscript{1050}

It is submitted that once the damage is already done, whether publishing an apology can undo the harm. Further, such like incidents raise certain important questions i.e. whether there is any mechanism whereby the media could be prevented from committing such a blunder rather than taking a corrective measure later on? Thus, the regulatory framework on the media needs to be evaluated. There is definitely a need of self regulation in the media, besides framing the code of ethics to be observed by it. Moreover, failure to observe the code should result in penal sanctions.

\textsuperscript{1049} \textit{R. v. Hose Ferry Road Metropolitan Stipendiary Magistrate ex p. Siadatan}, (1991) 1 \textit{All ER} 324. While comparing this with India, it was very different as the book was altogether banned in India. Given this position in law in the UK, it is doubtful that a challenge to the recent publication of cartoons of the Prophet by a Danish newspaper (and republished in other publications in Europe) would have succeeded.

Hate speech and hate writing are two mechanisms that have been systematically used in recent times, during and after elections, to whip up anti-minority hatreds and in many cases, actual violence. “Hate speech” is generally an accompaniment of the politics in the name of religion and language, and also many times it precedes the violence in India.

India has witnessed some burning cases\textsuperscript{1051} of hate speech from last some years and recently controversy has arisen due to some hate remarks by Mr. Varun Gandhi.\textsuperscript{1052} The Indian laws have ample provisions to combat such practices which are enumerated as follows.

- Article 1\textsuperscript{1053} gives all citizens the right to freedom of speech and expression but subject to reasonable restrictions for preserving inter alia “public order, decency or morality”.

- Further, the Constitution of India does not provide for a State religion as is clarified in Article25.\textsuperscript{1054}

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\textsuperscript{1053} Article 19(1)(a) of the Indian Constitution guarantees to all its citizens “the right to freedom of speech and expression”. Clause (2) of Article 19, at the same time provides: “19. (2) Nothing in sub-clause (a) of clause (1) shall affect the operation of any existing law, or prevent the State from making any law, insofar as such law imposes reasonable restrictions on the exercise of the right conferred by the said sub-clause in the interests of the sovereignty and integrity of India, the security of the State, friendly relations with foreign States, public order, decency or morality or in relation to contempt of Court, defamation or incitement to an offence”.

\textsuperscript{1054} Article 25(1) of the Indian Constitution provides for the freedom of conscience and free profession, practice and propagation of religion. It states that subject to public order, morality and health and to the other provisions of this Part, all persons are
• Article 51-A (h) imposes on every citizen the duty to develop the scientific temper, humanism and the spirit of inquiry and reform.

• India prohibits hate speech by several Sections of the Penal Code, the Code of Criminal Procedure, and by other laws, which put limitations on the freedom of expression. Section 95 of the Code of Criminal Procedure gives the Government the right to declare certain publications forfeited if the publication appears to the State Government to contain any matter the publication of which is punishable under Section 124-A or Section 153-A or Section 153-B or Section 292 or Section 293 or Section 295-A of the Penal Code.

• The Cable Television Network (Regulation) Act, 1995 requires that all programmes and advertisements telecast on television conform to the Programme Code and the Advertisement Code. Rule 6 of the Cable Television Networks Rules, 1994 lays down the Programme Code and prohibits the carrying of any programme on the cable service which:

(i) contains an attack on religion or communities or visuals or words contemptuous of religious groups or which promotes communal attitudes;

equally entitled to freedom of conscience and the right freely to profess, practice and propagate religion.

Section 95 Cr.P.C. provides for the power to declare certain publications forfeited, and to issue search warrants for the same.

Section 153-A provides for the offence of promoting enmity between different groups on grounds of religion, race, place of birth, residence, language, etc., and doing acts prejudicial to maintenance of harmony.

Section 153-B deals with imputations, assertions prejudicial to national integration.

Section 295-A provides for deliberate and malicious acts intended to outrage religious feelings of any class by insulting its religion or religious beliefs.

Supra note 697, Section 5 and 6.

Supra note 716, Rule 6(1)(c).
(ii) is likely to encourage or incite violence or contains anything against maintenance of law and order or which promotes anti-national attitudes;\textsuperscript{1061}

(iii) criticises, maligns or slanders any individual in person or certain groups, segments of social, public and moral life of the country;\textsuperscript{1062}

(iv) contains visual or words which reflect a slandering, ironical and snobbish attitude in the portrayal of certain ethnic, linguistic and regional groups.\textsuperscript{1063}

- Under the Cinematograph Act 1952, a film can be denied certification on various grounds, including on the ground that it is likely to incite the commission of an offence or that it is against the interests of the sovereignty and integrity of India or public order.\textsuperscript{1064}

- The Information Technology Act, 2000 allows the interception of information by the authorities in the interest of public order or the sovereignty and integrity of India or for the purpose of preventing incitement to the commission of a cognizable offence.\textsuperscript{1065}

- Norms of Journalistic Conduct, 1996 issued by the Press Council of India (constituted under the Press Council of India Act, 1978) contain the guidelines on the reporting of communal incidents).\textsuperscript{1066}

\textsuperscript{1061}Id., Rule 6(1)(e).
\textsuperscript{1062}Id., Rule 6(1)(i).
\textsuperscript{1063}Id., Rule 6(1)(m).
\textsuperscript{1064}Supra note 724, Section 5-B.
\textsuperscript{1065}Section 69, The Information Technology Act, 2000.
\textsuperscript{1066}While covering communal disputes/clashes, the following points need to be considered –

(A) News, views or comments relating to communal or religious disputes/clashes shall be published after proper verification of facts and presented with due caution and restraint in a manner which is conducive to the creation of an
Recently a very unusual trend is seen in the cases of detention under the National Security Act, 1980. The Act was basically enacted to allow people to be taken into preventive custody to stop them from hurting the country’s security, its relation with foreign countries, maintain public order, supplies and services essential to the community. However, the law is apparently being used in a distorted manner for purposes it was not intended to cater to and for regions that do not warrant its use. E.g. a BJP leader Varun Gandhi was arrested in the year 2009 under National Security Act, 1980 in March 2009 for a ‘hate speech’. It is important to mention here that the file of a person detained under NSA, 1980 is sent to the Home Department of the state and if approved, it is sent to Ministry of Home Affairs. Out of the total cases referred to the Ministry of Home Affairs from across the country, around 94 percent of the cases have been rejected by it. This shows the unsatisfactory state of affairs going in the system.

5.19.7.7 Hate Speech: Judicial Response

The Indian judiciary has come up with some landmark judgments to fight the danger posed by hate speech. Section 153-A IPC is invoked most
often in cases related to hate speech. One of the earliest cases to discuss in detail the scope of this Section was *Shib Sharma v. Emperor*,\(^{1068}\) where the Oudh High Court examined whether a book entitled ‘Chaman Islam ki Sair’ was violative of the Section. The Court noted that what the author had done on quoting Islamic texts and scriptures was to have collected a number of passages which may be perfectly right and harmless in their proper setting, but when disconnected or detached may seem scurrilous, indecent and highly objectionable. Any Mohamedan who reads the passages must feel them highly painful and excite his anger and disgust.

In *Babu Rao Patel v. State (Delhi Admn.)*,\(^{1069}\) the Supreme Court was faced with the task of distinguishing speech violative of Section 153-A from political thesis and historical truths, which are what the author of the two Articles under scrutiny, claimed they were. The Supreme Court examining the two Articles held that they were an undisguised attempt to promote feelings of enmity, hatred and ill-will between the Hindu and the Muslim communities. The reference to the alleged Muslim tradition of rape, loot, violence and murder and the alleged terror struck into the hearts of Hindu minority in a neighbouring country by periodical killings, in the context of his thesis that communalism is the instrument of a militant minority can lead to no other inference.\(^{1070}\)

In *Joseph Bain D’Souza v. State of Maharashtra*,\(^{1071}\) the Bombay High Court considered a public interest litigation praying for a writ of mandamus to direct the Commissioner of Police, Bombay to register crimes under Sections 153-A and 153-B IPC against the editor and executive editor of Saamna for editorials published during the 1993 Bombay riots and for the State of Maharashtra to grant sanction under Section 196(1) for the prosecution of these cases.

\(^{1068}\) AIR 1941 Oudh 310 at 313.
\(^{1069}\) (1980) 2 SCC 402.
\(^{1070}\) Id., at 404, (para 3).
\(^{1071}\) 1995 Cri LJ 1316 (Bom).
After examining various judgments on the Section, the Bombay High Court determined that while the motive in writing the Articles and editorials was irrelevant, the Articles would have to be read as a whole to determine their effect.  

In *Das Rao Deshmukh (Dr.) v. Kamal Kishore Nanasaheb Kadam*, the Supreme Court considered a poster where the appellant appealed for votes to “teach a lesson to Muslims”. The Supreme Court held that such kind of an appeal, to say the least, was potentially offensive and was likely to rouse passion in the minds of the voters on communal basis. Such appeal to teach a lesson was also likely to bring disharmony between the two communities, namely, the Hindus and the Muslims and offended the secular structure of the country.

The Supreme Court noted that speeches delivered in elections had to be appreciated dispassionately keeping in mind their context as the atmosphere is often surcharged with partisan feelings and emotions. Keeping these factors in mind, the Supreme Court found that the poster “cannot be justified in any manner even by giving reasonable latitudes in election speeches”. For nearly a decade, Salman Rushdie had a price on his head for writing a book. A Muslim born in India, and now a British citizen, Rushdie wrote ‘Satanic Verses’, which has been denounced by Iran’s leadership as blaspheming the Muslim religion by denying that Islam’s holy book, the Koran was received from God and criticizing the Prophet Mohammed and his wives. Rushdie denies the charges and says the book is about secular morality, not religion. Despite Rushdie’s statement that he was sorry if the book offended Muslims, there was an offer in force to pay $2.5 million to anyone who will kill the author.

Sometimes certain reporting in the press also has the effect of creating communal violence. Without undermining the positive role played

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1072 *Id. at 1328.*, (para 27).
1073 *(1995) 5 SCC 123.*
1074 *Id. at 135.*, (para 16).
1075 *Supra note 1010.*
by media in different spheres, be it investigative journalism or helping individuals get justice, there are certain grey areas like politics of projection, hate propaganda, paid news, populist reporting and even reporting of distorted facts at the hands of ruling government etc. which need to be mentioned.

An important instance of the same is quoted by writer Patwant Singh in his writing, “The Distorting Mirror”, which is an attempt by the author to inform and to analyse how and why a communal divide of proportions has opened up between the Hindus and Sikhs. Why the image of the Sikhs all over the country was- and often is- portrayed as an extremist, a fundamentalist, and secessionist. Especially by some of the national dailies which had been conducting with an unparalleled viciousness what is virtually a vendetta against an entire national minority. The role of the press in the Punjab crisis was very significant. The irony of the events which propelled Punjab towards the abyss lay in the artful innocence with which the country’s media helped ignite communal keg.

The newspapers served the government of the day well by faithfully following the official line. Objectivity and rational thinking end when scholarship begins to serve partisan ends, and is misused to reinforce foregone conclusions. In such a situation, when emotions have been consistently stirred to serve narrow interests rather than the public good, the Sikhs were automatically blamed, as in the Punjab crisis, for any untoward event, whether historical or contemporary, and however caused. With no major newspaper or periodical of their own, and hardly any access to the national press, the Sikhs have not been able to counter the barrage of increasingly inimical writings against them. Editors, columnists, reporters and so-called ‘scholars, all infused with the urge to paint the Sikhs in the most lurid of colours, had bombarded the public into believing the worst of the entire community.


Ibid.

Id., at 17, 19, 20.
Thus, throwing racial slurs or epithets at people in order to demean them is not a fair or just practice. Besides law, one’s community, religious values and a sense of civic responsibility play a very important role in curtailing the same. Every effort must be taken by the media to be cautious enough not to hurt the religious sentiments of any community in a country like India which is a country of diverse religions, languages and cultures.

5.19.7.8 Submissions

Hate speech does not find place in Article 19(2) of the Constitution and therefore, does not constitute a specific exception to the freedom of speech and expression under Article 19(1)(a). It would have to be read into Article 19(2) under other specified exceptions such as ‘sovereignty and integrity of India’, ‘security of the State’, ‘incitement to an offence’ and ‘defamation’.

Hate speech is not an exception specifically carved our under Article 19(2) but could be read into some exceptions listed under Article 19(2). There are cases where a hate campaign may not actually cause a breach of public order but would nevertheless fall within the expression ‘in the interest of public order’.

More than ever before, the Indian media came into sharp scrutiny with its coverage of communal violence in Gujarat in 2002. On the morning of 27th February, 2002 the Sabarmati Express that had just arrived in Godhra, Gujarat is alleged to have been torched, burning alive 58 pilgrims on their return from Ayodhya, the legendary birthplace of Lord Rama. The needle of suspicion was on the Muslim community that dominated Godhra. As the news spread the state of Gujarat saw the most macabre bloodbath against Muslims in independent India. The press came in for some sharp criticism for its provocative reporting in an already incensed and communally charged atmosphere. The Editors’ Guild Report indicts Sections of the vernacular press, notably the Sandesh and the Gujarat Samachar for its depiction of grisly colour photos of Godhra victims and slanted reports which were said to have played a role in the violent aftermath of Godhra.
This was the first time that the electronic media was used to fuel the fire. Rioters and looters were given directions on mobile phones. SMS messages were sent out with the rumour that milk supplies had been poisoned. E-mail was used to threaten, intimidate and send out hate mail.  

The media, through newspapers, television or the internet has an important role to play in the context of hate speech. Powerful, potentially provocative and far reaching, the media has time and again allowed itself to be used to fuel such campaigns through active propaganda or irresponsible reporting. Equally, the media is capable of assisting in quelling the effects of hate speech through responsible and restrained reporting.  

On 3rd April 2002, the Chairman of the Press Council of India, Justice K. Jayachandra Reddy noted with anguish that:

A large number of newspapers and news channels in the country and, in particular, a large Section of the print and electronic media in Gujarat has, instead of alleviating communal unrest, played an ignoble role in inciting communal passions leading to large scale rioting, arson, and pillage in the State concerned.  

There is no doubt that the media played an invaluable role in bringing to the citizen the true state of affairs in Gujarat. If one had relied on the State Information Department which dismissed the gruesome riots involving the killing hundreds of innocent people as mere violent disturbances, the public would never have known the extent of violence and destruction.

The problem sometimes gets its worst manifestation in the age of the new media. Internet communications do have an impact in the real world. Racists and other extremists can use the Net as easily as liberals or Democrats to canvass support. Moreover, Reputations may suffer and privacy may be invaded. Consumers of pornography may use computer images of children engaged in sexual activity for the purposes of, grooming’

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1080 Supra note 2 at 199.
1081 Ibid.
and for sexual abuse. Indeed, the Net poses greater dangers to safety and
public order than the conventional mass media. While the extremist speech
of racists or anti-abortion campaigners is unlikely to find a place in the
correspondence columns of national papers or in television programmes, it
can easily be disseminated on the Net. Unlike speech on the mass media,
Net communications are not controlled or modified by professional editors.
The directness and immediacy of Internet communication is both its strength
and its weakness.1082

These considerations are relevant to fundamental questions of legal
policy. One of these concerns the general treatment of the Internet under
constitutional free speech principles, in particular whether it should, like the
broadcasting media, be subject to a measure of special legal regulation.

A top British Law Officer, Attorney General Dominic Grieve has
recently taken note of the postings made by people on the micro-blogging
site involving racially aggravated harassment and said, “If somebody goes
down to the pub with printed sheets of paper and hands it out, that’s no
different than if somebody goes and does a tweet”. He further pointed out
that a person posting on twitter usually believes he is immune because of
anonymity but that is a mistake and if needed strict action could be taken to
prevent crime”.1083

Recently, in India, The J & K Police have identified around 35
administrators of Face book pages as “Anti India”. It is also monitoring a
Swiss woman who has been “Coordinating the activities of such
administrators” in Kashmir and uploading “Seditious” material. Condemning
the act of J & K Police of summoning the administrators, one of the Face
book administrators “Aalaw” posted that “Arresting innocent youth and

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1082 Supra note 605 at 470.
labelling them as Aalaw adminis can be considered Fake Cyber encounters".  

It is, thus, submitted that there is required a combination of improved technology and legal restraint in order to reduce the scale of the problem. The development and use of software enabling website operators and ISPs to control the geographical destination of communications on the Net should reduce the gravity of the problem. Further, it may be technically easier to prevent cross-border flows on the Net with improved filtering techniques. Moreover, it would be better, it may be argued, to abandon control by national laws which are necessarily inimical to the development of Internet communication, and replace them with systems of self-regulation. It is hoped that eventually, a common cyber law might emerge.

Moreover, as far as the print and electronic media is concerned, there is a duty cast upon the media to report accurately and honestly and keep the citizen informed of what the government may choose to hide. But there there is a corresponding duty to avoid sensation, graphic pictures, strong adjectives and provocative display. Since there is a little or no time to edit or censure instantaneous coverage, there is an onerous burden on the reporter to use his discretion to report the truth but ensure that in doing so he does not fuel or incite further violence.

5.20 Concluding Remarks

There has been a constant expansion in the scope of the study of freedom of speech and expression owing to the development of information and communication technology. Several challenges have also been posed to this freedom amidst which a fundamental issue to be addressed by a legal scholar consists in knowing to what extent the phrase freedom of speech and

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1085 Supra note 605 at 469.


1087 Supra note 605 at 210-211.
expression can be expanded so as to include the different concepts within its protection; as well as to decipher that if the protection is to be so afforded does it also attract the provision of being imposed with certain reasonable restrictions, as the case may be.

A detailed study of the diverse statutory provisions and various guidelines pertaining to the concepts of privacy, information, broadcasting, confidentiality, legislative privileges, media reporting of judicial proceedings, hate speech and the like has been carried out from different angles. Wherever the legislature is found wanting, the judiciary has stepped in. Besides this, the judiciary has been creatively and relentlessly interpreting the legal provisions towards the promotion of the freedom of speech and the betterment of society.

A study of the case laws reveals the judicial creative approach in broadening the horizons of the freedom of speech and expression for which it would have definitely won for itself the applause of the framers of the constitution as well. Further the constant efforts of the judiciary have given a firm constitutional basis to the freedom of the speech and expression. Besides the judicial response in India, a comparative analysis of the judicial attitude of certain other jurisdictions has also been brought out to give a better peep into the subject.

It is submitted that the Courts do not merely construe the law and mechanically churn out the outcomes; they also mediate and make outcomes acceptable. They negotiate the space between the legislative mandate and empirical reality.