



CHAPTER-III

Media law –National and
International perspective

CHAPTER III

MEDIA LAW NATIONAL AND INTERNATIONAL PERSPECTIVE

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CHAPTER III

MEDIA LAW NATIONAL AND INTERNATIONAL PERSPECTIVE

CHAPTER III:

3.1 MEDIA LAW NATIONAL PERSPECTIVE

The media is the fourth Pillar of democratic system, the legislature, executive and the judiciary being the other three. While legislature enacts the law for the society and the executive takes steps for implementing them, the third stepping stone is the judiciary, which has to ensure the legality of all actions and decisions. The media has to operate within the framework of these statutes and Constitutional provisions to act in public and national Interest. This is indicative of the fact that nobody is above the law. When the Constitution of India guaranteed freedom of speech and expression to its citizen, it ensured the freedom was not absolute. In India “freedom of speech and expression is a fundamental right under Article 19 (1) (a) of the Constitution provides to only citizen. This clause should be read with clause (2) of the Article (19) which states that this right shall not prevent the operation or making of law relating to the subjects specified therein.¹

3.2 *Constitutional Provisions*

Unlike the U.S. Constitution and most recent Constitution South African Constitution, the Constitution of India does not separately refer to the freedom of media in part III². But the law treats these rights as part of the freedom of speech and oppression. The demand for the separate provision to media freedom was made even at the time of framing of the Constitution. Dr. K.M. Munshi had proposed the freedom of Press separate right.³ However, Dr. B.R. Ambedkar explained the position. The press has no special rights which are not to be given or which are not to be exercised by a citizen in his individual capacity. The editor of a press and the manager are all citizens and, therefore, when they choose to write in newspaper, they are merely exercising their right of expression and no special mention is necessary of the freedom of press at all⁴ and the Constituent Assembly agreed with this reasoning and rejected the demand for a specific

¹. The Primary purpose of the constitutional guarantee of a free media was a similar one to create a fourth institution outside the government as an additional check on the three official Branches. Consider the opening words of the Tree clauses of the Massachusetts constitution; drafted By John Adams; “The liberty of the press is essential to the security of the state.

². The Constitution of India, Fundamental Rights(Art.12-35)

³. Constituent Assembly Debates Vol. VII, P. 780 (2nd December, 1948)

⁴. Ibid

provision to media freedom. The freedom of press which, though not separately and specifically guaranteed has been read as part of Article 19 (1) (a) the basic structure.⁵

The preamble to the Constitution of India resolves to secure for the citizen of India, liberty of thought, expression and belief.⁶ The Article 19 (1) (a) of the Constitution from which the media derives its right guarantees to every citizen of India, the freedom of speech and expression, Article 19 (1) (a) reads.

19. (1) All citizens shall have the rights.

(a) to freedom of speech and expression.

3.2.1 Freedom of speech, expression and media: Constituent Assembly Debate

On 13th December, 1946, the Constituent Assembly of India adopted the historic objectives resolution. The Assembly declared in its resolution its firm resolve to draw up a Constitution guaranteeing, inter alia, freedom of speech and expression. Clause 5 of the resolution reads:

Wherein shall be guaranteed and secured to all the people of India justice, social, economic, and political; equality of status, of opportunity, and before the law; freedom of thought, expression, belief, faith, worship, vocation, association and action, subject to the law and public morality....

An advisory committee was appointed on 24th January 1947 to framed provision relating to fundamental rights and allied subjects. This committee submitted an interim report on fundamental rights which was prepared with the assistance of a sub-committee. The sub-committee recommended that the list of fundamental rights should be in two parts, the first part consisting of rights enforceable under the appropriate legal process and the second consisting of directive principles of social policy which though not enforceable in Courts would be regarded as fundamental in the governance of the country. Clause 8 of the 24 clauses on fundamental rights dealt with the right of freedom and read:

There shall be liberty for the exercise of the following rights subjects to public order and morality or to the existence of grave emergency declared to be such by the Government of the Union or the Unit concerned whereby the security of the Union or the Unit, as the case may be, is threatened:

⁵. I.R. Coelho V. State of Tamilnadu (2007) 2 SCC 737 at para 106

⁶. Constitution of India, 1950, Preamble, we the people of India

- (a) The right of every citizen to freedom of speech and expression. Provision may be made by law to make the publication or utterance of seditious, obscene, blasphemous, slanderous, libelous or defamatory matter actionable or punishable.

This interim report underwent such debate. A number of members, including Pundit Hirday Nath Kunzru and Somnath Lahiri protested that the safeguards were excessive and rendered the rights conferred practically ineffective.

On 29th August, 1949, the Drafting Committee was appointed to prepare a Constitution in accordance with the decisions of the Constituent Assembly on the reports made by the various committees appointed by it. Article 13 (which later came to be passed as Article 19) was criticized as being riddled with so many exceptions that the exceptions had eaten up the rights altogether. The criticism was summed up by Dr. Ambedkar: 'the most criticized part of the Draft Constitution is that which relates to fundamental rights. It is said that Article 13 which defines fundamental rights is riddled with so many exceptions that the exceptions have eaten up the rights altogether. It is condemned as a kind of deception. In the opinion of the critics' fundamental rights are not fundamental rights unless they are also absolute rights. The critics rely on the Constitution of the United States and to the Bill of Rights embodied in the first ten Amendments to that Constitution in support of their contention. It is said that the fundamental rights in the American Bill of Rights are real because they are not subjected to limitations or exceptions.

Dr. Ambedkar explained that it was not as if the rights under the American Constitution were absolute or unbridled. What the Draft Constitution did was to define the limitations on the fundamental rights instead of depending on the Supreme Court to come to the rescue of Parliament. There was no difference in the result, explained Ambedkar. One did directly what the other did indirectly.

Some members, in particular, Damodar Swarup Seth and K.T. Shah demanded that provision should be made for the freedom of the press separately from the freedom of expression afforded to the citizen. In support of the demand, K.T. Shah said:

The freedom of the press...is one the time around which the greatest, the bitterest of Constitutional struggles have been waged in all Constitutions and in all countries where liberal Constitutions prevail. They have been attained at considerable sacrifice and suffering. They have now been achieved and enshrined in those countries. Where there is no written Constitution, they are in the well-established conventions or judicial decisions.

In those which have written Constitutions, they have been expressly included as the freedom of the press...Even the United Nations Charter gives good prominence and special mention of freedom of the press....The press may be liable to abuse; I feel there may have been instances where the press has gone, at least in the mind of the established authority, beyond its legitimate limits. But any curtailment of the liberty of the press is.....called a 'black Act'...To omit it altogether....would be a great blemish which you may maintain by the force of the majority, but which you will never succeed in telling the world is a progressive liberal Constitution .

Dr. Ambedkar accepted the demand for the deletion of 'sedition' as a ground of restriction. But on the demand for a separate right for the freedom of the press Dr. Ambedkar responded:

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 citizens and therefore when they choose 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.

Finally, when the amendments were put to vote, there emerged no separate right for the press under Article 13. The new Article 13 read thus:

19(1)(a) Every citizen shall have the right to freedom of speech and expression.

(2) Nothing in sub clause (a) of clause (1) of this Article shall affect the operation of any existing law or prevent the State from making any law, relating to libel, slander, defamation, contempt of Court or any other matter which offends against decency or morality or undermines the security of or tends to overthrow the State.

This article was finally passed as Article 19 of the Constitution of India which came into force on 26th January 1950.

3.2.2 Constitutional Status of the Media

The media derives its rights from the right to freedom of speech and expression available to the citizen. Thus, the media has the same right – no more and no less than any individual to write, publish, circulate or broadcast. In a case that arose in pre-independent India, the Privy Council held:

*The freedom of the journalist is an ordinary part of the freedom of the subject and to whatever lengths the subject in general may go, so also may the journalist, apart from the statute law, his privilege is no other and no higher. No privilege attaches to his position.*⁷

The framework for analyzing media right remains much the same in post-independence India. In *M.S.M. Sharma v. Krishna Singh*,⁸ the Supreme Court observed: A non-citizen running a newspaper is not entitled to the Fundamental Right to freedom of speech and expression and, therefore cannot claim, as his Fundamental Right, the benefit of the liberty of the Press. Further, being only a right flowing from the freedom of speech and expression, the liberty of the Press in India stand on no higher footing than the freedom of speech and expression of the citizen and that no privilege attaches to the Press as such, that is to say, as distinct from the freedom of the citizen. In short, as regards citizens running a newspaper, the position under our Constitution is the same as it was when the Judicial Committee decided the case of 41 In App 149⁹ and as regards non-citizens the position may even be worse.

In other words, the media enjoys no special immunity or elevated status compared to the citizen and is subject to the general laws of the land, including those relating to taxation.¹⁰ However, in post-independent India both the citizen and citizen-owned media enjoy a Constitutional guarantees that was hitherto absent.

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 citizens and therefore when they choose to write in newspaper, they are merely exercising their right of

⁷. Channing Arnold v. Emperor, AIR 1914 PC 116

⁸. AIR 1959 SC 395

⁹ : AIR 1914 PC 116

¹⁰. On taxation and the media, available at www.oecd.org/tax/administration/48870427.visited on 29 may 2013

*expression and in my judgment therefore no special mention is necessary of the freedom of the press at all.*¹¹

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.¹² In fact, successive judgments of the Supreme Court of India have struck down laws that abridge the freedom of the press and have echoed the sentiment expressed in the First Amendment of the U S Constitution.

Romesh Thappar v. State of Madras,¹³ amongst the earliest cases to be decided by the Supreme Court, involved a challenge against an order issued by the Government of Madras under Section 9(1-A) of the Madras Maintenance of Public Order Act, 1949 imposing a ban on the entry and circulation of the journal, Cross Roads, printed and published by the petitioner. The Court struck down Section 9(1-A) holding that the right to freedom of speech and expression was paramount and that nothing short of a danger to the foundations of the State or a threat to its overthrow could justify a curtailment of the right to freedom of speech and expression. The impugned provision which authorized the imposition of restrictions for the wide purpose of securing public safety and public order fell outside the scope of the reasonable restrictions permitted under Article 19(2) and was held to be unconstitutional.

In **Brij Bhushan v. State of Delhi**,¹⁴ the Supreme Court quashed a pre-censorship order passed against the publishers of the Organiser. The order was passed by the authorities under Section 7(i)(c) of the East Punjab Safety Act, 1949. The Court held that Section 7(i)(c) which authorized such a restriction on the ground that it was 'necessary for the purpose of preventing or combating any activity prejudicial to the public safety or the maintenance of public order' did not fall within the purview of Article 19(2).

The strongest affirmation of the spirit of the First Amendment of the U S Constitution is echoed in **Express Newspaper (P) Ltd. v. Union of India**.¹⁵ This case arose out of a challenge to the Working Journalists and other Newspaper Employees (Conditions of Service) and Miscellaneous Provision act, 1955, on the ground that its

¹¹. Constituent Assembly Debates, Vol. VII, p. 780 (2nd December, 1948).

¹². Brij Bhushan v. State of Delhi, AIR 1950 SC 129; Express newspapers Ltd. v. Union of India, AIR 1958 SC 578; Sakal Papers v. Union of India, AIR 1962 SC 305; Bennett Coleman & Co. v. Union of India, (1972) 2 SCC 788; AIR 1973 SC 106; Maneka Gandhi v. Union of India, (1978) 1 SCC 248.

¹³. AIR 1950 SC 124.

¹⁴. AIR 1950 SC 129.

¹⁵. AIR 1958 SC 578.

provisions violated Article 19(1)(a). In the facts of the case, the Court held that the impact of the legislature on the freedom of speech was much too remote and no judicial interference was warranted. However, the Court did recognize an important principle.

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.¹⁶

3.2.3 Emergency provision and Art.19 (1) (a)

The Constitution of India provides three type emergencies: National Emergency (Art.352), State Emergency (Art .356) and Financial Emergency (Art360).Further Art.358 provides for suspension of fundamental right part III of the Constitution .The Art.19 automatically suspended as soon as emergency are proclaimed.

3.3. Dimension of freedom of speech and expression: media freedom under Article-19(1) (a)

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. It is also a dynamic concept that has evolved with time and advances in electronic and information technology.

Briefly, Article 19(1)(a) covers the right to express oneself by word of mouth, writing, printing, picture or in any other manner. It includes the freedom of communication and the right to propagate or publish one's views. The communication of ideas may be through any medium, newspaper, magazine or movie,¹⁷ including the electronic and cyber media.

3.3.1 Right to Circulate

Right to free speech and expression includes the right not only to publish but also to circulate information and opinion. Without the right to circulate, the right to free speech

¹⁶. AIR 1997 SC 73.

¹⁷. S. Rangarajan v. P. Jagjivan Ram, (1989) 2 SCC 574.

and expression would have little meaning. The freedom of circulation has been held to be as essential as the freedom of publication.¹⁸

In **Sakal Papers v. Union of India**,¹⁹ 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) extends not only to the matter which the citizen is entitled to circulate but also to the volume of circulation.²⁰ This case arose out of a challenge to the newsprint policy of the government which restricted the number of pages a newspaper was entitled to print.

Likewise, in **Bennett Coleman & Co. v. Union of India**,²¹ 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.²² The Court held that any restriction leading to a loss of advertising revenue would affect circulation and thereby impinge on the freedom of speech.²³

In **LIC v. Manubhai Shah**,²⁴ 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 :

Freedom to air one’s view is the lifeline of any democratic institution and any attempt to stifle or suffocate or gag this right would sound a death knell to democracy and would help usher in autocracy or dictatorship.²⁵

The Court held that any attempt to deny the right to circulation and propagation of ideas must be frowned upon unless it falls within the mischief of Article 19(2).

¹⁸. Romesh Thappar v. State of Madras, AIR 1950 SC 124 : Virendra v. State of Punjab, AIR 1957 SC 896; Sakal Papers v. Union of India, AIR 1962 SC 305.

¹⁹. AIR 1962 SC 305.

²⁰. Ibid, paras 33-34, p. 313.

²¹. (1972) 2 SCC 788 : AIR 1973 SC 106.

²². Ibid., Para 82, p. 824 (SCC).

²³. Ibid., Para 43, p. 8813 (SCC).

²⁴. (1992) 3 SCC 637.

²⁵. Ibid., para 8, p. 651 (SCC).

The right to circulate encompasses the right to determine the volume of circulation.²⁶

3.3.2 Right to criticize

Acceptance by Government of a dissident press is the measure of the maturity of the nation.²⁷ Freedom of speech and expression covers the right to criticize government, the requisite of a healthy democracy. The draft Constitution proposed that laws penalizing sedition would be an exception to free speech. The word 'sedition', defined in draft Article 13(2) as 'exciting or attempting to excite in others certain bad feelings towards the government and not in exciting or attempting to excite mutiny or rebellion or any sort of actual disturbance, great or small', was deleted from Article 13(2) of the draft Constitution, (eventually passed as Article 19(2)). In **Romesh Thappar v. State of Madras**,²⁸ the Supreme Court noted that the deletion made it clear that the authors of the Constitution intended that criticism of the government was not to be regarded as a ground for restricting the freedom of speech or expression.

In a leading American case, **Terminiello v. Chicago**, which has been frequently cited by Indian Courts, the rationale behind the freedom of speech was explained: A function of free speech under our system of government is to invite dispute. It may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs the people to anger. Speech is often provocative and challenging. It may strike at prejudices and preconceptions and have profound unsettling effects as it presses for acceptance of an idea. There is no room under our Constitution for a more restrictive view for the alternative would lead to standardization of ideas either by legislatures, Courts or dominant political or community groups.²⁹

Kedar Nath Singh v. State of Bihar³⁰ arose out of a Constitutional challenge to Sections 124-A and 505 of the Indian Penal Code, 1860 which penalize attempts to excite disaffection towards the government by words or in writing and publications which may disturb public tranquility. The Supreme Court dismissed the challenge but clarified that criticism of public measures or comments on government action, however strongly

²⁶. Sakal Papers v. Union of India, AIR 1962 SC 305; Secretary, Ministry of Information and Broadcasting v. Cricket Assn., Bengal, (1995) 2 SCC 161, para 43, p. 208.

²⁷. Douglas, J. in Terminiello v. Chicago, (1948) 93 L Ed. 1131 : 337 US 1 (1949).

²⁸. AIR 1950 SC 124.

²⁹. Terminiello v. Chicago, (1948) 93 Ed. 1131 p. 1134; quoted with approval by Jeevan Reddy, J. in Printers (Mysore) Ltd. v. Asstt. Commercial Tax officer, (1994) 2 SCC 434 para 13 pp. 441-42; also referred to in Secy., Ministry of Information and Broadcasting v. Cricket Assn., Bengal, (1995) 2 SCC 161.

³⁰. AIR 1962 SC 955.

worded, would be within reasonable limits and would be consistent with the Fundamental Right of freedom of speech and expression.

3.3.3 Right to Receive Information

The freedom of speech and expression comprises not only the right to express, publish and propagate information through circulation but also to receive information. This was held by the Supreme Court in a series of judgments which have discussed the right to information in varied contexts from advertisements enabling the citizen to get vital information about life saving drugs,³¹ to the right of sports lovers to watch cricket³² and the right of voters to know the antecedents of electoral candidates.³³

3.3.4 Right to Expression beyond National Boundaries

The right to expression transcends national boundaries. The revolution in communications and the electronic media has broken down traditional barriers and has made possible the transmission of information to any part of the world in a matter of seconds.

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**.³⁴ The case concerned a challenge to Section 10(3) (c) of the Passport Act, 1967 which permitted a passport to be impounded 'in the interests 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). At around the time the Constitution was brought into force, the Constitutional debate over the Universal Declaration of Human Rights was underway in the United

³¹. Tata Press Ltd. v. Mahanagar Telephone Nigam Ltd. (1995) 5 SCC 139.

³². Secy., Ministry of Information and Broadcasting v. Cricket Assn., Bengal, (1995) 2 SCC 161.

³³. Union of India v. Assn. for Democratic Reforms, (2002) 5 SCC 294. See generally, State of U.P. v. Raj Narain, (1975) 4 SCC 428; Indian Express Newspapers v. Union of India, (1985) 1 SCC 641; S.P. Gupta v. Union of India, 1981 Supp. SCC 87; Reliance Petrochemicals Ltd. v. Proprietors of Indian Express Newspapers Bombay (P) Ltd., (1988) 4 SCC 592 ; Dinesh Trivedi v. Union of India, (1997) 4 SCC 306; People's Union for Civil Liberties v. Union of India, (2003) 4 SCC 399.

³⁴. (1978) 1 SCC 248.

Nations. Article 13 of the Universal Declaration of Human Rights was underway in the United Nations. Article 13 of the Universal Declaration reads:

Every one has a right to freedom of opinion and expression, this right includes freedom to hold opinion without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers.

3.3.5 Right of the press to conduct interviews

This is a limited right, subject to the willing consent of the person being interviewed. A number of cases have arisen where the right of the press to interview convicts or under trials has been examined.

In **Prabha Dutt v. Union of India**,³⁵ 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 legal obligation on the party 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 594(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.

3.3.6 Reporting Court Proceedings

Although in principle the press enjoys no higher status than that of the ordinary citizen, in practice it does. Ordinary citizens are not allowed free access in the way the press does, as for instance, they do not enjoy the privilege of sitting in the press bench as journalists do. The press enjoys privileges on account of the citizen's right to be informed on matters of public importance.

It is not because of any special wisdom, interest or status enjoyed by proprietors, editors or journalists. It is because the media are the eyes and ears of the general public. They act on behalf of the general public. Their right to know and their right to publish is

³⁵. (1982) 1 SCC 1. See also Sheela Barse v. Union of India, (1987) 4 SCC 373

neither more nor less than that of the general public. Indeed it is that of the general public for whom they are trustees.³⁶

The journalist has a fundamental right to attend proceedings in Court and the right to publish a faithful report of the proceedings witnessed and heard in Court. This right is available in respect of judicial and quasi judicial tribunals.³⁷

The right to report judicial proceedings stems from the necessity for transparency. Justice must not only be done, it must be seen to be done. Openness is a safeguard against judicial error and misconduct. Publicity is the very soul of justice. It is keenest spur to exertion and the surest of all guards against improbity. It keeps the judge himself while trying, under trial.³⁸ Publicity of proceedings serves another important purpose. It enhances public knowledge and appreciation of the working of the law and the administration of justice. There is also a therapeutic value to the public in seeing criminal trails reach their logical conclusion.³⁹

Publicity of proceedings is not an absolute rule. The open justice system must give way when there is higher consideration. For instance, the names of rape victims or riot victims must be protected. Such persons may be reluctant to complain if their identities are disclosed and rails publicized. It is not only necessary to protect such persons from public humiliation and embarrassment, but also necessary to ensure that the victim gives the best available evidence which she may not be able to provide if she is in the public gaze. Similarly, family disputes warrant privacy, particularly to protect children from unwarranted publicity. In **Naresh Shridhar Mirajkar v. State of Maharashtra**,⁴⁰ the Supreme Court held that the Court may restrict the publicity of proceedings 'in the interests of justice'. The Court has the inherent power to order a trail to be held in camera, but this power must be exercised with great caution and only where the Court is satisfied beyond doubt that the ends of justice would be defeated if the case were to be tried in open Court.⁴¹

³⁶. Lord Donaldson in *Attorney General v. Guardian Newspapers Ltd. (No.2)*, (1988) 3 ALL er 595, p. 600; applied in *Re. M.* (1990) 1 All ER 205.

³⁷. *Saroj Iyer v. Maharashtra medical (Council) of Indian Medicine*, AIR 2002 Bom. 97.

³⁸. Bentham quoted in *Scott v. Scott*, 19911 ER I. p. 30; quoted with approval in *Naresh Shridhar Mirajkar v. State of Maharashtra*, AIR 1967 SC 1 and *Samarias Trading Co. (P) Ltd. v. S. Samuel*, (1984) 4 SCC 666. Also see *Vineet Narain v. Union of India*, (1998) 1 SCC 226.

³⁹. *Kartar Singh v. State of Punjab*. (1994) 3 SCC 569, para 269, p. 684.

⁴⁰. AIR 1967 SC 1.

⁴¹ Civil Procedure Code, 1908, under Section 151

3.3.7 Reporting legislative proceedings

The right to report proceedings of Parliament and the State Assemblies stems from the public's right to be informed about the debates and deliberations of its elected representatives on matters of public importance. Under Article 361-A of the Constitution, there is no liability in respect of the publication of a substantially true report of Parliamentary proceedings or those of the state assemblies so long as the publication is untainted by malice. A similar provision is contained in the Parliamentary Proceedings (Protection of Publication) Act, 1977.⁴²

The right to report legislative proceedings has often been curtailed in the name of legislative privilege available to both Parliament and the state assemblies. Legislative privilege refers to special rights conferred by the Constitution on Parliament and the State Legislatures to ensure freedom of speech for legislators, to enable them to discuss and debate matters of importance without the fear of inviting liability of any sort.⁴³

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.⁴⁴

In an age of information and accountability, where the live telecast of legislative proceedings has become mandatory,⁴⁵ the whole concept of legislative privilege and contempt is anachronistic. Further, in the absence of defined privileges, this power is misused with impunity.⁴⁶

3.3.8 Right to advertise (commercial speech)

In **Tata Press Ltd. v. Mahanagar Telephone Nigam Ltd.**,⁴⁷ the Supreme Court interpreted the Fundamental Right to freedom of speech and expression under Article 19(1)(a) as including the right to advertise or the right of commercial speech. Till this judgment, advertisements were excluded from the realm of free speech. In an earlier

⁴². The Parliamentary Proceedings (Protection of Publication) Act, 1977. Sections 3 and 4.

⁴³. Constitution of India, Articles 105, 194.

⁴⁴. Tej Kiran Jain v. N. Sanjiva Reddy, (1970) 2 SCC 272 : AIR 1970 SC 1573.

⁴⁵. Gazette Notification No. 16(1) Cable/2005 E-III dated 25 February, 2005 issued by Prasar Bharti.

⁴⁶. See P.V. Narasimha Rao v. State (CBI/SPE). (1998) 4 SCC 626 and a detailed discussion in Chap. 10 titled 'Privileges of Parliament and the State Assemblies.

⁴⁷. (1995) 5 SCC 139.

ruling, **Hamdard Dawakhana v. Union of India**,⁴⁸ the Supreme Court held that advertisements being for commercial gain, could not avail of the rights under Article 19(1)(a). The case concerned a challenge to the provisions of the Drugs and Magic Remedies (Objectionable Advertisements) Act, 1954 which was intended at preventing self-medication. The 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. The Court observed:

*Freedom of speech goes to the heart of the natural right of an organized freedom loving society to 'impart and acquire information about that common interest' If any limitation is placed which results in the society being deprived of such right then no doubt it would fall within the guaranteed freedom under Article 19(1)(a). But if all it does is that it deprives a trader from commending his wares, it would not fall within that term.*⁴⁹

In **Indian Express Newspapers V. Union of India**,⁵⁰ a case concerning a challenge to the imposition of import duty on newsprint thereby affecting the circulation of newspapers and consequently advertising revenue, the Supreme Court restricted the application of Hamdard Dawakhana:

In the above said case the Court was principally dealing with the right to advertise prohibited drugs, to prevent self medication and self-treatment. That was the main issue in the case. It is no doubt true that some of the observations referred to above go beyond the needs of the case and tend to affect the right to publish all commercial advertisements.....we feel that the observations made in the Hamdard Dawakhana case are too broadly stated and the 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.⁵¹

This position was endorsed in **Bennett Coleman & Co. v. Union of India**⁵² where the Court recognized the position that advertisements were an essential factor affecting circulation and any restraint on advertisements would have the effect of infringing the Fundamental Right of propagation, publication and circulation under Article 19(1)(a).

⁴⁸. AIR 1960 SC 554.

⁴⁹. Ibid., para 18. P. 564

⁵⁰. (1985) 1 SCC 641.

⁵¹. Ibid., para 93, pp. 701-02.

⁵². (1972) 2 SCC 788: AIR 1973 SC 106.

Since the time the **Hamdard Dawakhana** case was decided there has been a huge transformation in the economy and advertising has come to acquire a very prominent role not only in shaping public choices but also in influencing economic activity. In the liberalized economy, where countless products have flooded the market generating fierce competition, advertising gives one product an edge over another. More importantly, it is advertising which effectively sustains the media. Newspapers earn far more revenue from advertisements than from readership subscription. In **Tata Press Ltd. V. Mahanagar Telephone Nigam Ltd.**,⁵³ the Supreme Court recognized this phenomenon:

Advertising is considered to be the cornerstone of our economic system. Low prices for consumers are dependent on mass production, mass production is dependent upon volume sales, and volume sales are dependent upon advertising. Apart from the lifeline of the free economy in a democratic country, advertising can be viewed as the lifeblood of free media paying most of the costs and thus making the media widely available. The newspaper industry obtains 60% 80% of its revenue from advertising. Advertising pays a large portion of the costs of supplying the public with newspaper. For a democratic press the advertising subsidy is crucial. Without advertising, the resources available for expenditure on the news' would decline, which may lead to an erosion of equality and quantity. The cost of the 'news' to the public would increase, restricting its 'democratic' availability.⁵⁴

In **Hindustan Times v. State of U.P.**,⁵⁵ the Supreme Court reiterated the importance of advertising and its impact on the circulation of a paper. The case arose out of a challenge to an order issued by the U.P. State Government directing a cut of 5% from bills payable to newspapers with a circulation of about 25,000 copies for publication of government advertisements. The government claimed that the order was to aid a pension and social security scheme for full-time journalists. The Court held that advertisements in newspapers play an important role in generating revenue and have a direct nexus with circulation. Advertising revenues enable newspaper to meet the cost of newsprint and other financial liabilities. Advertising also enables the reader to purchase a newspaper at an affordable price. The owner of a newspaper was not liable to undertake the burden of the impugned tax which was struck down as being unconstitutional. The bargaining power of the State and newspapers in matters of release of advertisements was unequal and any

⁵³. (1995) 5 SCC 139.

⁵⁴. Ibid., para 20, p. 154 (SCC).

⁵⁵. (2003) 1 SCC 591.

unjust condition on newspapers would be violation of Article 14 of the Constitution as also of Section 23 of the Contract Act.⁵⁶

3.3.9 Right of rebuttal

The freedom of speech and expression entails the right to resend or the right of rebuttal. This was held by the Supreme Court in **LIC V. Manubhai Shah**.⁵⁷ The case arose out of the publication in a newspaper of an article by the trustee of a consumer rights organization. The article criticized unfair practices adopted by the LIC (Life Insurance Corporation of India) on its policy holders. A member of the LIC responded to this article challenging the conclusion of the trustee and published them in the same newspaper. The trustee published his rejoinder which also appeared in the same newspaper. Meanwhile, the author of the counter had his piece published in the *Yogakshema*, the in house magazine of the LIC. When the trustee tried to have his rejoinder published in the same journal, his request was turned down on the ground that the magazine was an in-house publication. Adopting the 'fairness doctrine', the Gujarat High Court allowed the trustee's writ petition. The Supreme Court upheld the High Court judgment and held that the LIC was under an obligation to publish the rejoinder since it had published the counter. The trustee's Fundamental Right of speech and expression entitled him to insist that his view on the subject should reach readers so that they have a complete picture rather than a lopsided or distorted one. The Court held that the LIC, a 'monopolistic state instrumentality' which survived on public funds could not act in an arbitrary manner on the ground that it was a matter of exclusive privilege to publish or refuse to publish in an in-house magazine. But the Court also clarified that there was no absolute rule that a public institution was under an obligation to publish any matter that a citizen forwarded for publication.⁵⁸

3.3.10 Right to broadcast

The concept 'speech and expression' has evolved with the progress of technology and encompasses all available means of expression and communication. This would include the electronic and the broadcast media. India is a country of curious contradictions. A vast proportion of its urban population has nowhere to live other than on streets and pavements, in squalor and apparent penury without proper shelter, sanitation or

⁵⁶. Ibid., paras 27-30, pp. 601-02; para 39, p. 604.

⁵⁷. (1992) 3 SCC 637.

⁵⁸. Ibid., para 12. P. 655 (SCC).

drinking water. But peering into some of the shanties that line our roads, it shouldn't be a surprise to see its inhabitants rapt before a television set. So potent is the power of the idiot box that its demand seems to surpass the need for a decent dwelling. Perhaps this should be no surprise³ in a country which has been unable to achieve for a vast majority of its citizens the right to a decent standard of living, but, nevertheless where watching televised cricket has been elevated, virtually, to the status of a fundamental right.

This phenomenon of burgeoning television audiences is the result of the broadcasting revolution of the 1990s. Technological developments, spurred by the satellite invasion, have outpaced the law. Though three hundred television channels cram the airwaves, there is no organized and effective regulatory mechanism

In **Odyssey Communications (P) Ltd. v. Lokvidayan Sanghatana**,⁵⁹ the Supreme Court held that the right of a citizen to exhibit films on the State channel, Doordarshan is part of the Fundamental Right guaranteed under Article 19(1)(a). 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 Anthoni 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 recognized in **LIC v. Manubhai D. Shah**.⁶⁰ 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).

Similarly, in **Secretary, Ministry of Information and Broadcasting v. Cricket Assn., Bengal**,⁶¹ the Supreme Court held that broadcasting is a means of communication and a medium of speech and expression within the framework of Article 19(1)(a). This case involved the rights of a cricket association to grant telecast right to an agency of its

⁵⁹. (1988) 3 SCC 410.

⁶⁰. (1992) 3 SCC 637.

⁶¹. (1995) 2 SCC 161.

choice. It was held that the right to entertain and to be entertained, in this case, through the broadcasting media are an integral part of the freedom under Article 19(1)(a).

If the right to freedom of speech and expression include the right to disseminate information to as 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.⁶²

The Court went on to hold that since the broadcasting media depended on the use of airwaves, a limited common property resource, the right of the telecaster were also limited. This was a restriction in addition to those set out under Article 19(2) and was justified on the ground of the limited spectrum of airwaves. This limitation did not extend to the viewer, whose right to be informed, educated and entertained is paramount.⁶³

3.3.11 Right to entertain and to be entertained

The term 'expression' under Article 19(1)(a) covers the right of an individual to entertain as also the right of the audience to be entertained.⁶⁴ Both the participant in a sports event and the organizer and telecaster of the even have a right to entertain. As we have seen, this right is restricted by the limited availability of airwaves.⁶⁵

3.3.12 Right to fly the national flag

In **Union of India v. Naveen Jindal**,⁶⁶ 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

3.4 Right to freedom of speech and expression: Article-21

3.4.1 (i) Right to silence

The Constitution of India guarantees every person right against self incrimination under Article 20 (3)⁶⁷. It is well established that the Right to Silence has been granted to the accused by virtue of the pronouncement in the case of **Nandini Sathpathy vs**

⁶². Ibid., para 78, p. 227 (SCC)

⁶³. Ibid.

⁶⁴. Ibid., para 78, pp. 226-27; para 194 pp. 292-94 (SCC)

⁶⁵. Ibid., para 78, pp. 226-27 (SCC)

⁶⁶. (2004) 2 SCC 510.

⁶⁷ No person accused of any offense shall be compelled to be a witness against himself".

P.L.Dani⁶⁸, no one can forcibly extract statements from the accused, who has the right to keep silent, but only in the Court of law. The accused cannot exercise his right to silence during interrogation by public servants. By the administration of these tests, forcible intrusion into one's mind is being restored to, thereby nullifying the validity and legitimacy of the Right to Silence.⁶⁹ In 2010 The Supreme Court made narco-analysis, brain mapping and lie detector test as a violation of Article 20(3)⁷⁰.

3.4.2 (ii) Right to privacy

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 the 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 endeavors to balance these competing freedoms. 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 has facilitated an unprecedented information revolution. It is no longer the film star alone who is in the public eye. Politicians, business persons, media personalities, professionals and socialites actively Court the media to project themselves and to advance their agenda.

3.5.1 The law on privacy 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

⁶⁸ AIR 1957 SC 1025

⁶⁹ "Privilege Against Self Incrimination". Legalserviceindia.com. <http://www.legalseviceindia.com/article/1466-Privilege-Against-Self-Incrimination.html> Retrieved 2011-12-21

⁷⁰ "Forced narco tests illegal: Supreme Court Times Of India". Timesofindia.indiatimes.com. 2010-05-06. <http://timesofindia.indiatimes.com/india/Forced-narco-tests-illegal-Supreme-court/articleshow/5895005.cms>. Retrieved 2011-12-21

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).

.Under Constitutional law, the right to privacy is implicit in the fundamental right to life and liberty guaranteed by article 21 of the Constitution.⁷¹ This would include the right to be let alone. The Constitutional right to privacy flowing from Article 21 must, however, be balanced against the Fundamental Right of the media to publish any matter of public interest. Privacy as a concept involves what privacy entails and how it is to be valued. Privacy as a right involves the extent to which privacy is (and should be legally protected). “The law does not determine what privacy is, but only what situations of privacy will be afforded legal protection⁷².” It is interesting to note that the common law does not know a general right of privacy and the Indian Parliament has so far been reluctant to enact one.

Privacy” is not a subject in any of the three lists in Schedule VII of the Constitution of India. But Entry 97 of List I states: “any other matter not enumerated in List II and List III” Thus only the Indian Parliament is competent to legislate on privacy since it can be interpreted as any other matter not enumerated in List II and List III. Till date there is no specific enactment on Privacy. But the Constitution of India has embodied many Rights in Part III, which are called Fundamental Rights. These are enumerated in Article 14-30 of the Constitution .Article 13 (2) prohibits the Indian State (Parliament and State legislatures) from making any law, which takes away or abridges the rights conferred by Part III. Article 32 guarantees the right to move the Supreme Court of India for enforcement of the rights conferred by Part III. This right is available against the State, which is defined in Article 12 as inclusive of the Government and Parliament of India and Government and Legislatures of each State and all local and other authorities in India.

From the above discussion it follows that while no legislative competence is found for the subject of Privacy, yet the Constitution of India has provided for many Rights (Fundamental Rights), which cannot be taken away by the State and are legally enforceable against the State.

⁷¹. R. Rajagopal v. State of T.N., (1994) 6 SCC 632.

⁷². Hyman Gross, The Concept of Privacy, 42 N.Y.U.L. Rev. 36, 36 (1967).

The fundamental right “to freedom of speech and expression” as enumerated in Article 19(1)(a) of the Constitution of India comes with reasonable restrictions imposed by the State relating to (i) defamation; (ii) contempt of Court; (iii) decency or morality; (iv) security of the State; (v) friendly relations with foreign states; (vi) incitement to an offence; (vii) public order; (viii) maintenance of the sovereignty and integrity of India. Thus, the right to privacy is limited against defamation, decency or morality.

3.5.2 Privacy and Data Protection

Privacy is closely connected to Data Protection. An individual’s data like his name address, telephone numbers, profession, family, choices, etc. are often available at various places like schools, colleges, banks, directories, surveys and on various web sites. Passing on such information to interested parties can lead to intrusion in privacy like incessant marketing calls. Data protection is, thus, a Central subject and only the Central Government is competent to frame legislations on issues dealing with data protection. In fact, the Information Technology Act, 2000, enacted by the Indian Parliament is the first legislation, which contains provisions on data protection but not in an exclusive manner

Malak Singh v. State of P&H⁷³ was yet another challenge to the Constitutionality of police powers of surveillance, this time under the Police Act and the Punjab Police Rules. The Supreme Court again upheld the regulations that authorized surveillance for the prevention of crime and justified the maintenance of ‘history sheets’ and surveillance registers as confidential documents. The Court observed that surveillance of persons who did not fall within the category mentioned under the impugned regulation, or for reasons unconnected with prevention of crime or excessive surveillance would entitle a citizen to the protection of the Court. But the law on privacy was taken no further.

R. Rajagopal v. State of T.N.⁷⁴ is a watershed in the development of the Indian law of privacy. For the first time, the Supreme Court discussed the right to privacy in the context of the freedom of the press. The case concerned the right of the publisher of a magazine to publish the autobiography of the condemned prisoner, ‘Autoshankar’. The Respondents contended that the intended publication (which was to expose some sensational links between the police authorities and the criminal) was likely to be defamatory and therefore required to be restrained. The issue of the right to privacy came up in this context. The Supreme Court held that the press had the right to publish what

⁷³. (1981) 1 SCC 420; 1981 SCC (Cri) 169.

⁷⁴. (1994) 6 SCC 632.

they claimed was the autobiography of Autoshankar in so far as it appeared from the public record, even without his consent or authorization. However, if the publication went beyond the public record and published his life story that would amount to an invasion of his right to privacy. Similarly, the government and prison officials who sought to protect themselves (by ostensibly seeking to protect the privacy of the incarcerated prisoner), did not have the right to impose a prior restraint on the publication of the autobiography; their remedy, if at all, could arise only after the publication.

The Court recognized two aspects of the right to privacy (1) the tortious law of privacy which affords an action for damages resulting from an unlawful invasion of privacy and (2) the Constitutional right 'to be let alone' implicit in the right to life and liberty under Article 21. A citizen has the right to safeguards his own privacy, that of his family, marriage, procreation, parenthood, child bearing, education, etc. and no person has the right to publish anything relating to such matters without the consent of the person concerned. The Court acknowledged two exceptions to this rule: first, where the matter has become a matter of public record, the right to privacy no longer subsists. Second, public officials are not entitled to claim privacy when the act or conduct in question relates to the discharge of their official duties. Even where the publication is based upon facts found to be untrue, the public official is not entitled to protection unless it is shown that the publication was made with reckless disregard for truth. It is sufficient for the publisher to show that he acted after a reasonable verification of facts.

In **Kaleidoscope (India) P Ltd. V. Phoolan Devi**,⁷⁵ Phoolan Devi, once India's most dreaded dacoit, sought an injunction restraining the exhibition of the controversial biographical film *Bandi Queen* both in India and abroad. The trial Court reached a prima facie view that the film infringed the right to privacy of Phoolan Devi, notwithstanding that she had assigned her copyright in her writings to the films producers. This was upheld by the Division Bench. The Court reached the prima facie conclusion that even assuming that Phoolan Devi was a public figure whose private life was exposed to the media, private matters relating to rape or the alleged murders committed by her could not be commercially exploited as news items or as matters of public interest.

Does the disclosure by a hospital of the medical condition of an AIDS patient to his fiancée amount to a breach of the patient's privacy? This question arose in **Mr 'X' v.**

⁷⁵. AIR 1995 Del 316.

Hospital ‘Z’.⁷⁶ The Supreme Court was confronted with the task of striking a balance between two conflicting 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.⁷⁷

This case may be compared with an English case that arose in their late eighties, **X v. Y.**⁷⁸ 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 written by the defendant reporter titled ‘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.

3.6.1 Right to Information

For many decades, despite the establishment of parliamentary democracy in India, there was no legal right to information. It was through a creative interpretation of Article 19(1)(a) of the Constitution that the Supreme Court put a fundamental right to information as being implicit in the right to free speech and expression. This right is of special importance to the media whose lifeline is information and whose business it is to communicate information to the electorate so that the latter may make informed choices.

⁷⁶. (1998) 8 SCC 296.

⁷⁷. 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, 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.

⁷⁸. (1988) 2 All ER 648.

One of the earliest cases where the Supreme Court laid emphasis on the people's right to know was **Ramesh Thappar v. State of Madras**.⁷⁹ The petitioner challenged an order issued by the then Government of Madras under Section 9(1-A) of the Madras Maintenance of Public Order Act, 1949 imposing a ban on the circulation of the petitioner's journal Cross Roads. The order was struck down as being violation of the right to freedom of speech and expression under Article 19(1)(a). The Supreme Court held:

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 process of popular Government, is possible.⁸⁰

3.7 Right to freedom of speech and expression: Media Trial vs. Fair Trial

Article 19(1) (a) of the Indian Constitution, which provides freedom of speech and expression includes within ambit, freedom of press and media. The Constitution of India guaranteed some fundamental right and protection to an accused from conviction against ex post facto laws⁸¹, double jeopardy⁸² and right to fair trial in the Court of law.

3.7.1 Right to legal representative and Media Trial The media assumption of guilt clearly encroach upon the right to legal representation – a critical component of the right to fair trial and also intimidate lawyers into represent accused person⁸³.

3.8 Freedom of Media, information and Intellectual property right

The Intellectual property right⁸⁴ laws should not prevail over the right to education, knowledge and information. This right must exercised through the concept of fair use that is for education and research. The free and responsible media can play important role to establishing information and communication society.

3.9 Freedom of speech and expression Parliamentary Privileges

Article 361-A of the Constitution of India confers protection on newspapers in respect of the publication of a substantially true report of proceedings of either House of

⁷⁹ AIR 1950 SC 124.

⁸⁰ Ibid., para 11, pp. 128-29.

⁸¹ Art. 20 (1) No person shall be convicted of any offence except for violation of a law in force at the time of the commission of the Act charged as an offence, nor be subjected to a penalty greater than that which might have been inflicted under the law in force at the time of the commission of the offence.

⁸² 2) No person shall be prosecuted and punished for the same offence more than once.

⁸³ Priti Saxena ,Role of judiciary in Trial By Media On Crossing The Line Between The Private and The Public Domain,1 JFJS(2009)

⁸⁴ Intellectual property right means; Copy right, patent, Trademarks etc.

Parliament and/or of the State legislatures.⁸⁵ Under the Parliamentary Proceedings (Protection of Publication) Act, 1977 a person is not liable in any civil or criminal proceedings in respect of the publication in a newspaper of a substantially true and accurate report of any proceedings in either House of Parliament unless the publication is proved to have been made maliciously. The protection is, however, not available if the publication is not for the public good.⁸⁶ The Act also applies to broadcasting agencies

3.10 Right to freedom of speech and expression: Electronic Communication Technology (ECT) and Cyber Media

The internet represents a communication revolution. A medium of instantaneous, long-distance communication, and the uniqueness of the internet lies in its ability to make communication with a million or more people no more difficult than with a single person. Also it takes no longer for a message to travel for thousands of miles across the globe than it takes to travel next door. The internet breaks down traditional barriers as it knows no geographical or jurisdictional constraints. It is a medium that facilitates free speech and the exchange of ideas like no medium has before. The internet renders censorship of speech somewhat meaningless as what may be sought to be controlled in one jurisdiction can be made easily available through another.

The internet is an important means of expression and communication but equally important is its role as a source of information. The net offers information on a limitless and mind-boggling variety of subjects. The right to information has been judicially recognized to be part of the right to freedom of speech and expression under Article 19(1)(a). The role of the internet as a source of information is therefore an important facet from the standpoint of Article 19(1)(a)

Ironically, the very qualities about the internet that have revolutionized communication are the qualities that have made it amenable to misuse. The internet has become an engine for rampant piracy of copyrighted music, for pornography and obscenity, for defamation, for hate speech and lately for terrorist planning and

⁸⁵. The Parliamentary Proceedings (Protection of Publication) Act, 1977, Section 3. C.K. Daphtary v. O.P. Gupta, (1971) 1 SCC 626: AIR 1971 SC 1132. See also Jawahar Darda v. Manohar rao Ganpatrao Kapsikar, (1998) 4 SCC 112.

⁸⁶. C.K. Daphtary v. O.P. Gupta (1971) 1 SCC 626: 1971 SCC (Cri) 286. See also Cook v. Alexander, (1974) QB 279 and Wasan, ex p., (1869) LR 4 QB 573.

propaganda.⁸⁷ The instantaneous and technologically advanced means of communication make it difficult to contain and the damage is manifold compared to any other traditional means of communication, by reason of its sheer speed and the sweep of its reach. In India, the internet is regulated by the Information Technology Act, 2000

3.10.1 Convergence of Media

Traditionally, communication services were distinct: broadcasting, voice telephony and on-line computer services. 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 allows 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 service delivered to television sets via systems like web television; web-casting of radio and television programming on the internet; using the internet for voice telephony; and email and World Wide Web (www) access via digital television decoders and mobile telephones. 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.

Variegated technological changes in information services have posed a formidable challenge to legal regulation as new forms of delivery of information are able to escape effective regulatory control. There is a pressing need for a comprehensive legal framework to cover the convergence of technologies and service.

3.11 Constitutional restrictions on the freedom of speech and expression

The freedom of speech means expression of views through words, spoken, written or printed or through any other channel like Radio, Television or other media. But it is subject to restriction, imposed under Article 19 (2) of the Constitution of India.⁸⁸ Article 19(2) exhaustively sets out the grounds upon which the freedom of speech and expression

⁸⁷. The Al Qaeda is known to advertise for recruitments on the web. The net is used for terrorist communication through a variety of methods which include steganography and false emails. Steganography, in which messages are hidden inside image files was used by conspirators in the 2001 Parliament attack case as well as by the Al Qaeda post 9/11. False images are messages that are not actually dispatched but are read with the help of a common password. Several terrorists have the password to one email account. One of them writes an email and saves it as a draft. Another logs on to the same account and accesses the draft message. Communication thus takes place without the email actually being sent. Other methods of communication include message in the font of an esoteric language and using high encryption system. Such messages take so long to decrypt that by the time they are deciphered the message is likely to become useless. The traditional espionage concept of 'dead drops', of dropping messages in a pre-arranged public place such as a phone booth or a toilet has now evolved to 'dead drops on the web. Terrorists use remotely controlled computers called 'bots' which allow emails to be sent from an account without the knowledge of the account holder.

⁸⁸. Life Insurance corporation of India v. Prof M.D. Shah AIR 1993 SC 171 at P. 2-177

under Article 19(1)(a) can be restricted. Any restriction which does not fall within those clearly spelt out in Article 19(2) is not permissible and would be struck down as being in violation of Article 19(1)(a).⁸⁹

Article 19(2), as it originally stood,⁹⁰ subjected the freedom of speech and expression to the government's authority to legislate on matters concerning 'libel, slander, defamation, contempt of Court, any matter offending decency and morality, or which undermines the security of or tends to overthrow, the State.'⁹¹

In Punjab, the State Government imposed pre-censorship on an English language weekly in the name of protecting public safety and order. The East Punjab Public Safety Act, 1949 which was the subject-matter of the challenge in **Brij Bhushan v. State of Delhi**,⁹² was struck down by the Supreme Court on the ground that pre-censorship was an unjustifiable restriction on the liberty of the press. The Court held that Section 7(i)(c) which authorized such a restriction on the ground that it is 'necessary for the purpose of preventing or combating any activity prejudicial to the public safety or the maintenance of public order' could not fall within the purview of Article 19(2). Patanjali Shastri, J. who delivered the majority judgment observed:

There can be little doubt that the imposition of pre-censorship on a journal is a restriction on the liberty of the press which is an essential part of the right to freedom of speech and expression declared by Article 19(1)(a). as pointed out by Blackstone in his Commentaries.

"The liberty of the press consists in laying no previous restraint upon publications, and not in freedom from censure from criminal matter when published. Every free man has an undoubted right to liberty what sentiments he pleases before the public; to forbid this, is to destroy the freedom of the press'.⁹³ After much deliberation and debate in Parliament, the first amendment to the Constitution was passed in June, 1951,⁹⁴ retroactively empowering the government to impose 'reasonable restrictions' on the freedom of expression 'in the interests of the security of the State,⁹⁵ friendly relations with foreign State, public order, decency or morality, or in relation to contempt of Court,

⁸⁹. Express Newspapers (P) Ltd. v. Union of India, AIR 1958 SC 578; Supdt., Central Prison v. Ram Manohar Lohia, AIR 1960 SC 633; Bennett Coleman v. Union of India, (1972) 2 SCC 788: AIR 1973 SC 106.

⁹⁰. Prior to the 16th amendment to the Constitution vide the Constitution (Sixteenth Amendment) Act, 1963.

⁹¹. Amended and substituted vide the Constitution (Sixteenth Amendment) Act, 1963.

⁹². AIR 1950 SC 129.

⁹³ Blackstone's Commentaries, Vol. IV, pp. 151, 152.⁹³

⁹⁴. The Constitution (First Amendment) Act, 1951.

⁹⁵. Replacing the words 'tends to overthrow, the State'.

defamation, or incitement to an offence.’ ‘Defamation’ replaced the words ‘libel’ and ‘slander’ in Article 19(2). The introduction of ‘incitement to an offence’ was a response to the Bihar and Punjab High Court decisions referred to earlier.⁹⁶ A redeeming feature of the amendment was the inclusion of the word ‘reasonable’ before the words ‘restrictions’.

Although Prime Minister Nehru was anxious to outlaw certain kinds of speech and the language of the amendment ostensibly made prosecution easier, the qualification of the restrictions by the addition of the word ‘reasonable’ empowered the citizen to turn to the Courts for judicial review.

The second amendment to Article 19 came in 1963 and added that the government had the power to place restrictions on the freedom of speech and expression in the interests of ‘the sovereignty and integrity of India’.⁹⁷ The Article 19 (2) of the Constitution states that’s; Nothing is 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 impose reasonable restrictions on the exercise of the right conferred by the said provision. The qualifier in Article 19(2)⁹⁸ ‘reasonable’ remained in place. The amended Article 19(2) contains the following grounds on which reasonable restrictions can be placed on the freedom of speech: The sovereignty and integrity of India, The security of the state, Friendly relation with foreign states, Public order, Decency or Morality, In relation to contempt of Court, Defamation and Incitement to an offence.

3.11.1 Sovereignty and integrity of India

The amendment introducing ‘sovereignty and integrity of India’ as a ground under Article 19(2) for restricting the freedom under Article 19(1)(a) was reaction to the tense situation prevailing in different parts of the country. Chinese incursions had started in the north-east in 1960. Also around this time, there were strong demands led by Master Tara Singh for a separate Sikh homeland. The Dravida Munnetra Kazhagam (DMK) had called for an entity separate from India called Dravida Nadu comprising Madras, Mysore, Kerala and Andhra. Law Minister Asoke Sen introduced a bill in the Lok Sabha on 21st January, 1963 describing its object as giving ‘appropriate powers to impose restrictions against those individuals or organizations who want to make secession from India or disintegration of India as political purposes for fighting elections.’ The object of the

⁹⁶.State of Bihar v. Shailabala Devi, AIR 1952 SC 329; Brij Bhushan v. State of Delhi, AIR 1950 SC 129.

⁹⁷. Inserted by the Constitution (Sixteenth Amendment) Act, 1963, w.e.f. 6-10-1963.

⁹⁸ The words the sovereignty and integrity of India in Clause.2 of Article 19 have been inserted by Section 2 of the Constitution (Sixteenth Amendment) Act, 1963 .

amendment was to confer on Parliament specific power to legislate on this subject without having to face a Constitutional challenge on the ground that the legislation was inconsistent with Article 19(1)(a). The amendment enabled the enactment of laws such as the Criminal Law Amendment Act, 1961 and the Unlawful Activities (Prevention) Act, 1967 which made punishable the act or words of any individual or association intending or supporting 'the cession of any part of the territory of India or the secession' of the same.⁹⁹

3.11.2 Security of the State' and 'Public Order'

The term 'public order' means public peace, safety and tranquility. The insertion of 'public order' as a ground under Article 19(2) by the Constitution (First Amendment) Act, 1951 was an attempt to get over the effect of the decisions of the Supreme Court in *Romesh Thappar v. State of Madras*¹⁰⁰ and *Brij Bhushan v. State of Delhi*.¹⁰¹ The former case was a challenge to Section 9(1-A) of the Madras Maintenance of Public Order Act, 1949 under which the Government of Madras had issued an order imposing a ban on the entry and circulation of the journal Cross Roads in the state. In considering whether the impugned Act was made in the interests of the security of the State, Patanjali Shastri, J. drew a difference between a breach of public order which affects the security of the State and that which involves a breach of a purely local significance.

Though all these offences thus involve disturbances of public tranquility and are in theory offences against public order, the difference between them being only a difference of degree, yet for the purpose of grading the punishment to be inflicted in respect of them they may be classified into different minor categories as has been done by the Penal Code. Similarly, the Constitution in formulating the varying criteria for permissible legislation imposing restrictions on the Fundamental Rights enumerated in Art 19(1), has placed in a distinct category those offences against public order which aim at undermining the security of the State or overthrowing it, and made their prevention the sole justification for legislative abridgement of freedom of speech and expression, that is to say, nothing less than endangering the foundations of the State or threatening its overthrow could justify the curtailment of the rights to freedom of speech and expression. The Constitution thus requires a line to be drawn in the field of public order or tranquility marking off, more or

⁹⁹. In *People's Union for Civil Liberties v. Union of India*, (2004) 9 SCC 580, the Supreme Court dismissed a challenge to the Prevention of Terrorism Act, 2002 on the ground, inter alia, that Parliament was competent to legislate on the subject of terrorism which was a threat to the security and sovereignty of the nation. This Act was subsequently repealed with effect from 21st September, 2004.

¹⁰⁰. AIR 1950 SC 124.

¹⁰¹. AIR 1950 SC 129.

less roughly, the boundary between those serious and aggravated forms of public disorder which are calculated to endanger the security of the State and the relatively minor breaches of the peace of a purely local significance treating for this purpose differences in degree as if they were differences in kind.¹⁰²

The Court held that unless a law restricting freedom of speech and expression is directed solely against the undermining of the security of the State or its overthrow, such law cannot fall within the restriction under clause (2) of Article 19, although the restrictions which it seeks to impose may have been conceived generally in the interests of public order.¹⁰³ This decision was followed by the Supreme Court in **Brij Bhushan v. State of Delhi**.¹⁰⁴

In **State of Bihar v. Shailabala Devi**¹⁰⁵, while interpreting Section 4(1)(a) of the Press (Emergency Powers) Act, 1931 dealing with words, signs or visible representations which incite or encourage or tend to incite or encourage the commission of any offence of murder or violence, the Supreme Court held that any speech or expression which incites or encourages the commission of violent crimes such as murder, undermines the security of the State and falls within the ambit of Article 19(2).

Supdt., Central Prison v. Ram Manohar Lohia,¹⁰⁶ concerned a challenge to Section 3 of the U.P. Special Powers Act, 1932 which made it an offence to instigate persons not to pay dues to the government. Dr. Lohia was arrested under the Act for making speeches exhorting people not to pay the government's increased irrigation rates. The impugned provision was struck down by the Supreme Court which held that the provision was not 'in the interests of public order'. The Supreme Court held that the expression 'in the interests of public order'. The Supreme Court held that the expression 'in the interests of public order' though wider than the phrase 'for the maintenance of public order' could not mean that the existence of any remote or fanciful connection between the impugned act and public order would be sufficient to sustain the validity of the law. There should be a reasonable and rational relation between the act and the object sought to be achieved, not a farfetched or remote connection.¹⁰⁷

¹⁰². AIR 1950 SC 124, Para 10, p. 128.

¹⁰³. Ibid., Para 12, p. 129.

¹⁰⁴. AIR 1950 SC 129.

¹⁰⁵. AIR 1952 SC 329.

¹⁰⁶. AIR 1960 SC 633.

¹⁰⁷. Ibid., paras 13-14, p. 640.

‘Public order’ ‘law and order’ and ‘security of the State’ are not synonymous expressions. These concepts are in the nature of three concentric circles, ‘law and order’ representing the largest circle, within which lies the next circle representing ‘public order’ and within which is the smallest circle representing ‘security of the State’. Thus, an act which affects ‘law and order’ may not necessarily affect ‘public order’ and an activity which may be prejudicial to ‘public order’ may not necessarily affect ‘security of the State’.¹⁰⁸ In **Madhu Limaye v. Sub-Divisional Magistrate**,¹⁰⁹ the Supreme Court held that ‘public order’ includes the absence of all acts which are a danger to the security of the State and also the acts described by the French as *ordre publique*, that is, the absence of insurrection, riot, turbulence, or crimes of violence. But it does not include acts which disturb only the serenity of others.

In matters of forfeiture of books or other publications by the government on grounds of a likely disturbance of public order, tranquility or the like, the Courts have emphasized the necessity for the government to lay down the precise grounds under which such forfeiture became necessary. In **Harnam Das v. State of U.P.**,¹¹⁰ the Supreme Court struck down an order of forfeiture passed by the Government of Uttar Pradesh under Section 99-A of the Code of Civil Procedure, 1898 in respect of two books published in Hindi on the ground that the publication of those books was punishable under Sections 153-A and 295-A of the Indian Penal Code. The Court found that the government had not set out the grounds for its opinion and had not stated in its order which communities were alienated from each other, whose religious beliefs had been wounded or why the government thought that such alienation or offence to religion had been caused by the publication of the books in question. Under Section 99-D of the Code of Civil Procedure, held the Supreme Court, it is the duty of the High Court to set aside an order of forfeiture if it is not satisfied that the grounds on which the government formed its opinion, could justify that opinion. It is not the duty of the Court to do any more or to find out for itself whether the book contained any such matter.¹¹¹

In **Gajanan Visheshwar Birjur v. Union of India**,¹¹² the petitioner challenged the confiscation of books imported by him from China containing Marxist literature under Section 111-D of the Customs Act, 1962. It was found that the order of confiscation failed

¹⁰⁸. Ram Manohar v. State of Bihar, AIR 1966 SC 740, para 52, pp. 758-59. Also see V.K. Javali v. State of Mysore, AIR 1966 SC 1387 ; Kedar Nath Singh v. State of Bihar, AIR 1962 SC 955; Dalbir Singh v. State of Punjab, AIR 1962 SC 1106.

¹⁰⁹. (1970) 3 SCC 746 : AIR 1971 SC 2486.

¹¹⁰. AIR 1961 SC 1962.

¹¹¹. Ibid., paras 12-13, pp. 1665-66.

¹¹². (1994) 5 SCC 550.

to specify which of the books contained words, signs or visible representations which were likely to incite or encourage any person to resort to violence for sabotage for the purpose of overthrowing or undermining the government. It was found that the show cause notices were devoid of particulars and extremely casually drawn up and that the final orders of confiscation also lacked the required specifications. The orders of confiscation were struck down as being violation of Article 19(1)(a).

3.11.3 Friendly relations with foreign states

Restrictions under this category would include not only libel of foreign dignitaries but also propaganda in favour of rivals to authority in a foreign state after India has recognized a particular authority in that state, or propaganda in favour of war with a state at peace with India. At present there is no specific legislation on this subject. However, a variety of statutes contain restrictions on forms of expression which would have an adverse impact on friendly relations with foreign states. These statutes include the Cinematograph Act, 1952,¹¹³ the Cable Television Networks (Regulation) Act, 1995¹¹⁴ and the Right to Information Act, 2005.¹¹⁵

3.11.4 Incitement to an offence

The word 'offence' is not defined in the Constitution¹¹⁶. According to the General Clauses Act, 1897, it means 'any act or omission punishable by any law for the time being in force'.¹¹⁷ In order to qualify as a reasonable restriction under Article 19(2), the law imposing a restriction relating to 'incitement to an offence' must relate to a pre-existing offence i.e. the incitement must be of an act which is, at the time, a punishable offence under an existing law.¹¹⁸ Further, the legislation must be in respect of a definite offence. Mere approval of or admiration for an act of murder or violence does not automatically come within the scope of this restriction unless the publication itself has a present tendency to incite or encourage the commission of the offence. The Court must look to the circumstances in each case in judging such a tendency, the purpose of the work, the time at which it was published, the class of the people who would read it, the effect it would

¹¹³. The Cinematograph Act, 1952, Section 5-B (1).

¹¹⁴. See the Cable Television Networks Rules, 1994, Rules 6(1)(b).

¹¹⁵. The Right to Information Act, 2005, Section 8(1)(a). See also, Section 8(1)(f).

¹¹⁶. See Indian Penal Code, 1860, Sec.40.

¹¹⁷. General Clauses Act, 1897, Section 3(8).

¹¹⁸. *Supdt, Central Prison v. Ram Mahohar Lohia*, AIR 1960 SC 633.

have on their minds, the context of the words and the interval between the incidents narrated and the publication of the work.¹¹⁹

3.11.5 Decency and morality: exceptions to Article 19(1) (a)

One of the exceptions to the fundamental right to free speech and expression guaranteed under Article 19(1)(a) of the Constitution is in respect of laws which impose reasonable restrictions in the interest of 'decency' and 'morality'.¹²⁰

Some of the laws which embody restrictions on the right to free speech in the interest of decency and morality are :

- (i) The Indian Penal Code, 1860 makes the sale, letting to hire, distribution, public exhibition, circulation, import, export and advertisement of obscene material an offence punishable with imprisonment and fine.¹²¹
- (ii) The Cinematograph Act, 1952 prohibits the certification of a film by the Censor Board for public exhibition if the film or any part of it is against the interests of morality and decency.¹²²
- (iii) The Dramatic Performances Act, 1876 empowers the government to prohibit public dramatic performance on the ground of obscenity and visits the disobedience of a prohibition with imprisonment and fine.¹²³
- (iv) The Customs Act, 1962 empowers the government to prohibit or impose conditions on the import or export of goods in the interest of decency and morality.¹²⁴
- (v) The Post office Act, 1898 prohibits the transmission by post any material on the ground of decency or obscenity.¹²⁵

¹¹⁹. State of Bihar v. Shailabala Devi, AIR 1952 SC 329.

¹²⁰. Constitution of India, 1950, Article 19(2).

¹²¹ Indian Penal Code, 1860 Sections 292-94.

¹²². The Cinematograph Act, 1952, Section 5-B. also see Sections 4 and 5-A of the Act on the examination and certification of films for public exhibition. A film certified by the Board of Film Certification for unrestricted public exhibition carries a 'U' certificate. A film certified as being suitable for unrestricted public exhibition may carry a 'UA' certificate if the Board is of the view that the question as to whether a child below the age of twelve should be allowed to view the film should be considered by his parents or guardians. A film certified for public exhibition restricted to adults carries an 'A' certificate, while a film certified for public exhibition restricted to members of any profession or class of persons carries an 'S' certificate. Once the film has obtained any of these certificates, the distributor, exhibitor or any other person to whom rights in the film have passed shall not be liable for punishment under any law relating to obscenity. See Section 5-A(1). See also LIC v. Manubhai Shah, (1992) 3 SCC 637; Ramanlal v. Central Board of Film Certification, AIR 1988 Bom 278.

¹²³. The Dramatic Performances Act, 1876, Preamble; Section 3(c); Section 6.

¹²⁴. The Customs Act, 1962, Section 11(b).

¹²⁵. The Post Office Act, 1898, Section 20.

(vi) The Indecent Representation of Woman (Prohibition) Act, 1986 prohibits the indecent representation of women through advertisements or other publications, writings, painting, figures, etc. and makes the contravention of the provisions of this Act punishable with imprisonment and fine.¹²⁶ Section 2(c) of the Act defines the indecent representation of women as:

the depiction in any manner of the figure of a woman, her form or body or any part thereof in such a way as to have the effect of being indecent, or derogatory to, or denigrating women, or is likely to deprave, corrupt or injure the public morality or morals;

(vii) The young persons (Harmful Publications) Act, 1956 prohibits publications which could corrupt a child or young person and incite him to commit crimes of violence or cruelty, etc. A contravention of the provisions of this Act is punishable with imprisonment and fine.¹²⁷

(viii) The Information Technology Act, 2000 makes the publication and transmission in electronic form of ‘material which is lascivious or appeals to the prurient interest or if its effect is such as to tend to deprave and corrupt persons who are likely, having regard to all relevant circumstances, to read, see or hear the matter contained or embodied in it’ punishable with imprisonment and fine.¹²⁸

(ix) The Cable Television Networks (Regulation) Act, 1995 prohibits the telecast of programmes on cable television, which offend decency and morality and visits a contravention with imprisonment and fine.¹²⁹ In fact, Section 5 of the Cable Television Networks (Regulation) Act, 1995 read with Rule 6(1)(o) of the Cable Television Network Rules, 1994 prohibits the carriage of programmes that are not suitable for ‘unrestricted public exhibition’. The expression, ‘unrestricted public exhibition’ is found in Section 5-1 read with Section 4 of the Cinematograph Act, 1952 which provides for the examination and certification of films by the Boards of Film Certification (CFBC). This effectively means that no adult film (‘A’ film) or film which is suitable for public exhibition restricted to member of any

¹²⁶. The Indecent Representation of Women (Prohibition) Act, 1986, Sections 3-6.

¹²⁷. The Young Persons (Harmful Publications) Act, 1956, Sections 2(a); 3-7.

¹²⁸. The Information Technology Act, 2000, Section 67; see also Avinash Bajaj v. State; (2005) 3 Comp. LJ 364 (Del).

¹²⁹. The Cable Television Networks (Regulation) Act, 1995 5, 6, 17, 19 and 20 read with the Cable Television Network Rules, 1994, Rules 6(1)(a), (d), (k), (n) and (o), 6(2), 6(5); Rule 7(2)(iii) and (vi) ; Ruel 7(8).

profession or any class of persons ('S' film) can be telecast on television by cable operators.¹³⁰

Indecency and obscenity

Used often in the context of 'decency' and 'morality' is the term 'obscenity' which is expressly prohibited by Section 292 of the Indian Penal Code, 1860.

Section 292(1) defines 'obscenity' thus:

For the purpose of sub-section (2), a book, pamphlet, paper, writing, drawing, painting, representation, figure or any other object, shall be deemed to be obscene if it is lascivious or appeals to the prurient interest or if its effect, or (where it comprises two or more distinct items) the effect of any one of its items, is, if taken as a whole, such as to tend to deprave and corrupt persons who are likely, having regard to all relevant circumstances, to read, see or hear the matter contained or embodied in it. The definition is very similar to that found in the English Obscene Publications Act, 1959.¹³¹ 'Obscenity' has been defined by the Supreme Court as 'the quality of being obscene which means offensive to modesty or decency; lewd, filthy and repulsive.'¹³²

'Indecency' is a concept wider than 'obscenity'. Although anything that is 'obscene' must necessarily be 'indecent',¹³³ what is 'indecent' need not always be 'obscene'.¹³⁴ In other words, while 'indecent' merely means non conformance with accepted standards of morality, 'obscenity' refers to that which has prurient or lascivious appeal.¹³⁵

In the USA, the term 'obscene' refers to material which 'the average person applying contemporary standards would find that, taken as a whole, appeals to the prurient interest, contains patently offensive depictions or descriptions of specified sexual conduct, and has no serious literary, artistic, political or scientific value.'¹³⁶

¹³⁰. In *Pratibha Naitthani v. Union of India* (Writ Petition No. 1232 of 2004), a public interest petition filed by a college lecturer to control obscenity in the media, in an order dated 21st December 2005 (unreported), the Bombay High Court interpreted Rule 6(1)(o) of the Cable Networks Rules, 1994 to mean that no film of which public exhibition is restricted can be carried on the cable service. The Court upheld the restriction under Rule 6(1)(o) holding that it did not violate the rights of an adult to watch films ('A' films) since such films could be viewed in a cinema hall or even privately on DVD or VCD.

¹³¹. Section 1(1) of the English Act defines 'obscenity' thus: 'For the purposes of this Act, an article shall be deemed to be obscene if its effect or (where the article comprises two or more distinct items) the effect of any one of its items is, if taken as a whole, such as to tend to deprave and corrupt persons who are likely, in all the circumstances, to read, see or hear the matter contained or embodied in it.'

¹³². *Ranjit D. Udeshi v. State of Maharashtra*, AIR 1965 SC 881, para. 7. P. 885.

¹³³. *R. v. Stanely*, (1965) 1 All ER 1035.

¹³⁴. *R. v. Greater London Council*, (1978) 3 All ER 184, pp. 188-89.

¹³⁵. *F.C.C. v. Pacifica Foundation*, (1978) 438 US 726 (740).

¹³⁶. *Miller v. California*, 37 L Ed 419. P. 422.

The Supreme Court quoted with approval, the comparison made by the Appellate Tribunal¹³⁷ with the scene of naked men and women being led to their death in a Nazi concentration camp in the film Schindler's List. The nudity was meant to convey horror and shame at these men and women who were about to die but were stripped of even their last shred of dignity. The Supreme Court took the view that a film that condemns social evil must necessarily show that evil and that the scenes of nudity and rape were intended not to arouse prurient or lascivious thought but revulsion against the perpetrators and pity for the victim. Such powerful portrayals are not to be censored in the name of perverts who would feel titillated rather than repulsed even at such scenes.

3.11.6 Contempt of Court

The law of contempt is one of the recognized exceptions under Article 19(2) to the freedom of speech and expression guaranteed under Article 19(1) (a) of the Constitution of India.¹³⁸

3.11.6.1 Criminal contempt

'Criminal contempt' is defined under Section 2(c) of the contempt of Courts Act, 1971 :

2(c) 'criminal contempt' means the publication, whether by words, spoken or written, or by signs, or by visible representations, or otherwise, of any matter or the doing of any other act whatsoever which –

- (i) Scandalises or tends to scandalise, or lowers or tends to lower the authority of any Court; or
- (ii) Prejudices, or interferes or tends to interfere with, the due course of any judicial proceeding; or
- (iii) Interferes, or tends to interfere with, or obstructs, or tends to obstruct, the administration of justice in any other manner.

The language contained in the section is loosely couched and there is no explanation in respect of what 'tends to' scandalise or interfere with or obstruct the administration of justice and how it is different from actually scandalising or interfering with or obstructing

¹³⁷. Constituted under the provisions of the Cinematograph Act, 1952.

¹³⁸. Article 19(2) reads : '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 relation to contempt of court.'

the administration of justice. The definition is extremely wide with the result that the jurisdiction can be quite easily invoked.

3.11.7 Defamation

The law of defamation is recognition of the inherent right of every individual to the preservation of his honour and the esteem in which he is held by society. Every individual has a right to claim that his reputation shall not be disparaged by defamatory statements made about him to a third person or person without lawful justification or excuse. Reputation is an integral and important aspect of the dignity of an individual.¹³⁹ Reputation has an important bearing on many decisions in a democratic society which are vital to its well-being: whom to vote for, whom to work for, whom to employ, whom to do business with, whom to socialize with. The right to preservation of one's reputation is acknowledged as a right in rem, a right good against the entire world.

The law of defamation is a culmination of a conflict between society and the individual. On one hand lies the Fundamental Right to freedom of speech and expression enshrined under Article 19(1)(a) of the Constitution, on the other is the right of the individual to have his reputation intact. How far does the liberty of free speech and expression extend? And when does it become necessary for the law to step in to safeguard the right of the individual to preserve his honour and reputation? The law of defamation seeks to attain a balance between these competing freedoms and is a reasonable restriction under Article 19(2) on the Fundamental Right to freedom of speech and expression guaranteed by Article 19(1)(a). The wrong of defamation consists in the publication of a false and defamatory statement about another person without lawful justification or excuse. A statement is said to be 'defamatory' when it injures the reputation of the person to whom it refers and 'exposes him to hatred, ridicule, or contempt, or which causes him to be shunned or avoided or which has a tendency to injure him in his office, profession or calling.'¹⁴⁰

Further restriction have been imposed on freedom of speech and expression by Article 51 A defining fundamental duties of citizen.¹⁴¹ Under the Article 5 (A), no one should in exercise of the freedom of expression or of the press do any of the following acts:-

¹³⁹. Right to reputation is a fact of the right to life. Where any authority in discharge of its duties traverses into the realm of personal reputation it must provide a chance to the person concerned to have a say in the matter. *State of Bihar v. Lal Krishna Advani*, (2003) 8 SCC 361.

¹⁴⁰. *Nevill v. Fine Art and General Ins.* (1897) AC 68, p. 72

¹⁴¹. 42nd Constitutional Amendment, 1976.

1. To disparage the Constitution , its ideals and institution, or the National flag or the National Anthem;
2. To undermine the sovereignty by, unity and integrity of India;
3. To disrupt the spirit of common brother hood among all the people; and
4. To insult the rich heritage of our composite culture.

3.12 Statutory provision in refer to the freedom of speech and expression vis-a-vis media freedom, Media Trial and Electronic Technology

3.12.1 Press Laws: Print Media

Print media in India has always played a crucial role in the country's development and well-being. Unlike many other countries, the print media has very well withstood the stiff competition from the electronic media, if the growing number of newspaper and magazines in India is a yardstick to adhere by. The print media is also the well-regulated media in India. There exist a number of Acts which deal with the functioning of print media. This chapter deals with the Acts which regulated the print media in India. This chapter provides the salient features of the Press and Registration of Books Act, 1867, Press Council Act 1978 and Working Journalists and Other Newspaper Employees (Condition of Service) and Miscellaneous Provisions Act, 1955.

3.12.2 Press Council Act, 1978

The purpose of the Act was to establish a Press Council for preserving the freedom of the Press and of maintaining and improving the standards of newspapers and news agencies in India. The Act made way for the establishment of the press council.

Section 5. It states that the Council shall consist of a Chairman and twenty-eight other members.

Section 6. It states that in general circumstances, the Chairman and other members shall hold office for a period of three years.

Section 7. Conditions of service of members- The Chairman shall be a whole-time officer and shall be paid such salary as the Central Government may think fit; and the other members shall receive such allowances of fees for attending the meeting of the Council, as may be prescribed. Powers and functions of the Council :-

Section 13. Objects and functions of the Council

- (1) The objects of the Council shall be to preserve the freedom of the press and to maintain and improve the standards of newspapers and news agencies in India.
- (2) The Council may, in furtherance of its objects, perform the following functions, namely;
 - (a) to help newspapers and news agencies to maintain their independence;
 - (b) to build up a code of conduct for newspaper, news agencies and journalists in accordance with high professional standards;
 - (c) to ensure on the part of newspapers, news agencies and journalists, the maintenance of high standards of public taste and promote a due sense of both the rights and responsibilities of citizenship;
 - (d) to encourage the growth of a sense of responsibility and public service among all those engaged in the profession of journalism;
 - (e) to keep under review any development likely to restrict the supply and dissemination of news of public interest and importance;
 - (f) to keep under review cases of assistance received by any newspaper or news agency in India from any foreign source including such cases as are referred to it by the Central Government or are brought to its notice by an individual, association of persons or any other organization.
 - (g) To undertake studies of foreign newspapers, including those brought out by any embassy or other representative in India of a foreign State, their circulation and impact.
 - (h) To promote a proper functional relationship among all classes of persons engaged in the production or publication of newspapers of in news agencies.
 - (i) to concern itself with developments such as concentration of or other aspects of ownership of newspapers and news agencies which may affect the independence of the Press;
 - (j) to undertake such studies as may be entrusted to the Council and to express its opinion in regard to any matter referred to it by the Central Government;

- (k) to do such other acts as may be incidental or conducive to the discharge of the above functions.

Section 14. Power to Censure

The Council may conduct an inquiry with the newspaper, or news agency, the editor or journalist-on the receipt of a complaint or otherwise-if the Council has reason to believe that they have offended against the standards of journalistic ethics or public taste or that an editor or working journalist has committed any professional misconduct. If the Council is satisfied that it is necessary to do so, it may, for reasons to be recorded in writing, warn, admonish or censure the newspaper, the news agency, the editor or the journalist or disapprove the conduct of the editor or the journalist

3.12.3 The young persons (Harmful Publications) Act, 1956

It is an Act to prevent the dissemination of certain publication harmful to young persons.

“Harmful publication” means any book, magazine, pamphlet, leaflet, newspaper or other like publication which consists of stories told with the aid of pictures or without the aid of pictures or wholly in pictures, being stories portraying wholly or mainly –

- (i) The commission of offences; or
- (ii) Acts of violence or cruelty; or
- (iii) Incidents of a repulsive or horrible nature; in such a way that the publication as a whole would tend to corrupt a young person into whose hands it might fall, whether by inciting or encouraging him to commit offences or acts of violence or cruelty or in any other manner whatsoever.

“Young person” means a person under the age of twenty years.

3.12.4 Drugs and Magic Remedies (Objectionable Advertisements) Act. 1954

This is an Act to control the advertisement of drugs in certain cases, to prohibit the advertisement for certain purposes of remedies alleged to possess magic qualities and to provide for matter connected therewith.

“Advertisement” includes any notice, circular, label, wrapper, or other document, and any announcement made orally or any means of producing or transmitting light, sound or smoke; (b) drug” includes-(i) a medicine for the internal or external use of human

beings or animals; (ii) any substances intended to be used for or in the diagnosis, cure, mitigation, treatment or prevention of disease in human beings or animals; (iii) any article, other than food, intended to affect or influence in any way the structure or any organic function of the body of human being or animals; (iv) any article intended for use as a component of any medicine, substance or article, referred to in subclasses (i), (ii) and (iii).

“Magic remedy” includes a talisman, mantra, kavacha, and any other charm of any kind which is alleged to possess miraculous power for or in the diagnosis, cure, mitigation, treatment or prevention of any disease in human beings or animals or for affecting or influencing in any way the structure or any organic function of the body of human beings or animals.

3.13 Media Laws

Broadcasting is dissemination of information through audio or video. Broadcasting comprising both radio and television constitutes a very large part of the mass media. In India, radio broadcasting (All India Radio) started in the year 1936 and television broadcasting (Doordarshan) was introduced in the year 1959. For a long time, broadcasting in India was under the Control of Government till Prasar Bharti (Broadcast Corporation of India) Act, 1990 was framed to provide autonomy to All India Radio and Doordarshan. A change in the policy of the Indian Government in the early 1990s resulted in mushrooming of private television channels and Cable Television Network (Regulation) Act, 1995 was framed to regulated them.

3.13.1 The Prasar Bharati (Broadcasting Corporation of India) Act, 1990

The Prasar Bharti Act, 1990 The Prasar Bharti Act establishes a legal framework for public broadcasting in India. The Act provides the Prasar Bharti Corporation as the principal public broadcasting agency. It is an Act to provide for the establishment of Broadcasting Corporation for India, to be known as Prasar Bharati, to define its composition, functions and powers and to provide for matters connected therewith or incidental thereto.

3.13.2 The Cable Television Networks (Regulation) Act, 1995

Cable Network Act, 1995 The cable television networks (Regulation) Act, 1995 regulates the operation of cable television networks in India. The Act was amended in 2003 to require cable operators to sue ‘addressable systems’ also called (CAS) conditional

access systems based on satellite. It is an Act to regulate the operation of cable television networks in the country and for matters connected therewith or incidental thereto.

Broadcasting Services Regulations Bill, 2006 The government also announced a new broadcasting Bill. The will establish a broadcasting regulatory authority to regulate broadcasting and cable service. The object of the bill is as follows:

To promote, facilitate and develop in an orderly manner the carriage and content of broadcasting,

To provide for regulation of broadcasting services in India for offering a variety of entertainment, news, views and information in a fair, objective and competitive manner and to provide for regulation of content for public viewing and matters connected therewith or incidental thereto.

To provide for the establishment of an independent authority to be known as the Broadcast Regulatory Authority of India for the purpose of regulating and facilitating development of broadcasting services in India.

Whereas airwaves are public property and it is felt necessary to regulate the use of such airwaves in national and such public interest, particularly with a view to ensuring proper dissemination of content and in the widest possible manner;

Whereas Government has issued guidelines from time to time, with the approval of the Union Cabinet, for regulating the Broadcasting Services and it is felt necessary to give a statutory effect to these guidelines with retrospective effect

3.14 The Film Media

The important regulation related to film media in India is Cinematograph Act, 1952. The others include The Cinematograph (Certification) Rules, 1983. Those related to Cine Workers are The Cine-Workers and Cinema Theatre Workers (Regulation of Employment) Rules, 1984, The Cine-Workers Welfare Cess Act, 1981, The Cine-Workers Welfare Cess Rules, 1984, The Cine-Workers Welfare Fund Act, 1981 and The Cine-Workers Welfare Fund Rules, 1984.

3.14.1 Cinematograph Act, 1952

The salient features of the Act are as follows :

Section 3. Board of Film Censors

- (1) For the purpose of sanctioning films for public exhibition, the Central Government shall, by notification in the official gazette, constitute a Board to be called the Board of Film Certification having not less than twelve and not more than twenty five other members.

Section 4. Examination of films and 5.A Certification of films

Any person desiring to exhibit any film shall in the prescribed manner make an application to the Board for a certificate. The Board may, after examining either;

- A. Sanction the film for unrestricted public exhibition (in which case certificate will be U).
- B. If the board is of the opinion that whether children below the age of twelve years should watch the film should be considered by their parents, the Board may sanction the film for unrestricted public exhibition with an endorsement to that effect (certificate UA).
- C. Sanction the film for public exhibition restricted to adults (certificate A).
- D. Sanction the film for public exhibition restricted to members of any profession or any class of persons, depending upon the nature, content and theme of the film (certificate S).
- E. Direct the applicant to carry out certain decisions or modifications in the film before sanctioning the film for public exhibition under any of the foregoing clauses; (or)

Refuse to sanction the film for public exhibition

3.15 Telecommunication Laws

3.16 Constitution and communication Law

The Constitution of India has a significant influence over the regulatory and legal framework for communication. The impact of Constitution law on communication classified in to four categories. *First*, under India's federal system¹⁴², the Constitution of India ordains whether and to what extent the centre and the states have competence to

¹⁴² India is a federation which comprises of the Union, various States and Union Territories¹⁴². The Constitution apportions executive and legislative power between the Union and States¹⁴². Parliament which is the Union legislature, can make law for the any part of India¹⁴². As a default rule, the union gets to make and implement laws for any matters that are not expressly included in any of the three lists in the Seventh Schedule¹⁴² contains point, the Supreme Court has described India as federation with a bias to the center, although states are supreme within their assigned competences

regulate, controls and tax communication¹⁴³. *Second* the Constitution protects citizens and other persons from arbitrary and subversive state action by guaranteeing them certain fundamental rights. This guarantees the right to freedom of speech and expression. *Third*, a set of Constitutional provisions called the directive principle about appropriate role of the state in economic matters including the provision of communication service. *Finally*, the Constitution's guarantee of Equal protection of administrative law principals that affect the manner in which licensing and regulatory decisions are made.

3.16.1 Union Government responsibility for Communication

The Constitution assigns all legislative and executive power over communication to the Union: only parliament can make law to govern and regulate communication. The seventh schedule entry 31 in Union List: Post and telegraphs; telephones, wireless, broadcasting and other like forms of communication.

It gives the Union the ability to make laws for new Technologies and service that developed over time. Therefore; although the Internet and satellite are not expressly mentioned in entry 31 as they constitute other like forms of communication¹⁴⁴.

States are forbidden from directly regulation communication because Art-240 Provides that parliament has exclusive power to enact laws for items, such as entry-31 Union List. It should be noted that entry 13 in the state list also was on term communication that entry focuses on physical means of communication such as roads, bridges. It does not cover electronic Radio visual communication, which is the subject of Union List entry 31¹⁴⁵.

3.16.2 State and Local Regulation on Communication

Although central Government plays a dominant role in regulating communication, but State and Local Government are also important players in the regulatory landscape for several aspects. First; state government are responsible for enforcing various Central statutes as part of their General responsibility to maintain law and order in their territories second, state health and safety laws can affect the operations of telecom and communication network third, state levy a significant amount of sales, entertainment tax on communication services.

¹⁴³. S.R. Bommai, Vs Union of India, AIR 1994 SC. 1918.

¹⁴⁴. Gujarat Cable T.V. operators Vs state of Gujarat AIR 1999 Guj. 330.

¹⁴⁵. Bharat Shantilal Shah Vs state of Maharashtra (2002) 1 BOM. L.R. 529. Seventh Schedule (Art. 246) List-I Entry 31. Post and Telegraphs ; telephones, wireless, Broadcasting and other like forms Communication.

3.16.3 Public order, law enforcement function and communication Law and order is a state subject¹⁴⁶. There for state police and law enforcement agencies are usually responsible for implementation of central law like Telegraph and communication laws. The case on point recent controversy over the condition Accuses system (CAS) satellite based cable Television.

In case of **PUCL Vs Union of India**¹⁴⁷ Supreme Court held that the state law enforcement agencies have to monitor and intercept communication.

3.17 Fundamental Rights and Communication

The Constitution protects every activity and, in some cases all person against state action that violates the fundamental right in part III of the Constitution fundamental rights, and it is important to obtain a basic understanding of these rights.

3.17.1 Equality and equal Protection of laws

Article 14 of the Constitution provides that the state shall not deny to any person equality before law equal protection of the laws within the Territory of India. This article is of great importance to communication. All government development and regulatory agencies must act consistently, fairly and reasonably according to Supreme Court, equality is antithesis to arbitrariness¹⁴⁸.

3.17.2 Freedom of Speech and Expression: Life and personal liberty

The Constitution of India includes various basic freedoms in Art, 19. The right freedom of speech and expression in Art, 19(1)(a). This Article is of tremendous significant to communication, it read as follows: All citizens shall have the right- (a) to freedom of speech and expression.

Unlike the more recent South African Constitution, India is Constitution does not expressly recognize media freedom¹⁴⁹. Life and personal liberty: The Constitution of India provides that no person shall be deprived of life or personal liberty except according to procedure established by Law¹⁵⁰. We are of the view that to have a communication telephone, satellite phone as connection from the government nowadays

¹⁴⁶. See, The constitution of India, Sch. VII, List-II, Entry 1. Public order [but not including (the use of any Naval, military or air force or any other armed force of the Union or of any other force subject to the control or of any contingent or unit thereof in aid of civil power)] 2. Police (including railway and village police) Subject to the entry of List-I.

¹⁴⁷. AIR 1997 S.C. 368.

¹⁴⁸. E.P. Royappa Vs State of Tamil Nadu AIR 1974 SC 555.

¹⁴⁹. The Constitution of the Republic of South Africa, Sec. 16(1)(a). However Indian judiciary has inserted media rights as part of Art. 19(1)(a) through interpretation some of the cases are; Romesh thoper case

¹⁵⁰. See, The constitution of India, Part-III, Art. 21 Protection of life and personal liberty – No Person shall be deprived of his life or personal liberty except according to procedure established by Law.

is a necessity in order to lead a meaningful life within the meaning of Act 21 of the Constitution of India¹⁵¹.

3.17.3 Right to Communicate and telecast

The Supreme Court decision Cricket Association¹⁵² was a defining event in the evolution of India free speech jurisprudence. In this case Supreme Court recognized and strong linkage between Act 19(1) (a)¹⁵³ and Broadcasting communication freedom.

3.17.4 Restriction of free speech and communication

Article 19(2) provide that the government of was impose reasonable restrictions on free speech and explosions in the interest of India's sovereignty and integrity, state security, friendly relation with Foreign states, public order, decency, morality contempt of Court defamation and incitement of an offence.

3.18 Statutory Framework and communication

3.18.1 Indian Telegraph Act, 1885

Indian communication law started from the Indian Telegraph Act, 1885. This statute was passed by British Government for India and electric Telegraph were the Principal means of electronic communication. Although the Telegraph Act is more than 120 years old, it remains the principal pillars of the regulatory framework for communication. The statute, legal rule and regulatory provisions are organized around the concept of a Telegraph. This term is capaciously defines in the Act this definition covers within it most modern form of communication including landline telephone, cellular service, satellite Radio and the internet. However, statutes such as the telegraph Act, that regulate technology and scientific matters must be given a progressive construction to accommodate new inventions and innovations that arise after the first enacted¹⁵⁴.

3.18.2 Telecom Regulatory Authority of India Act, 1997

Telecom Regulatory Authority of India Act is a key element in the regulatory framework for Indian communication. The TRAI Act builds upon and establishes the telegraph Act is basic legal architecture. Its main objective was to establish an independent

¹⁵¹. Francis coralie Vs State of Delhi AIR 1981 SC 746.

¹⁵². Secretary, Ministry of Information and Broadcasting Vs Cricket Association of Bengal AIR 1995 SC 1236

¹⁵³. See, Constitution of India, Article 19 Protection of certain rights regarding freedom of speech, etc. – (1) All citizens shall have the rights – (a) to freedom of speech and expression.

¹⁵⁴. Senior Electric Inspector Vs Laxmi narayan Chopra AIR 1962 SC 159.

regulatory system for communication, licenses and to protect consumers. The Act was substantially amended in 2000 and provides to the establishment of (TDSAT) Telecom Disputes Settlement and Appellate Tribunal exclusive dispute resolution forum for communication. The directions, regulations and recommendations have contributed to the emergence of distinct communications jurisprudence in India¹⁵⁵.

3.18.3 The Telegraph Wires (Unlawful possession) Act, 1950

The telegraph wires (Unlawful possession) Act a penal statute designed to curb the theft of copper wires used in telegraph and telephone service¹⁵⁶.

3.18.4 The Wireless Telegraphy Act, 1933 the act deals with wireless equipment like transmitters, cellular phones and radio to obtain a license.

3.18.5 Information Technology Act, 2000

The information technology Act, 2000 This Act not exclusively deals with the communication but some provision of the Act that's includes communication technology¹⁵⁷. This is an Act to provide legal recognition for transactions carried out by means of electronic data interchange and other means of electronic communication, commonly referred to as "electronic commerce", which involve the use of alternatives to paper-based methods of communication and storage of information, to facilitate electronic filing of documents with the Government agencies and further to amend the Indian Penal Code, the Indian Evidence Act, 1872, the Bankers' Books Evidence Act, 1891 and the Reserve Bank of India Act, 1934 and for matters connected therewith or incidental thereto.

Whereas the General Assembly of the United Nations by resolution. A/RES/51/162, dated the 30th January, 1997 has adopted the Model Law on Electronic Commerce adopted by the United Nations Commission on International Trade Law; and where as the said resolution recommends inter alia that all State give favorable consideration to the said Model Law when they enact or revise their laws, in view of the need for uniformity of the law applicable to alternatives to paper-based methods of communication and storage of information; and whereas it is considered necessary to give

¹⁵⁵. Krishnalal Shridharan, Story of Indian telegraph: A century of progress, Post and Telegraph Department 1993.

¹⁵⁶. Vikram Raghavan, Communication Law in India, Lexis Nexis, Butterworths, Wadhwa Nagpur p. 7.

¹⁵⁷. S.4 of Information Technology Act, 2000 provides definition of Computer Networks-Means the interconnection of one or more computers or computer system or communication device through-

(i) The use of satellite, microwave, wire, wireless are other communication media.

(ii) Terminals or a computer consisting two or more inter connected computers or communication device.

effect to the said resolution and to promote efficient delivery of Government services by means of reliable electronic records.

3.18.6 Electronic governance

Section 4. Legal recognition of electronic records ; Where any law provides that information or any other matter shall be in writing or in the type written or printed form, then, notwithstanding anything contained in such law, such requirement shall be deemed to have been satisfied if such information or matter is, -

- (a) Rendered or made available in an electronic form; and
- (b) Accessible so as to be usable for a subsequent reference.

3.18.6.1 Penalties and Adjudication

This Act deals with two types of wrongs, the civil wrongs and the offences. While the civil wrongs are covered by Section 43-45, the offences are mentioned in Section 65-81.

Section 43. Penalty for damage to computer, computer system, etc

If any person without permission of the owner or any other person who is in charge of a computer, computer system or computer network,-

- (a) accesses or secures access to such computer, computer system or computer network;
- (b) downloads, copies or extracts any data, computer data base or information from such computer system or computer network including information or data held or stored in any removable storage medium;
- (c) introduces or causes to be introduced any computer contaminant or computer virus into any computer, computer system or computer network;
- (d) damages or causes to be damaged any computer, computer system or computer network, data, computer data base or any other programmes residing in such computer, computer system or computer network;
- (e) disrupts or causes disruption of any computer, computer system or computer network;
- (f) denies or causes the denial of access to any person authorized to access any computer, computer system or computer network by any means;

- (g) provides any assistance to any person to facilitate access to a computer, computer system or computer network in contravention of the provisions of this Act, rules or regulations made there under;
- (h) charges the services availed of by a person to the account of another person by tampering with or manipulating any computer, computer system, or computer network;

he shall be liable to pay damages by way of compensation not exceeding one crore rupees to the person so affected.

Section 44. Penalty for failure to furnish information return, etc.

If any person who is required under this Act or any rules or regulation made there under to,-

- (a) furnish any document, return or report to the Controller or the Certifying Authority fails to furnish the same, he shall be liable to a penalty not exceeding one lakh and fifty thousand rupees for each such failure;
- (b) file any return or furnish any information, books or other documents within the time specified therefore in the regulations fails to file return or furnish the same within the time specified therefore in the regulations, he shall be liable to a penalty not exceeding five thousand rupees for every day during which such failure continues;
- (c) Maintain books of account or records, fails to maintain the same, he shall be liable to a penalty not exceeding ten thousand rupees for every day during which the failure continues.

3.18.2 Offences

Section 65. Tampering with computer source documents

Whoever knowingly or intentionally conceals, destroys or alters or intentionally or knowingly causes another to conceal, destroys or alters any computer source code used for a computer, computer programme, computer system or computer network, when the computer source code is required to be kept or maintained by law for the time being in force, shall be punishable with imprisonment up to years, or with fine which may extend up to two lakh rupees, or with both.

Explanation: For the purposes of this section, “computer source code” means the listing of programmes, computer commands, design and layout and programme analysis of computer resource in any form.

Section 66: Hacking with computer system

- (1) Whoever with the intent to cause or knowing that he is likely to cause wrongful loss or damage to the public or any person destroys or deletes or alters any information residing in a computer resource or diminishes its value or utility or affects it injuriously by any means, commits hack:
- (2) Whoever commits hacking shall be punished with imprisonment up to three years, or with fine which may extend upto two lakh rupees, or with both.

Section 67 Publishing of information which is obscene in electronic form

Whoever publishes or transmits or causes to be published in the electronic form, any material which is lascivious or appeals to the prurient interest of if its effect is such as to tend to deprave and corrupt persons who are likely, having regard to all relevant circumstances, to read, see or hear the matter contained or embodied in it, shall be punished on first conviction with imprisonment of either description for a term which may extend to five years and with fine which may extend to one lakh rupees and in the event of a second or subsequent conviction with imprisonment of either description for a term which may extend to ten years and also with fine which may extend to two lakh rupees.

3.19 Miscellaneous Statutory Laws

3.19.1 Indian Penal Code, 1860

Indian Penal Code covers almost all the crime happening in the society. It is a piece of British colonial legislation dating from 1860. Now it provides a penal code for the entire country including Jammu and Kashmir, where it was renamed the Ranbir Penal Code (RPC). The code could be applied to any offence committed by an Indian citizen anywhere and on any Indian registered ship or aircraft (This law does not however apply to the armed forces or supersede any other acts). The draft of the Indian Penal Code was prepared by the First Law Commission, chaired by Lord Macaulay. The draft, after it underwent a very careful revision, was passed into law in 1860. Indian Penal Code came into force and is regularly amended. The code has a total of 511 Sections covering various aspects of the criminal law.

Section 124A. Sedition

Section 153A. Promoting enmity between different groups on grounds of religion, race, place of birth, residence, language, etc., and doing acts prejudicial to maintenance of harmony

153B. Imputations, assertions prejudicial to national integration

Section 171G. False statement in connection with an election

Section 292. Sale, etc., of obscene books, etc.

Section 293. Sale, etc., of obscene objects to young person

Section 295A. Deliberate and malicious acts, intended to outrage religious feelings of any class by insulting its religion or religious beliefs

Section 499. Defamation **Section 500.** Punishment for defamation

Section 501. Printing or engraving matter known to be defamatory

Section 505. Statements conducing to public mischief

3.19.2 Criminal Procedure code, 1973

The Code of Criminal Procedure, 1973 deals with many offences. Bail able (the accused has the right to get bail) and no-bail able offences (the decision to grant bail or not is the decision of the Court), cognizable (the police officer can arrest an offender without a warrant) and non-cognizable (the police officer cannot arrest without a warrant) offences, compoundable (can be compromised by the parties to the dispute) and non-compoundable (those which cannot be compromised by any means) offences. In both Indian Penal Code and Criminal Procedure Code, certain provisions specifically deal with media. This chapter provides an account of those portions which are relevant to media. The following provisions of the Criminal Procedure Codes, 1973 are relevant to media.

Section 91. Summons to produce document or other thing

1. **Section 93.** When search warrant may be issued
2. **Section 95.** Power to declare certain publications forfeited and to issue search-warrants for the same
3. **Section 108.** Security for good behaviour from persons disseminating seditious matters

4. **Section 144.** Power to issue order in urgent cases of nuisance or apprehended danger
5. **Section 196.** Prosecution for offence against the State and for criminal conspiracy to commit such offence
6. **Section 199.** Prosecution for defamation
7. **Section 327.** Court to be open
8. **Section 345.** Procedure in certain cases of contempt
9. **Section 349.** Imprisonment or committal of person refusing to answer or produce document

3.19.3 Official Secrets Act, 1923

To combat the nefarious act of spying, the Government had been adopting various measures by making various provisions in different laws. The first step in this direction was the enactment of the Indian Official Secrets Act, 1889 which was amended by the Indian Official Secrets (Amendment) Act, 1904. Later, the Official Secrets Act, 1911, a British Act was brought into force in India. But it has been recognized that it is unsatisfactory to have two separate laws in force simultaneously in India. Further, although the British Act of 1911 was in force in India, difficulties arose in applying it because of the use in it of English common law terms and so on. For these reasons it was felt desirable that these should be a single consolidated Act applicable to Indian condition. To consolidate and amend the law relating to official secrets, the Official Secrets Bill was put before the Legislature. It was passed in the year 1923. This Act is of importance to journalists also, as it deals with 'wrongful communication'. The objective of the official Secrets Act is to consolidate and amend the law related to official secrets.

3.19.4 The Juvenile Justice (Care and Protection) Act, 2000

This Act is restricted media freedom in matter relating to juvenile.

3.19.5 The Indecent Representation of Women (Prohibition) Act, 1986

Section 3 of this Act state that: (Prohibition of advertisement containing indecent representation of women)- No person shall publish ,or cause to be published ,or arrange or take part in the publication or exhibition of, any advertisement which contains indecent representation of women in any form.

3.19.6 The Contempt of Courts Act, 1971

The jurisdiction to punish for contempt of Courts touches upon two important fundamental rights of the citizens, namely, the right to personal liberty and the right to freedom of expression. It was, therefore, considered advisable to have the entire law on the subject scrutinized by a special committee. In pursuance of this, a committee was set up in 1961 under the chairmanship of the late Shri H.N. Sanyal, the then Additional Solicitor General. The committee made a comprehensive examination of the law and problems relating to contempt of Court in the light of the position obtaining in our own country and various foreign countries. The recommendations which the committee made took note of the importance given to freedom of speech in the Constitution and of the need for safeguarding the status and dignity of Courts and interests of administration of justice. The recommendation of the committee have been generally accepted by Government after considering the view expressed on those recommendations by the State Governments, Union Territory Administrations, the Supreme Court, the High Court and the Judicial Commissioners. After it was enacted, the Contempt of Courts Act gave effect to the accepted recommendations of the Sanyal Committee.

According to this Act, contempt could be civil or criminal.

Section 2(a) “contempt of Court” means civil contempt or criminal contempt;

Section 2(b) “civil contempt” means willful disobedience to any judgment, decree, direction, order, writ or other process of a Court or willful breach of an undertaking given to a Court;

Section 2(c) “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 –

- (i) Scandalizes, or tends to scandalize, or lowers or tends to lower the authority of, any Court; or
- (ii) prejudices, or interferes or tends to interfere with, the due course of any judicial proceeding; or
- (iii) interferes or tends to interfere with, or obstructs or tends to obstruct, the administration of justice in any other manner;

Section 2(d) “High Court” means the High Court for a State or a Union territory, and includes the Court of the Judicial Commissioner in any Union territory.

Section 3. Innocent publication and distribution of matter not contempt

- (1) A person shall not be guilty of contempt of Court on the ground that he has published (whether by words, spoken or written, or by signs, or by visible representations, or otherwise) any matter which interferes or tends to interfere with, or obstructs, or tends to obstruct, the course of justice in connection with any civil or criminal proceeding pending at that time of publication, if at that time he had no reasonable grounds for believing that the proceeding was pending.
- (2) Notwithstanding anything to the contrary contained in this Act or any other law for the time being in force, the publication of any such matter as is mentioned in sub-section (1) in connection with any civil or criminal proceeding which is not pending at the time of publication shall not be deemed to constitute contempt of Court.
- (3) A person shall not be guilty of contempt of Court on the ground that he, has distributed a publication containing any such matter as is mentioned in sub-section (1), if at the time of distribution he had no reasonable grounds for believing that it contained or was likely to contain any such matter as aforesaid:

Provided that, this sub-section shall not apply in respect of the distribution of

- (i) any publication which is a book or paper printed or published otherwise than in conformity with the rules contained in Section 3 of the Press and Registration of Books Act, 1867, (25 of 1867);
- (ii) Any publication which is a newspaper published otherwise than in conformity with the rules contained in Section 5 of the said Act.

Section 4. Fair and accurate report of Judicial proceeding not contempt

Subject to the provisions contained in Section 7 of this Act, a person shall not be guilty of contempt of Court for publishing a fair and accurate report of a judicial proceeding or any stage thereof.

Section 5. Fair criticism of judicial act not contempt

A person shall not be guilty of contempt of Court for publishing any fair comment on the merits of any case which has been heard and finally decided.

Section 7. Publication of information relating to proceeding in chambers or in camera not contempt except in certain cases

(1) notwithstanding anything contained in this Act, a person shall not be guilty of contempt of Court for publishing a fair and accurate report of a judicial proceeding before any Court sitting in chambers or in camera except in the following cases, that is to say,-

(a) where the publication is contrary to the provisions of any enactment for the time being in force;

(b) where the Court, on ground of public policy or in exercise of any power vested in it, expressly prohibits the publication of all information relating to the proceeding of information of the description which is published;

(c) where the Court sits in chambers or in camera for reason connected with public order or the security of the State, the publication of information relating to those proceedings;

(d) Where the information relates to a secret process, discovery or invention which is an issue in proceedings.

(2) Without prejudice to the provisions contained in sub-section (1), a person shall not be guilty of contempt of Court for publishing the text or a fair and accurate summary of the whole or any part, of an order made by a Court sitting in chambers or in camera, unless the Court has expressly prohibited the publication thereof on grounds of public policy, or for reasons connected with public order or the security of the State, or on the ground that it contains information relating to a secret process, discovery or invention, or in exercise of any power vested in it.

Section 10. Power of High Court to punish contempt's of subordinate Courts

Every High Court shall have, and exercise, the same jurisdiction, powers and authority, in accordance with the same procedure and practice, in respect of contempt's of Courts subordinate to it as it has and exercises in respect of contempt's of itself:

Provided that no High Court shall take cognizance of Contempt alleged to have been committed in respect of a Court subordinate to it where such contempt is an offence punishable under the Indian Penal Code (45 of 1860).

Section 12. Punishment for Contempt of Court

- (1) Save as otherwise expressly provided in this Act or in any other law, a contempt of Court may be punished with simple imprisonment for a term which may extend to six months, or with fine which may extend to two thousand rupees, or with both:

Provided that the accused may be discharged or the punishment awarded may be remitted on apology being made to the satisfaction of the Court. (An apology shall not be rejected merely on the ground that it is qualified or conditional if the accused makes it bona fide).

- (2) Notwithstanding anything contained in any law for the time being in force, no Court shall impose a sentence in excess of that specified in sub-section (1) for any contempt either in respect of itself or of a Court subordinate to it.
- (3) Notwithstanding anything contained in this section, where a person is found guilty of a civil contempt, the Court, if it considers that a fine will not meet the ends of justice and that a sentence of imprisonment is necessary shall, instead of sentencing him to simple imprisonment, direct that he be detained in a civil prison for such period not exceeding six months as it may think fit.
- (4) Where the person found guilty of contempt of Court in respect of any undertaking given to a Court is a company, every person who, at the time the contempt was committed, was in charge of, and was responsible to the company for the conduct of business of the company, as well as the company, shall be deemed to be guilty of the contempt and the punishment may be enforced, with the leave of the Court, by the detention in civil prison of each such person:

Provided that nothing contained in this sub-section shall render any such person liable to such punishment if he proves that the contempt was committed without his knowledge or that he exercised all due diligence to prevent its commission.

3.19.7 The Right to Information Act, 2005

The Government also decided to repeal the Freedom of Information Act, 2002 and The Right to information Act, 2005¹⁵⁸ passed with provide an effective framework for effectuating the right of information recognized under Article 19 of the Constitution of India.

3.19.8 Freedom of media, Sting Operation and the Public Interest Discloser (Protection of Information) Bill, 2002

The Public Interest Discloser (Protection of Information) Bill, 2002¹⁵⁹ introduced in parliament which gives protection to the person who discloses information relating to the conduct of any public servant including the commission of any offence made in public interest. In other countries like U.S.A., U.K. and Australia¹⁶⁰ have protection of information laws are known as whistle blowers Laws. The investigative journalism and sting operation I part of whistle blowing activity¹⁶¹.

3.20 The Media Council Bill, 2010

Media is a social instrument that is powerful enough to mould a society, to develop and destruct it. It is a force that could be put to much constructive use in the right hands. Every democracy gets the government it deserves and every society, its media. In a country with as robust and multi-faceted a freedom of expression as India, media plays a very significant role in balancing interests of public and exercise its powers.

It is needless to mention that media is called the fourth pillar of democracy and derives all its rights from the wider interpretation of Article 19 (1) (a) of Constitution, which talks about freedom of speech and expression. Thus, press freedom is not a gift from the government, it's guaranteed by Constitution. Recently this freedom of press has been in controversy for reasons like 'paid news', Media Trial, for twisting facts, for invasion of privacy and so on and so forth.

Interestingly, from the perspective of many Indian laws, the Indian news media is already perhaps the most regulated amongst the advanced democracies. According to the freedom

¹⁵⁸ The Act passed by Lok Sabha on 11th May, 2005 and by Rajya Sabha on 12th in May, 2005 received the assent of President on 15th June, 2005.

¹⁵⁹ This Bill has been introduced accordance with the 179th Report of the Law Commission of India in Dec.14, 2001. Justice B.P.Jeavan Reddy was the Chairman of the Commission at that time.

¹⁶⁰The Whistler Blower Protection Act,1989(U.S.A.),Public Intrest Disclosure Act, 1948(U.K.) The Australian Service Public Bill,1999

¹⁶¹ In India The Tehalka exposure of Dileep Singh Judeo incident and acceptance of money by the member of parliament for raising question in the parliament re the instance of whistle blowing

of the press 2011 study, India ranks 79th and is categorized as 'partly free'. Any further regulation of the media would effectively undermine individual liberties that are so essential to a democracy. Even so, the Media Council Bill, 2010, has been drafted to regulate the Indian media.

3.21 Electronic Technology and Media Convergence Laws

3.21.1 Electronic communication and media

The Electronic and satellite communication covers- T.V., radio, internet, satellite internet access, satellite phone, satellite radio, satellite television, satellite navigation, weather satellite, earth observation satellites, research satellite etc. Space stations and human space craft in orbit are also satellite.

The world has become a global village through satellite communication. Communication satellite frequently called birds or teacher's in sky' are merely orbiting solar powered relay stations. They receive up linked, signals from special satellite, earth stations equipped with suitable transmitters and dishes, which retransmit the signals earth worlds as the speed of light.

Satellite broadcasting implies the direct reception of radio and television programming through dish antenna. In India the most common form of satellite television is direct-to-home (DTH).

3.21.2 Communication convergence Bill

Communication Convergence Bill: A legislative proposal is pending in parliament since 2000 called the communication convergence Bill¹⁶². The main propose of this law is to create a single regulatory and licensing umbrella for all type of telecommunication and communications broadcasting and cable services. It would replace following statutes:-

- The Indian telegraph Act 1885
- The Indian wireless telegraphy Act 1933.
- The India wireless (Unlawful possession) Act 1950.
- The telecom regulatory authority of India Act, 1997.
- The cable television networks (Regulation) Act, 1995.

¹⁶². The communication convergence Bill, 2000 reprinted in 2001.

The Communications Convergence Bill, 2001 (“Convergence Bill”) aims at promoting, facilitating and developing the carriage and content of communications including broadcasting, telecommunication and multimedia in an orderly manner. It recognizes the coming together of voice, video and data, aims to set up a single super-regulator for the telecom, Internet and broadcasting sectors, to be called the Communications Commission of India (“CCI”).¹⁶³The Convergence Bill will replace the Indian Telegraph Act, 1885, the Indian Wireless Telegraphy Act, 1933, the Telegraph Wires (Unlawful Possession) Act, 1950, the Cable Television Networks (Regulation) Act, 1995 and the TRAI Act, 1997.¹⁶⁴The Convergence Bill also provides for a new licensing regime, with a limited number of five licenses, which include network infrastructure facilities¹⁶⁵, networking services,¹⁶⁶network application services,¹⁶⁷content application services¹⁶⁸and value-added network application services.¹⁶⁹While granting licences, the CCI may grant them either singly or jointly, depending upon the nature of services to be offered. Therefore, while providing Internet telephony services, the service provider would have to obtain the network application services licence and probably the value-added network application services licence under the Convergence Bill. Presently, the Convergence Bill is before the Standing Committee on Information Technology. The Committee is likely to finalize its recommendations by May 2002. The Standing Committee is also expected to examine issues such as direct-to-home television broadcasting, quality of electronic media programming, problems and requirements of the information technology industry, human resource development in information technology as well as the expansion of telecom networks with special focus on rural and remote areas.The Prasar Bharti Act is not covered under the Bill. The proposed law would establish the communication commission of India as the super regulator of India communication systems with both power regulatory and licensing functions. The Bill also proposed to create a commission appellate tribunal to hear appeals from the communication commission’s decision.

¹⁶³ Clauses 6 to 22 of the Convergence Bill deal with the establishment, objectives, powers, duties and functions of the CCI.

¹⁶⁴ Clause 93 of the Convergence Bill.

¹⁶⁵ Clause 26(a) of the Convergence Bill. They include earth station, cable infrastructure, wireless equipments, towers, posts, ducts and pits used in conjunction with other communication infrastructure, and distribution facilities including facilities for broadcasting distribution.

¹⁶⁶ Clause 26(b) of the Convergence Bill. They include bandwidth services, fixed links and mobile links

¹⁶⁷ Clause 26(c) of the Convergence Bill. They include public switched telephony, public cellular telephony, global mobile personal communication by satellite, internet protocol telephony, radio paging services, public mobile radio trunking services, public switched data services and broadcasting (radio or television service excluding continued)

¹⁶⁸ Clause 26(d) of the Convergence Bill. They include satellite broadcasting, subscription broadcasting, terrestrial free to air television broadcasting and terrestrial radio broadcasting.

¹⁶⁹ Clause 26(e) of the Convergence Bill. Information technology enabled services such as call centers, electroniccommerce, tele-banking, tele-education, tele-trading, tele-medicine, videotex and videoconferencing shall not be licensed under this Act.

3.22 Government policies and Programmes

3.22.1 Freedom of Press and Freedom of Information and the National Commission to Review the Working the Constitution (N.C.R.W.C)

Article 19(1)(a) refers to ‘freedom of speech and expression’. It is proposed that the article must expressly include the freedom of the press and other media, the freedom to hold opinion and to seek, receive and impart information and ideas. It is also proposed to amend article 19(2) by adding a further restriction on disclosure of information received in confidence except if required in public interest. The Commission recommends that article 19(1)(a)¹⁷⁰ and (2)¹⁷¹ be amended .

A mere legislation by the Parliament by amending the Contempt of Courts Act, 1971 alone may not suffice because the power of the Supreme Court and the High Courts to punish for contempt is recognized in the Constitution. Therefore, the Commission recommends that an appropriate proviso to article 19(2) of the Constitution may be added as under:-

“Provided that, in matters of contempt, it shall be open to the Court to permit a defence of justification by truth on satisfaction as to the bona fides of the plea and it being in public interest.”

3.22.2 Media Freedom and Regulation

Under the Constitution of India, Media, Press, telecom, broadcasting and cable service are regulated by the union government. The following agencies involved in communication regulation.

- Press Council of India
- Telecom regulatory authority of India (TRAI)
- Department of telecommunication (DoT)
- Telecom commission and Prime Minister Office¹⁷².
- Telecom disputes settlement and appellate tribunal (TDSAT).
- Ministry of Information and Broadcasting.

¹⁷⁰ Art. 19(1): All citizens shall have the right -(a) to freedom of speech and expression which shall include the freedom of the press and other media, the freedom to hold opinions and to seek, receive and impart information and ideas;”.

¹⁷¹ 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, 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, or preventing the disclosure of information received in confidence except when required in public interest.”.

¹⁷². Charu Malhotra, Chronology perspective of telecommunication infrastructure develops in India, IJPA No. 3 Vol. 47, 2001.

- Prasar Bharti Corporation.
- Advertising Slandered Council of India (ASCI)
- All India Newspaper Editors’s Conference (AINCE)Code
- Code for Commercial
- News Broadcasters Association
- Advertising Council of India
- Advertising Agencies Association of India
- The Central Board for Film Certification (CBFC)

3.23 MEDIA LAW: INTERNATIONAL PERSPECTIVE

The right to freedom of expression is a fundamental human right; fundamental both in the sense of its central importance to human life and dignity but also because it is the essential underpinning of all human rights – including the right to participate in political life – due to its crosscutting nature as well as its role in ensuring the effective protection of rights. It is a freedom that includes the right to express controversial opinions in public; the mere fact that an idea is unpopular cannot justify preventing a person from expressing it. Freedom of expression is not, however, limited to the right to express oneself. It also includes the right to seek and receive information from others including the right to obtain and read newspapers, to listen to broadcasts, surf the internet, and of course, to participate in discussions, public and private, as a listener. It is increasingly being recognised that the right includes the right to access information held by public authorities. As such, it places a duty on these bodies to both disseminate information of key public importance and to respond to requests for access to publicly held information.

Freedom of expression has long been viewed as the cornerstone of democracy and fundamental freedoms. At the beginning of 2010, the four ‘special international mandates for promoting freedom of expression’¹⁷³ confirmed in a joint statement “ *the fundamental importance of freedom of expression – including the principles of diversity and pluralism – both inherently and as an essential tool for the defence of all other rights and as a core element of democracy.*”¹⁷⁴

¹⁷³. The four special international mandates on freedom of expression are the UN Special Rapporteur for the promotion and protection of the Right to Freedom of opinion and expression (“UN Special Rapporteur on Freedom of Expression”), the Organisation for Security and Co-operation in Europe (OSCE) Special Rapporteur for Freedom of Expression, the Organization of American States (OAS) Special Rapporteur For Freedom of Expression, and the African Commission on Human and People’s Rights (ACHPR) Special Rapporteur on Freedom of Expression and Access to Information.

¹⁷⁴. UN Special Rapporteur on Freedom of Expression, OSCE Special Rapporteur on Freedom of Media, OAS Special Representative for Freedom of Expression and ACHPR Special Rapporteur on Freedom of Expression and Access to Information, Tenth Anniversary Joint Declaration: Ten Key Challenges to Freedom of Expression in the Next Decade, 3 February 2010, available at: http://www2.ohchr.org/english/bodies/hrcouncil/docs/14session/A.HRC.14.23.Add.2_en.pdf.

Freedom of expression is important for three main reasons. First, it is a key right for ensuring individual dignity. It gives people autonomy to express themselves as they see appropriate and exchange ideas with others so as to obtain a better understanding of themselves and the society around them.¹⁷⁵

Second, freedom of expression, as noted in the statement of the special international mandates above, is essential to democracy. Without the ability to express their views freely, access information and assemble together to address issues of common concern, people are unable to influence government, participate in decision-making and hold government to account all of which are vital tenets of democracy.¹⁷⁶ Freedom of expression also bolsters democracy by providing a tool for accountability. Scrutiny of the government, and the opposition, by the media, civil society actors and citizens is an important mechanism for curtailing corruption and dishonesty. Freedom of expression thus plays an essential role in improving democratic governance and is vital for the progressive development of democracy. Third, freedom of expression is not only important as a right in itself but it is the fundamental guarantor of all other human rights. Without the space to exercise freedom of expression it becomes increasingly difficult to protect and promote other human rights and bring to light violations of those rights.

The right to freedom of opinion and expression is defined and protected under both international and domestic law. Some limitations on the right are permitted. However, in spite of these ratifications and incorporations, restrictions on the right to freedom of expression that are incompatible with human rights principles continue to exist.

The League of Nations originally made the earliest attempt at producing a multilateral instrument on information – the International Convention Concerning the use of Broadcasting in the Cause of Peace of 1936.¹⁷⁷ According to this Convention, states have a right to control and if necessary suppress information transmitted by radio broadcasting. The League's stance on information was more of an effort at suppression rather than support for openness. It was only after 1945 that freedom of expression and information made a debut in the international governance and democracy arena. Indeed the formation of the UN was coupled with a general concern for individual human rights. At

¹⁷⁵. ARTICLE 19, Central Asian Pocketbook on Freedom of Expression (London: ARTICLE 19, October 2006), p. 21, available at: <http://www.article19.org/pdfs/tools/central-asian-pocketbook.pdf>.

¹⁷⁶. Ibid., pp. 21 – 22.

¹⁷⁷. Inger Osterdahl, "Freedom of Information in Question: Freedom of Information in International Law and the Calls for a New World Information and Communication Order (NWICO)," *The International and Comparative Law Quarterly*, 43, No. 2 (April 1994): 476.

the time, the predominance of the Western liberal attitudes within the newly established UN as well as the emergence of the American news agencies played an instrumental role in shedding light on the need for freedom of information.

Within the UN, freedom of information was recognized as a fundamental right of the people. In 1946, during its first session, the UN General Assembly adopted resolution 59(1) which stated: “Freedom of Information is a fundamental human right and...the touchstone of all the freedoms to which the UN is consecrated.”¹⁷⁸ From its inception, the UN placed great significance to freedom of information especially in summoning the International Conference on Freedom of Information in Geneva in 1948.¹⁷⁹

Moreover, in 1948, the UN General Assembly adopted the Universal Declaration of Human Rights (UDHR), which guarantees the freedom of opinion and expression under Article 19. The adoption of this Declaration was an important milestone that placed the right of access to information at the heart of human rights. The UDHR was reaffirmed by the 1966 legally binding treaty, the International Covenant on Civil and Political Rights (ICCPR).¹⁸⁰ Freedom of information was so fundamental in the UDHR that ICCPR adopted this provision and Article 19 was mirrored in the ICCPR.

More recently, the UN Commissioner on Human Rights has established the office of the “UN Special Rapporteur on Freedom of Opinion and Expression” in 1993 who has worked since then on the right to freedom of information through annual reports, commentaries and statements. Although the UDHR, as a UN General Assembly resolution, is not directly binding on States, Article 19 is now widely regarded as having acquired “legal force as customary international law” since its adoption in 1948.¹⁸¹

3.23.1 The International Bill of Human Rights

The International Bill of Human Rights consists of the Universal Declaration of Human Rights, the International Covenant on Economic, Social and Cultural Rights, and the International Covenant on Civil and Political Rights and its two Optional Protocols.

3.23.2 The Universal Declaration of Human Rights

¹⁷⁸. Article 19 & The British Council, Access to Information Booklet, [publication online] (British Council 2004, accessed 12 January 2008); available from <http://www.britishcouncil.org/governance-foebooklet.doc>, Internet.

¹⁷⁹. Carlos P. Romulo, “UN Freedom of Information Convention: What the Conference Achieved,” United Nations Bulletin, 4, No. 9 (May 1984), 2.

¹⁸⁰. Article 19 & The British Council, Access to Information Booklet, [publication online] (British Council 2004, accessed 12 January 2008); available from <http://www.britishcouncil.org/governance-foebooklet.doc>, Internet.

¹⁸¹. Toby Mendel, National Security and Open Government: Striking the Right Balance (New York: Campbell Public Affairs Institute, Syracuse University, 2003), 4.

The **Universal Declaration of Human Rights** (hereinafter referred as ‘UDHR’) is a declaration adopted by the United Nations General Assembly (10 December 1948 at Palais de Chaillot, Paris). The Declaration arose directly from the experience of the Second World War and represents the first global expression of rights to which all human beings are inherently entitled. It consists of 30 articles which have been elaborated in subsequent international treaties, regional human rights instruments, national Constitutions and laws.

The underlying structure of the Universal Declaration was introduced in its second draft which was prepared by René Cassin. Cassin worked from a first draft prepared by John Peters Humphrey. The structure was influenced by the Code Napoleon, including a preamble and introductory general principles. Cassin compared the Declaration to the portico of a Greek temple, with a foundation, steps, four columns and a pediment. Articles 1 and 2 are the foundation blocks, with their principles of dignity, liberty, equality and brotherhood. The seven paragraphs of the preamble, setting out the reasons for the Declaration, are represented by the steps. The main body of the Declaration forms the four columns. The first column (articles 3–11) constitutes rights of the individual, such as the right to life and the prohibition of slavery. The second column (articles 12–17) constitutes the rights of the individual in civil and political society. The third column (articles 18–21) is concerned with spiritual, public and political freedoms such as freedom of religion and freedom of association. The fourth column (articles 22–27) sets out social, economic and cultural rights. In Cassin's model, the last three articles of the Declaration provide the pediment which binds the structure together. These articles are concerned with the duty of the individual to society and the prohibition of use of rights in contravention of the purposes of the United Nations.

Article 3 state that: *Everyone has the right to life and security of person.*

Article 12 deals with the person's privacy right and reads; *No one shall be subject to arbitrary interference with his privacy ,family home or correspondence ,nor attack upon his owner and reputation.*

So far as freedom of expression Article 19 of the Universal Declaration of Human Rights (the “UDHR”) states that:

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

Article 21

(1) Everyone has the right to take part in the government of his country, directly or through freely chosen representatives. (2) Everyone has the right of equal access to public service in his country. (3) The will of the people shall be the basis of the authority of government; this will be expressed in periodic and genuine elections which shall be by universal and equal suffrage and shall be held by secret vote or by equivalent free voting procedures.

3.23.3 The International Covenant on Civil and Political Rights

The **International Covenant on Civil and Political Rights** (hereinafter referred as 'ICCPR') is a multilateral treaty adopted by the United Nations General Assembly on December 16, 1966, and in force from March 23, 1976. It commits its parties to respect the civil and political rights of individuals, including the right to life, freedom of religion, freedom of speech, freedom of assembly, electoral rights and rights to due process and a fair trial. As of March 2012, the Covenant had 74 signatories and 167 parties. The *International Covenant on Civil and Political Rights* (ICCPR),¹⁸² a treaty which elaborates on many rights included in the UDHR, imposes formal legal obligations on State Parties to respect its provisions. The ICCPR Article 19 of the ICCPR guarantees the right to freedom of expression in terms very similar to those found at Article 19 of the UDHR;

1. Everyone shall have the right to freedom of opinion.
2. Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art or through any other media of his choice.

3.23.3.1 Media Freedom and ICCPR

¹⁸². UN General Assembly Resolution 2200A(XXI), adopted 16 December 1966, in force 23 March 1976.

The guarantee of freedom of expression applies with particular force to the media, including the broadcast media and public service broadcasters. The European Court of Human Rights has consistently emphasized the “pre-eminent role of the press in a State governed by the rule of law.”¹⁸³ It has further stated:

Freedom of the press affords the public one of the best means of discovering and forming an opinion of the ideas and attitudes of their political leaders. In particular, it gives politicians the opportunity to reflect and comment on the preoccupations of public opinion; it thus enables everyone to participate in the free political debate which is at the very core of the concept of a democratic society.¹⁸⁴

The media merit special protection in part because of their role in informing the public and in acting as watchdog of government. The European Court of Human Rights has made this clear in the following statement, which it has often quoted:

Whilst the press must not overstep the bounds set [for the protection of the interests set forth in Article 10(2)] ... it is nevertheless incumbent upon it to impart information and ideas of public interest. Not only does it have the task of imparting such information and ideas; the public also has a right to receive them. Were it otherwise, the press would be unable to play its vital role of “public watchdog”.¹⁸⁵

The Court has also held that Article 10 applies not only to the content of expression but also the means of transmission or reception.¹⁸⁶

3.23.3.2 Restrictions on the Right to Freedom of Expression

The right to freedom of expression is not absolute. Both international law and most national Constitutions recognise that freedom of expression may be restricted. However, any limitations must remain within strictly defined parameters. Article 19(3) of the ICCPR lays down the conditions which any restriction on freedom of expression must meet:

The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:

- (a) For respect of the rights or reputations of others;

¹⁸³. Thorgeirson v. Iceland, 25 June 1992, Application No. 13778/88, 14 EHRR 843, para. 63.

¹⁸⁴. Castells v. Spain, 24 April 1992, Application No. 11798/85, 14 EHRR 445, para. 43.

¹⁸⁵. See Castells v. Spain, note 13, para. 43, Thorgeirson v. Iceland, note 12, para. 63, The Observer and Guardian v. UK, 26 November 1991, Application No. 13585/88, 14 EHRR 153, para. 59 and The Sunday Times v. UK (II), 26 November 1991, Application No. 13166/87, 14 EHRR 229, para. 65.

¹⁸⁶. Autronic AG v. Switzerland, 22 May 1990, Application No. 12726/87, 12 EHRR 485, para. 47.

- (b) For the protection of national security or of public order (order public), or of public health or morals.

It is a maxim of human rights jurisprudence that restrictions on rights must always be construed narrowly; this is especially true of the right to freedom of expression in light of its importance in democratic society. Accordingly, any restriction on the right to freedom of expression must meet a strict three-part test, as recognised by the Human Rights Committee. This test requires that any restriction must a) be provided by law, b) be for the purpose of safeguarding one of the legitimate interests listed, and c) be necessary to achieve this goal.

The first condition, that any restrictions should be ‘provided by law’, is not satisfied merely by setting out the restriction in domestic law. Legislation must itself be in accordance with human rights principles set out in the ICCPR.¹⁸⁷

3.23.4 International Covenant on Economic, Social and Cultural Rights

The International Covenant on Economic, Social and Cultural Rights (ICESCR) is a multilateral treaty adopted by the United Nations General Assembly on 16 December 1966, and in force from 3 January 1976. It commits its parties to work toward the granting of economic, social, and cultural rights (ESCR) to individuals, including labour rights and the right, the right to education, and the right to an adequate standard of living. As of July 2011, the Covenant had 160 parties. A further seven countries, including the United States of America, had signed but not yet ratified the Covenant.

3.23.5 the Convention on Rights of Child, 1989

Article 13

1. The child shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of the child’s choice.

2. The exercise of this right may be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:

(a) For respect of the rights or reputations of others; or

(b) For the protection of national security or of public order, or of public health or morals.

¹⁸⁷. *Faurisson v. France*, Decision of 8 November 1996, Communication No. 550/1993 (UN Human Rights Committee).

Art.19 (2) Such protective measures should, as appropriate, include effective procedures for the establishment of social programmes to provide necessary support for the child and for those who have the care of the child, as well as for other forms of prevention and for identification, reporting, referral, investigation, treatment and follow-up of instances of child maltreatment described heretofore, and, as appropriate, for judicial involvement.

Article- 30 In those States in which ethnic, religious or linguistic minorities or persons of indigenous origin exist, a child belonging to such a minority or who is indigenous shall not be denied the right in community with other members of his or her group, to enjoy his or her own culture, to profess and practice his or her own religion, or to use his or her own language.

3.23.6 International Cyber Space governance and human rights

The impacts of Internet companies on human rights should be viewed in the context of how the Internet is governed and regulated nationally and

Internationally, this is a controversial topic provoking strong opinions among many stakeholders (representing governments, business and civil society) across the world. The UN promoted a World Summit on the Information Society (WSIS) involving 175 countries in two phases (Geneva 2003 and Tunis 2005) to try to develop a framework for global Internet governance.¹⁸⁸ In the end, the Tunis meeting, unable to agree on how to govern the Internet, decided to leave much of the control where it currently resides – concentrated in the hands of the US-based Internet Corporation for Assigned Names and Numbers (ICANN). The failure to reach a binding agreement on the future of Internet governance, or even what the term should encompass,¹⁸⁹ ended with a compromise agreement to set up a consultative Internet Governance Forum which will meet for the first time in Athens in November 2006.

Ensuring respect for human rights, including freedom of expression, is a vital component in creating the Information Society. As UN Secretary General Kofi Annan stated in his address to the Tunis WSIS meeting:

And of course, the information society's very life blood is freedom. It is freedom that enables citizens everywhere to benefit from knowledge, journalists to do their

¹⁸⁸. World Summit on the Information Society. <http://www.itu.int/wsis/visited> on 05 April,2012

¹⁸⁹.The June 2005 report of the Working Group on Internet Governance offers as a working definition: Internet governance is the development and application by Governments, the private sector, civil society, in their respective roles, of shared principles, norms, rules, decision making procedures, and programmes that shape the evolution and use of the Internet.

essential work, and citizens to hold government accountable. Without openness, without the right to seek, receive and impart information and ideas through any media and regardless of frontiers, the information revolution will stall, and the information society we hope to build will be stillborn.¹⁹⁰

Similarly, the Declaration of Principles agreed by the WSIS in Geneva and reaffirmed in Tunis emphasises the importance of respecting human rights in developing the Information Society. This is reflected in the following clauses:¹⁹¹

We reaffirm, as an essential foundation of the Information Society, and as outlined in Article 19 of the Universal Declaration of Human Rights, that everyone has the right to freedom of opinion and expression; that this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers. Communication is a fundamental social process, a basic human need and the foundation of all social organisations. It is central to the Information Society. Everyone everywhere should have the opportunity to participate and no one should be excluded from the benefits the Information Society offers.

We further reaffirm our commitment to the provisions of Article 29 of the Universal Declaration of Human Rights, that everyone has duties to the community in which alone the free and full development of their personality is possible, and that, in the exercise of their rights and freedoms, everyone shall be subject only to such limitations as are determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society. These rights and freedoms may in no case be exercised contrary to the purposes and principles of the United Nations. In this way, we shall promote an Information Society where human dignity is respected.

In 2005, the UN Commission on Human Rights requested the UN Secretary-General to appoint a Special Representative on the issue of human rights and business. The mandate includes identifying and clarifying standards

3.23.7 UNESCO Conference

Every year on 3 May the ‘World Press Freedom Day’ is celebrated. It was proclaimed by the UNESCO in 1992, to mark the ratification of the ‘Windhoek

¹⁹⁰. Kofi Annan, November 2005, Tunis. <http://www.itu.int/wsis/tunis/statements/docs/io-un-opening/1.html>, visited on 7 March 2009

¹⁹¹. Outcome of the first phase of the World Summit on the Information Society, Geneva, December 2003. <http://www.itu.int/wsis/docs/geneva/official/dop.html> visited on 9 May, 2014

Declaration'. It was adopted one year later, during a regional UNESCO conference, when media representatives and experts had demanded independence, freedom and pluralism of the press.

3.23.8 The Madrid Principles on the Relationship between the Media and Judicial Independents – 1994

A group of 40 distinguished Legal experts and Media representatives, convened by the International Commission of Jurists (ICJ), at its center for though independents of Judge and Lawyers, and Spanish committee of UNICEF, met in Madrid, Spain between 18-20, January 1994 to examine the relationship between media and judiciary .The formulating principle recognized 'Rule of Law', Independent judiciary, freedom and restriction of media as per UDHR¹⁹² and ICCPR¹⁹³.

3.23.9 The International Telecommunication Union

The International Telecommunication Union (hereinafter referred as ITU) is an agency of the United Nations which is regulating information and communication technology issues. ITU Coordinates the shared global use of the Radio spectrum, Promotes International cooperation assigning satellite orbits works to improve Telecommunication in infrastructure in the developing world and establish worldwide standards. To establish sustainable and affordable access to International and Communication Technologies (hereinafter referred as ICT).

ITU are based in Geneva, Switzerland and its 191 Member states. The legal frameworks of ITU are adopted by the Plenipotentiary Conference, the optional protocol on the settlement of disputes. ITU also set up the International Telephone and Telegraph consultative committee (hereinafter referred as CCITT) in 1992.

3.23.10 World Summit on the Information Society, (WSIS)

It's provided a global forum on the thereof ICTs for development. European Conference on Postal and telecommunication Administrations. (Hereinafter CEPT) was established on June 26, 1959. As a Coordinating body for European State Telecommunication and Postal Organizations, CEPT also create of the European Telecommunication standards Institute in 1988.

3.24 REGIONAL PERSPECTIVE

¹⁹² The Universal Declaration of Human Rights,1948

¹⁹³ The International Covenant on Civil and Political Rights,1966

Freedom of expression is also protected in the three regional human rights systems.

3.24.1 French declaration of 1789

French declaration of 1789 Article -11 says “Free communication of thought and opinions is one of the most precious rights of man.

3.24.2 The Council of Europe

At the end of the Second World War Europe was marked by unsurpassed destruction and human suffering. This harsh experience gave rise to new political efforts especially compromise among the peoples of Europe¹⁹⁴. These efforts worked out and The Council of Europe was founded on 5 May 1949 by the Treaty of London. In Article 1 of the Statute of the Council of Europe, its aim has been determined as “to achieve a greater unity between its members for the purpose of safeguarding and realizing the ideals and principles which are their common heritage and facilitating their economic and social progress” and in Article 3 its stated that, in the realization of its aim “Every member of the Council of Europe must accept the principles of the rule of law and of the enjoyment by all persons within its jurisdiction of human rights and fundamental freedoms, and collaborate sincerely and effectively”. As indicated, the primary components, to implement “a greater unity”, are to accept the principles of the rule of law, the enjoyment of human rights and fundamental freedoms by all persons and collaborate sincerely and effectively.

3.24.3 African (Banjul) Charter on Human Rights and Peoples' Rights

The *African Charter on Human and Peoples' Rights*¹⁹⁵*Preamble*: The African States members of the Organization of African Unity, parties to the present convention entitled "African Charter on Human and Peoples' Rights¹⁹⁶", the African Charter on Human and Peoples' Rights came into effect on 21 October 1986– in honour of which 21 October was declared "African Human Rights Day".

Recalling Decision 115 (XVI) of the Assembly of Heads of State and Government at its Sixteenth Ordinary Session held in Monrovia, Liberia, from 17 to 20 July 1979 on the preparation of a "preliminary draft on an African Charter on Human and Peoples' Rights providing inter alia for the establishment of bodies to promote and protect human and peoples' rights";

¹⁹⁴. Council of Europe, http://en.wikipedia.org/wiki/Council_of_Europe#History accessed 24 December 2008.

¹⁹⁵. Adopted 26 June 1981, in force 21 October 1986.

¹⁹⁶ Adopted 27 June 1981, OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982), entered into force 21 October 1986

Considering the Charter of the Organization of African Unity, which stipulates that "freedom, equality, justice and dignity are essential objectives for the achievement of the legitimate aspirations of the African peoples";

Reaffirming the pledge they solemnly made in Article 2 of the said Charter to eradicate all forms of colonialism from Africa, to coordinate and intensify their cooperation and efforts to achieve a better life for the peoples of Africa and to promote international cooperation having due regard to the Charter of the United Nations. And the Universal Declaration of Human Rights;

Taking into consideration the virtues of their historical tradition and the values of African civilization which should inspire and characterize their reflection on the concept of human and peoples' rights;

Recognizing on the one hand, that fundamental human rights stem from the attributes of human beings which justifies their national and international protection and on the other hand that the reality and respect of people's rights should necessarily guarantee human rights;

Article 2: Every individual shall be entitled to the enjoyment of the rights and freedoms recognized and guaranteed in the present Charter without distinction of any kind such as race, ethnic group, color, sex, language, religion, political or any other opinion, national and social origin, fortune, birth or other status.

Article 9: Every individual shall have the right to receive information. Every individual shall have the right to express and disseminate his opinions within the law

3.24.4 Declaration on Promoting an Independent and Pluralistic Media in Afghanistan

On 5 September 2002, an International Seminar bringing together representatives of the Afghan government, local civil society and the international community adopted a Declaration on Promoting an Independent and Pluralistic Media in Afghanistan (Declaration). Action Point 2 of this Declaration provides:

It is recommended that a thorough and time-bound review of the legal system as it affects the media begin immediately, with the goals of creating laws and procedures that promote freedom of expression, protect the rights of journalists, and guarantee their freedom to do their work in safety, including publishing critical reports and opinions.

3.24.5 The *European Convention on Human Rights* (ECHR),¹⁹⁷

The Convention for the Protection of Human Rights and Fundamental Freedom (commonly known as the European Convention on Human Rights (ECHR),¹⁹⁸ is an international treaty to protect human rights and fundamental freedoms in Europe. Drafted in 1950 by the then newly formed Council of Europe, the convention entered into force on 3 September 1953. All Council of Europe member states are party to the Convention and new members are expected to ratify the convention at the earliest opportunity.

The Convention established the European Court of Human Rights (ECHR). Any person who feels his or her rights have been violated under the Convention by a state party can take a case to the Court. Judgments finding violations are binding on the States concerned and they are obliged to execute them. The Committee of Ministers of the Council of Europe monitors the execution of judgments, particularly to ensure payment of the amounts awarded by the Court to the applicants in compensation for the damage they have sustained. The establishment of a Court to protect individuals from human rights violations is an innovative feature for an international convention on human rights, as it gives the individual an active role on the international arena (traditionally, only states are considered actors in international law). The European Convention is still the only international human rights agreement providing such a high degree of individual protection. State parties can also take cases against other state parties to the Court, although this power is rarely used. The Convention has several protocols, which amend the convention framework.

The Convention is drafted in broad terms, in a similar (albeit more modern) manner to the English Bill of Rights, the American Bill of Rights, the French Declaration of the Rights of Man or the first part of the German Basic law. Statements of principle are, from a legal point of view, not determinative and require extensive interpretation by Courts to bring out meaning in particular factual situations.

3.24.5.1 Article 6 - Fair Trial

Article 6 provides a detailed right to a fair trial, including the right to a public hearing before an independent and impartial tribunal within reasonable time, the presumption of innocence, and other minimum rights for those charged with a criminal offence (adequate time and facilities to prepare their defence, access to legal

¹⁹⁷. Adopted 4 November 1950, in force 3 September 1953

¹⁹⁸. Adopted 4 November 1950, in force 3 September 1953

representation, right to examine witnesses against them or have them examined, right to the free assistance of an interpreter).

The majority of Convention violations that the Court finds today are excessive delays, in violation of the "reasonable time" requirement, in civil and criminal proceedings before national Courts, mostly in Italy and France. Under the "independent tribunal" requirement, the Court has ruled that military judges in Turkish state security Courts are incompatible with Article 6. In compliance with this Article, Turkey has now adopted a law abolishing these Courts.

Another significant set of violations concerns the "confrontation clause" of Article 6 (i.e. the right to examine witnesses or have them examined). In this respect, problems of compliance with Article 6 may arise when national laws allow the use in evidence of the testimonies of absent, anonymous and vulnerable witnesses.

3.24.5.2 Article 8 - Privacy

Main article: Article 8 of the European Convention on Human Rights

Article : 8 provides a right to respect for one's "private and family life, his home and his correspondence", subject to certain restrictions that are "in accordance with law" and "necessary in a democratic society". This article clearly provides a right to be free of unlawful searches, but the Court has given the protection for "private and family life" that this article provides a broad interpretation, taking for instance that prohibition of private consensual homosexual acts violates this article. This may be compared to the jurisprudence of the United States Supreme Court, which has also adopted a somewhat broad interpretation of the right to privacy. Furthermore, Article 8 sometimes comprises positive obligations: whereas classical human rights are formulated as prohibiting a State from interfering with rights, and thus *not* to do something (e.g. not to separate a family under family life protection), the effective enjoyment of such rights may also include an obligation for the State to become active, and to *do* something (e.g. to enforce access for a divorced father to his child).

3.24.5.3 Article 10 - Expression

Article 10 provides the right to freedom of expression, subject to certain restrictions that are "in accordance with law" and "necessary in a democratic society". This right includes the freedom to hold opinions, and to receive and impart information and ideas, but allows restrictions for:

- interests of national security
- territorial integrity or public safety
- prevention of disorder or crime
- protection of health or morals
- protection of the reputation or the rights of others
- preventing the disclosure of information received in confidence
- maintaining the authority and impartiality of the judiciary

3.24.6 Convention Protocols

As of January 2010, fifteen protocols to the Convention have been opened for signature. These can be divided into two main groups: those amending the framework of the convention system, and those expanding the rights that can be protected. The former require unanimous ratification by member states before coming into force, while the latter require a certain number of states to sign before coming into force.

3.24.7 The American Convention on Human Rights¹⁹⁹

Article 13 of the *American Convention on Human Rights*²⁰⁰ : The American Convention on Human Rights, also known as the Pact of San José, is an international human rights instrument. It was adopted by many nations of the Americas in San José, Costa Rica, on 22 November 1969. It came into force after the eleventh instrument of ratification (that of Grenada) was deposited on 18 July 1978.

The bodies responsible for overseeing compliance with the Convention are the Inter-American Commission on Human Rights and the Inter-American Court of Human Rights, both of which are organs of the Organization of American States (OAS).

The first, the Additional Protocol to the American Convention on Human Rights in the area of Economic, Social, and Cultural Rights (commonly known as the "Protocol of San Salvador"), was opened for signature in the city of San Salvador, El Salvador, on 17 November 1988. It represented an attempt to take the inter-American human rights system to a higher level by enshrining its protection of so-called second-generation rights in the economic, social, and cultural spheres. The protocol's provisions cover such areas as the

¹⁹⁹. Adopted 22 November 1969, in force 18 July 1978.

²⁰⁰. Adopted 22 November 1969, in force 18 July 1978.

right to work, the right to health, the right to food, and the right to education. It came into effect on 16 November 1999 and has been ratified by 14 nations.

3.25 Constitution of other countries: Freedom of speech and expression

3.25.1 United State of America

First Constitutional Amendment - Freedom of Religion, Press, and Expression²⁰¹

Article [I.] Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; of the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Fourteen Amendments - Citizenship Rights²⁰²

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

3.25.2 The Republic of South Africa²⁰³

Article 10 Human dignity.-Everyone has inherent dignity and the right to have their dignity respected and protected.

²⁰¹ First Amendment Ratified on 12/15/1791. The first ten Amendments collectively are commonly known as the Bill of Rights. The first ten amendments were ratified by the following States, and the notifications of ratification by the Governors thereof were successively communicated by the President to Congress: New Jersey, November 20, 1789; Maryland, December 19, 1789; North Carolina, December 22, 1789; South Carolina, January 19, 1790; New Hampshire, January 25, 1790; Delaware, January 28, 1790; New York, February 24, 1790; Pennsylvania, March 10, 1790; Rhode Island, June 7, 1790; Vermont, November 3, 1791; and Virginia, December 15, 1791. Ratification was completed on December 15, 1791. The amendments were subsequently ratified by the legislatures of Massachusetts, March 2, 1939; Georgia, March 18, 1939; and Connecticut, April 19, 1939.

²⁰² The fourteenth amendment to the Constitution of the United States was proposed to the legislatures of the several States by the Thirty-ninth Congress, on the 13th of June, 1866. It was declared, in a certificate of the Secretary of State dated July 28, 1868 to have been ratified by the legislatures of 28 of the 37 States. The dates of ratification were: Connecticut, June 25, 1866; New Hampshire, July 6, 1866; Tennessee July 19, 1866; New Jersey, September 11, 1866 (subsequently the legislature rescinded its ratification, and on March 24, 1868, readopted its resolution of rescission over the Governor's veto, and on November 12, 1880, expressed support for the amendment); Oregon, September 19, 1866 (and rescinded its ratification on October 15, 1868); Vermont, October 30, 1866; Ohio, January 4, 1867 (and rescinded its ratification on January 15, 1868); New York, January 10, 1867; Kansas, January 11, 1867; Illinois, January 15, 1867; West Virginia, January 16, 1867; Michigan, January 16, 1867; Minnesota, January 16, 1867; Maine, January 19, 1867; Nevada, January 22, 1867; Indiana, January 23, 1867; Missouri, January 25, 1867; Rhode Island, February 7, 1867; Wisconsin, February 7, 1867; Pennsylvania, February 12, 1867; Massachusetts, March 20, 1867; Nebraska, June 15, 1867; Iowa, March 16, 1868; Arkansas, April 6, 1868; Florida, June 9, 1868; North Carolina, July 4, 1868 (after having rejected it on December 14, 1866); Louisiana, July 9, 1868 (after having rejected it on February 6, 1867); South Carolina, July 9, 1868 (after having rejected it on December 20, 1866). Ratification was completed on July 9, 1868. The amendment was subsequently ratified by Alabama, July 13, 1868; Georgia, July 21, 1868 (after having rejected it on November 9, 1866); Virginia, October 8, 1869 (after having rejected it on January 9, 1867); Mississippi, January 17, 1870; Texas, February 18, 1870 (after having rejected it on October 27, 1866); Delaware, February 12, 1901 (after having rejected it on February 8, 1867); Maryland, April 4, 1959 (after having rejected it on March 23, 1867); California, May 6, 1959; Kentucky, March 18, 1976 (after having rejected it on January 8, 1867). Ratified 7/9/1868. Date of Enforcement: May 3, 1947.

²⁰³ Date of promulgation: 18 December 19, 1961 [Dated of commencement: 4 Feb. 5, 1971]

Article 16 Freedom of expression.-(1) everyone has the right to freedom of expression, which includes-

- (a) Freedom of the press and other media;
- (b) Freedom to receive or impart information or ideas;
- (c) Freedom of artistic creativity; and
- (d) academic freedom and freedom of scientific research.

(2) The right in subsection (1) does not extend to-

- (a) Propaganda for war;
- (b) Incitement of imminent violence; or
- (c) Advocacy of hatred that is based on race, ethnicity, gender or religion and that constitutes incitement to cause harm.

3.25.3 Japan²⁰⁴

The Constitution of Japan provides under, Article 21 Freedom of assembly and association as well as speech, press and all other forms of expression are guaranteed. No Censorship shall be maintained, nor shall the secrecy of any means of communication be violated.

3.25.4 Britain

Foundations of British Media Law: It is well known that Britain does not have a written Constitution. The most basic of these principles is that Parliament is sovereign and has the power to make laws concerning any matter relating to Britain. Britain became a party to the European Convention on Human Rights in 1952. The government has now radically changed the legal treatment of human rights issues in Britain with the adoption of the Human Rights Act 1998 .

It is a fundamental principle of English law that the Courts should administer justice in public and should exclude the public only when it is necessary to secure the proper administration of justice. This is sometimes called the "open justice principle". This long-standing right of public access to the Courts is also supported by which states in

Article 6(1)²⁰⁵ that "everyone is entitled to a fair and public hearing". Open justice refers to the right of the public to attend the Courts and does not include a right to use cameras or make television films in Court. These are currently banned in England because of concerns about their influence on Court proceedings. However, some judges have called for the abolition of this ban on photography and television filming.

3.25.5 The Islamic Republic of Pakistan

Article 19 ²⁰⁶ Every citizen shall have the right to freedom of speech and expression ,and there shall be freedom of press be freedom of the press ,subject to any reasonable restrictions imposed by law in the interest of the glory of Islam or integrity, security or defence of Pakistan or any part thereof ,friendly relation with foreign state ,public order , decency or morality ,or in relation to contempt of Court, [commission of] or incitement to an offence.

3.25.6 Burma

The Constitution of Burma Sec. 17 (1) There shall be liberty for the exercise of the following rights, subject to law, public order and morality: (i) the right of the citizens to express freely their convictions and opinion.

3.25.7 France

The following declaration appears in the preamble of the Constitution of the French Republic:

The free communication of ideas and opinions is one of the most precious rights of man; every citizen then can freely speak, write and print, subject to responsibility for the abuse of this freedom in cases determined by law

3.25.8 German Democratic Republic

The Constitution of German Democratic Republic, Article 9 - All citizens have the right within the limits of the laws applying tom all, to use their opinion freely and openly, and to assemble peaceable and without arms for this purpose. This freedom shall not be restricted by any contract of service or labour; no one shall be prejudiced through making use of this right.

3.25.9 The Republic of Ireland

²⁰⁵ The European Convention of Human Rights,

²⁰⁶ The Costitution of the Islamic Republic of Pakistan,Art.19

The Constitution of Eire Sec. 40(6)(1)- The state guarantees liberty for the exercise of the following rights , subject to public order and morality :(i) The right of citizens to express freely their convictions and opinions.

3.25.10 Czechoslovakia

The Constitution of Czechoslovakia: Article 18(1) The Freedom of expression is guaranteed.

(2) Every person may, within the limits prescribed by law, express his opinion by word of mouth, in writing, in print, pictorially or in any other manner, No person shall suffer prejudice through the exercise of the right.

Article 21-(1) Freedom of press is guaranteed It is not therefore permitted as a rule to subject the press to prior censorship.

(2) The law shall determine in what person shall have the right to publish newspaper and periodicals and on what conditions (in particular, such as ensure that the press is not conducted for profit)

(3) The law shall determine in what manner the publication and distribution of non periodicals publication (in particular books music and reproduction of works of art)shall be organized on a planed basis while maintaining the freedom of science and art and with due regard to the protection of valuable works.

Article 22-(1) The right to produce, distribute, publicly exhibit, import and export cinematograph film is reserved to state.

(2) Broadcasting and television are the exclusive right of state.

(3) The exercise of the above rights shall be governed by laws, which shall prescribe any exceptions

3.25.11 The People's Republic of China²⁰⁷

The Constitution of peoples Republic of China- provides under Article 35 Citizens of the People's Republic of China enjoy freedom of speech, of the press, of assembly, of association, of procession and of demonstration.

²⁰⁷ Adopted on December 4, 1982

3.25.12 Finland

Finland is one of the most democratic countries in the world, with a government that respects freedom of everyone's expression. Freedom of the press has a long history in Finland. The first Freedom of Information Act was stated in 1766. Today, freedom of expression and access to information in Finland is guaranteed by the Constitution. There is no censorship in the media. The Constitution of Finland States that: *Section 10 - The right to privacy; Everyone's private life, honour and the sanctity of the home are guaranteed.* More detailed provisions on the protection of personal data are laid down by an Act. The secrecy of correspondence, telephony and other confidential communications is inviolable. Measures encroaching on the sanctity of the home, and which are necessary for the purpose of guaranteeing basic rights and liberties or for the investigation of crime, may be laid down by an Act. In addition, provisions concerning limitations of the secrecy of communications which are necessary in the investigation of crimes that jeopardise the security of the individual or society or the sanctity of the home, at trials and security checks, as well as during the deprivation of liberty may be laid down by an Act.

Section 12 - Freedom of expression and right of access to information; Everyone has the freedom of expression. Freedom of expression entails the right to express, disseminate and receive information, opinions and other communications without prior prevention by anyone. More detailed provisions on the exercise of the freedom of expression are laid down by an Act. Provisions on restrictions relating to pictorial programmes that are necessary for the protection of children may be laid down by an Act. Documents and recordings in the possession of the authorities are public, unless their publication has for compelling reasons been specifically restricted by an Act. Everyone has the right of access to public documents and recordings.

Two basic tools in Finnish media policy are legislation and public subsidy. The Ministry of Transport and communications oversees telecommunications; the operating licenses for local radio and television. Journalism in Finland is self-regulated by publishers and journalists. The Council for Mass Media (CMM) was established in 1968 by publishers and journalists in the field of mass communication. CMM interprets good professional practice and defends the freedom of speech and publication. CMM does not exercise legal jurisdiction.

3.25.13 Norway

The Norwegian Constitution²⁰⁸ in state that: Article 100

1. *There shall be freedom of expression.*
2. *No person may be held liable in law for imparting or receiving information, ideas or messages unless such liability can be justified in relation to the reasons behind freedom of expression, i.e. the seeking of truth, the promotion of democracy and the individual's freedom to form his or her own opinions. Such legal responsibility must be clearly prescribed by law. No person may be held liable in law for the reason that a statement is untrue if it was uttered in non-negligent good faith.*
3. *Everyone shall be free to speak his mind frankly on the administration of the State and on any other subject whatsoever.*
4. *Prior censorship and other preventive measures may only be used as far as is necessary to protect children and the youth from harmful influence of moving pictures. Censorship of letters may only be implemented in institutions and by leave of a Court of law.*
5. *Everyone has a right of access to the documents of the State and of the municipal administration and a right to be present at sittings of the Courts and of administrative bodies elected by the people. The law may only prescribe such clearly defined limitations to this right as overriding considerations show to be necessary.*

It is the responsibility of the authorities of the State to create conditions enabling an open and enlightened public debate.

3.25.14 Sri Lanka

The Constitution of Sri Lanka States That's Article: 14. (1) Every citizen is entitled to –(a) the freedom of speech and expression including publication ;

Restriction: Art. 15 (2) The exercise and operation of the fundamental right declared and recognized by Article 14(1)(a) shall be subject to such restrictions as may be prescribed by law in the interests of racial and religious harmony or in relation to parliamentary privilege, Contempt of Court, defamation or incitement to an offence.

1. ²⁰⁸ http://library2.parliament.go.th/giventake/content_cons/norway.pdf (accessed on 20.12.2012)

3.25.15 Switzerland

The Federal Constitution of the Swiss Confederation²⁰⁹ States that's;

Art. 16 Freedom of expression and of information

- 1 Freedom of expression and of information is guaranteed.
- 2 Everyone has the right freely to form, express, and impart their opinions.
- 3 Everyone has the right freely to receive information to gather it from generally accessible sources and to disseminate it.

Art. 17 Freedom of the media :(1) Freedom of the press, radio and television and of other forms of dissemination of features and information by means of public telecommunications is guaranteed.

(2) Censorship is prohibited.

3 The protection of sources is guaranteed.

Art. 18 Freedom to use any language: The freedom to use any language is guaranteed.

3.25.16 Canada

Canada's 1982 constitution guarantees freedom of expression and freedom of the press. The government may legally restrict free speech with the aim of ending discrimination, ensuring social harmony, or promoting gender equality, but the definition of hate speech, which is punishable by law, remains vague. In November 2010, the Supreme Court began hearing the case *Saskatchewan Human Rights Commission v. William Whatcott*, in which a local human rights tribunal found Christian activist William Whatcott's flyers and messages against homosexuality to be in violation of the Saskatchewan Human Rights Code. Whatcott's lawyer has argued that defining "hate" is extremely difficult. The Supreme Court continued to review the issue in 2012, and the case was ongoing at year's end. In previous cases, the Supreme Court has ruled that inciting hatred is a criminal offense, but the threshold for guilt is high: It must be proven that the person engaged in hate speech willfully and publicly.

In 2009, the Supreme Court attempted to strike a balance between freedom of expression and protection of reputation, allowing journalists to avoid liability for alleged defamation if they are able to show that they acted responsibly in reporting a matter of public interest, even if the statements were untrue.

²⁰⁹ Adopted by the popular vote of 18 April 1999 (Federal Decree of 18 Dec. 1998, Federal Council Decree of 11 Aug. 1999)

3.25.17 Australia

Press freedom in Australia is upheld by convention rather than by constitutional guarantees, except in the state of Victoria, where it is protected under the Charter of Human Rights and Responsibilities. In 2006, Australia consolidated varying state-level defamation regulations under the Uniform Defamation Laws Reform Act, which allows only individuals, nonprofits, and corporations with fewer than 10 employees to sue over defamation. Although rarely invoked, criminal defamation laws are still on the books in Australia. Civil cases, which are more common, can result in heavy fines. In May 2012, the News Corporation media group was ordered to pay A\$325,000 (US\$339,000) for an article in the *Sunday Telegraph* that labeled a former police detective as “corrupt.”

The 2011 Evidence Amendment Act protects the identity of journalists’ sources and extends this protection to include bloggers, citizen journalists, independent media organizations, and anyone “active in the publication of news in any medium.” Journalists are only compelled to reveal sources when it is proven that the public interest outweighs any potential harm to the source or the public caused by divulging the source’s identity. While the Evidence Amendment Act can only be applied in federal cases, states such as Victoria and Western Australia enacted similar legislation in 2012.

The Freedom of Information (FOI) Act of 1982 provides for access to government documents. Reforms passed in 2010 revised the fees charged for FOI requests, making them more accessible; allowed for fewer FOI exemptions; and created a new, single public-interest test weighted in favor of disclosure. In October 2012, the government announced that the 1982 FOI Act would be reviewed to determine whether it and related laws still provide an adequate framework for accessing official information.