CHAPTER-IV

Media, e-Media and its Convergence: Media trial

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4.1 a. Media and Human right

4.2 b. Media and Sting operation

4.3 Trial by Media

4.4 Fair Trial and Human Rights

4.4.1 Pre Trial Rights

4.4.2 Post Trial Rights

4.5 Media and Sting Operation

4.6 Electronic Media, Information Technology and its Convergence

The emergence and convergence of various Media (Information and communication technologies hereinafter referred as ICTs) such as radios, televisions, computers, the Internet, telephones, cell phones, videos, multimedia, CD-ROMs, software and hardware (ICT) constitutes both a challenge and an opportunity for developing countries. ICT alone provides a powerful convergence of tools for handling information, from acquisition and production to transmission, archiving and storage. Combined with space technology[1], it has an enormous impact on all aspects of life by reducing time, distance and the information gap. It increases the scope for greater and faster interaction within different groups of people from different societies and civilizations. Under favorable conditions, ICT can be a powerful instrument for increasing productivity, generating economic growth by facilitating trade, transport and financial issues, thus creating jobs and improving the quality of life of all. ICT has brought e-commerce, e-learning, e health and e-sustainability, and among many other things, the creation of an e-society. The emergence of new ICTs has shaped and transformed today's society, forming new social and political structures.

[1] Space technology, here mainly referring to satellite communications, remote sensing and geographic information systems (GIS), plays both a complementary and a supplementary role to conventional technologies in the different types of applications. It has indeed been instrumental in providing the means to extend the reach of ICT services to even the most remote and isolated regions.

ICT have become commonplace entities in all aspects of life. Across the past twenty years the use of ICT has fundamentally changed the practices and procedures of nearly all forms of endeavor within life, business and governance. The way these fields operate today is vastly different from the ways they operated in the past.[2] ICT created virtual communicative space that known as Cyberspace[3]. It is not limited to the operation of computer networks, but also encompasses all social activities in which digital information and communication technologies are deployed. It thus ranges from computerized reservation systems to automated teller systems and smart cards. With the 'embedding' of digital facilities in more and more objects (from microwave ovens to jogging shoes), these acquire intelligent functions and communicative capacities and begin to create a permanent virtual life-space. The issue of the governance of cyberspace emerges in many current ICT-debates at different levels. There is the curb revolutionary position that considers cyberspace[4] a totally new and alien territory where conventional rules do not apply. But, however attractive this approach may seem, if more people are to use cyberspace this is likely to need public and corporate policymaking. This is equally the case if cyberspace is to be protected against unprecedented opportunities for criminal activity. Cyberspace is perceived by the digital settlers as the last 'electronic' frontier, but cyberspace also colonizes our non-virtual reality and lest it totally controls daily life it needs to be governed by norms and rules. A re-current question is whether cyberspace gives rise to new forms of democratic [electronic] governance, which are less-territory based, less hierarchical, more participatory, and demand new rules for political practice. As for as Human Rights is Concern, in cyberspace the Human rights should not only be articulated as individual rights, but should be recognized both as individual and as collective rights.. Media plays a vital role in mold the opinion of the society and it is capable of changing the whole viewpoint through which people perceive various events.

[2] http://elrond.scam.ecu.edu.au/oliver/2002/he21.pdf visted on 5/4/2010

[3] Thomas Ploug , Ethics in Cyberspace: How Cyberspace May Influence Interpersonal Interaction,Spiringer Pub.p.70

[4] The ICT consists of segments as diverse as telecommunications, television and radio Broadcasting, computer hardware, software and services and electronic media (for example, the Internet and electronic mail). Information and communication needs can be met byMore traditional means, such as print media and fixed telephone lines, or by satellite technology, mobile phones and the Internet. Traditional technologies continue to be important for large numbers of people around the world, particularly in rural areas. However, new technologies have a vast potential for empowerment which needs to be fully exploited. The term ICT has been used to encompass technological innovation and convergence in information and communication leading to the development of so-called information or knowledge societies, with resulting changes in social interaction, economic and business practices, political engagement, education, health, leisure and entertainment. Over the past decade, there has been a growing understanding that these technologies can be powerful instruments for advancing economic and social development through the creation of new types of economic activity, employment opportunities, improvements in health-care delivery and other services, and the enhancement of networking, participation and advocacy within society. ICT also have the potential to improve interaction between Governments and citizens, fostering transparency and accountability in governance.

The media can be commended for starting a trend where the media plays an active role in bringing the accused to hook. Especially in the last two decades, the advent of Electronic media i.e. cables television, local radio networks and the internet have greatly enhanced the reach and impact of the mass media. The circulation of newspapers and magazines in English as well as the various vernacular languages has also been continuously growing in our country. This ever-expanding readership and viewership coupled with the use of modern technologies for newsgathering has given media organizations an unprecedented role in shaping popular opinions. However, media freedom also entails a certain degree of responsibility. In an increasingly competitive market for grabbing the attention of viewers and readers, media reports often turn to distortion of facts and sensationalisation. The pursuit of commercial interests also motivates the use of intrusive newsgathering practices which tend to impede the privacy of the people who are the subject of such coverage. The problem finds its worst manifestation when the media extensively covers sub judice matters by publishing information and opinions that are clearly prejudicial to the interests of the parties involved in litigation pending before the Courts.

However, sensationalized news stories circulated by the media have steadily gnawed at the guarantees of a right to a fair trial and posed a grave threat to the presumption of innocence. In recent times there have been numerous instances in which media has conducted the trial of an accused and has passed the verdict even before the Court passes its judgment. Some famous criminal cases that would have gone unpunished but for the intervention of media, are Priyadarshini Mattoo case, Jessica Lal case[5], Nitish Katara murder case[6] and Bijal Joshi rape case[7]. This phenomenon is popularly called as media trial. Trial by Media it is the impact of television and newspaper coverage on a person's reputation by creating a widespread perception of guilt regardless of any verdict in a Court of law. There is a heated debate between those who support a free press which is largely uncensored and those who place a higher priority on an individual's right to privacy and right to a fair trial. The media exceeds its right by publications that are recognized as prejudicial to a suspect or accused like concerning the character of accused, publication of confessions, publications which comment or reflect upon the merits of the case, photographs, police activities, imputation of innocence, creating an atmosphere of prejudice, criticism of witnesses, It encompasses several other rights including the right to

[5] Robert S. Fortner, P. Mark Fackler , The Handbook of Global Communication and Media Ethics,wiley Pub.

[6] Abhinav Garg (31 May 2008). "Trial court sees Katara murder as honour killing". Times of India. Retrieved 2008-05-31

[7] N Prabha Unnithan , Crime and Justice in India, Sage Pub.,p291

be presumed innocent until proven guilty, the guilt is to be proved beyond reasonable doubt and the law is governed by senses and not by emotions the right not to be compelled to be a witness against oneself, the right to a public trial, the right to legal representation, the right to speedy trial, the right to be present during trial and examine witnesses, etc.

In **Zahira Habibullah Sheikh v. State of Gujarat**[8], the Supreme Court explained that a "fair trial obviously would mean a trial before an impartial Judge, a fair prosecutor and atmosphere of judicial calm. Fair trial means a trial in which bias or prejudice for or against the accused, the witnesses, or the cause which is being tried is eliminated." Right to a fair trial is absolute right of every individual within the territorial limits of India vide articles 14 and 20, 21 and 22 of the Constitution. Needless to say right to a fair trial is more important as it is an absolute right which flows from Article 21 of the Constitution to be read with Article 14. Article 19(1) (a) of the Constitution of India guarantees the fundamental right to freedom of speech and expression. In accordance with Article 19(2), this right can be restricted by law only 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." So the right to freedom and speech and expression does not embrace the freedom to commit contempt of Court. While freedom of expression remains an important facilitator for widespread engagement within a democratic society, it must be balanced against the right to a fair trial and the right to privacy. The Contempt of Court Act[9] defines contempt by identifying it as civil and criminal. Criminal contempt has further been divided into three types: *Scandalizing or prejudicing trial and hindering the administration of justice.* The provision of contempt has its origin to the principle of natural justice i.e. every accused has a right to a fair trial along with the principle that justice should not be done only but it must also appear to have been done. If media exercises an unrestricted or rather unregulated freedom in publishing information about a criminal case and prejudices the mind of the public and those who are to adjudicate on the guilt of the accused and if it projects a suspect or an accused as if he has already been

[8] (2004) 4 SCC 158,

[9] The Contempt of Courts Act, 1971 Sec. 2. Definitions.—In this Act, unless the context otherwise requires,—(a) "contempt of court" means civil contempt or criminal contempt;(b) "civil contempt" means wilful disobedience to any judgment, decree, direction, order, writ or other process of a court or wilful breach of an undertaking given to a court;(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) 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;

adjudged guilty well before the trial in Court, there can be serious prejudice to the accused. In fact, even if ultimately the person is acquitted after the due process in Courts, such an acquittal may not help the accused to rebuild his lost image in society. If excessive publicity in the media about a suspect or an accused before trial prejudices a fair trial or results in characterizing him as a person who had indeed committed the crime, it amounts to undue interference with the "administration of justice", calling for proceedings for contempt of Court against the media. Other issues about the privacy rights of individuals or defendants may also arise. The various excesses of media trial cannot be ruled out as not hampering the fairness of trials concerned.

Through media trial, we have started to create pressure on the lawyers even — to not take up cases of accused[10], thus trying to force these accused to go to trial without any defense. Is this not against the principles of natural justice? Every person has a right to get himself represented by a lawyer of his choice and put his point before the adjudicating Court and no one has the right to debar him from doing so. For an instance, when eminent lawyer Ram Jethmalani decided to defend Manu Sharma, a prime accused in a murder case, he was subject to public derision. A senior editor of a television news channel CNN-IBN called the decision to represent Sharma an attempt to "defend the indefensible". This was only one example of the media instigated campaign against the accused. As we all knew that in that case we had one of the best lawyers of the country, Gopal Subramaniam, appearing for the state and the case of Manu was handed to some mediocre lawyer. The media assumption of guilt clearly encroaches upon the right to legal representation, a critical component of the right to fair trial and may also intimidate lawyers into refusing to represent accused persons. Suspects and accused apart, even victims and witnesses suffer from excessive publicity and invasion of their privacy rights. Police are presented in poor light by the media and their morale too suffers. The day after the report of crime is published; media says 'Police have no clue'. Then, whatever gossips the media gathers about the line of investigation by the official agencies, it gives such publicity in respect of the information that the person who has indeed committed the crime, can move away to safer places. The pressure on the police from media day by day builds up and reaches a stage where police feel compelled to say something or the other in public to protect their reputation. Sometimes when, under such pressure, police come forward with a story that they have nabbed a suspect and that he has confessed, the

[10] http://www.hrdc.net/sahrdc/hrfeatures/HRF164.htm accessed on 10th June 2009.

'Breaking News' items start and few in the media appear to know that under the law, confession to police is not admissible in a criminal trial[11]. Once the confession is published by both the police and the media, the suspect's future is finished. When he retracts from the confession muddle, Witness protection is then a serious casualty. This leads to the question about the admissibility of hostile witness evidence and whether the law should be amended to prevent witnesses changing their statements. Again, if the suspect's pictures are shown in the media, problems can arise during 'identification parades' conducted under the Code of Criminal Procedure for identifying the accused. Subconscious Effect on the Judge as one of the major allegations upon 'media trial' is prejudicing the judges presiding over a particular case. As there is always a chance judges may get influenced by the flowing air of remarks made upon a particular controversy. The media presents the case in such a manner to the public that if a judge passes an order against the "media verdict", he or she may appear to many either as corrupt or biased.

Justification by Media:

We have a rich tradition of fiercely independent journalism. In fact, most of the big scams were busted by the press. The law enforcers merely followed them up. The poorly paid journalist must be credited for extracting those information's which looked inaccessible for the top vigilance teams of the country. That is how HDW (Howaldtswerke-Deutsche Werft GmbH) marine case and Bofors hit the headlines. That is how we found out that Narasimha Rao had bribed the Jharkhand Mukti Morcha[12] MPs and Satish Sharma and Buta Singh had brokered the deal. The media did us proud at every place of our political juncture. There is increasing and intense public focus on Courts and the cases filed therein. Now that the Courts have come under the media's microscope, they are likely to remain there forever. A Positive byproduct of changes spurred by the media and addressed by the Courts is that more Indians are aware of their Constitution al rights than ever before. The media strongly resents this sub judice rule and complains that Courts during the course of a hearing tend to interpret the sub judice rule quite strictly to prohibit any discussion of the issues before the Court even if they are engaging public attention. There is, therefore, an urgent need to liberalize the sub judice rule, invoking it only in cases of an obvious intent to influence the trial and not to any act that might have the remote possibility of

[11] Trial by Media by Prejudicing the sub judice available at http://www.rmlnlu.ac.in/notice_pdf/devesh_article.pdf ,visited on 10 may 2010

[12]http://indiatoday.intoday.in/story/jharkhand-mukti-morcha-bribery-scandal-in-1993-corruption-got-institutionalised-in-india/1/192408.html,visited on22 May2013

influencing it. Another major constraint on stings and trials by media is the public interest. If public interest is missing and self or manipulative interests surface, the media loses its ground and invites the wrath of the Court. In such cases media reporting can swing popular sentiments either way. It is, therefore, necessary to make a balance between the Constitution al guarantee of free media on one hand and the individual right to fair trial on the other.

The Judiciary and the Media are the third and fourth pillars respectively of a Democratic set up. Both are indispensable for the smooth functioning of the system. While the former should duly regard the Freedom and Right of the latter to cover and disseminate news about Court proceedings in an open justice system, the latter on its part also ought to show its due diligence and extreme caution while reporting the same so as to preserve the sanctity of the former as well as for ensuring a free and fair trial. Any confrontation between the two over Reportage of news in sub judice matters is indeed unwarranted. On the contrary, they both rather ought to work in tandem respecting each other's domain and independence.

In **Saibal Kumar vs. B.K. Sen**,[13] the Supreme Court tried to discourage the tendency of media trial and remarked,

> "*No doubt, it would be mischievous for a newspaper to systematically conduct an independent investigation into a crime for which a man has been arrested and to publish the results of the investigation. This is because trial by newspapers, when a trial by one of the regular tribunals of the country is going on, must be prevented. The basis for this view is that such action on the part of a newspaper tends to interfere with the course of justice, whether the investigation tends to prejudice the accused or the prosecution*."

Although our judicial system relies on the competence, impartiality and fearlessness of the trial judge and one can argue for unrestrained media converge of Court proceeding on the ground that it will not influence the judgment. But even in England there has been divergence of opinion. In view of Lord Denning, a professional judge will not be influenced by media coverage which affects only common man. This concept of

[13] 1961) 3 SCR 460

judicial superiority was not endorsed by **Lord Dilhorne**.[14] Even in United States the judiciary has been of the view that the Court cannot function properly if a reporting is calculated to disturb the judicial mind. In **John D. Pennekamp vs. State of Florida**,[15] it was observed,

> "*No Judge fit to be one is likely to be influenced consciously, except by what he see or hears in Court and by what is judicially appropriate for his deliberations. However, Judges are also human and we know better than did our forbears how powerful is the pull of the unconscious and how treacherous the rational process—and since Judges, however stalwart, are human, the delicate task of administering justice ought not to be made unduly difficult by irresponsible print*."

It is correct that contempt of Court is one of the ground on which reasonable restriction can be imposed on the freedom of speech. The Contempt Of Court Act defines contempt by identifying it as civil and criminal. Criminal contempt has further been divided into three types: Scandalizing or prejudicing trial and hindering the administration of justice. The provision of contempt has its origin to the principle of natural justice i.e. every accused has a right to a fair trial along with the principle that justice should not be done only but it must also appear to have been done. There may be many ways to prejudice a trial. If it is allowed, a person may be held guilty of an offence, which he has not actually committed. No publication, which is calculated to poison the mind of a Judge, a witness or a party or cerate an atmosphere in which the administration of justice would be difficult or impossible, amounts to contempt. No editor has the right to assume the role of an investigator so as to prejudice the Court against any person. But law of contempt can only be attracted to prevent comments when the case is sub-judice. If the case is not pending in the Court, it is of no avail. In our legal system, the Courts do not have any power to impose prior restraints on the publication of prejudicial material during the pendency of Court proceedings.

In **M.P. Lohia vs. State of West Bengal**[16] the Supreme Court has strongly deprecated the media for interfering with the administration of justice by publishing one-sided articles touching on merits of cases pending in the Courts.

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[14] See Attorney General v. British Broadcasting Corporation, 1981 AC 303 (HL)

[15] (1946) 328 US 331

[16] (2005) 2 SCC 686

Pointing out that the article was a one-sided version of the case, N. Santosh Hedge Justice said that the facts narrated therein are materials that may be used in the forthcoming trial in this case and that this type of article appearing in the media would certainly interfere with the administration of justice. He remarked-

> "*We deprecate this practice and caution the Publisher, Editor and the journalist who are responsible for the said articles against indulging in such trial by media when the issue is sub-judice. Others concerned in journalism would take note of this displeasure expressed by us for interfering with the administration of justice."*

Restriction on media trial is necessary so that the people may not have a wrong perception of the Administration of Justice System. Sometimes it is necessary to protect the privacy of individual. But the major concerned is, and which is the core issue of this work is the need to check prejudicial effect caused by a sensational reporting of a sub-judice matter. So far as a criminal trial is concern media reporting has a more negative influence rather than a positive effect. The media cannot be granted a free hand in Court proceedings. The media has to be properly regulated. One way is the recourse to the Law of Contempt. But, in the interest of democracy, it is better to have a self-regulated and self disciplined media in comparison to a media regulated by the Court and the state

It is pertinent to note that May 2, 2008 proved to be a landmark day in the annals of Indian Judiciary, when TV Cameras were allowed in Lok Adalat's held within the premises of the Supreme Court, which were presided over by the Chief Justice of India K.G. Balakrishnan, Justice Ashok Bhan, Justice Arijit Prasayat and Justice Aftab Alam. This was the first instance in India, wherein Cameras were allowed to record Court proceedings. Nevertheless the Chief Justice K.G.Balakirshnan commenting on whether TV Cameras would be allowed to cover the proceedings of the Supreme Court stated that at the given juncture, it would not be feasible to do the same and in fact Lok Adalat[17] proceedings could not be termed as Court proceedings. Elaborating further Chief Justice stated that given the sensitivity of the matters that the Courts have to adjudicate upon, the not common acrimonious exchanges that take place between the lawyers coupled with the embarrassing moments that arise during Court proceedings, necessitate that TV Cameras

[17] Lok Adalat is an Alternative Dispute Resolution Mechanism that has been evolved for speedier dispensation of Justice and many Jurists are of the opinion that Lok Adalatproceedings are of a different nature that expend with the necessity of procedural requirementsand formalities of a regular court.See generallyJUSTICEJITENDRAN. BHATT, A Round Table Justice Through Lok Adalat (People'sCourt) – A Vibrant ADR In India (2002) 1 SCC (Jour) 11; JUSTICEK.A. ABDULGAFOOR, TheConcept of Permanent Lok Adalat And The Legal Services Authorities Amendment Act,2002(2003) 5 SCC (Jour) 33.

should not be allowed in Court rooms.[18] The broadcaster's right to inform the public through televising of Courtroom proceedings could be derived from Article 19(1)(a) provided the time is right for it's sustenance and it is not leading to a violation of a higher right. In India it might not work so well because even in a developed country like America the reare still repentances about the right.

Fair trial has been recognized as a fundamental right under Article 21 of the Indian Constitution and the first imperative in the dispensation of justice.[19]An open Court is occupies one spot in a constellation of requirements for a fair trial. The primary values and interest addressed while holding a public trial is fairness in the administration of justice. Now in certain circumstances if a public trial itself creates certain damaging effects on the trial, then conducting of such trials should be precluded. In India there are statutory provisions[20] wherein the Court can conduct trials in camera, that is, when the hearing takes place with closed door, at the exclusion of the public. This is also a way of ensuring a fair trial and is inactive of the fact that if there is a conflict between the right of the pubic to know and the right of the press to inform about a trial's proceedings on the one hand and the right of the accused to a fair trial on the other hand, then the latter should be given precedence over the former. Recently, even Chief Justice K.G. Balakirishnan, the Chief Justice of India, speaking at a Workshop on "Reporting of Court Proceedings by Media and Administration of Justice"[21]commented that no matter to what extent the fourth estate while covering the Court proceedings tries to be accurate, the margin for a slip-up creeping in cannot be discounted. Since, administration of justice is regarded to be one of the most sanctimonious jobs ever undertaken, such slipups, however small, can dilute the faith that an ordinary Indian reposes in the Judiciary. The Chief Justice laid stress on the fact that with the advent of mass media, trials by media instead of giving a helping hand to the Judiciary's endeavour to ensure justice for all are impinging upon the elementary right of the accused to get a fair trial. These media trials always ride on the wave of public sentiment and usually pronounce the guilt of the accused in sub-judice matters. This acts as a prejudice to the accused that has a right to a fair trial. As an offshoot to this, the re arises a possibility that general public could feel let down by the institution of judiciary

[18] SC Lets Camera Crew Film Lok Adalat Session, The Times of India, 4 May 2008
[19] Commissioner of Police Delhi v Registrar, Delhi High Court, New Delhi, AIR 1997 SC 95.
[20] Section 14 of the Indian Official Secrets Act, 1923; Section 22(1) of the Hindu MarriageAct, 1955, Section 327 (proviso) of The Code of Criminal Procedure, 1973; Section 153 B(proviso) of The Code of Civil Procedure, 1908
[21] This Workshop was held at Vigyan Bhawan, New Delhi on 29thMarch and 30thMarch 2008.
This workshop was jointly organized by the Supreme Court Legal Services Committee,
Press Council of India, Indian Law Institute, National Legal Services Authority and Editors
Guild of India.

when a determination going against the media verdict is made by the Court.[22] The Supreme Court of India in **Naresh Shridhar Mirajkar v State of Maharashtra**[23]observed that the public has a right to be present in Court and to watch the proceedings conducted there, however the same is a right given to the public at large only in the interests of the administration of justice and is not a fundamental right of the public. The Court observed that, as a judicial decision purports to decide the controversy between the parties before the Court and nothing more, a judicial verdict pronounced by the Court in relation to a matter brought before it for its decision would not affect the right of citizens under Article 19(1).[24]Though this observation would hold water with regard to civil suits, in criminal trials the justification would differ to a great extent because crime is considered to be an offense against the whole society and not against one individual alone.[25]Hence, it might be argued that the citizens would have right to know and right to receive information[26]about a criminal trial which is a matter of public concern. But even in criminal trials, the citizen's right to know is not absolute. In the past, Courts have excluded the public in order to safeguard a witness against possible reprisal or prevent embarrassment and emotional disturbance to the witness and such orders have been upheld as valid discretionary decisions made in part to ensure that the Courtroom atmosphere does not inhibit a witness from fully disclosing his or her information. The primary purpose of criminal trials is to provide an impartial forum to the parties in a trial. Moreover, it is of fundamental importance that justice should not only be done but should manifestly and undoubtedly be seen to be done.[27]Thus the paramount concern in any trial ought to be the administration of justice enabled by emergence of truth and truth will emerge only if the witnesses are forth coming in their testimony, the judge has control over the Courtroom and the integrity of the trial is maintained. The presence of cameras in Courtrooms could cause serious threats to the emergence of truth. A public trial is a means of ensuring a fair trial, wherein the accused is not prosecuted or convicted in secret proceedings. It is an endeavour to protect the right of the accused and not to provide a spectacle to the community. The operative right in the judicial system is the right of the accused to a fair trial[28]and not that of the public to see it on television. Therefore an open

[22] CJI for Caution against Trial by Media, The Hindu, Mar. 31, 2008, http://www.thehindu.com/holnus/000 200803310305.htm
[23] AIR 1967 SC 1
[24] Article 19(2) - Nothing in sub-clause (a)of clause (1) shall affect the operation of any existing law in so far as it relates to, or prevent the State from making any law relating to, libel, slander, defamation, contempt of court or any matter which offends against decency or morality or which undermines the security of, or tends to overthrow, the State.
[25] L ARORA, Law of SpeedyTrial in India 17 (2006).
[26] State of U.P. v Raj Narian AIR 1975 SC 865.
[27] R v Sussex (1924) 1 KB 256.
[28] Nancy T. Gardner, Cameras in the Courtroom: Guidelines for State Criminal Trials, 84MICH. L. REV. 475 1985).

Court implies that there ought to be an opportunity with the public to attend the trial, and such opportunity is enough to avert any danger of an unfair trial, further whether or not the opportunity is taken by the public is irrelevant.[29]Although cameras in Courtrooms would imply that more people would have access to judicial proceedings, but such access rather than ensuring a fair trial, might just endanger the right to fair trial. Even in the absence of any unambiguous scientific proof of imminent danger to a fair trial, in the event of televising Court room proceedings, the mere knowledge from the American experience that presence of cameras could detract from the business of the trial and jeopardize a fair trial should be sufficient to warrant the exclusion of cameras from Indian Court rooms. To assure the impartial accomplishment of justice would not lead to an abridgement of freedom of speech and expression or the freedom of the press.[30]The Fundamental Rights provided in Part III of the Indian Constitution occupy a transcendental position and are necessary for the development of human personality.[31] The Supreme Court has recognized that a peripheral or concomitant right which facilitates the exercise of a named fundamental right or gives it meaning and substance or makes it effective, is not itself a guaranteed right included within the named fundamental right.[32]Fundamental rights themselves have no fixed content; most of them are empty vessels into which each generation must pour its content in the light of its experience.[33]Whenever a concomitant right is read into a named fundamental right, it must be ensured that the former can be adjusted with the society at the existing stage of development.

In pursuance of the democratic ideals underlying Article 19(1)(a), the Supreme Court of India at various instances has read freedom of press as a part of the right to free speech and expression.[34]The press has now assumed the role of the public educator making formal and non-formal education possible on a large scale particularly in the developing world.[35]Article 19(1)(a) also guarantees the right to receive and impart information which can be achieved through word of mouth, in writing or in print, inthe form of art or through television, radio etc.[36]

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[29] Josephja ConelliI, Open Justice- A Critique of the Public Trial 23 (2002)
[30] Reliance Petrochemicals Ltd. v Proprietors of Indian Express Newspapers, Bombay Pvt. Ltd. and Ors AIR 1989 SC 190.
[31] I.C. Golak Nath v Union of India. AIR 1967 SC 1643
[32] All India Bank Employees Association v National Industrial Tribunal, AIR 1962 SC 171.
[33] Keshavananda Bharti v State of Kerala (1973) 4 SCC 225.
[34] Sakal Newspapers v Union of India AIR 1962 SC 305; Bennett Coleman & Co. v Union of India AIR 1973 SC 106
[35] Indian Express Newspaper (Bombay) Private Ltd. Ors v Union of India and Ors AIR 1986SC 515.
[36] Secretary, Ministry of Information and Broadcasting v Cricket Association of Bengal AIR 1995 SC 1236; Association for Democratic Reforms v Union of India AIR 2001 Del 126

There is little doubt that broadcasting freedom is implicit in the freedom of speech and expression.[37]However Article 19(1)(a) does not confer any right on the press to have an unrestricted access to means of information.[38] From the standpoint of Article 19(1)(a), The Supreme Court has further emphasized that the freedom of press is not so much for the benefit of the press as for the benefit of the general community because the community has a right to be supplied with information. Freedom of press extends to include a right to publish a faithful report of Courtroom proceedings witnessed and heard by the journalist.[39]Thus when it comes to televising of Courtroom proceedings the effective right to be considered is the right of the general public of India, who are to be the viewers of these proceedings. However there can be instances wherein the attendance of the press is banned in the Courtrooms or the press may be prohibited from publishing the trial or any part of it thereof in order to ensure a fair trial. The question that arises for consideration is whether the public has an absolute right to know about the proceedings of a trial and therefore, the press has the right to televise Courtroom proceedings?

Televising of Courtroom proceedings is considered to be a means of ensuring open justice. Cameras in Courts, it is believed, would prevent the abuses that can take place in closed proceedings, provide opportunity to the public to become better educated about the judicial process and ensure the level of public access needed to build genuine public support for the justice system. Section327[40]of The Code of Criminal Procedure Code, 1973 and Section 153B[41]of The Code of Civil Procedure (CPC) prescribe open Courts for criminal proceedings and civil proceedings respectively. Public trials in open Court subject to public scrutiny and gaze naturally act as a check against judicial caprices or vagaries, and serve as a powerful instrument for creating confidence of the public in the fairness, objectivity and impartiality of the administration of justice.[42]

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[37] Broadly speaking, broadcasting freedom can be said to have four facets, (a) freedom of the broadcaster, (b) freedom of the listeners/viewers to a variety of view and plurality of opinion, (c) right of the citizens and groups of citizens to have access to the broadcasting media, and (d) the right to establish private radio/TV stations

[38] Smt Prabha Dutt V. Union of India AIR 1982 SC 6

[39] Jagdish Swarup, Constitution of India 684 (Dr. L.M. Singhvi ed., 2006)

[40] The Code of Criminal Procedure, 1973 Section 327.Court to be open - The place in which may Criminal Court is held for the purpose of inquiring into or trying any offence shall be deemed to be an open Court, to which the public generally may have access, so far as the same can conveniently contain them.Provided that the presiding Judge or Magistrate may, if he thinks fit, order at any stage of any inquiry into, or trial of, any particular case, that the public generally, or any particular person, shall not have access to, or be or remain in, the room or building used by the Court

[41] The Code of Civil Procedure, 1908 Section 153 B. Place of trial to be deemed to be open Court. - The place in which any Civil Court is held for the purpose of trying any suit shall be deemed to be an open Court, to which the public generally may have access, so far as thesame can conveniently contain them. Provided that the presiding Judge may, if he thinks fit, order at any stage of any inquiry into, or trial of, any particular case, that the public generally, or any particular person, shall nothave access to, or be or remain in, the room or building used by the Court

[42] Naresh Shridhar Mirajkar v State of Maharashtra AIR 1967 SC 1

4.2 HUMAN RIGHT AND TRIAL BY MEDIA

The right to a fair trial on a criminal charge is considered to start running not "only upon the formal lodging of a charge but rather on the date on which State activities substantially affect the situation of the person concerned.[43]" This could obviously coincide with the moment of arrest, depending on the circumstances of the case. Fair trial guarantees must be observed from the moment the investigation against the accused commences until the criminal proceedings, including any appeal, have been completed. The distinction between pre- trial procedures, the actual trial and post trial procedures is sometimes blurred in fact, and the violation of rights during one stage may well have an effect on another stage. However the most relevant articles of the ICCPR can be loosely divided into those three categories and the separation is sometimes helpful for the purposes of identifying which issues will be of particular interest during different time periods of the trial process[44].

PRE-TRIAL RIGHTS

1. The Prohibition on Arbitrary Arrest and Detention
2. The Right to Know the Reasons for Arrest
3. The Right to Legal Counsel
4. The Right to a Prompt Appearance before a Judge to Challenge the Lawfulness of Arrest and Detention
5. The Prohibition of Torture and the Right to Humane Conditions during Pre-trial Detention
6. The Prohibition on Incommunicado Detention

THE HEARING

1. Equal Access to, and Equality before, the Courts

[43] Manfred Nowak, U.N. Covenant on Civil and Political Rights, CCPR Commentary (N.P. Engel, Arlington: 1993),p.

[44] Lawyers Committee for Human Rights ,What is fair trial, Basic Guide to Legal Standards and Practice,march 2000This guide was originally prepared by Jelena Pejic in 1995. It was updated by Vanessa Lesnie in 1999

2. The Right to a Fair Hearing
3. The Right to a Public Hearing
4. The Right to a Competent, Independent and Impartial Tribunal Established by Law
5. The Right to a Presumption of Innocence
6. The Right to Prompt Notice of the Nature and Cause of Criminal Charges
7. The Right to Adequate Time and Facilities for the Preparation of a Defense
8. The Right to a Trial without Undue Delay
9. The Right to Defend Oneself in Person or through Legal Counsel
10. The Right to Examine Witnesses
11. The Right to an Interpreter
12. The Prohibition on Self-incrimination
13. The Prohibition on Retroactive Application of Criminal Laws
14. The Prohibition on Double Jeopardy

POST-TRIAL RIGHTS

1. The Right to Appeal
2. The Right to Compensation for Miscarriage of Justice

4.3 Trial by Media

While freedom of expression remains an important facilitator for widespread engagement within a democratic society, it must be balanced against the right to a

fair trial and the right to privacy. Unfortunately, rules designed to regulate journalistic conduct are inadequate to prevent the encroachment of civil rights.

Article 19(1) (a) of the Constitution of India guarantees the fundamental right to freedom of speech and expression. In accordance with Article 19(2), this right can be restricted by law only 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."

The Indian Supreme Court has concluded that the fundamental rights to privacy and a fair trial flow out of the broader right to life contained in Article 21 of the Constitution. In **Kharak Singh v. State of Uttar Pradesh**, the Supreme Court held that the right to privacy was an "essential ingredient of personal liberty" which is "a right to be free from restrictions or encroachments".

The right to a fair trial is at the heart of the Indian criminal justice system. It encompasses several other rights including the right to be presumed innocent until proven guilty, the right not to be compelled to be a witness against oneself, the right to a public trial, the right to legal representation, the right to speedy trial, the right to be present during trial and examine witnesses, etc. In **Zahira Habibullah Sheikh v. State of Gujarat**, the Supreme Court explained that a "fair trial obviously would mean a trial before an impartial Judge, a fair prosecutor and atmosphere of judicial calm. Fair trial means a trial in which bias or prejudice for or against the accused, the witnesses, or the cause which is being tried is eliminated."

However, sensationalized news stories circulated by the media have steadily gnawed at the guarantees of a right to a fair trial and posed a grave threat to the presumption of innocence. What is more, the pervasive influence of the press is increasingly proving to be detrimental to the impartial decision-making process of the judiciary. Such news stories cannot easily be defended under the auspices of freedom of expression.

Impact of pre-trial publicity

> Sensationalised journalism has also had an impact on the judiciary. For example, in upholding the imposition of the death penalty on Mohammed Afzal for the December 2001 attack on the Indian Parliament, Justice P. Venkatarama Reddi stated, "the incident, which resulted in heavy casualties, had shaken the entire nation and the collective conscience of the society will only be satisfied if the capital punishment is awarded to the offender."
>
> A 'media trial' began almost immediately after Afzal's arrest. Only one week after the attack, on 20 December 2001, the police called a press conference during the course of which Afzal 'incriminated himself' in front of the national media. The media played an excessive and negative role in shaping the public conscience before Afzal was even tried.
>
> Similarly, S.A.R. Geelani, one of Afzal's co-defendants in the Parliament attack case, was initially sentenced to death for his alleged involvement despite an overwhelming lack of evidence. Large sections of the Indian media portrayed him as a dangerous and trained terrorist. On appeal, the Delhi High Court overturned Geelani's conviction and described the prosecution's case as "at best, absurd and tragic". ayendra Saraswati, head abbott of Kanchi Kamakoti, was accused of killing two mill-workers as sacrifice, based solely on newspaper reports. The Andhra Pradesh High Court in **Labour Liberation Front v. State of Andhra Pradesh** held that the writ petition filed to force the authorities to investigate relied upon incorrect facts that should have been verified. The Court observed that "(o)nce an incident involving prominent person or institution takes place, the media is swinging into action and virtually leaving very little for the prosecution or the Courts…"

It is becoming a pernicious media practice to blame the accused in a crime even before the judiciary is ruling. To stop this, the Courts would be right in issuing a gag order for cases that are sub-judice.

News paper and TV channels have picked up on the death penalty awarded to Santosh Singh in the Priyadarshini Matto case and are according it a priority in their coverage. People are celebrating it, and are hoping that justice will be done in the Jessica Lal case as well. None of us know whether Santosh had actually committed the rape and murder, but

we all believe that — and believed so right from the beginning — that he indeed committed the crime. How did the people come to this conclusion? Isn't it because this is what they were told and shown by the media?

Similar is the case with Manu Sharma, the accused in the Jessica Lal case, and other accused persons in many other high-profile cases. Right after the incident, the media trial begins and all media entities — print or electronic — more or less have similar focus in their stories. Worse, they even pronounce their judgment, which usually goes against the accused or the suspect.

With almost a propaganda-like zeal, the story is presented to the viewers as if the accused is really the culprit. In cases where the charge is not proved in the Court, there are SMS campaigns, blogging outrages, candle-lit processions, and rallies to mobilize the citizens against the "injustice" done by the Courts and to put the pressure on the appellate Court.[45]

I don't know whether Santosh is the culprit or Manu Sharma has done anything or not, but so is the case with these hundred thousands of people who have been campaigning in the Jessica Lal and Priyadarshani Matto cases. If we are celebrating this new trend of holding anyone guilty by the media and the common people, then why do we have the judiciary and the criminal justice system? Let's start having ballot boxes and put the name of all the suspects of a case for voting and ask common people to cast their vote, send SMSes and the suspect who would get the maximum SMSs and votes shall be held guilty and shall be punished. This will ensure speedy trial with cent-percent conviction rate. Is this what we are moving towards? Is this what we want?

In the criminal justice system, the guilt is to be proved beyond reasonable doubt and if it's not proved, then the person has to be set free. That's the system we have been following. Law is governed by senses and not by emotions. While displaying our emotions, the media and the masses forget that it puts tremendous pressure on the judge presiding over the case. How can we expect a fair judgment from a judge who is under such tremendous pressure from all sections of the society?

[45] Vikas Upadhyay,Trial by media: Stop the menace ,http://www.merinews.com/article/trial-by-media-stop-the-menace/123650.shtml visited on 11june 2010

A person is presumed to be innocent unless he is held guilty by the competent Court, but here the trend, which has started and which is growing day by day, is to declare a person guilty right at the time of arrest.

The trial by media is a very serious thing and must be stopped before it takes a more vicious form. The media is there to report facts or news and raise public issues; it is not there to pass judgments. The media has a responsibility towards the society; it's not for making money.

These big business houses running and controlling the major media players are showing anything that sells in the market, totally unconcerned about their responsibility. Media has an important role to play, but if that's the direction in which they are headed, the Courts need to take a bold step and issue a gag against them on matters that are sub-judice.

A couple of days back, a big hue and cry was created when Ram Jethmalani accepted the brief for Manu Sharma. I am not able to understand that what do we want? In that case we have one of the best lawyers of the country, Gopal Subramanium, appearing for the state and we want the case of Manu to be handled by some mediocre lawyer. Why can't Jethmalani handle the case? Don't we want to give equal opportunity to the defence to prove its case, or have we lost faith in the judiciary?

Through media trail, we have started to create pressure on the lawyers even — to not take up cases of accused, thus forcing these accused to go to trial without any defence. Is this not against the principles of natural justice? Being a lawyer, I believe that every person has a right to get himself represented by a lawyer of his choice and put his point before the adjudicating Court and no one has the right to debar him from doing so. The media have to understand their limit before it becomes too late. Freedom of speech and expression is one thing and its abuse is another. One has a *maryada,* which is to be honored.

The Law Commission in its 200th report, Trial by Media: Free Speech versus Fair Trial under Criminal Procedure (Amendments to the Contempt of Courts Act, 1971), has recommended a law to debar the media from reporting anything prejudicial to the rights of the accused in criminal cases, from the time of arrest to investigation and trial. The commission has said, "Today there is feeling that in view of the extensive use of the television and cable services, the whole pattern of publication of news has changed and several such publications are likely to have a prejudicial impact on the suspects, accused,

witnesses and even judges and in general on the administration of justice". This is criminal contempt of Court, according to the commission; if the provisions of the Act impose reasonable restrictions on freedom of speech, such restrictions would be valid. It has suggested an amendment to Section 3(2) of the Contempt of Courts Act. Under the present provision such publications would come within the definition of contempt only after the charge sheet is filed in a criminal case, whereas it should be invoked from the time of arrest.

In another controversial recommendation, it has suggested that the high Court be empowered to direct a print or electronic medium to postpone publication or telecast pertaining to a criminal case. [46]On November 3, 2006, former chief justice of India Y K Sabharwal expressed concern over the recent trend of the media conducting 'trial' of cases before Courts pronounce judgments, and cautioned: "If this continues, there can't be any conviction. Judges are confused because the media has already given a verdict". According to law an accused is presumed to be innocent till proved guilty in a Court of law, and is entitled to a fair trial. So, it is legitimate to demand that nobody can be allowed to prejudge or prejudice one's case? Why should judges be swayed by public opinion? In the US, the O J Simpson case attracted a lot of pre-trial publicity. Some persons even demonstrated in judges' robes outside the Court, the trial judge. Yet, Simpson was acquitted. The judge was not prejudiced by media campaign or public opinion. The Supreme Court has ruled in many cases that freedom of the press is a fundamental right covered by the right to freedom of expression under Article 19 (1)(a)of the Constitution. But the right to fair trial has not explicitly been made a fundamental right. That does not mean that it is a less important right. More than a legal right, it is basic principle of natural justice that everyone gets a fair trial and an opportunity to defend one self. The NHRC, in its special leave petition filed before the Supreme Court against acquittal of the accused in the Best Bakery case, contended that the concept of a fair trial is a Constitutional imperative recognized in Articles 14, 19, 21, 22 and 39-A as well as by the Cr P C. If there is a clash between the two rights — freedom of expression and fair trial — which should prevail? It is true that contempt of Court is a ground for restricting the freedom of speech, but the media has not tried to lower the dignity of the judiciary by exposing loopholes of the investigation and the prosecution.

[46] Sudhanshu Ranjan, Jan 26, 2007, 12.00am IST,Media on trial, available at http://timesofindia.indiatimes.com/articleshow/1460248.cms on 11june 2010

And if judicial decisions also appear to be arbitrary, they must be subjected to ruthless scrutiny. It will be dangerous to gag the press in the name of contempt of Court. If the appellate Court feels that the media publicity affected fair trial, it can always reverse the decision of the lower Court.

In the US, in 1965, Sam Sheppard was convicted for the murder of his pregnant wife in their Cleveland suburban home. As this case received an enormous amount of pre-trial publicity, the US Supreme Court ruled that Sheppard's Sixth Amendment rights were violated and overturned the trial Court's decision. In the 1970s and 1980s, the US supreme Court began focusing more on the media's First Amendment rights — the right to freedom of the press. The Supreme Court's pronouncement in Rajendra Sail case, though given in context of criminal contempt, provides the proper guideline: "For rule of law and orderly society, a free press and independent judiciary are both indispensable".

Impact on the right to legal representation

There has been extensive media coverage of police investigations of ‘serial-killings’ in Noida in the outskirts of New Delhi. The owner of the house where the corpses were found, Mohinder Singh Pandher, and his domestic help Surendra Kohli, are suspected of having committed these crimes. Influenced by media coverage, much of it proclaiming that the two men had already confessed to the killings, the local Bar Association announced that it had decided that no advocate from Noida would defend Pandher and Kohli in Court.

Likewise, when eminent lawyer Ram Jethmalani decided to defend Manu Sharma, a prime accused in a murder case, he was subject to public derision. A senior editor of the television news channel CNN-IBN called the decision to represent Sharma an attempt to “defend the indefensible”. This was only one example of the media-instigated campaign against the accused. The media assumption of guilt clearly encroaches upon the right to legal representation — a critical component of the right to fair trial — and may also intimidate lawyers into refusing to represent accused persons.

Regulatory measures

The Press Council of India (PCI) was established to preserve the freedom of the press and to improve the standards of news reporting in India. Under the Press Council Act

1978, if someone believes that a news agency has committed any professional misconduct, the PCI can, if they agree with the complainant, "warn, admonish or censure the newspaper", or direct the newspaper to, "publish the contradiction of the complainant in its forthcoming issue." Given that these measures can only be enforced after the publication of news materials, and do not involve particularly harsh punishments, their effectiveness in preventing the publication of prejudicial reports appears to be limited.

Along with these powers, the PCI has established a set of suggested norms for journalistic conduct. These norms emphasis the importance of accuracy and fairness and encourages the press to "eschew publication of inaccurate, baseless, graceless, misleading or distorted material." The norms urge that any criticism of the judiciary should be published with great caution. These norms further recommend that reporters should avoid one-sided inferences, and attempt to maintain an impartial and sober tone at all times. But significantly, these norms cannot be legally enforced, and are largely observed in breach.

Lastly, the PCI also has criminal contempt powers to restrict the publication of prejudicial media reports. However, the PCI can only exercise its contempt powers with respect to pending civil or criminal cases. The limitation over the extent to which pre-trial reporting can impact the administration of justice.

Modern democracy and the media are intrinsically related. In modern democracies the media are the link between those who govern and those who are governed. Media need democracy because it is the only form of government which respects freedom of speech, expression and information, and the independence of the media from the state Political ideas and initiatives, in turn, is disseminated among citizens by the media, and individual opinion making and voting are largely based on political information provided by media. From a normative perspective, the media have three specific democratic functions to meet:

(a) Safe guarding the flow of information;

(b) Providing a forum for public discussion about diverse, often conflicting political ideas;

(c) Acting as a public watchdog against the abuse of power.

Mass media and democracy are obviously closely related. However, democracy is not one-dimensional. In principle, there are as many concepts of democracy as there are democratic countries. Several views about what characterizes democracy give way to a

multitude of concepts of democracy. Although, drawings on recent overviews of democratic theory make a difference between a few basic concepts of democracy, which can be classified on a continuum from minimalist to maximalist variants:

The 'elitist democracy', is based on a minimalist conception,

The 'participatory democracy[47]' is based on a mid-range concept, while

The 'deliberative democracy'[48] stands on a broader understanding of democracy.

The minimalist perspective assumes, that every political system is ruled by political elites capable of making public decisions and protecting individual liberty. The broader public has neither the adequate ability nor the interest to govern itself. However, citizens are nevertheless seen as the final instance which chooses by election the representatives that will govern for a predefined period of time. This view assumes thus active political elites on the one hand and reacting citizens on the other hand. According to the elitist democracy, the basic requirement to the media is the provision of citizen with reliable information. In order to choose between competing political elites, people need information and knowledge about political issues and actors.

In Participatory democracy understands democracy as a value-laden system where a strong ethos, political equality and tolerance play a crucial role. Democracy is sustained by dedicated citizens: "The more people are politically interested, the more they engage in associations and civic organizations, the more they vote, the more they develop attitudes and norms of generalized reciprocity, the better". Therefore, democracy can never be built or sustained from elected skilled elites, it has to be built and sustained by the actions of a large number of people.

Three fundamental principles correspond to these three prototypes of democracy: freedom, equality and control. These principles originate from the 'Age of Enlightment' and the great democratic revolutions of the 18th and 19th century. They are the principles that democrats in all time and places have struggled for and which accompanied the development of modern states freedom can be understood as consisting of three types of rights: political, civil, and social rights. Freedom rights are based on the idea of people's freedom to act (e.g. freedom of opinion, freedom of association, freedom of information).

[47] http://dictionary.reference.com/browse/participatory+democracy,visited on 23 April2014
[48] http://www.britannica.com/EBchecked/topic/1918144/deliberative-democracy,visite on 23 April 2014

In their widest sense, freedom rights should thus be viewed as protecting people's ability to act independently and with self-determination, in political, economic, social and cultural terms. Of central importance for people's freedom is the protection against infringements by the state. "Over time, the list of negative freedom rights has grown and the protection and guarantee of these rights have become one of the minimal conditions for democratic regimes." Beyond this protection, conditions must be created to ensure that people are able to develop freely and live a self-determined life. From this perspective, political liberties are seen as preconditions for citizens to actively influence political decisions. This implies that the state must protect freedom rights.

Freedom as a principle in civil society has often been defined in terms of communication rights to hold opinions and to receive and impart information: "Political communication in democracy is connected with the idea of freedom. Freedom of expression and opinion building as individual basic rights, and as institutional guarantees for an independent media system are part of very core of democracy, and they are constitute for a democratic order. In this view, freedom of expression is both, a crucial individual right and an indispensable social good. The media's communication function which derives from freedom is the information function. Media can meet this function due to their specific capabilities to collect and process large amounts of information and to distribute it to all participants of the political process. Equality, understood as political equality proclaims the equality of all citizens in and before the law and in the political process. Thus, equality means equal treatment of all citizens by the state, and equal rights to participate in politics - i.e. citizens' preferences have the same weight in political decisions.

Control is essential for democracy and its political institutions. This principle demands that citizens control their representatives in the government in order to secure their own freedom and equality: "In a good democracy the citizens themselves have the sovereign power to evaluate whether the government provides liberty and equality according to the rule of law" This also implies that citizens, their organizations and parties participate and compete to hold elected officials accountable for their policies and actions. Moreover, they monitor the efficiency and fairness of the application of the laws as well as the efficacy of government decisions. Control as a principle in relation to communication and power assumes that the mass media should act on behalf of the public as a watchdog

holding government officials accountable. In order to preserve the conditions for the enjoyment of civil rights and political liberties, the mass media should act as an independent, fair and impartial critic of powerful interests and inform about abuses of political and economic power. This implies that mass media should not just be informing in an unfiltered way and without critical analysis of political messages. Some liberal authors consider the watchdog function as even more important than the information function. “We have distinguished two political roles of free press in classical liberalism: the watchdog and the democratic [i.e. information] functions. And we noted that for advocates of limited government, the first is by far the more important .The media’s communication function which follows from control is a watchdog function against the abuse of all sorts of power. The functions the media and communication processes must meet in order to promote the three fundamental democratic principles are (1) a guardian of the flow of information, (2) a public forum for public discussion of diverse, often conflicting political ideas, (3) a public watchdog against the abuse of all sorts of power.

The media concentration and deregulation have weakened their position in most European countries and probably world-wide. They do not fit well in an information world where speed succeeds over accuracy and where corporate interests prevail over the public interest. News and information changes originate in the personalized Internet realm rather than in large and sometimes inflexible public institutions. Nonetheless, democratic societies depend on active citizenry who participate in public life. Public issues concern people, interested in reaching their personal objectives or common goals. These active groups of democratic societies require media services that go beyond what commercial and participatory online media are able to deliver. PSM are best placed to respond to this demand. Information, interest mediation and watchdog control are public service virtues that are more and more neglected by other types of mass media. Internet related forms of public communication can only partially fulfill democratic requirements.

It is most likely that those trend-setting mass media become less interested in comprehensive information on policy processes and democracy. By this development private commercial and internationalized mass media erode their relevance to national and transnational policy institutions and policy processes. Thereby, a window of opportunity opens for public service media that are less exposed to these trends than private commercial mass media. Consequently, the relevance of public service media for the

democratic process and the policy discourse increases. However, the larger and more commercial corporate media become, the less they are interested to enable and fulfill these essential democratic requirements. Public service media with their remit gain strength and relevance in return. Democratic policy making requires specific forms of media coverage that is not offered by commercial transnational corporate media. Public service media are well placed to fill this important vacancy official networks, the whole blogosphere, Internet fora, second life, and other forms of computer-aided communication enable citizens to exchange opinions bypassing traditional mass media. One of the main functions of mass media is at stake: Groups of citizens can communicate to one another without the interpretation of journalism provided by corporate media. Without over-emphasizing this change, digital technology and smart online applications have opened new communication spaces.

4.4 FAIR TRIAL AND HUMANRIGHTS

The right to a fair trial is a norm of international human rights law designed to protect individuals from the unlawful and arbitrary curtailment or deprivation of other basic rights and freedoms, the most prominent of which are the right to life and liberty of the person. It is guaranteed under Article 14 of the International Covenant on Civil and Political Rights (ICCPR),[49] which provides that "everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law."

The fundamental importance of this right is illustrated not only by the extensive body of interpretation it has generated but, most recently, by a proposal to include it in the non- derogable rights provided for in Article 4(2) of the ICCPR.[50] The right to a fair trial is applicable to both the determination of an individual's rights and duties in a suit at law and with respect to the determination of any criminal charge against him or her.

[49] International Covenant on Civil and Political Rights, UN General Assembly resolution 2200A (XXI), December16, 1966, entered into force March 23, 1976 [hereinafter ICCPR].

[50] *See* Draft Third Optional Protocol to the ICCPR, Aiming at Guaranteeing Under All Circumstances the Right to a Fair Trial and a Remedy, Annex I, in: "The Administration of Justice and the Human Rights of Detainees, The Right to a Fair Trial: Current Recognition and Measures Necessary for Its Strengthening," Final Report, Commission on Human Rights, Sub-Commission on Prevention of Discrimination and Protection of Minorities,46th Session, E/CN.4/Sub.2/1994/24, June 3, 1994 [hereinafter The Final Report], at 59-62. http://www.unhchr.ch/Huridocda/Huridoca.nsf/TestFrame/d8925328e178f8748025673d00599b81,visited on 25 May 2014

The term "suit at law" refers to various types of court proceedings—including administrative proceedings, for example—because the concept of a suit at law has been interpreted as hinging on the nature of the right involved rather than the status of one of the parties.[51]

The standards against which a trial is to be assessed in terms of fairness are numerous, complex, and constantly evolving. They may constitute binding obligations that are included in human rights treaties to which the state is a party. But, they may also be found in documents which, though not formally binding, can be taken to express the direction in which the law is evolving. The right to a fair trial on a criminal charge is considered to start running not "only upon the formal lodging of a charge but rather on the date on which State activities substantially affect the situation of the person concerned."[52]

4.4.1 PRE-TRIAL RIGHTS

The prohibition on arbitrary arrest and detention

Article 9(1) of the ICCPR provides that "everyone has the right to liberty and security of person." The liberty of a person has been interpreted narrowly, to mean freedom of bodily movement, which is interfered with when an individual is confined to a specific space such as a prison or a detention facility. Security has been taken to mean the right to be free from interference with personal integrity by private persons. Under Article 9(1) "No one shall be subjected to arbitrary arrest or detention" and "No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law." The principle of legality embodied in the latter sentence both substantively ("on such grounds") and procedurally ("in accordance with such procedure") mandates that the term "law" should be understood as referring to an abstract norm, applicable and accessible to all, whether laid down in a statute or forming part of the unwritten, common law.

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[51] *See* Dominic McGoldrick, *The Human Rights Committee, Its Role in the Development of the International Covenant on Civil and Political Rights* (Clarendon Press, Oxford: 1994), at 415

[52] Manfred Nowak, *U.N. Covenant on Civil and Political Rights, CCPR Commentary* (N.P. Engel, Arlington: 1993) [hereinafter Nowak Commentary], at 244

1. The right to know the reasons for arrest

Article 9(2) of the ICCPR[53] provides that "Anyone who is arrested shall be informed, at the time of arrest, of the reasons for his arrest and shall be promptly informed of any charges against him." These provisions have been interpreted to mean that anyone who is arrested must be informed of the general reasons for the arrest "at the time of arrest," while subsequent information, to be furnished "promptly," must contain accusations in the legal sense. However there must be sufficient information to permit the accused to challenge the legality of his or her detention. A written arrest warrant is not unconditionally required, but the lack of a warrant may, in some cases, give rise to a claim of arbitrary arrest.

2. The right to legal counsel

The right to be provided and communicate with counsel is the most scrutinized specific fair trial guarantee in trial observation practice, because it has been demonstrated to be the one that is most often violated. Principle 1 of the Basic Principles on Lawyers states that "[a]ll persons are entitled to call upon the assistance of a lawyer of their choice to protect and establish their rights and to defend them in all stages of criminal proceedings." This right is particularly relevant in case of pre-trial detention.[54]

3. The right to a prompt appearance before a judge to challenge the lawfulness of arrest and detention

The rights of a person arrested or detained on a criminal charge, which "shall be brought promptly before a Court or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release." In this context it should be noted: (i) that the term "court" signifies not only a

[53] *See also* European Convention, Article 5(2); American Convention, Article 7(4); Body of Principles, Principle 10; 1992 Resolution on the Right to Recourse Procedure and Fair Trial of the African Commission on Human and Peoples' Rights [hereinafter African Commission Resolution], Paragraph 2(B) (http: //www1.umn.edu/humanrts/africa/achpr11resrecourse.html)

[54] The Human Rights Committee has stated that "all persons who are arrested must immediately have access to counsel." (Concluding Observations of the Human Rights Committee, Georgia, UN Doc. CCPR/C/79 Add.75, April 1, 1997 para 27). *See also* the Report of the Special Rapporteur on the Independence of Judges and Lawyers regarding the Mission of the Special Rapporteur to the United Kingdom, UN Doc E/CN.4/1998/39/Add.4, March 5, 1998, para 47

regular court, but a special court, including an administrative, constitutional or military court as well[55]

4. The prohibition of torture and the right to humane conditions during pre-trial detention

Article 7 of the ICCPR prohibits torture[56]—or cruel, inhuman or degrading treatment or punishment—and is a norm of customary international law that also belongs to the category of *jus cogens*. Article 10 of the ICCPR provides in paragraph 1 that "All persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person."

5. The prohibition on incommunicado detention

The incommunicado detention may violate Article 7 of the ICCPR which prohibits torture, inhuman, cruel and degrading treatment.

B. THE HEARING

Article 14 of the ICCPR is undoubtedly the most relevant to this review. It specifically provides for equality before the courts and for the right to a fair and public hearing by a competent, independent and impartial tribunal established by law, regardless of whether a criminal trial or a suit at law is involved (paragraph 1). The remainder of its provisions— paragraphs 2 to 7—contains a catalogue of "minimum [procedural] guarantees" belonging to an individual in the determination of any criminal charge against him/her. The following section elaborates the meaning of the rights set out in Article 14 in the order in which they arise.

[5555] the European Court in *Chahal v United Kingdom* (70/1995/576/662, 15 November 1996, paras 130-133) which decided that an advisory panel which did not disclose its reasons for decision, had no binding decision-making power and which did not permit legal representation did not satisfy Article 5(4) of the European Convention., Report of the Human Rights Committee, Vol II, UN Doc.A/45/40, at 99-100), which states that the opportunity of an asylum-seeker to appeal to the Ministry of the Interior does not satisfy Article 9(4) of the ICCPR. Regarding advisory panels.

[56] The definition of and protection against torture was elaborated in the 1984Convention against Torture:

Art 1(1): … the term "torture" means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.

1. Equal access to, and equality before, the courts

The first sentence of Article 14(1) provides that "All persons shall be equal before the courts and tribunals" and has been interpreted to signify that all persons must be granted, without discrimination, the right of equal access to a court. The second sentence of Article 14(1) relates to the right to a fair and public hearing by a competent, independent and impartial tribunal established by law. It includes the basic components of due process of law which is, in criminal cases.

2. The right to a fair hearing

The right to a fair hearing as provided for in Article 14(1) of the ICCPR encompasses the procedural and other guarantees laid down in paragraphs 2 to 7 of Article 14 and Article15. However, it is wider in scope, as can be deduced from the wording of Article 14(3) which refers to the concrete rights enumerated as "minimum guarantees.

3. The right to a public hearing

Article 14(1) of the ICCPR[57] also guarantees the right to a public hearing, as one of the essential elements of the concept of a fair trial. However, it also permits several exceptions to this general rule under specified circumstances. The publicity of a trial includes both the public nature of the hearings—not, it should be stressed, of other stages in the proceedings— and the publicity of the judgment eventually rendered in a case. It is a right belonging to the parties, but also to the general public in a democratic society

4. The right to a competent, independent and impartial tribunal established by law

The basic institutional framework enabling the enjoyment of the right to a fair trial is that proceedings in any criminal case (or in a suit at law) are to be

[57] See , European Convention, Article 6(1)

conducted by a competent, independent and impartial tribunal established by law. [58]

5. The right to a presumption of innocence

According to Article 14(2) of the ICCPR "Everyone charged with a criminal offense shall have the right to be presumed innocent until proved guilty according to law."[69] As a basic component of the right to a fair trial, the presumption of innocence, *inter alia*, means that the burden of proof in a criminal trial lies on the prosecution and that the accused has the benefit of the doubt. The presumption of innocence must, in addition, be maintained not only during a criminal trial *vis á vis* the defendant, but also in relation to a suspect or accused throughout the pre-trial phase. It is the duty of both the officials involved in a case as well as all public authorities to maintain the presumption of innocence by "refraining from prejudging the outcome of a trial.

6. T*he right to prompt notice of the nature and cause of criminal charges*

In the determination of any criminal charge against him/her everyone shall be entitled, in full equality "to be informed promptly and in detail in a language which he understands of the nature and cause of the charge against him.[59]

7. The right to adequate time and facilities for the preparation of a defense

Article 14(3)(b) of the ICCPR provides that in the determination of any criminal charge against him or her everyone is entitled "To have adequate time and facilities for the preparation of his defense and to communicate with counsel of his own choosing." The right to adequate time and facilities for the

[58] Article 14(1)ICCPR

[59] ICCPR ,Art.14(3)(a)

preparation of a defense applies not only to the defendant but to his or her defense counsel as well[60] and is to be observed in all stages of the proceedings.

8. *T*he right to a trial without undue delay

In the determination of any criminal charge against him/her, everyone shall be entitled "To be tried without undue delay"[61]

9. The right to defend oneself in person or through legal counsel

The right to counsel is clearly linked to the right to a defense during trial as set out in Article 14(3)(d) of the ICCPR. The provision states that everyone shall be entitled, in the determination of any criminal charge against him/her "To be tried in his presence, and to defend himself in person or through legal assistance of his own choosing; to be informed, if he does not have legal assistance, of this right; and to ha ve legal assistance assigned to him, in any case where the interests of justice so require, and without payment by him in any such case if he does not have sufficient means to pay for it." This provision includes the following specific rights:

(i) the right to be tried in one's presence[62]

(ii) to defend oneself in person;

(iii) to choose one's own counsel;

(iv) to be informed of the right to counsel; and

(v) to receive free legal assistance.

10. The right to examine witnesses

In the determination of any criminal charge against him/her, everyone is entitled "To examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him" [63]

[60] Basic Principles on the Role of Lawyers, Principle 21
[61] ICCPR,Article 14(3)(c)
[62] . This is one of the more controversial rights in terms of its interpretation. A literal reading would not permit trials in absentia, which is a view consistently held by most international human rights NGOs and, more recently, supported by the Statute of the International Criminal Court.
[63] ICCPR,Article 14(3)(e)

11. The right to an interpreter

Everyone is entitled "To have the free assistance of an interpreter if he cannot understand or speak the language used in court" [64]

12. The prohibition on self-incrimination

In the determination of any criminal charge against him/her, everyone is entitled "Not to be compelled to testify against himself or to confess guilt" [65]

13. The prohibition on retroactive application of criminal laws

The retrospective Law is applicable in Criminal law and criminal justice.[66]

14. The prohibition on double jeopardy

No one shall be liable to be tried or punished again for an offence for which he has already been finally convicted or acquitted in accordance with the law and penal procedure of each country"[67] The prohibition of *ne bis in idem* or of double jeopardy is aimed at preventing a person from being tried—and punished—for the same crime twice.

4.4.2 POST-TRIAL RIGHTS

1. The right to appeal

"Everyone convicted of a crime shall have the right to his conviction and sentence being reviewed by a higher tribunal according to law"[68] . The right to appeal is aimed at ensuring at least two levels of judicial scrutiny of a case, the second of which must take place before a higher tribunal.

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[64] ICCPR,Article 14(3)(f)
[65] ICCPR ,Article 14(3)(g)
[66] Article 15(1) of the ICCPR which embodies the principle *nullum crimen sine lege* (a crime must be provided for by law).
[67] ICCPR,Article 14(7), *See also* Article 4 of Protocol 7 to the European Convention and Article 20 of the ICC Statute. Note that Article 8(4) of the American Convention is different in that the prohibition applies only if the accused has been previously *acquitted*, but then the prohibition is not limited to retrial on the same charge—no charge arising out of the same facts ("the same cause") may be pursued.
[68] ICCPR,Article 14(5)

2. The right to compensation for miscarriage of justice

When a person has by a final decision been convicted of a criminal offence and when subsequently his conviction has been reversed or he has been pardoned on the ground that a new or newly discovered fact shows conclusively that there has been a miscarriage of justice, the person who has suffered punishment as a result of such conviction shall be compensated according to law, unless it is proved that the non-disclosure of the unknown fact in time is wholly or partly attributable to him".[69]

Media and Human right

It is widely accepted that a vibrant and flourishing media is essential to democracy and development. The freedom of the media is essential for the full and effective exercise of freedom of expression and an indispensable instrument for the functioning of representative democracy, through which individuals exercise their right to receive, impart and seek information. 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. The Implementation of Information and Communication Technology (ICT) in Indian Judiciary and in Indian Courts needs rejuvenation. The successful use of e-governance for Indian e-judiciary model requires a techno-legal e-Court framework. We need ICT Training and e-Courts training for Indian Judicial System as soon as possible. Further, e-Courts in India must also be supported by active use of online dispute resolution (ODR) in India to reduce backlog of cases. It really wishes to encase the benefits of Information and Communication Technology (ICT) for effective, speedier and Constitutional justice delivery system. . Information and Communication technology (ICT) can be a panacea for the dying judicial system of India. We can effectively use ICT for establishment of E-Courts in India so that E-Judiciary in India can be a reality.

4.5 Media and Sting Operations: Scope and Limitations

"*When it comes to privacy and accountability, people always demand the former for themselves and later for everyone else*". David Brin

[69] ICCPR,Article 14(6)

The Delhi High Court delivered a judgment on controversial **Anirrudh Bahal v State**,[70] and made sting operations legal. Anirrudh Bahal and Suhasini Raj, conducted a sting operation of some Members of Parliament, in which they were offered money for asking questions in Parliament and the act was caught in the camera. Soon after the operation was over it was aired on television to expose this practice to the public. But the pity was that after this entire incident no First Information Report (FIR) was filed by the Delhi Police against those corrupt politicians. The first FIR was filed one and half year later after this entire episode in which both of the journalists were charged as an accomplice for abetting the offence under Section 12 and 13 of the prevention of corruption act. This raised a pertinent question before the Court that: Whether a citizen of this country has right to conduct sting operations to expose the corruption by using agent provocateurs and to bring to the knowledge of common man, corruption at high strata of society?

The Court considered it to be the fundamental duty of an ordinary citizen under Article 51A[71] (b), 51A (h) and 51A (j) to expose such practices prevailing in the system and thus for this purpose any such act or operation conducted, with the intention of doing public good is justified. The Court refused to consider agent provocateurs as accomplice in such cases.

Therefore the utility of conducting sting operations (as has been described in the judgment) is to expose any practice of public officials (not only corruption), related to his official duty, which are against public interest and which if exposed will do larger public good. In all such cases a public official cannot make claim for his right to privacy.

The law with regard to such exposition of unauthorized acts of public officials is also very clear. The honorable Supreme Court of India in **R. Rajgopal v State Of Tamil Nadu**[72] has even held that in case of infringement of privacy of public officials, they have no remedy or damage available, if the act or conduct is associated with their official duty. However the Court further held that in matter not relevant to his official duty a public official enjoys the same protection as any other citizen. The concept not only applies to public officials but equally applies to other persons as well if the gravity and impact of

[70] Manu/ DE/2461/2010,24/09/2010

[71] The Constitution of India ,Article,51A, Fundamental duties It shall be the duty of every citizen of India, (b) to cherish and follow the noble ideals which inspired our national struggle for freedom;(h) to develop the scientific temper, humanism and the spirit of inquiry and reform;(j) to strive towards excellence in all spheres of individual and collective activity so that the nation constantly rises to higher levels of endeavour and achievement.

[72] (1994) 6 SCC 632,

conduct is high as for e.g. cases dealing with scams and scandals, sedition, offences related to elections, waging of war against the State etc. In all such cases if the exposition of the acts will do larger public good than the tool of sting can be used by overriding the privacy of an individual.

Limitations: Professor Siras case[73], where authority comes, it should be coupled with responsibility because authority without responsibility leads to abuse of authority. The act or conduct in questions here are the private acts or conducts and thus it is very crucial to identify their association with the official conduct of the person. Any misjudgment will lead to a disastrous consequence as was met by Aligarh Muslim University Professor Srinivas Ram Chandra Siras. A gay professor (Siras) whose homosexual act was captured in camera and was exposed to university authorities, after which he was suspended from the university. In this entire course of event my only concern is with regard to the act of 'sting operation' conducted, which raises two issues: Firstly just because he was a gay and the stand of the Supreme Court is not clear over gay rights, after the controversial NAZ foundation[74] judgment of the Delhi High Court, gives any one the right to enter into their private area and expose the act of consensual sex which a normal prudent man (of any sexual orientation) would not want to get exposed to any third party? Obviously the answer is NO. Secondly was the act or conduct in any manner associated with his official duty? Was the act or conduct in any manner was affecting his efficiency as a professor? Were his conduct in public sphere was such which was objectionable to other students or staff of the University?

Irrespective of whether the answer to the above questions is yes or no, the act of sting operation cannot be justified. The act of homosexuality is a punishable offence under section 377 of the Indian Penal Code[75], 1860 due to the moral turpitude of the Indian society which consider such kind of acts to be immoral. These are a victimless offence which does not victimize anyone and are carried out in utmost secrecy, with the consent of

[73] http://www.ndtv.com/india-news/gay-amu-professor-found-dead-suicide-suspected-414740,visited on 10 April2011
[74] (2014) 1 SCC 1
[75] Chapter XVI Section 377 in The Indian Penal Code,1860, Unnatural offences.—Whoever voluntarily has carnal intercourse against the order of nature with any man, woman or animal, shall be punished with 1[imprisonment for life], or with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine. Explanation.—Penetration is sufficient to constitute the carnal intercourse necessary to the offence described in this section. The section was declared unconstitutional with respect to sex between consenting adults by the High Court of Delhi on 2 July 2009. That judgement was overturned by theSupreme Court of India on 12 December 2013, with the Court holding that amending or repealing Section 377 should be a matter left to Parliament, not the judiciary.

both the partners. Therefore even if the objection is to be raised it should be based on circumstantial evidence which leads to irresistible conclusion that the homosexual act would have been performed and not by conducting sting to give direct evidence. It is highly unethical to capture the compromising position of two consenting adults. However the matter would have been different if there would have been a trap to expose unlawful forced sex or molestation. Secondly if the act of sting is justified on ground that it will maintain the morality of the society than it's nothing more than an empty euphoria. The prohibition on such kind of acts will only develop ground for such kind of acts to be carried out in secrecy and victimization of actors as is evident from the present case. In other words no regulation can stop the continuance of these activities in the society.

What public good than the act of sting operation served? Instead it brought the shame and disrepute, which forced the Professor to commit suicide. Just because he was a gay does not justify the sting, where the opinion of Indian judiciary is also changing with respect to gay rights. Therefore it is very essential to deal with the matter in a cautious manner. Identifying the relevancy of conducting stings with due respect to the privacy of an individual should be determining the extent up to which it is feasible to enter into the private sphere of any individual. The Freedom of the media is indeed an integral part of the freedom of speech and expression; and an essential requisite of a democratic set up. The Indian Constitution has guaranteed this freedom by way of a Fundamental Right. The media, which is obligated to respect the rights of individuals, is also expected to work within the framework of legal principles and provisions so that the right to privacy of an individual is not unnecessarily infringed at any cost whatsoever. The increased role of the media in today's globalized and tech-savvy world was aptly put in the words of Justice Hand of the United States Supreme Court when he said, "The hand that rules the press, the radio, the screen and the far spread magazines, rules the country. Democracy is the rule of the people, a system which has three strong pillars - the executive, the legislature and the judiciary. But as Indian society today tries to stabilize on its three pillars, the guarantee of Article 19 (1) (a) has given rise to a fourth pillar i.e. media. It plays the role of a conscience keeper, a watchdog of the functionaries of society and attempts to address to the wrongs in our system, by bringing them to the knowledge of all, hoping for correction. It is indisputable that in many dimensions the unprecedented media revolution has resulted in great gains for the general public. Even the judicial wing of the state has benefited from the ethical and fearless journalism and

taken suo moto cognizance of the matters in various cases after relying on their reports and news highlighting grave violations of human rights. The criminal justice system in this country has many lacunae which are used by the rich and powerful to go scot-free. Figures speak for themselves in this case as does the conviction rate in our country which is abysmally low at 4 percent. In such circumstances the media plays a crucial role in not only mobilizing public opinion but also bringing to light injustice which most likely would have gone unnoticed otherwise.

The advent of sophisticated information communication, specially the pin-hole camera technology, enables one to clandestinely make a video or audio recording of a Conversation and actions of individuals.[76] In India, the Media has been first to grab this state of the art technology to conduct 'sting operations' to expose an offence before the police or the Judiciary takes the cognizance of the matter. The electronic media particularly TV Channels, in order to hype their TRP[77] by showing innovation and a difference, highly publicize the exposure. This results in unwarranted, illegal and immoral use of technology -the so called 'Trial by Media'. The phrase 'Trial by Media' illuminates the impact of media coverage on a person's reputation by creating a widespread perception of guilt regardless of any verdict in a Court of law. Thus the media, the supposed fourth Pillar of our democracy, usurps the role of the executive and the judiciary. This is not only a sheer violation of state's substantive and procedural penal laws but a hit on the face of the entire Constitutional framework as well.[78].

There is no check on using the hidden cameras in one's own house or office, but, in many Countries, it is illegal to use them covertly against another person in his or her house or Office. In UK there is a heated debate between those who support a free press which is largely uncensored and those who advocate an individual's right to privacy regardless of what wrong they have done. In US, only the law enforcement agencies and police licensed private detectives are allowed to use them under certain circumstances, that too under carefully controlled conditions. Licensed private detectives can use them for the collection of evidence, but not in a sting operation. Except the FBI, no private individual, not even journalists can mount a sting operation.[79] In India, in the absence of law

[76] http://www.legalserviceindia.com/articles/fre_pre_v.htm,visited on 20 may2013
[77] Television Rating Point (TRP)
[78] Jain,Praveen Kumar ;Sting Operations – An Invasion of Privacy,CNN, Vol. 3, No. 9, September 2005, pp. 39-41

[79] https://www.ncjrs.gov/pdffiles1/Digitization/146908NCJRS.pdf,visited on30 June 2013

regulating the sting operations, the media has violated and distorted the rules of natural justice and particularly the basic fundamental rights enshrined under Article 20[80] and 21[81] of the Constitution.

The use of unauthorized and unauthenticated camouflaged cameras poses real problems for the penal procedural laws as the evidence they provide may be inadmissible for numerous reasons like the probabilities of editing, lack of clear audio and video imaging, unavailability of exact dates, times and places etc. Moreover, it is the era of technology. Through computer generation techniques one could create make-believe picture of something, which is far from what actually happened. It is said that in the spectacular scenes of the film "Gladiator", only 30 per cent of the shots were actually taken with a camera; the rest were computer-generated.

There have been complaints from US human rights organization that a number of FBI sting operations have caused serious harm to innocent citizens who were the accidental victims of the make-believe criminal organizations set up by the bureau. They have pointed out that an even bigger risk, associated with sting operations aimed at public corruption, is that the people may lose faith in the Government institutions. There is every possibility that foreign intelligence agencies may use such covert and computer generated techniques to destroy the citizen's confidence in their political leadership and administration. During high publicity Court cases the media is often accused of provoking an atmosphere of public hysteria akin to a lynch mob which not only makes a fair trial nearly impossible but also causes irreparable, irreversible and incalculable harm to the reputation of a person and shunning of his family, relatives and friends by the society. He is ostracized, humiliated and convicted without trial. Recent instance of such a trial is of Punjabi Pop singer Daler Mehandi, whose discharge was sought in a human trafficking case few of days after his humiliation and pseudo trial through media as the police could not find the evidence sufficient even for filing the charge sheet.

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[80] Article 20 of Constitution Of India, : Protection in respect of conviction for offences(1) No person shall be convicted of any offence except for violation of the 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(2) No person shall be prosecuted and punished for the same offence more than once(3) No person accused of any offence shall be compelled to be a witness against himself.

[81] Article 21 of The Constitution Of India 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

All this is done in the interest of freedom of communication and right of information little realizing that right to a fair trial is equally valuable. There is nothing more incumbent upon Courts of justice to preserve their proceedings from being misrepresented than to prejudice the minds of the public against persons concerned before the cause is finally heard. The streams of justice have to be kept clear and pure. The investigative journalism and publicity of pre-mature, half-baked or even presumptive facets of investigation either by the media itself or at the instance of Investigating Agency have almost become a daily occurrence whether by electronic media, radio or press. It can well lead to miscarriage of justice. The media is supposed to make the people aware of crimes, not to punish criminals.

In **the Jacobson vs U.S. case** of 1992 relating to child sex, the US Supreme Court cited the following guidelines of the US Attorney General on FBI sting operations issued on Dec 31, 1980: "...an inducement to commit a crime should not be offered unless: There is a reasonable indication, based on information developed through in formants or other means, that the subject is engaging, has engaged, or is likely to engage in illegal activity of a similar type, or the opportunity for illegal activity has been structured so that there is reason for believing that the persons drawn to the opportunity, or brought to it, are predisposed to engage in the contemplated illegal activity. "

Functions of sting operations [82]

Operations are emphasized and analyzed: **One** is the informational, or investigatory, function of identifying individuals who are engaged in (or likely to engage in) criminal activity. The **second** is the behavioural function of deterring individuals from engaging in (independent) criminal activity: the threat of being caught in a sting may scare individuals away from genuine criminal opportunities that would otherwise seem appealing. Though complementary in some respects, these functions are also in some tension with each other. A sting operation that does not serve informational purposes may be good for deterrent purposes, and vice versa.

[82] www.law.harvard.edu/programs/olin_center/papers/pdf/441.pdf,visited on03 May2012

Rationales and Hazards of Sting Operations

Normally a sting operation is carried out by agents acting undercover, that is, concealing the fact that they work for the authorities[83]. The critical feature is that the agent is authorized to somehow promote or facilitate (using those terms broadly) the unlawful activity of others, who then are penalized for that crime (including attempted crime). We will use the terms "target" or "sting victim[84]" to refer to the individuals who are thus caught and charged. ng operations come in two basic types.[85]The first type has the agent pose as a participant in unlawful activity, such as a buyer or seller of illegal goods or services.[86]In India Sting operations are also undertaken to establish adultery. Such Operations can also be useful in the arrest of terrorists and anti-national elements. The spy camera of media caught 11 members of the Parliament accepting bribe for asking questions in the Parliament. When the media gets all the evidence against the corrupt and the wrongdoer and the aim is public interest, why do media not file a case in the proper Court and submit these as proof? This will lead to punishing of these wrongdoers. Or, even after getting such evidences, why no information is given to public authorities so as to make them take appropriate actions? But, there exists an opposite view. Such cases cannot be filed in Courts with these tapes- audio or video recording- as evidence or proof because Courts do not consider these as credible evidence and proof. Moreover, as the Government machinery is not functioning the way it should function, that is why instances of sting operations are on the increase. In such circumstances, what is the point in taking it to the public authorities? On the other hand, when this is exposed by media, the general public becomes aware of the illegal business going on inside the "Government machinery". There is a pressure on the government agencies concerned to act. The news Broadcasters Association (NBA) justified Sting Operation as "legitimate journalistic tool". The correspondents who telecast sting operations argue that Sting Operation take place in public interest and where public money is involved. According to them Sting Operations are carried out in hospitals which bring out the problems of paucity of doctors in hospitals, absence of medicines and medication. But, it can easily be made out that one of the basic reasons to carry out Sting Operation is to increase the so called Television Rating Point

[83]http//: scholarship.law.missouri.edu/cgi/viewcontent.cgi?article=3652...mlr,visited on 23 Aug.2014

[84] http://lawinfowire.com/articleinfo/legality-sting-operations,visited on25 May 2014
[85] Most of the examples to follow are drawn from newspaper articles and judicial case reports.
[86] Among the best known recent cases are Abscam, in which members of Congress took bribes in exchange for influencing immigration authorities, Operation Greylord, in which Chicago judges took bribes in exchange for fixing cases.

(TRP) or in other words to 'interest the public' rather than 'in public interest'. In view of this, the 17th Law Commission in its 200th[87] report has made specific recommendations to the centre to bring a comprehensive legislation to prevent the media from interfering with the privacy rights of the individuals.

Role of Judiciary in Maintaining Check and Balances

Since there is no comprehensive law to deal with the subject and the media is yet to evolve a code of conduct of its own, the judiciary is bound to play the role of an umpire. It is worthwhile to mention that all Sting Operations, even though carried out in the purported exercise of right under Article 19 (2), do violate Right to Privacy, as guaranteed by the Constitution , to a certain extent because during such Sting Operation, in nearly all cases, the person being filmed is not aware of the presence of a hidden camera. Thus the consent of the person concerned for such recording does not exist whereas without consent of a person, in ordinary course, no one has the right to film him. However, it may be argued that an illegal act being committed by a public servant during his office hours and in abuse of the spirit of his office, is not worthy of protection under Right to Privacy. Right to Privacy is implicit to Article 21. According to Subba Rao J 'liberty' in Article 21 is comprehensive enough to include privacy. His Lordship said that although it is true that he does not explicitly declare the Right to Privacy as a Fundamental Right but the right is an essential ingredient of personal liberty. It is regarded as a Fundamental Right but cannot be called absolute. It can be restricted on the basis of compelling public interest.[88] The Court, however, has limited it to personal intimacies of the family, marriage, motherhood, procreation and child bearing.[89]The movement towards the recognition of right to privacy in India started with **Kharak Singh v. State of Uttar Pradesh and Others,**[90] wherein the apex Court observed that it is true that our Constitution does not expressly declare a right to privacy. Today, it is seen that the over-inquisitive media, which is a product of over-commercialization, is severely encroaching on the individual's right to privacy by crossing the boundaries of its freedom. Yet another observation of the Court which touched this aspect of violation of right to privacy of the

[87] the 200 th Report of the Law Commission on "Trial by Media: Free Speech Vs. Fair Trial Under Criminal Procedure (Amendments to the Contempt of Court Act, 1971)

[88] Govind v. State of M.P. (1975)2 SCC 148, AIR 1975 S.C. 1378

[89] P.U.C.L. v. Union of India (1997)1 SCC 301, AIR 1997 S.C. 568

[90] AIR 1963 SC 1295

individuals is found in the judgment of the Andhra Pradesh High Court in **Labour Liberation Front v. State of Andhra Pradesh.** The Court observed: "Once an incident involving a prominent person or institution takes place, the media is swinging into action virtually leaving very little for the prosecution or the Courts to examine in the matter. Recently, it has assumed dangerous proportions, to the extent of intruding into the very privacy of individuals. Gross misuse of technological advancements and the unhealthy competition in the field of journalism resulted in obliteration of norms or commitments to the noble profession. The freedom of speech and expression, which is the bedrock of journalism, is subjected to gross misuse. It must not be forgotten that only those who maintain restraint can exercise rights and freedoms effectively".

The following observations of the Supreme Court in **R. Rajagopal and Another v. State of Tamil Nadu and Others**[91] are true reminiscence of the limits of freedom of press with respect to the right to privacy: A citizen has a right to safeguard the privacy of his own, his family, marriage, procreation, motherhood, child bearing and education among other matters. No one can publish anything concerning the above matters without his consent - whether truthful or otherwise and whether laudatory or critical. If he does so, he would be violating the right to privacy of the person concerned and would be liable to action for damages. Position may, however, be different, if a person voluntarily thrusts himself into controversy or voluntarily invites or raises a controversy". The ever-increasing tendency to use media while the matter is sub-judice has been frowned down by the Courts including the Supreme Court of India on the several occasions. In **State of Maharashtra v. Rajendra Jawanmal Gandhi**[92], the Supreme Court observed: "There is the procedure established by law governing the conduct of trial of a person accused of an offence. A trial by press, electronic media or public agitation is very antithesis of rule of law. It can well lead to miscarriage of justice. A judge has to guard himself against any such pressure and is to be guided strictly by rules of law. If he finds the person guilty of an offence he is then to address himself to the question of sentence to be awarded to him in accordance with the provisions of law".

The Hon'ble Supreme Court in the case of **Rajendra Sail v. Madhya Pradesh** High Court Bar Association and Others, observed that for rule of law and orderly society, a free responsible press and an independent judiciary are both dispensable and

[91] 1995 AIR 264
[92] 2005 (2) SCC 686

both have to be, therefore, protected. The aim and duty of both is to bring out the truth. And it is well known that the truth is often found in shades of grey. Therefore the role of both cannot be but emphasized enough, especially in a 'new India', where the public is becoming more aware and sensitive to its surroundings than ever before. The only way of functioning orderly is to maintain the delicate balance between the two. The country cannot function without two of the pillars its people trust the most.[93]

With power comes responsibility. With great power comes great responsibility and therefore, the freedom of speech and expression under Article 19 (1) (a) of the Constitution of India correlates with a duty not to violate the law. If citizens and organizations are left absolutely free and unchecked, it will lead to conflict of rights and ultimately end in disorder and anarchy. The news Channels in a bid to enhance their viewer ship resort to sensationalized journalism. Sting operations are bound to come on the agenda. Performing a sting operation with an attempt to attack the personality, reputation and carrier, especially when no national interest or public money is involved, may be an exercise of the right of freedom of expression, but it hits at the privacy of some other individual. Therefore, while exercising such rights of speech and expression, one should keep in mind the fundamental right to dignity and privacy of the individual concerned as guaranteed under Article 21 of the Constitution of India. In a recent Judgment the Hon'ble Supreme Court has upheld the validity of the sting operation carried out by a leading news channel NDTV on a very well known and senior Advocate R. K. Anand. A Bench comprising of Justices B.N. Agrawal, G.S. Singhvi and Aftab Alam, in its judgment in the 'R.K. Anand' case, said: "*It is not our intent here to lay down any reformist agenda for the media. The norms to regulate the media and to raise its professional standards must come from inside." "Despite many faults", the Court pointed out that, "the telecast of the sting operation was in public interest and it has rendered important serviced to protect and salvage the purity of the course of justice*". Writing the judgment, Justice Alam said: "The programme may have any other fault or weakness but it certainly did not interfere with or obstruct the due course of the BMW [hit-and-run case] trial[94]. The programme telecast by NDTV showed to the people [the Courts not excluded] that a conspiracy was afoot to undermine the BMW trial.

[93] Dalei ,Pravesh and Nirala ,Surendra Kumar ; ting Operation vis-à-vis Right to Privacy by Media: A legal analysis in Indian Context, International Journal of Humanities and Applied Sciences (IJHAS) Vol. 2, No. 4, 2013 ISSN 2277 – 4386

[94] http://zeenews.india.com/tags/bmw-hit-and-run-case.html,visited on5,April 2014

What was shown was proved to be substantially true and accurate. The programme was thus clearly intended to prevent the attempt to interfere with or obstruct the due course of the BMW trial."Further the Court has also ruled out the plea of getting prior permission for the purpose of sting operation and said that, "Such a course would not be an exercise in journalism but in that case the media would be acting as some sort of special vigilance agency for the Court. On a little consideration, the idea appears to be quite repugnant both from the points of view of the Court and the media. It would be a sad day for the Court to employ the media for setting its own house in order; and media too would certainly not relish the role of being the snoopers for the Court."The Court further said: "Moreover, to insist that a report concerning a pending trial may be published or a sting operation concerning a trial may be done only subject to the prior consent and permission of the Court would tantamount to pre-censorship of reporting of Court proceedings. And this would be plainly an infraction under Article 19 (1)(a) of the Constitution."

Guidelines for conducting sting operations

In furtherance of the principles of self-regulation as contained in NBA's Code of Ethics and Broadcasting Standards and Specific Guidelines Covering Reportage, a member news channel may conduct a "sting operation", but only in conformity, with the following guidelines :

1. No sting operation shall be conducted except with the prior approval and under the supervision of the head of the editorial team of a news channel, who shall also, along with other person concerned, be responsible for all consequences ;

2. A sting operation may be conducted only if warranted in public interest;

3. A sting operation should be conducted only for exposing a wrong-doing;

4. A sting operation should not be used for gratuitously prying into peoples' private lives;

5. A sting operation may be resorted to only if there is no other effective overt means of collecting or recording the same information or news ;

6. In conducting a sting operation, a news channel shall not indulge in inducing a person to commit a wrongful act not otherwise contemplated by the person;

7. Resort shall not be had to sleaze or sex or any illegal act as a means for carrying-out a sting operation;

8. The entire recordings of a sting operation, including edited and un-edited, audio and video footage, must be preserved, as they are for a period of 90 days or for such other period as may be necessary in a given case ;

9. Recordings of a sting operation, including edited and un-edited, audio and video footage, shall not be tampered, manipulated, interposed, altered, distorted, morphed or otherwise doctored in any manner that may change the context, purport or meaning thereof

10. There must be concurrent and contemporaneous recording in writing of the various stages of progress of a sting operation by the person in-charge of it ; and such written record shall also be preserved for a period of 90 days or for such other period as may be necessary in a given case ;

11. A sting operation must not offend against the provisions of Section 5 of The Cable Television Networks (Regulation) Act 1995[95] and Rule 6 of The Cable Television Networks Rules 1994 relating to "Programme Code" or any other law in force for the time being, including Section 24 of the Prevention of Corruption Act, 1988 ; 12. A sting operation shall be telecast only if, and when there is ample evidence to prima facie demonstrate the culpability of a wrong-doer;

13. If a sting operation is found false or fabricated, all persons concerned with conducting the sting operation could be liable for punishment in act.

Normally a sting operation is carried out by agents acting undercover, that is, concealing the fact that they work for the authorities. he critical feature is that the agent is authorized to somehow promote or facilitate (using those terms broadly) the unlawful activity of others, who then are penalized for that crime (including attempted crime). We will use the terms "target" or "sting victim" to refer to the individuals who are thus caught and charged. Sting operations come in two basic types.[96]The first type has the agent pose as a participant in unlawful activity, such as a buyer or seller of illegal goods or services.[97]

[95] The Cable Television Networks (Regulation) Act 1995
[96] Most of the examples to follow are drawn from newspaper articles and judicial case reports.
[97] Among the best known recent cases are Abscam, in which members of Congress took bribes in exchange for influencing immigration authorities, Operation Greylord, in which Chicago judges took bribes in exchange for fixing cases.

Sting operations by various television channels are a subject of debate over media ethics with the number of news channels increasing day by day, one or other television channel conducts a sting operation across the country. Some target corrupt officials. Some other sting operations chase politicians in power. Some expose the wrong doings of public life. Many such operations invade private life of high and mighty. In an age of sensationalism the sting operations have become effective means of capturing the audience. The myriad hour, multi channel television boom is propelling the phenomenon of sting operations. It raises many ethical, moral and professional questions. The Tehelka expose which saw top BJP leaders[98] caught on cameras accepting bribe has become a controversy for alleged use of unfair means in the process of carrying out the sting operation. More recently, the sting operation that unraveled the cash for votes scam raised questions on parliamentary practice. The cash for questions scam brought to the notice of the world how our parliamentarians work. The sting operation that exposed the sex scandal of former Andhra Pradesh governor ND Tiwari revealed how vulnerable even the top leaders to this new journalistic weapon. The critics of sting operations often accuse this as an invasion of privacy. The sting operations have to be welcomed if they serve a public purpose whatever may be the motive behind conducting these operations. Should means justify the ends or ends justify the means. This is a long heard philosophical debate. I think both means and ends should be justifiable.

Given this debate, some broad conclusions can be drawn on the arguments and counterarguments over the sting operations by television channels. **First**, these sting operations should definitely serve a larger public purpose. People in power cannot escape public scrutiny in the name of right to privacy. Parliamentarians cannot get immunity from public scrutiny through media in the name of privileges. Moral and ethical dimensions of media are embedded in the larger public purpose the media operations serve. Sting operations for settling scores or targeting personal lives for sensational purposes or undermining some ones interests cannot be acceptable. Strict adherence to public cause and purpose should be the basis for any media sting operations.

Second, sting operations should be sparingly used. It cannot become a routine media practice as if covering a press conference. **Thirdly**, sting operations should be used only when it is impossible to collect information through normal journalistic

[98]Tehelka sting: How Bangaru Laxman fell for the trap". Retrieved 18 April2013

practices and the media organization or the concerned journalists should have exhausted these means. Suitable legal and regulatory mechanism should be in place to prevent misuse of such an effective tool in the hands of media to uncover the shadow society. The media should evolve its own code of conduct and self regulatory mechanism to standardize the practice. Professional methods of sting operations and the ethical edifice of this practice should form part of the training programmes of journalism schools and in house media training centre. There should be closer and effective scrutiny of sting operations to make it healthier and professionally sound.[99]Finding an acceptable Constitutional balance between free press and administration of justice is a difficult task in every legal system.

The privatization policy of the Government many industrial house are opening new television channels which compete for their existence. News reporting is now on commercial basis. Every channel wants to high up its TRP rating[100] to prove its supremacy over collecting and telecasting the news programme to the public as early as possible. Many news channels present crime related news in the sensational manner to increase their TRP and have also started exclusive crime news channels. They telecast the criminal cases involving high profile personality to attract more public attention. These crime news channels play the role of investigators and adjudicator especially regarding sensational/ high profile crimes about the guilt of the accused. Many accused are now using these channels to surrender themselves in a heroic way after giving long interviews to gain public sympathy and these channels live telecast these surrenders again and again or a day or two. Sometimes witnesses of such cases are traced by their news reporters to get their live version about the facts of the case without caring their impact on the trial of the cases.

This media trial has its pros and cons qua the fair trial to the accused. This right of fair trial of an accused is a legal right, which comes from Article, 21 of the Constitution of India and also from the various provisions of Code of Criminal Procedure. Sometimes "Media Trial" also invades the protection conferred upon the accused under Article 20(3) of the Constitution, against self incrimination. So the question now is whether the freedom of press/media should be absolute or there should be some rider on this freedom.

[99] http://indiacurrentaffairs.org/are-sting-operations-acceptable-%E2%80%93-prof-k-nageshwar,visited on 12 Novmber,2014
[100] timesofindia.indiatimes.com/home/sunday-times/...TRP.../11816.cms,visited on 9 may2013

The Apex Court **in Re. Hari Jai Singh in Re. - Vijay Kumar**[101] expressed serious concern about freedom of press being misused, while holding that the freedom of press is indispensable for the functioning of democracy. The Apex Court observed: "The protection cover of freedom of press must not be thrown open for wrong doings. Public order, decency, morality and such other things must be safeguarded. If a news paper publishes what is improper, mischievously false or illegal and abuses its liberty, it must be punished by the Court of law. It is the duty of a true and responsible journalist to strive to inform the people with accurate and impartial presentation of news and their views after dispassionate evaluation of the facts and information received by them and to be published as a news item. The presentation of news should be truthful, objective and comprehensive without any false and distorted expression". Thus freedom of press is not an unfettered freedom; it is under a duty to exercise it with a sense of responsibility by taking into consideration the provision of Article 19(2) of the Constitution of India.

In **State of Maharashtra vs. Jalga on Municipal Council** [102]the Apex Court observed that an accused cannot be convicted merely because anybody including press so desire. The press has right to publish Court proceedings but this right is not absolute one and is subject to two limitations. Firstly, it should not be contempt of Court and secondly, it should not prejudice the accused.

In **State vs. Mohd Afzal & others** [103]the Defence Counsel took the plea that the Police allowed the Media to take interview of Mohd. Afzal and the same were prominently telecasted for about 100days by various channels which caused prejudice to the accused. He further submitted that Media trial is anti thesis of the rule of law and results in miscarriage of justice. He further contended that pre-trial publicity is sufficient to cause prejudice and hatred against the accused and the presumption of innocence of every person till found guilty by a Court of Law is eroded. But the Hon'ble judges of Delhi High Court rejected this argument by observing that judges are trained, skilled and have sufficient experience to shut their minds receiving hearsay evidence or being influenced by the Media. But the Hon'ble judge lodged a caveat on this aspect of the matter by observing: It has indeed become a disturbing feature as is being noticed by us repeatedly that the accused persons, after their remand by the Magistrate, are brazenly paraded before the press and interviews are being allowed. Accused persons are exposed to public glare

[101] (1996) 6 SCC. Page 446
[102] AIR 2003, S.C.1659
[103] 2003(3) JCC 1669

through T.V. and in case where test identification parade or the accused person being identified by witnesses (as in the present case) arises, the case of the prosecution is vulnerable to be attacked on the ground of exposure of the accused persons to public glare, weakening the impact of the identification. Further, what is more fundamentally disturbing to our mind is the fact that the police custody is given by the Court to the investigation authorities on the premise that the accused is required for the purpose of investigation. This custody is not to be misused by allowing the media to interview the accused persons. The practice of allowing the media to interview the accused persons when they are in police custody under the order of the Court has therefore, to be deprecated."

Similarly in **State vs. Sushil Sharma**[104], while rejecting the plea of unfair trial due to Media Trial, the Hon'ble Court observed, "As far as the grievances of the appellant's counsel against the media publicity of the case is concerned we do not think that anything would turnaround this plea. We find that this is now becoming a main ground of challenge whenever some conviction takes place. We, however, feel that despite the fact that in this case the learned trial judge has also noticed in his judgment that this case had attracted lot of media attention but his decision is based on a fair, unbiased and unprejudiced analysis and assessment of the evidence before him. As far as parallel media trial of criminal cases is concerned , that takes place since these days media people are briefed on day to day basis by the police, representatives of the accused and even accused persons themselves also quite often speak before the cameras of various TV channels. In these circumstances media cannot be blamed for highlighting the facts, which are spoken to before the cameras by the representatives of the prosecution as well as the accused. We have also experienced that these days whenever media people highlight some crime the investigation agencies perform their functions with much more diligence and perfection. We, therefore, reject the argument that the appellant did not get a fair trial".

The Hon'ble Supreme Court also in case **R Bala Krishna Pillai vs. State of Kerala**[105] and also in case **Zee News V. Navjot Sandhu** [106] held that media interviews do not prejudice judges.But in **Kali Ram vs. State of H.P. reported in AIR**[107], the apex Court held that if a reasonable doubt arises regarding the guilt of accused, the benefit of that cannot be withheld from the accused. The Courts would not be justified in withholding that benefit

[104] 2007 (1) J.C.C. Page 765
[105] 2000(7) SCC page 129
[106] 2003(1) SCALE 113
[107] 1973, S.C. 2773

because the acquittal right have an impact on the law and order situation or create a diverse reaction in society or among those members of the society who believe the accused to be guilty. Guilt should have been established by the evidence on record.

In **M.P. Lohia vs. State of West Bengal**[108] the Apex Court observed "having gone through the record we find very disturbing fact, which we feel necessary to comment upon in the interest of justice. The death of Chandni took place on 23.10.2003 and the complaint in this regard was registered and the investigation was in progress. The application for grant of anticipatory bail was disposed of by the High Court of Calcutta on 13.12.2004 and the special leave petition was pending before this Court. Even then, an article, appeared in a magazine called Saga titled 'Doomed by Dowry' written by one Kokila Pooddar based on her interview of the family of the deceased giving version of the tragedy and extensively quoting the father of the deceased as to his version of the case. The facts narrated therein are all materials that may be used in the forthcoming trial in this case and we have no hesitation that these type of articles appearing in the media would certainly interfere with the administration of the justice. We deprecate this practice and caution the publisher, editor and the journalist, who were responsible for the said article, against indulging in such trial by media where the issue is sub-judice. However, to prevent any further issue being raised in this regard, we treat this matter as closed and hope that the order concerned in journalism would take note of this displeasure expressed by us for interfering with the administration of justice". This judgment also clarifies that no comments can be made on the merits of the case or on any material, which is the subject matter of a case pending before a Court of law.

In October 2005 a news item was published in Times of India, New Delhi with the heading "Media Trial ends in Suicide". It was stated in that news that one person Naresh Pal working as a driver with Pusa Agriculture Institute committed suicide with his wife after leaving a suicide note which stated that a T.V. Channel was called by his niece who made allegation of rape against him although he was impotent. He could not face humiliation and ended his life along with his wife. Without going on truth the fact is that the allegation of niece was telecast on T.V. Channel, which gave publicity to her claim of being raped by her uncle. The channel in such cases must have asked the complainant to lodge a report with the police for proper investigation instead of defaming a person

[108] 2005 "Crl. J 1416

without ascertaining his views just to sensationalize the news. Recently, Sting operation of General Secretary of Indian Hockey Federation for accepting bribe which stirred the sport arena including Hockey Federation even this operation rocked the Parliament when many members of Parliament raised this issue because of poor performance of Indian Hockey Team. The Sports Minister of India also demanded resignation of Chairman of Indian Hockey Federation due to corruption shown in the sting operation.

Restrictions

In many acts, apart from Constitution of India, there are restrictions imposed on the media by the legislation:

(1) Sec.499, of Indian Penal Code, which provide as under: "Defamation: Whoever, by words either spoken or intended to be read or by signs or by visible representations, makes or published any imputation concerning any person intending any harm, or knowing, or having reason to believe that such imputation, will harm, the reputation of such person, is said except in case hereinafter excepted, to defame that person. There are, however, ten exceptions to this section.

(2) Sec. 327 of Code of Criminal Procedure 1973,which provides as under: 'Court to be open (1) the place in which any criminal Court is held for the purpose of inquiring into or trying any offence shall be deemed to be an open Court, to which the public generally may have access, so far as the same can conveniently contain them; Provided that the presiding judge or magistrate may, if he thinks fit, order at any stage or any inquiry into, or trial of, any particular case, that the public generally, or any particular person, shall not have access to, or be or remain in the room or building used by the Court.

(2) Notwithstanding, anything contained in sub-section (1), the inquiry in to and trial of rape or an offence under Section 376, Section 376A, Section376B, Section 376C or Section 376D of the Indian Penal Code shall be conducted in-camera;

Provided that the presiding judge may, if he thinks fit, or on an application made by either of the parties, allow any particular person to access to, or be or remain in, the room or building used by Court.(3) Where any proceedings are held under sub-section (2) it shall not be lawful for any person to print or publish any matter in relation to any such proceedings, except with the previous permission of the Court .

Section 22 of Hindu Marriage Act, Proceedings to be in camera and may not be printed or published (1) Every proceeding under this Act shall be conducted in Camera and it shall not be lawful for any person to print or publish any matter in relation to any such proceedings except a judgment of the High Court or of Supreme Court printed or published with the previous permission of the Court.(2) If any person prints or publishes any matter in contravention of the provisions contained in subsection (1), it shall be punishable with fine, which may extend to one thousand rupees.

Section 14 Official Secrets Act: Exclusion of public from proceedings: In addition and without prejudice to any powers, which a Court may possess to order the exclusion of the public from any proceedings, if the course of proceedings before a Court against any person for an offence under this Act or the proceeding on appeal or in the course of trial of a person under this Act, application is made by the prosecution on the ground that the publication of any evidence to be given or of any statement to be made in the course of the proceedings would be prejudicial to the safety of the State, all or any portion of the public shall be excluded during any part of hearing, the Court may make an order to that effect, but the passing of the sentence shall in every case take place in public .Another aspect of media trials which denies fair trial to the accused is the interview of the accused during police custody to the electronic media persons and the same were telecast for many days which focus public opinion against the accused. These interviews are self incrimatory and off end protection against the self incrimination which is provided to him under article 20(3) of the Constitution. Article 20(3): provided that no person accused of an offence shall be compelled to be a witness against himself. The Hon'ble Supreme Court [109] held that the concept of compelled testimony goes back to the stage of interrogation as per provisions of Article 20(3) of the Constitution. The Court denied the compelled testimony as evidence procured not merely by physical threat, physic torture, at spherical pressure, environmental coercion, over bearing and intimidators methods and the like not legal penalty for violation.

Public awareness

It is true that largely the media, especially Electronic Media is doing deplorable job of public awareness by exposing corruption prevailing at every step, in the public life and exposing commission of crimes, etc., but at the same time it should not cross its

[109] in Nandini Satyhy vs. D.L. Dhani repotted in AIR 1978 S.C.C. page 1025

limitations and should not get involved in trial by media persons. For the last many years, a new concept of 'sting operation' is on increase on almost every channel of Electronic Media to show something different for exposing corruption and social evils prevailing in the society. These telecasts of sting operations have also increased the TRP rating of the news channels. Tehlka.com was the first to telecast sting operation for exposing corruption in defence deals. Another sting operation was telecast which shows accepting of money by the then BJP President. After getting good public response and success of these sting operations which also increased the TRP rating of those news channels, every channel appointed special investigator equipped with sophisticated special equipments and hidden cameras to expose quack Doctors, showing corruption in Sales Tax Department, Corruption in Police and also corruption among political personalities including Members of Parliament who misused MPLAD Fund[110] and accepted money for asking questions in the Parliament. Due to these sting operations, these Members of Parliament were adjudged disqualified and their memberships were cancelled. Many public servants were removed from service and criminal cases as well departmental enquires were also initiated. Some sting operations were telecast to expose the poor service in Medical Colleges and Govt. hospitals, such exposures through Electronic Media play a major role in stirring public opinions and consciousness and forcing the Govt. and its officials to act diligently and in a transparent manner. This role of public awareness also thrust a heavy responsibility on Media to act without crossing the limits as mentioned above, otherwise an individual has to pay its price against whom the sting operation was telecast. One of such case is of Ms. Uma Khurana a teacher in Delhi Govt. School against whom a sting operation was telecast on 'Live India' a television News Channel on 30.08.2007 in which she was dubbed as racketeer of prostitution who was purportedly forcing a girl student in to prostitution. After this telecast she was beaten by the public at the gate of her school who also tore her clothes. Police sprung into action and saved her from public outrage and arrested her. Due to public outcry after seeing her sting operation, the Education Department of Delhi Administration hurriedly, first suspended her and later dismissed her from service. Later on, it was revealed that the girl who had been shown as a student and was allegedly being forced into prostitution by Ms. Uma Khurana was not a school girl but a budding journalist. The news of the sting operation widely published in almost every newspaper for months together. The Hon'ble Delhi High Court suo moto took cognizance of this fake

[110] Member of Parliament Local Area Development Scheme (MPLADS)

sting operation and issued notice to Delhi Administration and Delhi Police. Pursuant to the notice, the police told the Court that it was a stage managed episode prepared by one Virendra Kumar in conspiracy with Mr. Prakash Singh and Ms. Rashmi Singh and was shown as sting operation, because Virendra Kumar had some monetary dispute with Ms. Khurana. Police also gave clear chit to Ms. Uma Khurana and charged above said three persons who prepared and telecast the alleged sting operation. The Hon'ble Court observed in its order, "Such incident should not happen and false and fabricated sting operation directly infringing upon a person's right to privacy should not recur because of desire to earn more and to have higher TRP rating.""There is no doubt and there is no second opinion that 'truth' is required to be shown to the public in public interest and the same can be shown whether in nature of sting operation or otherwise but what we feel is that entrapment of any person should not be resorted to and should not be permitted."

"Sting operations showing acts and facts as they are truly and actually happening may be necessary in public interest and as a toll for justice, but a hidden camera cannot be allowed to depict something which is not true, correct and is not happening but has happened because of inducement by entrapping a person.""No doubt the media is well within its rightful domain when it seeks to use tools of investigative journalism to bring us face to face with the ugly underbelly of the society. However, it is not permissible to the media to entice and try to actively induce an individual into committing an offence, which otherwise he is not known and likely to commit. In such cases there is no predisposition.

If one were to look into our mythology even a sage like Vishwamitra succumbed to the enchantment of "Maneka". It would be stating the obvious that the media is not to test individuals by putting them through what one might call the "inducement test" and portray it as a scoop that has uncovered a hidden or concealed truth. In such case the individual may as well claim that the person offering inducement is equally guilty and a party to the crime that he/she is being accused of. This would infringe upon the individual's right to privacy.

While disposing this writ petition [111]the Hon'ble Court asked the Ministry of Information and Broadcasting to consider certain proposed guidelines mentioned in the order while examining whether a statute/or a code of conduct should be enacted for telecast of sting operation. Thus, the electronic media is playing an important role for the

[111] (Crl. No. 1175/2007),

good health of our democracy by exposing corrupt officials and other evils prevailing in the society by way of sting operations, but while doing so it must adhere to the limitations mentioned above.

Characteristics of online sting operations

Prior to the emergence of the Internet, sting operations had potential but specific targets. However, sting operations through the Internet aim at unspecified individuals without specific targets, even though it is believed that people with dangerous dispositions will be caught eventually In addition, Internet users can change their identity and tend to behave differently on the Internet due to Anonymity, one of the key characteristics of the Internet. Internet users can "adopt different personae and fantasize about doing acts that they would never do in real life". Thus, a desire or intention expressed online might not be "real." This means that essentially everyone on the Internet is a potential target for the sting operation by law enforcement officers at some level.

4.6 Electronic Media, Information Technology and its Implications

Their uncertainty is not unfounded. Face book itself has acknowledged that members' data may be used without consent: a joint document published with the Province of Ontario's Office of the Information and Privacy Commissioner states, "at any point in time and potentially without any notice... information from your profile and logs of your online activities may be used and disclosed in unexpected ways that can affect your privacy"[112]his process of commodifying information based on surveillance intensified dramatically in November 2007, when Face book introduced Beacon, an advertising program that allowed forty commercial websites to track online purchases of Face book users and broadcast them to members' social networks, a form of viral marketing. In addition to structural features, gender-based discourses in mainstream media have outlined limited roles for young women as agents. Instead, they have been depicted as passive consumers or misguided youth whose provocative photographs risk attract in gun wanted attention. In contrast, young men behind the creation of many popular Web 2.0sites (including YouTube, My space, and Face book) are celebrated as creative, entrepreneurial boy geniuses. These discourses emphasize that the emerging gender order in Silicon Valley is still decidedly male terrain. The economic imperatives driving Face book, although still developing, enable or constrain the actions of its members. It is thus not

[112] Cavoukian , Facebook 2007, p. 3

surprising that, on a commercial and advertising oriented website whose culture depends upon personal disclosure, the young women we interviewed, although enthusiastic about the social possibilities of Face book, did not see space for creating alternative messages. Our research points to the need for further enquiry into how young women construct their identities on SNS, how they define their personal privacy on SNS, how corporations and marketers target young women on SNS, and how eminent action groups can utilize SNS for change.

What kinds of computer related activities impinge on privacy?

Although Information and Communications Technologies (ICTs) have greatly enhanced our capacities to collect, store, process and communicate information, it is ironically these very capacities of technology which make us vulnerable to intrusions of our privacy on a previously impossible scale. *Firstly,* data on our own personal computers can compromise us in unpleasant ways — with consequences ranging from personal embarrassment to financial loss. *Secondly*, transmission of data over the Internet and mobile networks is equally fraught with the risk of interception — both lawful and unlawful — which could compromise our privacy. *Thirdly,* in this age of cloud computing when much of "our" data — our emails, chat logs, personal profiles, bank statements, etc., reside on distant servers of the companies whose services we use, our privacy becomes only as strong as these companies' internal electronic security systems. *Fourthly*, the privacy of children, women and minorities tend to be especially breakable in this digital age and they have become frequent targets of exploitation. *Fifthly,* Internet has spawned new kinds of annoyances from electronic voyeurism to spam or offensive email to 'phishing' — impersonating someone else's identity for financial gain — each of which have the effect of impinging on one's privacy.[113]Although there are a number of technological measures through which these risks can be reduced, it is equally important to have a robust legal regime in place which lays emphasis on the maintenance of privacy. This note looks at whether and how the Information Technology Act that we currently have in India measures up to these challenges of electronic privacy.[114]

[113] Prashant Iyengar,Privacy and the Information Technology Act — do we have the Safeguards for Electronic Privacy? http://cis-india.org/internet-governance/blog/privacy/safeguards-for-electronic-privacy

[114] The IT Act is only one of the various laws which safeguard citizens from violations of online privacy. In addition, in the domain of finance, for instance, various RBI regulations mandate strong security protocols with respect to data held by financial institutions. Since

What provisions in the IT Act protect against violations of privacy?

At the outset, it would be pertinent to note that the IT Act defines a 'computer resource'; expansively as including a "computer, computer system, computer network, data, computer database or software".[115] As is evident, this definition is wide enough to cover most intrusions which involve any electronic communication devices or networks — including mobile networks. Briefly, then IT Act provides for both civil liability and criminal penalty for a number of specifically proscribed activities involving use of a computer — many of which impinge on privacy directly or indirectly. These will be examined in detail in the following sub-sections. Intrusions into computers and mobile devices

- accessing
- downloading/copying/extraction of data or extracts any data
- introduction of computer contaminant[116];or computer virus[117]
- causing damage either to the computer resource or data residing on it
- disruption
- denial of access
- facilitating access by an unauthorized person
- charging the services availed of by a person to the account of another person,
- destruction or diminishing of value of information
- stealing, concealing, destroying or altering source code with an intention

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this is the subject of a different dispatch on banking and privacy which we have brought out, these regulations are omitted from this discussion.

[115] Section 2(k) of the IT Act defines 'computer' as any electronic magnetic, optical or other high-speed data processing device or system which performs logical, arithmetic, and memory functions by manipulations of electronic, magnetic or optical impulses, and includes all input, output, processing, storage, computer software, or communication facilities which are connected or related to the computer in a computer system or computer network.

[116] Section 43 defines "computer contaminant" as any set of computer instructions that are designed— (a) to modify, destroy, record, transmit data or program residing within a computer, computer system or computer network; or (b) by any means to usurp the normal operation of the computer, computer system, or computer network;

[117] Similarly, "computer virus" has been defined in section 43 as "any computer instruction, information, data or program that destroys, damages, degrades or adversely affects the performance of a computer resource or attaches itself to another computer resource and operates when a program, data or instruction is executed or some other event takes place in that computer resource;

The Act provides for the civil remedy of "damages by way of compensation" for damages caused by any of these actions. In addition anyone who "dishonestly" and "fraudulently" does any of these specified acts is liable to be punished with imprisonment for a term of upto three years or with a fine which may extend to five lakh rupees, or with both.

Bangalore techie convicted for hacking government site (2009, Deccan Herald)[118]

In November 2009, The Additional Chief Metropolitan Magistrate, Egmore, Chennai, sentenced N G Arun Kumar, a techie from Bangalore to undergo a rigorous imprisonment for one year with a fine of Rs 5,000 under section 420 IPC (cheating) and Section 66 of IT Act (hacking).Investigations had revealed that Kumar was logging on to the BSNL broadband Internet connection as if he was the authorized genuine user and 'made alteration in the computer database pertaining to broadband Internet user accounts' of the subscribers.

The CBI had registered a cyber crime case against Kumar and carried out investigations on the basis of a complaint by the Press Information Bureau, Chennai, which detected the unauthorized use of broadband Internet. The complaint also stated that the subscribers had incurred a loss of Rs 38,248 due to Kumar's wrongful act. He used to 'hack' sites from Bangalore as also from Chennai and other cities, they said.

Children's privacy online

As computers and the Internet become ubiquitous children have increasingly become exposed to crimes such as pornography and stalking that make use of their private information. The newly inserted section 67B of the IT Act (2008) attempts to safeguard the privacy of children below 18 years by creating a new enhanced penalty for criminals who target children.

The section firstly penalizes anyone engaged in child pornography. Thus, any person who "publishes or transmits" any material which depicts children engaged in sexually explicit conduct, or anyone who creates, seeks, collects, stores, downloads, advertises or exchanges this material may be punished with imprisonment up to five years (seven years for repeat offenders) and with a fine of upto Rs. 10 lakh.

[118] Section 66 of the IT Act. Anon, 2009. Bangalore techie convicted for hacking govt site. Deccan Herald. Available at: http://goo.gl/jCvAh. , Accessed March 29, 2011

Secondly, this section punishes the online enticement of children into sexually explicitly acts, and the facilitation of child abuse, which are also punishable as above. Viewed together, these provisions seek to carve out a limited domain of privacy for children from would-be sexual predators. The section exempts from its ambit, material which is justified on the grounds of public good, including the interests of "science, literature, art, learning or other objects of general concern". Material which is kept or used for bona fide "heritage or religious purpose" is also exempt.

In addition, the newly released Draft Intermediary Due-Diligence Guidelines, 2011[119]require 'intermediaries'[120]to notify users not to store, update, transmit and store any information that is inter alia, "pedophilic" or "harms minors in any way". An intermediary who obtains knowledge of such information is required to "act expeditiously to work with user or owner of such information to remove access to such information that is claimed to be infringing or to be the subject of infringing activity". Further, the intermediary is required to inform the police about such information and preserve the records for 90 days.

Electronic Voyeurism

Although once regarded as only the stuff of spy cinema, the explosion in consumer electronics has lowered the costs and the size of cameras to such an extent that the threat of hidden cameras recording people's intimate moments has become quite real. Responding to the growing trend of such electronic voyeurism, a new section 66E has been inserted into the IT Act which penalizes the capturing, publishing and transmission of images of the "private area"[121]of any person without their consent, "under circumstances violating the privacy"[122] of that person. This offence is punishable with imprisonment of upto three years or with a fine of upto Rs. two lakh or both.

[119] The Information Technology (Due Diligence observed by Intermediaries Guidelines) Rules, 2011

[120]].'Intermediary' has been defined very expansively under section 2(w) of the Act to mean, with respect to any electronic record, "any person who on behalf of another person receives, stores or transmits that record, or provides any service with respect to that record and includes telecom service providers, network service providers, Internet service providers, web hosting service providers, search engines, online payment sites, online-auction sites, online-market places and cyber cafes

[121] Private area' has been defined in section 66E as "the naked or undergarment clad genitals, pubic area, buttocks or female breast".

[122] Defined as "circumstances in which a person can have a reasonable expectation that (i) he or she could disrobe in privacy, without being concerned that an image of his or her private area was being captured or (ii) any part of his or her private area would not be visible to the public regardless of whether that person is in a public or private place". See explanation to Section 66E.

Phishing – or Identity Theft

The word 'phishing' is commonly used to describe the offence of electronically impersonating someone else for financial gain. This is frequently done either by using someone else's login credentials to gain access to protected systems, or by the unauthorized application of someone else's digital signature in the course of electronic contracts. Increasingly a new type of crime has emerged wherein SIM cards of mobile phones have been 'cloned' enabling miscreants to make calls on others' accounts. This is also a form of identity theft. Two sections of the amended IT Act penalize these crimes:

Section 66C makes it an offence to "fraudulently or dishonestly" make use of the electronic signature, password or other unique identification feature of any person. Similarly, section 66D makes it an offence to "cheat by person" [123] by means of any 'communication device'[124] or 'computer resource'.Both offences are punishable with imprisonment of upto three years or with a fine of upto Rs. one lakh.

Mumbai Police Solves Phishing scam[125]

In 2005, a financial institute complained that they were receiving misleading emails ostensibly emanating from ICICI Bank's email ID. An investigation was carried out with the emails received by the customers of that financial institute and the accused were arrested. The place of offence, Vijaywada was searched for the evidence. One laptop and mobile phone used for committing the crime was seized. The arrested accused had used open source code email application software for sending spam e-mails. He had downloaded the same software from the Internet and then used it as it is. He used only VSNL to spam the e-mail to customers of the financial institute because VSNL email service provider does not have spam box to block the unsolicited emails. After spamming e-mails to the institute customers he got the response from around 120 customers of which 80 are genuine and others are not correct because they do not have debit card details as

[123] Cheating by personation" is a crime defined under section 416 the Indian Penal Code. According to that section, "a person is said to "cheat by personation" if he cheats by pretending to be some other person, or by knowingly substituting one person for another, or representing that he or any other person is a person other than he or such other person really is." The explanation to the section adds that "the offence is committed whether the individual personated is a real or imaginary person". Two illustrations to the section further elaborate its meaning: (a) A cheats by pretending to be a certain rich banker of the same name. A cheats by personation (b) A cheats by pretending to be B, a person who is deceased. A cheats by personation.

[124] Communication device" has been defined to mean "cell phones, personal digital assistance (sic) or combination of both or any other device used to communicate send or transmit any text, video, audio or image".

[125]2005. Cyber Crime Cell, Mumbai: Case of Phishing. Mumbai Police. Available at: http://www.cybercellmumbai.com/case-studies/case-of-fishing [Accessed March 23, 2011].

required for e-banking."

The customers who received his e-mail felt that it originated from the bank. When they filled the confidential information and submitted it the said information was directed to the accused. This was possible because the dynamic link was given in the first page (home page) of the fake website. The dynamic link means when people click on the link provided in spam that time only the link will be activated. The dynamic link was coded by handling the Internet Explorer once lick event and the information of the form will be submitted to the web server (where the fake website is hosted). Then server will send the data to the configured e-mail address and in this case the e-mail configured was to the e-mail of the accused. All the information after phishing (user name, password, transaction password, debit card number and PIN, mother's maiden name) which he had received through the Wi-Fi Internet connectivity of Reliance.com was now available on his Acer laptop.This crime was registered under section 66 of the IT Act, sections 419, 420, 465, 468 and 471 of the Indian Penal Code and sections 51, 63 and 65 of the Indian Copyright Act, 1957 which attract the punishment of three years imprisonment and fine upto Rs 2 lac which the accused never thought of.

Spam and Offensive Messages

Although the advent of e-mail has greatly enhanced our communications capacities, most e-mail networks today remain susceptible to attacks from spammers who bulk-email unsolicited promotional or even offensive messages to the nuisance of users. Among the more notorious of these scams is/was the so-called "section 409 scam" in which victims receive e-mails from alleged millionaires who induce them to disclose their credit information in return for a share in millions.

Hoax E-mails [126]

In 2009, a 15-year-old Bangalore teenager was arrested by the cyber crime investigation cell (CCIC) of the city crime branch for allegedly sending a hoax e-mail to a private news

[126] Hafeez, M., 2009. Crime Line: Curiosity was his main motive, say city police. Crime Line. Available at: http://mateenhafeez.blogspot.com/2009/05/curiosity-was-his-main-motive-say-city.html [Accessed March 23, 2011].

channel. In the e-mail, he claimed to have planted five bombs in Mumbai, challenging the police to find them before it was too late.According to police officials, at around 1p.m. on May 25, the news channel received an e-mail that read: "I have planted five bombs in Mumbai; you have two hours to find it." The police, who were alerted immediately, traced the Internet Protocol (IP) address to Vijay Nagar in Bangalore. The Internet service provider for the account was BSNL, said officials.

Minor Hoax Spells Major Trouble

- Sixteen-year-old Rakesh Patel (name changed), a student from Ahmedabad, sent an e-mail to a private news channel on March 18, 2008, warning officials of a bomb on an Andheri-bound train. In the e-mail, he claimed to be a member of the Dawood Ibrahim gang. Three days later, the crime investigation cell (CCIC) of the city police arrested the boy under section 506 (ii) for criminal intimidation. He was charge-sheeted on November 28, 2008.
- A 14-year-old Colaba boy sent a hoax e-mail to a TV channel in Madhya Pradesh, three days after the July 26, 2008, Ahmedabad bomb blasts. He claimed that 29 bombs would go off in Jabalpur. He was picked up by officers of the anti-terrorism squad (ATS) who, with the help of the MP police, were able to trace the e-mail to a cyber café in Colaba. Status: No FIR was registered. The Cuffe Parade police registered a non-cognizable (NC) complaint against him, and the boy was allowed to go home after the police gave him a "strict warning".
- Shariq Khan, 18, was arrested in Bhopal on July 26, 2006, for sending out three e-mails claiming to be a member of the terrorist organization, which the police believed was behind the 7/11 train bombings. He was arrested by the Bhopal police. Later, the ATS brought the boy to Mumbai and also booked him for a five-year-old unsolved case where an unknown accused had sent e-mail warnings to the department of Atomic Energy (DAE) in 2001.
- Status: The police filed a charge-sheet against Shariq who claimed that he had sent the e-mails for fun. Trial is pending in a juvenile Court. Shariq is presently out on bail in Bhopal.
- On February 26, 2006, a 17-yearold student from Jamnabai Narsee School called an Alitalia flight bound to Milan at 2 a.m. telling them there was a bomb on board. He wanted to stop his girlfriend from going abroad. She was one of the 12 students

on their way to attend a mock United Nations session in Geneva. Status: After being grilled by the police, he was arrested, but let out on bail.

Lawful Interception and monitoring of electronic communications under the IT Act

In addition to violations of privacy by criminal and the mischievous minded, electronic communications and storage are also a goldmine for governmental supervision and surveillance. This section provides a brief overview of the provisions in the IT Act which circumscribe the powers of the state to intercept electronic communications.

The newly amended IT Act completely rewrote its provisions in relation to lawful interception. The new section 69 dealing with "power to issue directions for interception or monitoring or decryption of any information through any computer resource" is much more elaborate than the one it replaced, In October 2009, the Central Government notified rules under section 69 which lay down procedures and safeguards for interception, monitoring and decryption of information (the "Interception Rules 2009"). This further thickens the legal regime in this context.

Unlawful Intercept

In August 2007, Lakshmana Kailash K., a techie from Bangalore was arrested on the suspicion of having posted insulting images of Chhatrapati Shivaji, a major historical figure in the state of Maharashtra, on the social-networking site Orkut. The police identified him based on IP address details obtained from Google and Airtel – Lakshmana's ISP. He was brought to Pune and detained for 50 days before it was discovered that the IP address provided by Airtel was erroneous. The mistake was evidently due to the fact that while requesting information from Airtel, the police had not properly specified whether the suspect had posted the content at 1:15 p.m. or a.m.Taking cognizance of his plight from newspaper accounts, the State Human Rights Commission subsequently ordered the company to pay Rs 2 lakh to Lakshmana as damages[127].The incident highlights how minor

[127] Holla, A., 2009. Wronged, techie gets justice 2 yrs after being jailed. Mumbai Mirror. Available at: http://www.mumbaimirror.com/index.aspx?page=article&sectid=2&contentid=2009062520090625031445786810374 83 [Accessed March 23, 2011].

privacy violations by ISPs and intermediaries could have impacts that gravely undermine other basic human rights [128].

In addition to section 69, the Government has been empowered under the newly inserted section 69B to "monitor and collect traffic data or information generated, transmitted, received or stored in any computer resource".

"Traffic data" has been defined in the section to mean “any data identifying or purporting to identify any person, computer system or computer network or any location to or from which communication is or may be transmitted.” Rules have been issued by the Central Government under this section (the “Monitoring and Collecting Traffic Data Rules, 2009”) which are similar, although with important distinctions, to the rules issued under section 69.

Thus, there are two parallel interception and monitoring regimes in place under the Information Technology Act. In the paragraphs that follow, we provide an overview of the regime of surveillance under section 69 — since they are more targeted towards the individual, and consequently the threats to privacy are more severe — while highlighting important differences in the rules drafted under section 69.

Who may lawfully intercept?

Section 69 empowers the “Central Government or a state government or any of its officers specially authorized by the Central Government or the state government, as the case may be” to exercise powers of interception under this section. Under the Interception Rules 2009, the secretary in the Ministry of Home Affairs has been designated as the "competent authority", with respect to the Central Government, to issue directions pertaining to interception, monitoring and decryption. Similarly, the respective state secretaries in charge of Home Departments of the various states and union territories are designated as "competent authorities" to issue directions with respect to the state government.[129]

[128] See also Nanjappa, V., 2008. 'I have lost everything'. Rediff.com News. Available at: http://www.rediff.com/news/2008/jan/21inter.htm [Accessed March 23, 2011].

[129] By contrast, rules framed under Section 69B designates only the Secretary to the Government of India in the Department of Information Technology under the Ministry of Communications and IT as the “competent authority” to issue orders of interception.

	Central Government	State/Union Territory
Ordinary Circumstances	Secretary in the Ministry of Home Affairs	Secretary in charge of Home Departments of State
Emergency	Head or second senior most officer of security and law enforcement	Authorized officer not below the rank of Inspectors General of Police

However, an exception is made in cases of emergency, either

- in remote areas where obtaining prior directions from the competent authority is not feasible or
- for 'operational reasons' [130]where obtaining prior directions is not feasible.

In such cases it would be permissible to carry out interception after obtaining the orders of the Head or second senior most officer of security and law enforcement at the central level, and an authorized officer not below the rank of Inspector General of Police at the state or union territory level. The order must be communicated to the competent authority within three days of its issue, and approval must be obtained from the authority within seven working days, failing which the order would lapse.

Where a state/union territory wishes to intercept/monitor or decrypt information beyond its territory, the competent authority for that state must make a request to the competent authority of the Central Government to issue appropriate directions.

Under what circumstances a direction to intercept may be issued?

Purposes for which interception may be directed

Under section 69, the powers of interception may be exercised by the authorized officers "when they are satisfied that it is necessary or expedient" to do so in the interest of:

- sovereignty or integrity of India,
- defense of India,

[130]It is unclear what these "operational reasons" could mean. The text of the rules provide no useful guidance

- security of the state,
- friendly relations with foreign states or
- public order or
- preventing incitement to the commission of any cognizable offence relating to above or
- for investigation of any offence.

Under section 69B, the competent authority may issue directions for monitoring for a range of "cyber security"[131] purposes including, inter alia, "identifying or tracking of any person who has breached, or is suspected of having breached or being likely to breach cyber security".

Contents of direction

The reasons for ordering interception must be recorded in writing.[132]In the case of a direction under section 69, in arriving at its decision, the competent authority must consider alternate means of acquiring the information other than issuing a direction for interception.[133] The direction must relate to information sent or likely to be sent from one or more particular computer resources to another (or many) computer resources.[134] The direction must specify the name and designation of the officer to whom information obtained is to be disclosed, and also specify the uses for which the information is to be employed.[135]

Duration of interception and periodic review

Once issued, an interception direction issued under section 69 remains in force for a period of 60 days (unless withdrawn earlier), and may be renewed for a total period not exceeding 180 days.[136] A direction issued under section 69B does not expire automatically through the lapse of time and theoretically would continue until withdrawn.

[131] "Cyber security breach" is defined as meaning "any real or suspected adverse event in relation to cyber security that violates an explicitly or implicitly acceptable security policy resulting in unauthorized access, denial of service, disruption, unauthorized use of a computer resource for processing or storage of information or changes to date, information without authorization". Rule 2(f) of the Monitoring and Collecting of Traffic Data Rules 2009.
[132] Rule 7 of the Interception Rules 2009; Rule 3(3) of the Monitoring and Collecting of Traffic Data Rules 2009
[133] Rule 8 of the Interception Rules 2009
[134] Rule 9 of the Interception Rules 2009
[135] Rule 10 of the Interception Rules 2009;
[136] Rule 11 of the Interception Rules 2009

Within seven days of its issue, a copy of a direction issued under either section 69 or section 69B must be forwarded to the review committee constituted to oversee wiretapping under the Indian Telegraph Act.[137] Every two months, the review committee is required to meet and record its findings as to whether the direction was validly issued in light of section 69(3)[138]. If the review committee is of the opinion that it was not, it can set aside the direction and order destruction of all information collected.[139]

What powers of interception do they have?

The competent authority may, in his written direction "direct any agency of the appropriate government to intercept monitor or decrypt or cause to be intercepted or monitored or decrypted any information generated, transmitted, received or stored in any computer resource".[140]

Accordingly, the subscriber or intermediary or any person in charge of the computer resource is must, if required by the designated government agency, extend all facilities, equipment and technical assistance to:

- provide access to or secure access to the computer resource generating, transmitting, receiving or storing such information; or
- intercept, monitor, or decrypt[141] the information, as the case may be; or
- Provide information stored in computer resource.

The intermediary must maintain records mentioning the intercepted information, the particulars of the person, e-mail account, computer resource, etc., that was intercepted, the particulars of the authority to whom the information was disclosed, number of copies of the information that were made, the date of their destruction, etc.[142] This list of requisitions received must be forwarded to the government agency once every 15 days to

[137] Rule 22 of the Interception Rules 2009
[138] Ibid

[140] Section 69 of the IT Act
[141] The intermediary is required to assist in the decryption only to the extent that the intermediary has control over the decryption key. See Sub-Rule 13(3) of the Interception Rules 2009. Rule 17 enjoins the holder of a decryption key to provide decryption assistance when directed to by the competent authority
[142] Rule 16 of the Interception Rules 2009

ensure their authenticity.[143]In addition, a responsibility is cast on the intermediary to put in place adequate internal checks to ensure that unauthorized interception does not take place, and extreme secrecy of intercepted information is maintained.[144]

How long can information collected during interception are retained?

Interception rules require all records, including electronic records pertaining to interception to be destroyed by the government agency "in every six months except in cases where such information is required or likely to be required for functional purposes". In the case of the Monitoring and Collecting of Traffic Data Rules 2009, this period is nine months from the date of creation of record. In addition, all records pertaining to directions for interception and monitoring are to be destroyed by the intermediary within a period of two months following discontinuance of interception or monitoring, unless they are required for any ongoing investigation or legal proceedings. In the case of Monitoring Rules, this period is six months from the date of discontinuance.

What penalties accrue to intermediaries and subscribers for resisting interception?

Section 69 stipulates a penalty of imprisonment upto a term of seven years and fine for any "subscriber or intermediary or any person who fails to assist the agency" empowered to intercept.

Data Protection under the IT Act

Data Retention Requirements of 'Intermediaries': Section 67C of the amended IT Act mandates 'intermediaries'[145] to maintain and preserve certain information under their control for durations which are to be specified by law, any intermediary who fails to retain such electronic records may be punished with imprisonment up to three years and a fine.

Liability for body-corporate under section 43A

The newly inserted section 43A makes a start at introducing a mandatory data protection regime in Indian law. The section obliges corporate bodies who 'possess, deal or handle'

[143] Rule 18 of the Interception Rules 2009

[144] Rule 20 of the Interception Rules 2009; Rules 10 & 11 of the Monitoring and Collecting of Traffic Data Rules 2009. Failure to maintain secrecy of data may attract punishment under Section 72 of the Information Technology Act.

any ‘sensitive personal data’ to implement and maintain ‘reasonable’ security practices, failing which they would be liable to compensate those affected by any negligence attributable to this failure. It is only the narrowly-defined ‘body corporate’[146] engaged in ‘commercial or professional activities’ that are the targets of this section. Thus government agencies and non-profit organizations are entirely excluded from the ambit of this section. [147]

“Sensitive personal data or information” is any information that the Central Government may designate as such, when it sees fit to. The “reasonable security practices” which the section obliges body corporate to observe are restricted to such measures as may be specified either “in an agreement between the parties” or in any law in force or as prescribed by the Central Government. By defining both “sensitive personal data” and “reasonable security practice” in terms that require executive elaboration, the section in effect pre-empts the Courts from evolving an iterative, contextual definition of these terms.

Mphasis BPO Fraud: 2005[148]

In December 2004, four call centre employees, working at an outsourcing facility operated by MphasiS in India, obtained PIN codes from four customers of MphasiS’ client, Citi Group. These employees were not authorized to obtain the PINs. In association with others, the call centre employees opened new accounts at Indian banks using false identities. Within two months, they used the PINs and account information gleaned during their employment at MphasiS to transfer money from the bank accounts of CitiG roup customers to the new accounts at Indian banks.

By April 2005, the Indian police had tipped off to the scam by a U.S. bank, and quickly

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[146] Section 43A defines "'body corporate" as any company and includes a firm, sole proprietorship or other association of individuals engaged in commercial or professional activities;

[147] This does not necessarily mean that these entitles are exempt from taking reasonable care to safeguard information that they collect, maintain or control – only that remedies against the government must be sought under general common law, rather than under the IT Act.

[148] Anon, 2005. The MphasiS Scandal – And How it Concerns U.S. Companies Considering Offshore BPO. Carretek. Available at: http://www.carretek.com/main/news/articles/MphasiS_scandal.htm [Accessed March 29, 2011]. See also Anon, 2005. MphasiS case: BPOs feel need to tighten security. Indian Express. Available at: http://www.expressindia.com/news/fullstory.php?newsid=44856 [Accessed March 29, 2011].

identified the individuals involved in the scam. Arrests were made when those individuals attempted to withdraw cash from the falsified accounts, $426,000 was stolen; the amount recovered was $230,000.

Draft Reasonable Security Practices Rules 2011[149]

In February 2011, the Ministry of Information and Technology, published draft rules under section 43A in order to define "sensitive personal information" and to prescribe "reasonable security practices" that body corporate must observe in relation to the information they hold.

Sensitive Personal Information: Rule 3 of these Draft Rules designates the following types of information as 'sensitive personal information[150]':

- password;
- user details as provided at the time of registration or thereafter;
- information related to financial information such as Bank account / credit card / debit card / other payment instrument details of the users;
- physiological and mental health condition;
- medical records and history;(vi) Biometric information;
- information received by body corporate for processing, stored or processed under lawful contract or otherwise;
- call data records;

This however, does not apply to "any information that is freely available or accessible in public domain or accessible under the Right to Information Act, 2005".

[149] The Information Technology (Reasonable security practices and procedures and sensitive personal information) Rules, 2011. Available at http://www.mit.gov.in/sites/upload_files/dit/files/senstivepersonainfo07_02_11.pdf, last accessed February 15th, 2011.

[150] Rule 5 of the Draft Rules

They and "any person" holding sensitive personal information are forbidden from "keeping that information for longer than is required for the purposes for which the information may lawfully be used"[151]

Mandatory Privacy Policies for body corporate

Rule 4 of the draft rules enjoins a body corporate or its representative who "collects, receives, possess, stores, deals or handles" data to provide a privacy policy "for handling of or dealing in user information including sensitive personal information". This policy is to be made available for view by such "providers of information".[152] The policy must provide details of:

- Type of personal or sensitive information collected under sub-rule (ii) of rule 3;
- Purpose, means and modes of usage of such information;
- Disclosure of information as provided in rule 6 .

Prior Consent and Use Limitation during Data Collection

In addition to the restrictions on collecting sensitive personal information, body corporate must obtain prior consent from the "provider of information" regarding "purpose, means and modes of use of the information". The body corporate is required to "take such steps as are, in the circumstances, reasonable"[153]to ensure that the individual from whom data is collected is aware of :

- the fact that the information is being collected; and
- the purpose for which the information is being collected; and
- the intended recipients of the information; and
- the name and address of :

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[151] This is perhaps a bit vague, since the potential 'lawful uses' are numerous and could be inexhaustible. It is unclear whether "lawful usage" is coterminous with "the uses which are disclosed to the individual at the time of collection". In addition, this rule is framed rather weakly since it does not impose a positive obligation (although this is implied) to destroy information that is no longer required or in use.

[152]."Provider of data" is not the same as individuals to whom the data pertains, and could possibly include intermediaries who have custody over the data. We feel this privacy policy should be made available for view generally – and not only to providers of information. In addition, it might be advisable to mandate registration of privacy policies with designated data controllers.

[153] One wonders about the convoluted language used here when a simpler phrase like "take reasonable steps" alone might have sufficed - reasonableness has generally been interpreted by courts contextually. As the Supreme Court has remarked, "`Reasonable' means prima facie in law reasonable in regard to those circumstances of which the actor, called upon to act reasonably, knows or ought to know. See Gujarat Water Supply and Sewage Board v. Unique Erectors (Guj) AIR 1989 SC 973

- the agency that is collecting the information; and
- the agency that will hold the information.

During data collection, body corporates are required to give individuals the option to opt-in or opt-out from data collection.[154] They must also permit individuals to review and modify the information they provide "wherever necessary".[155] Information collected is to be kept securely[156], used only for the stated purpose [157] and any grievances must be addressed by the body corporate "in a time bound manner".[158]

Unlike "sensitive personal information" there is no obligation to retain information only for as long as is it is required for the purpose collected.

Limitations on Disclosure of Information

The draft rules require a body corporate to obtain prior permission from the provider of such information obtained either "under lawful contract or otherwise" before information is disclosed.[159] The body corporate or any person on its behalf shall not publish the sensitive personal information. Any third party receiving this information is prohibited from disclosing it further.[160] However, a proviso to this sub-rule mandates information to be provided to 'government agencies' for the purposes of "verification of identity, or for prevention, detection, investigation, prosecution, and punishment of offences". In such cases, the government agency is required to send a written request to the body corporate possessing the sensitive information, stating clearly the purpose of

[154] Sub-Rule 5(7).

[155] Sub-Rule 5(6). It is unclear what would count as a 'necessary' circumstance and who would be the authority to determine such necessity.

[156] Sub-Rule 5(8).

[157] Sub-Rule 5(5).
[158] Sub-Rule 5(9).
[159] Sub-Rule 6(1) There are two problems with this rule. First, it requires prior permission only from the provider of information, and not the individual to whom the data pertains. In effect this whittles down the agency of the individual in being able to control the manner in which information pertaining to her is used. Second, it is not clear whether this information includes "sensitive personal information". The proviso to this rule includes the phrase "sensitive information", which would suggest that such information would be included. This makes it even more important that the rule require that prior permission be obtained from the individual to whom the data pertains and not merely from the provider of information.

[160] Sub-Rule 6(4).

seeking such information. The government agency is also required to "state that the information thus obtained will not be published or shared with any other person".[161]

Sub-rule (2) of rule 6 requires "any information" to be "disclosed to any third party by an order under the law for the time being in force." This is to be done "without prejudice" to the obligations of the body corporate to obtain prior permission from the providers of information.[162]

Reasonable Security Practices

Rule 7 of the draft rules stipulates that a body corporate shall be deemed to have complied with reasonable security practices if it has implemented security practices and standards which require:

- a comprehensive documented information security program; and
- Information security policies that contain managerial, technical, operational and physical security control measures that are commensurate with the information assets being protected.

In case of an information security breach, such body corporate will be "required to demonstrate, as and when called upon to do so by the agency mandated under the law, that they have implemented security control measures as per their documented information security program and information security policies".

The rule stipulates that by adopting the International Standard IS/ISO/IEC 27001 on "Information Technology – Security Techniques – Information Security Management System – Requirements", a body corporate will be deemed to have complied with reasonable security practices and procedures.

[161] This is a curious insertion since it begs the question as to the utility of such a statement issued by the requesting agency. What are the sanctions under the IT Act that may be attached to a government agencies that betrays this statement? Why not instead, insert a peremptory prohibition on government agencies from disclosing such information (with the exception, perhaps, of securing conviction of offenders)?

[162] This sub-rule does not distinguish between orders issued by a court and those issued by an administrative/quasi-judicial body.

The rule also permits "industry associations or industry clusters" who are following standards other than IS/ISO/IEC 27001 but which nevertheless correspond to the requirements of sub-rule 7(1), to obtain approval for these codes from the government. Once this approval has been sought and obtained, the observance of these standards by a body corporate would deem them to have complied with the reasonable security practice requirements of section 43A.

Penalties and Remedies for breach of Data Protection

Civil Liability for Corporate:As mentioned above, anybody corporate who fail to observe data protection norms may be liable to pay compensation if:

- it is negligent in implementing and maintaining reasonable security practices, and thereby
- causes wrongful loss or wrongful gain to any person;[163]

Claims for compensation are to be made to the adjudicating officer appointed under section 46 of the IT Act. Further, details of the powers and functions of this officer are given in succeeding sections of this note.

Criminal liability for disclosure of information obtained in the course of exercising powers under the IT Act

Section 72 of the Information Technology Act imposes a penalty on "any person" who, having secured access to any electronic record, correspondence, information, document or other material using powers conferred by the Act or rules, discloses such information without the consent of the person concerned. Such unauthorized disclosure is punishable "with imprisonment for a term which may extend to two years, or with fine which may extend to one lakh rupees, or with both."

[163] "Wrongful loss" and "wrongful gain" have been defined by Section 23 of the Indian Penal Code. Accordingly, "Wrongful gain" is gain by unlawful means of property which the person gaining is not legally entitled. "Wrongful loss"- "Wrongful loss" is the loss by unlawful means of property to which the person losing it is legally entitled." The section also includes this interesting explanation "Gaining wrongfully, losing wrongfully- A person is said to gain wrongfully when such person retains wrongfully, as well as when such person acquires wrongfully. A person is said to lose wrongfully when such person is wrongfully kept out of any property as well as when such person is wrongfully deprived of property". Following this, it could be possible to argue that the retention of data beyond the period of its use would amount to a "wrongful gain

Criminal Liability for unauthorized disclosure of information by any person of information obtained under contract

Section 72A of the IT Act imposes a penalty on any person[164] (including an intermediary) who:

- has obtained personal information while providing services under a lawful contract and
- discloses the personal information without consent of the person,
- with the intent to cause, or knowing it is likely to cause wrongful gain or wrongful loss[165]
- Such unauthorised disclosure to a third person is punishable with imprisonment upto three years or with fine upto Rs five lakh, or both.

Whom to call? Adjudicatory Mechanism and Remedies under the IT Act

As mentioned above, the IT Act provides for both the civil remedy of damages in compensation (Chapter IX) as well as criminal penalties for offences such as imprisonment and fine (Chapter XI). In general, claiming a civil remedy does not bar one from seeking criminal prosecution and ideally both should be pursued together. For clarity, in the sections that follow, we will be discussing the two procedures separately.

Civil Damages and Compensation

Whom to approach?

Section 46 of the IT Act empowers the Central Government to appoint "adjudication officers" to adjudicate whether any person has committed any of the contraventions described in Chapter IX of the Act, and to determine the quantum of compensation payable. Accordingly, the Central Government has designated the secretaries of the Department of Information Technology of each of the states or union territories as the "adjudicating officer" with respect to each of their territories.[166]

[164] Section 3(39) of the General Clauses Act defines a person to include "any company or association or body of individuals whether incorporated or not". An interesting question here would be whether the State can be considered "a person" so that it can be held liable for unauthorized disclosure of personal information. In an early case of Shiv Prasad v. Punjab State AIR 1957 Punj 150, the Punjab High Court had excluded this possibility. However, the case law on this point has not been consistent. In Ramanlal Maheshwari v.Municipal Committee, the MP High Court held that the Municipal Council could be treated as a 'person' for the purpose of levying a fine attached to a criminal offence. Statutory corporate bodies (such as the proposed UID Authority of India) have been held to be 'persons' for purposes of law . See Commissioners, Port of Calcutta v. General Trading Corporation, AIR 1964 Cal 290. Here under the Calcutta Port Act, Port Commissioners were declared to be a "body corporate", and hence were held to be a 'person'.

[165] Information Technology Act,2000

[166] See G.S.R.240(E) New Delhi, the 25th March, 2003 available at < http://www.mit.gov.in/content/it-act-notification-no-240>

However, a pecuniary limit has been placed on the powers of adjudicating officers, and they may only adjudicate cases where the quantum of compensation claimed does not exceed Rs. five crores. In cases where the compensation claimed exceeds this amount, jurisdiction would vest in the "competent Court", under the Code of Civil Procedure.[167]

Section 61 of the Act bars ordinary civil Courts from jurisdiction over matters which the adjudicating officers have been empowered to decide under this Act.

When must a complaint be filed?

The Limitation Act provides that a suit must be filed within three years from when the right to sue accrues.[168]

What is the procedure?

Section 46 and the rules framed under that section provide elaborate guidelines on the procedure that is to be followed by the adjudicating officer. Thus, the adjudicating officer is required to give the accused person "a reasonable opportunity for making representation in the matter". Thereafter, if , on an inquiry, "he is satisfied that the person has committed the contravention, he may impose such penalty or award such compensation as he thinks fit in accordance with the provisions of that section."

In order to carry out their duties adjudicating officer have been invested with the powers of a civil Court which are conferred on the cyber appellate tribunal.[169] Additionally, they have the power to punish for their contempt under the Code of Criminal Procedure.

Rules framed under the section provide further details on the procedure that must be followed and provide for the issuance of a "show cause notice", manner of holding enquiry, compounding of offences, etc.[170]

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[167] See Section 46(1A).

[168] Schedule I, Part X of the Limitation Act "Suits for which there is no prescribed period."

[169] The powers of the Cyber Appellate Tribunal under Section 58 include the powers of (a) summoning and enforcing the attendance of any person and examining him on oath; (b) requiring the discovery and production of documents or other electronic records; (c) receiving evidence on affidavits; (d) issuing commissions for the examination of witnesses or documents; (e) reviewing its decisions; (f) dismissing an application for default or deciding it ex parte.

[170] Information Technology (Qualification and Experience of Adjudicating Officers and Manner of holding Enquiry) Rules, 2003 [GSR 220(E)] Available at <http://cca.gov.in/rw/resource/notification-gsr220e.pdf?download=true>.

Section 47 provides that in adjudging the quantum of compensation, the adjudicating officer shall have due regard to the following factors, namely:

- the amount of gain of unfair advantage, wherever quantifiable, made as a result of the default;
- the amount of loss caused to any person as a result of the default;
- the repetitive nature of the default.

Where must a complaint be filed and in what format?

The complaint must be made to the adjudicating officer of the state or union territory on the basis of location of computer system, computer network. The complaint must be made on a plain paper in the format provided in the Performa attached to the rules.[171]

In case the offender or computer resource is located abroad, it would be deemed, for the purpose of prosecution to be located in India.[172]

How long does the process take?

The Rules direct that the whole matter should be heard and decided "as far as possible" within a period of six months.[173]

How much does it cost?

The Rules stipulates a variable fee payable by a bank draft calculated on the basis of damages claimed by way of compensation

a) Upto Rs. 10,000	10% ad valorem rounded off to nearest next hundred
b) From 10001 to Rs.50000	Rs. 1000 plus 5% of the amount exceeding Rs.10,000 rounded off to nearest next hundred
c) From Rs.50001 to Rs.100000	Rs. 3000/- plus 4% of the amount exceeding Rs. 50,000 rounded off to nearest next hundred

[171] Ibid Rule 4(b).

[172] Section 75.

[173] Ibid, Rule 4(k).

d) More than Rs. 100000 Rs.5000/- plus 2% of the amount exceeding Rs. 100,000 rounded off to nearest next hundred

Appeals to the Cyber Appellate Tribunal and the High Court

The Act provides for the Constitution of a Cyber Appellate Tribunal to hear appeals from cases decided by the adjudicating officer. Within 25 days of the copy of the decision being made available by the adjudicating officer, the aggrieved party may file an appeal before the Cyber Appellate Tribunal.

Section 57 provides that the appeal filed before the cyber appellate tribunal shall be dealt with by it as expeditiously as possible and endeavor shall be made by it to dispose of the appeal finally within six months from the date of receipt of the appeal. Section 62 gives the right of appeal to a high Court to any person aggrieved by any decision or order of the cyber appellate tribunal on any question of fact or law arising out of such order. Such an appeal must be filed within 60 days from the date of communication of the decision or order of the Cyber Appellate Tribunal.

Can contraventions be compounded (compromised) with the offender?

Except in the case of repeat offenders, contraventions may be compromised by the adjudicating officer or between the parties either before or after institution of the suit. Where any contravention has been compounded the IT Act provides that "no proceeding or further proceeding, as the case may be, shall be taken against the person guilty of such contravention in respect of the contravention so compounded".[174]

Criminal Penalties

The process described above applies to "contraventions" under Chapter IX of the Act. In addition to being liable to pay compensation, in the cases falling under section 43, such offenders may also be liable for criminal penalties such as imprisonment and fines.[175] This

[174] Section 63 of the Act.

[175] Prior to amendment in 2008, contraventions listed in Section 43 were only liable to be compensated by damages through civil proceedings. Thus in 2007, the Madras High Court annulled an FIR lodged in a police station which listed an activity mentioned in 43(g). See S. Sekar vs The Principal General Manager < http://indiankanoon.org/doc/182565/> This position has however been changed with the new Section 66 which makes all actions listed in Section 43 an offence when committed with dishonest or fraudulent intent. Thus an FIR can be lodged with respect to these activities as well.

sub-section of this paper deals with the procedure to be followed with respect to the criminal offences set out under Chapter XI of the Act[176] .

Whom to approach? Who can take cognizance of offences and investigate them?

Section 78 of the IT Act empowers police officers of the rank of Inspectors and above to investigate offences under the IT Act. Many states have set up dedicated cyber crime police stations to investigate offences under this Act.[177] Thus, for example, the State of Karnataka has set up a special cyber crime police station responsible for investigating all offences under the IT Act with respect to the entire territory of Karnataka.[178]

When must a complaint be lodged?

Although there is no time limit prescribed by the IT Act or the Code of Criminal Procedure with respect to when an FIR must be filed, in general, Courts tend to take an adverse view when a significant delay has occurred between the time of occurrence of an offence and it's reporting to the nearest police station.

The Code of Criminal Procedure forbids Courts from taking cognizance of cases after three years "if the offence is punishable with imprisonment for a term exceeding one year but not exceeding three years". Where either the commission of the offence was not known to the person aggrieved, or where it is not known by whom the offence committed, this period is computed from the date on which respectively the offence or the identity of the offender comes to the knowledge of the person aggrieved.[179]

What is the procedure?

No special procedure is prescribed for the trial of cyber offences and hence the general provisions of criminal procedure would apply with respect to investigation, charge sheet, trial, decision, sentencing and appeal.

[176] for example, see sections 2.2 to 2.5 I.T.Act,2000

[177] An incomplete list of cyber crime cells of police in different states can be viewed at <http://infosecawareness.in/cyber-crime-cells-in-india

[178] Home and Transport3 Secretariat, Notification no. HD 173 POP 99 Bangalore, Dated 13th September 2001 Available at < http://cyberpolicebangalore.nic.in/pdf/notification_1.pdf>.visited on 25,April 2014

[179] Sections 468 and 469 of the Code of Criminal Procedure, 1973.

Can offences be compounded?

Offences punishable with imprisonment of upto three years are compoundable by a competent Court. However, repeat offenders cannot have their subsequent offences compounded. Additionally, offences which "affect the socio-economic conditions of the country" or those committed against a child under 18 years of age or against women cannot be compounded. [180]

4.7 Human Rights in cyber space

Cyberspace is the virtual communicative space created by digital technologies. It is not limited to the operation of computer networks, but also encompasses all social activities in which digital information and communication technologies (ICT) are deployed. It thus ranges from computerized reservation systems to automated teller systems and smart cards. With the 'embedding' of digital facilities in more and more objects (from microwave ovens to jogging shoes), these acquire intelligent functions and communicative capacities and begin to create a permanent virtual life-space. [181]The issue of the governance of cyberspace emerges in many current ICT-debates at different levels.

There is the staunch anarchistic position that considers cyberspace a totally new and alien territory where conventional rules do not apply. For those holding this cyber-libertarian view no governance is the best governance. But, however attractive this approach may seem, if more people are to use cyberspace this is likely to need public and corporate policymaking. This is equally the case if cyberspace is to be protected against unprecedented opportunities for criminal activity. Moreover, cyberspace technology does create a virtual reality, but this is not altogether de-linked from politics in the real world.Opposed to cyber-anarchy are those governments who would want a strict regime for activities in cyberspace in order to control not only the pornographers, and neo-Nazis but also the copyright pirates or just anybody who holds politically subversive aspirations. Then there are the cyberspace citizens who feel they can best police themselves and who

[180] Section 77A of the Information Technology Act,2000

[181] Cees J. Hamelink ,Human Rights in Cyberspace, the International Journal for Communication Studies,p.231

discuss among themselves a variety of forms of self regulation ranging from Parent Control software to Cyber Angels, Codes of Conduct and Netiquette.

Cyberspace is perceived by the digital settlers as the last ‘electronic’ frontier, but cyberspace also colonizes our non-virtual reality and lest it totally controls daily life it needs to be governed by norms and rules. A re-current question is whether cyberspace gives rise to new forms of democratic [electronic] governance, which are less-territory based, less hierarchical, more participatory, and demand new rules for political practice.

Whatever position one may take regarding future governance of cyberspace, it can not be denied that in any case (moral) choices have to be made and are being made since inevitably the proliferation of cyberspace technologies implies like all technological development a confrontation with moral issues on different levels.

These relate to -among others- choices about the way the technology will be designed; choices among possible applications and the responsibility for certain applications; choices about the the introduction and the use of applications. They also address issues such as the unequal distribution of harm and benefit of applications among social actors; the control over technology and its administration; and the uncertainty about the future impacts of technology.

The specific question that concerns me here is whether the current international human rights regime can provide us with meaningful moral and legal guidance for the solution of these moral choices.

A first issue that emerges concerns the observation that the human rights regime is firmly embedded in modernist, Enlightenment thought that seems to collide with the view that cyberspace is "a manifestation of the postmodern world" .Characteristic of the modern world are the physical categories, such as location, gender, ethnicity, appearance, from which cyberspace seems to liberate us. There is a pragmatic answer to this question. Even if the international human rights regime is affected by the flaws of modernity in today’s reality the regime is more noted for its violations than its respect, and the world would undoubtedly be a safer place for the world’s majority if its provisions were implemented. Moreover, cyberspace itself it solidly rooted in and connected with the forces of modernity. It originates with the military establishment (that created the predecessor of the

Internet) and is strongly promoted by the world's leading financial and industrial corporations.It seems however necessary to expand the discussion with a conceptual critique of the conventional human rights discourse. The real significance of human rights standards can only be uncovered if a number of theoretical inadequacies are addressed and remedied. Conventional theories on human rights imply limitations to the understanding of human rights that erode the effective implementation of the very basic claims they enunciate. These theories are characterized by their exclusive emphasis on individual rights; their limited interpretation of the concept 'freedom'; their limited understanding of the concept 'equality'; their limited scope for 'horizontal effect'; and their lack of institutional consideration.

Horizontal effect

Conventional human rights thinking mainly focuses on the vertical state/citizen relation and the basic moral standards almost exclusively focus on the political sphere. This ignores the possibility that concentration of power in the hands of individuals can be as threatening as state power. Whenever citizens pursue different economic interests, individual human rights will be under serious threat. Citizens also need to be protected against each other. A concept like of equality should therefore be extended to all those (socio-economic and cultural) spheres that are essential to human emancipation and self-development. Beyond the concern to realize equal voting rights in democratic societies, for example, the need to create equal participation in cultural life, should receive similar emphasis. Human rights cannot be realized without involving citizens in the decision-making processes about the spheres in which freedom and equality are to be achieved.

The idea of human rights has thus to extend to the social institutions (the institutional arrangements) that would facilitate the realization of fundamental standards. This moves the democratic process beyond the political sphere and extends the requirement of participatory institutional arrangements to other social domains. It claims that also culture and technology should be subject to democratic control.

This is particularly important in the light of the fact that current democratization processes (the "new world order" processes) tend to delegate important areas of social life to private rather than to public control and accountability. Increasingly large volumes of social

activity are withdrawn from public accountability, from democratic control, and from the participation of citizens in decision-making.

The People's Communication Charter

The recognition of individual rights under international law was thus linked with the notion that individuals also have duties under international law. This was eloquently expressed in 1947 by Mahatma Gandhi in a letter to the director of UNESCO about the issue of human rights. Gandhi wrote, "I learnt from my illiterate but wise mother that rights to be deserved and preserved came from duty well done".

The People's Communication Charter articulates essential rights and responsibilities that ordinary people have in relation to their cultural environment. It represents an attempt to redress some of the weaknesses inherent in the conventional human rights regime. It aspires to a democratic and sustainable organization of the world's communication structures and information flows. It is abundantly clear that these great ideas cannot be simply implemented by drafting and revising a text. The text constitutes merely a point of reference for a much needed civil activism that targets what arguably is a very central social domain.

The People's Communication Charter is an initiative of the Third World Network (Penang, Malaysia), the Centre for Communication & Human Rights (Amsterdam, the Netherlands), the Cultural Environment Movement (USA), the World Association of Community Radio Broadcasters (AMARC), and the World Association for Christian Communication.

The Charter provides the common framework for all those who share the belief that people should be active and critical participants in their social reality and capable of governing themselves. The People's Communication Charter could be a first step in the development of a permanent movement concerned with the quality of our cultural environment.

The movement should not be seen by those who work in the mass media as a populist intervention with their professional independence. It should rather be welcomed as a creative alliance between media producers and consumers against those commercial forces that are more intent on generating profits than on informing people properly. If we want to

apply human rights standards to relations in cyberspace this requires the active responsibility on behalf of those who are concerned.

From the beginning it was clear that the Charter should not be seen as an end in itself. It intends to provide the basis for a permanent critical reflection on those worldwide trends that determine the quality of our lives in the third millennium. The Charter has now been adopted by a growing number of organizations and individuals around the world and several activities inspired by the Charter are planned for the coming years, among them an international tribunal on violations of the Charter's rights. To-day the Web site of the Charter[182] is the place where such events and the progress in widening support for the PCC is made public. The core themes of the movement concern:

1. Communication and human rights: Communication and information services should be guided by respect for fundamental human rights.

2. The public domain. Communication resources (such as airwaves and outer space) belong to the "commons"; they are public domain and should not be appropriated by private parties.

3. Ownership. Communication and information services should not be monopolized by governments or business firms.

4. Empowerment. People are entitled to the protection of their cultural identity and to the development of their communicative capacities.

5. Public accountability. Providers of communication and information services should accept public accountability for the quality of their performance.

The cultural environment is ultimately not only shaped by governments and media moguls, but in important ways by the clients of the system. We need a critical debate on the use of the international human rights regime as instrument of moral guidance. Ultimately, all depends upon the commitment of people themselves to shaping humane governance for our future in cyberspace.

[182] In August 1997, for example, the Charter was displayed at the famous Dokumenta exhibition at Kassel, Germany. The text was discussed and signed by many visitors.