

LAW COMMISSION

CONSULTATION PAPER ON MEDIA LAW

RECOMMENDATIONS BY 4TH YEAR STUDENTS OF MEDIA
LAW*,

THE W.B. NATIONAL UNIVERSITY OF JURIDICAL SCIENCES,
KOLKATA

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This collaborative paper has been submitted in response to the Law Commission of India's notice, inviting recommendations from the stakeholders. The paper proceeds in the order of the issues as dealt with by the Law Commission, and follows the pattern of describing the relevant situation, followed by recommendations in answer to specific questions laid down by the Law Commission.

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AN INTRODUCTORY NOTE

In the 1980s, in his book ‘Only the Good News: The Law of the Press in India’, eminent lawyer Mr. Rajeev Dhavan had, with a touch of remorsefulness, stated that the Media Law scholarship in India was only “concerned with questions of ‘hard’ black letter law,” mentioning “next to nothing about where the laws came from, why they were introduced and how they became absorbed in social and political reality.” It is indeed true that the bulk of the scholarship of Media Law in India so far (apart from some glorious exceptions of course!) has been all about trying to work out different formulations of the ‘reasonability’ requirement that an Article 19(2) restriction is required to be adherent to, and the different facets that ‘freedom of speech and expression’ in Article 19(1)(a) could possibly entail. Therefore, the growth of Media Law as an independent discipline in itself, free from its umbilical relationship with Constitutional legal jurisprudence, has by and large remained stunted.

With the advent of globalization and the emergence of newer forms of media, the dynamics of the media’s relationship with the society, the government and in some cases with the market itself, and the concomitant legal problems, have undergone a sea change. Complex legal issues like Paid News, Private Treaties, Ambush Marketing, Comparative and Surrogate Advertising etc. have emerged, which have pushed the frontiers of Media Law to include a myriad of other legal disciplines, including disciplines of Private Law at times. The legal system therefore needs to keep pace with fast-emerging field of law, and develop effective strategies to counter the threats that unwarranted abuses of the freedom granted to the media as well as oppressive stifling of such freedom could pose to liberal democratic traditions. This development of the legal system has to be backed by some meaningful academic research and scholarship which would be instrumental in catalyzing a process of legal and concomitant social transformations. This collaborative paper has been drawn with this precise purpose in mind.

The West Bengal National University of Juridical Sciences, Kolkata is one of the country’s premier National Law Schools. In fact, it one of the few Universities in this country which offers a course on Entertainment and Media Law, a course that was initially envisaged way back in

2003 by its Founding Vice Chancellor, Prof. N.R. Madhava Menon, a visionary par excellence. In its brief existence spanning over little more than a decade, the University has firmly established its mark in the legal academic circles through the culture of critical thinking that it seeks to inculcate in the minds of all its students, which find its expression in numerous works of commendable academic and societal relevance. This paper is yet another humble attempt towards that direction.

The *modus operandi* of undertaking this vast research was simple. The 4th Year B.A. LL.B. (Hons.) students of Media Law were divided into groups of various sizes, and given one clear mandate – to explore pragmatic and legally tenable solutions to the questions that the Law Commission has so dexterously culled out with respect to each of the themes. The students had been categorically instructed to look into contemporary problems in each theme and seek their remedies using a comparative legal approach, in which they were free to borrow the global best practices and recommend their usage in the Indian context, albeit with necessary customizations. In this way, ten groups of students have dealt with ten different themes, under the overall supervision and editorial control of the faculty, and have produced this paper which, it is humbly submitted, is rich in path-breaking (and at times, futuristic) ideas that Indian Media Law could consider adopting for itself.

On behalf of the team that has drawn up this collaborative paper, we would like to thank the Law Commission for opening this forum for discussion and inviting responses by stakeholders. We would also like to thank the University authorities, especially our Vice Chancellor Prof. P. Ishwara Bhat, the members of the faculty and everyone else without whose meaningful support and contribution we would never have been able to draw up this paper.

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1) METHODS OF REGULATION

The current methods of regulation followed by the print and broadcasting sectors lack uniformity, predictability and enforceability. Therefore, we suggest a method of co-regulation which combines the expertise and efficiency of industry insiders with legal enforceability which can only be brought about by legislative recognition. Alternatively, in sectors where implementation of a co-regulatory model is difficult, a more stringent self-regulation mechanism has also been envisaged, and explored in detail in the section dealing with Publications and Trial by Media. We also suggest separate regulating authorities for print and broadcast media since much of our suggestion revolves around expertise of insiders, and this expertise is specific to the sector if media a member belongs to. The selection, terms of service, and terms of removal from service; of the members should follow a procedure which is free from political, governmental and commercial interests of partisan nature. However, the technicalities surrounding these need to be decided by expert bodies constituted for evolving the regulatory bodies.

1. **Do the existing self-regulation mechanisms require strengthening? If so, how can they be strengthened?**

Yes. Since we are proposing a model of co-regulation for print as well as broadcast media, the issues of self-regulation and contemplation of a statutory regulator are intertwined. Therefore, please refer to the detailed answer to Question 2.

2. **In the alternative should a statutory regulator be contemplated? If so, how can the independence of such regulator be guaranteed?**

We suggest that a system of ‘co-regulation’ should be adopted with respect to print and broadcast media. A co-regulatory system is a combination of non-government (industry) and government regulation. This is akin to the concept of “regulated self-regulation”, which aims to tap into the advantages of and avoid the drawbacks of self-regulation as well as traditional command-and-control regulation. While the industry will administer its own arrangements, the government provides legislative backing to enable the arrangements to be enforced.

It might be useful to first look at the available choices with regard to the model of regulation to be proposed. Print and broadcast media follow a system of state regulation and self-regulation respectively, both of which have proven insufficient and inefficient. While the perils of a typical command-and-control model of state regulation are more pronounced and have been well-documented in academic literature worldwide as highlighted in course of this report, it is generally assumed that self-regulation is a more pragmatic and equitable regulatory model to follow.

The four primary benefits of self-regulation in the media are as follows:

- The peer review system which the self-regulation model is based on serves as a check.¹
- Since the media is supposed to act as a government watchdog, involvement of the government in regulation of the media will compromise on the integrity of the media.²
- It also protects the journalists' and media persons' independence by preserving editorial freedom.³

Self-regulation is flexible and responsive to change.

Despite this, the self-regulation model has failed to offer comprehensive jurisprudence to media regulation, aspects of which have been explained in the sections that follow.

Print Media:

At present, the PCI is bogged down by certain limitations imposed upon it by the Press Council of India Act, 1978. For instance,

1. The PCI has limited powers of enforcing the guidelines issued. It cannot penalize newspapers, news agencies, editors and journalists for violation of the guidelines.
2. The PCI only overviews the functioning of the press. That is, it can enforce standards upon newspapers, journals, magazines and other forms of print media. It does not have the power to review the functioning of the electronic media like radio, television and the internet.

In fact, Justice Goda Raghuram of the Andhra Pradesh High Court, who reviewed the working of Press Councils and their structures generally, stated in his address on the occasion of National

¹Anthony Osae-Brown, *The Argument for Self-Regulation in the Media*, available at http://www.fesmedia-africa.org/uploads/media/Self_regulation_and_the_media_01.pdf (Last visited on August 4, 2014).

²*Id.*

³OSCE, *The Media Self Regulation Handbook*, 2008, available at <http://www.osce.org/fom/31497?download=true> (Last visited on August 4, 2014)

Press Day (2011) that, “... [the] operational deficit with many Press Councils is that they tend to consider themselves as complaints councils and insist on mediating and not on adjudicating against the Media, if they can avoid. On a holistic perspective, the role of Council is not just to satisfy a few individuals or groups who have been hurt by the media; not just to avoid law suits; and not just to discourage the State or limiting the freedom of the Media to make money. A Press Council is meant to improve the news Media.” (Emphasis is added).

The argument in favor of statutory regulation is that such a regulator will infuse public accountability in the media. A legislation passed by the Parliament to control the media in public interest would enjoy popular mandate.⁴ A tough government regulator could also increase compliance by the media.

However, statutory regulation has often been used by the government as a tool to stifle the freedom of the press. This can be done through statutory controls on licensing and registration, imposition of vague content requirements and creation of nominally independent regulatory bodies which are susceptible to political influence.⁵ The media can only act as a government watchdog, when it is subjected to as little state interference as possible. Apart from this, we are against a purely statutory government regulator for the following two reasons. *First*, traditional command and control regulation has the tendency of neglecting the interests of its objects.⁶ This leads to resistance rather than compliance. *Second*, the regulating State suffers from a knowledge gap.⁷ Thus, it should draw upon the expertise of industry actors to effectively regulate.

We are not in support of a government regulator, or a regulatory body which has a strong government representation. We fear that this will compromise the independence and freedom of the press. Some of the important functions of the press are to “inform, educate and entertain”.⁸ When doing so, it is meant to be “irreverent, unruly and opinionated”.⁹ However, this does not

⁴Anthony Osa-Brown, *The Argument for Self-Regulation in the Media*, available at http://www.fesmedia-africa.org/uploads/media/Self_regulation_and_the_media_01.pdf (Last visited on August 4, 2014).

⁵Karlekar, Radsch and Sierra as cited in Anthony Osa-Brown, *The Argument for Self-Regulation in the Media*, available at http://www.fesmedia-africa.org/uploads/media/Self_regulation_and_the_media_01.pdf (Last visited on August 4, 2014).

⁶Wolfgang Schulz & Thorsten Held, *Regulated Self-Regulation as a form of modern Government* 4 (2004)

⁷*Id.*

⁸Lord Justice Leveson, *An Inquiry into the Culture, Practices and Ethics of the Press, Executive Summary*, November 2012, 5.

⁹*Id.*

mean that the press is beyond challenge.¹⁰ As Justice Leveson aptly stated in his report on the culture, practices and ethics of the press, “[n]either does it mean that the price of press freedom should be paid by those who suffer, unfairly and egregiously, at the hands of the press and have no sufficient mechanism for obtaining redress.”¹¹ This notion should form the basis of any debate and decision on the methods of regulation of the press.

We suggest that a system of ‘co-regulation’ should be adopted with respect to print media. A co-regulatory system is a combination of non-government (industry) and government regulation. This is akin to the concept of “regulated self-regulation”, which aims to tap into the advantages of and avoid the drawbacks of self-regulation as well as traditional command-and-control regulation.¹² British scholars have also referred to this model as “enforced self-regulation” and “enforced voluntary regulation”.¹³ While the industry will administer its own arrangements, the government provides legislative backing to enable the arrangements to be enforced. Such legislation will not prescribe the code of performance in detail. Rather, the power to regulate and enforce codes will be left to the industry.¹⁴ However, certain strict mandatory requirements should be imposed by the legislation. Such requirements should be fixed after consultation with key stakeholders. A co-regulatory system combines “binding legislative and regulatory action with actions taken by the actors most concerned, drawing on their practical expertise.”¹⁵ It envisages the involvement of the government, independent regulatory agencies, industry, civil society groups and consumers in intersecting roles.¹⁶

Thus, the role of the State under a system of co-regulation will be to create a structural framework conducive to co-regulation and “encouraging progress and providing assistance in areas where the market is not delivering desired outcomes”.¹⁷

With regard to the proposal of including web and social media within the ambit of the ‘Media Council’, we recommend that at this stage, web and social media should not be regulated by a regulatory body. One viewpoint to this holds that web and social media constitutes a part of

¹⁰*Id.*

¹¹*Id.*

¹² Schulz & Held, *supra* note 6.

¹³*Id.*

¹⁴ Australian Communications and Media Authority, *Optimal Conditions for effective self and co regulatory arrangements*, June 2010.

¹⁵ White Paper 2001:21

¹⁶ Melanie Cishecki, *Co-Regulation: A New Model of Media Regulation*, October 2002. P 10

¹⁷ Schulz & Held, *supra* note 6.

mainstream media and hence, should be subjected to regulation.¹⁸ According to this view, the only question that remains to be resolved is the manner in which such regulation is to be done. However, we believe that this is oversimplifies the issue. The ramifications of subjecting web and social media to direct regulation are tremendous. While it is true that such media have been misused, such regulation is problematic. Enabling direct regulation of web and social media has a high probability of replicating the infamous Section 66A of the Information Technology Act, 2000, which the Government has used indiscriminately to stifle dissent and victimize hapless citizens. This issue has been dealt with in detail in a subsequent part of this paper, under the topic **Social Media and Section 66A of the Information Technology Act, 2000**. However, the Legislature should consider regulation of online news providers.

Our general observations and recommendations with regard to the co-regulatory system to be adopted are as follows:

- The supporting legislation should impose a legal duty on the government to protect the freedom of the press.¹⁹
- The PCI should undergo a complete overhaul- in terms of its mandate, composition, powers and reach. At present, the PCI is more in the nature of a complaint handling body rather than a regulator. This is similar to Justice Leveson's observations on the role of the Press Complaints Commission in the U.K.²⁰ Thus, the new measures to be adopted should be directed towards bolstering the *regulatory* role of the body so that it can function as effectively as other sector regulators such as Telecom Regulatory Authority of India (TRAI) and Competition Commission of India (CCI).
- The coverage of the PCI should be made universal to all registered newspapers. Registered newspapers should be mandatorily subjected to its regulation.

¹⁸David Allan Green, *How to think about social media*, January 31, 2012, available at <http://www.newstatesman.com/blogs/david-allen-green/2012/01/social-media-regulation> (Last visited on August 4, 2014).

¹⁹BBC, *Press 'need to act' after Leveson*, November 29, 2012, available at <http://www.bbc.com/news/uk-20543133> (Last visited on August 4, 2014).

²⁰Lord Justice Leveson, *An Inquiry into the Culture, Practices and Ethics of the Press, Executive Summary*, November 2012, ¶ 41.

- PCI's powers need to be fortified. It should have the right to conduct an effective investigation instead of relying on the version of those against whom the complaint is made.²¹
- The remedies which the PCI can make available to those found aggrieved should be adequate. For example, sufficient powers of initiating disciplinary action against erring journalists and censoring of editors must be available. It should have the power to investigate breaches and impose appropriate and commensurate sanctions.
- The Annual Report of the PCI for 2011-2012²² reflects that though the body has taken cognizance of various matters, these matters do not attain meaningful closure by way of persons being held accountable for their acts. While one matter was "treated as closed for non-pursuance", another matter was closed with the Council taking on record an assurance.²³ The following extract from an article published in The Hoot will shed light on this point:

"Out of the 90 complaints that were taken up, 60 per cent of the decisions were disposed of, dismissed, closed, dropped or withdrawn on account of non pursuance or a settlement between the two parties. In some cases the complaints were dropped as the complainant had either withdrawn or not appeared for hearing. The strongest decision that the Press Council took was to censure a publication or direct the editor to publish a rejoinder or an apology in connection to the complaint. The PCI has limited powers as it is not empowered to do more than that. It cannot impose a penalty or punishment on publications, editors or journalists for violating journalistic standards and the Council's guidelines."²⁴ [Emphasis supplied]

- The supporting legislation should contain a mechanism through which the regulatory body can be held accountable for its own lapses.

²¹*Id.*, ¶ 43.

²²Press Council of India, *Annual Report 2011-2012*, March 2012, available at [http://presscouncil.nic.in/OldWebsite/PCI-AnRe-2011-2012\(Eng\).pdf](http://presscouncil.nic.in/OldWebsite/PCI-AnRe-2011-2012(Eng).pdf) (Last visited on August 4, 2014).

²³*Id.*

²⁴The Hoot, *How effective is the Press Council?*, September 17, 2012, available at <http://thehoot.org/web/How-effective-is-the-Press-Council-/6292-1-1-9-true.html> (Last visited on August 4, 2014).

- Compliance by the press should be monitored and statistics of such compliance should be published periodically.
- While the model of press regulation may be self-regulation or co-regulation, it must be sufficiently independent from the industry, especially serving editors.

While deciding on the kind of regulation the press should be subjected to, the following observations of Justice Leveson may be useful:

“An independent regulatory body should be established, with the dual roles of promoting high standards of journalism and protecting the rights of individuals. That body should set standards, both through a code and in relation to governance and compliance. The body should: hear individual complaints against its members about breach of its standards and order appropriate redress while encouraging individual newspapers to embrace a more rigorous process for dealing with complaints internally; take an active role in promoting high standards, including having the power to investigate serious or systemic breaches and impose appropriate sanctions; and provide a fair, quick and inexpensive arbitration service to deal with any civil law claims based upon its members’ publications.”²⁵

Broadcast Media:

The issues plaguing the current regulation scenario in case of broadcast media may be summarised as follows under specific heads:

1. There is no state regulator dedicated to the broadcast media. The Telecom Regulatory Authority of India (TRAI), whose statutory mandate was limited to the telecom sector, has stepped in to this sector too. The Ministry of Information and Broadcasting, as well as TRAI, issues policy guidelines from time to time. There are a few efficient mechanisms; for e.g. content monitoring, of TV and private FM Radio channels, by the Electronic Media Monitoring Centre; and the Policy Guidelines for Uplinking of Television Channels from India issued by the Ministry which revokes broadcast permission following specific numbers of violation of the

²⁵ Lord Justice Leveson, *An Inquiry into the Culture, Practices and Ethics of the Press, Executive Summary*, November 2012, ¶ 57.

Programme and Advertising Code.²⁶ However, in the absence of a well-defined regulator governed by a fixed legislation as opposed to policies adopted from time to time, there is lack of uniformity and predictability at present.

2. The Cable Television Networks (Regulations) Act, 1995 was not formally applicable to satellite TV channels; it was the Policy Guidelines for Uplinking of Television Channels from India which mandated adherence to the Programme and Advertising Codes. Therefore, there is still no formal legislation to ensure adherence.
3. When it comes to self-regulation; in the non-news sector, the only step that the Broadcasting Content Complaints Council (BCCC), the grievance redressal mechanism created under the Indian Broadcasting Federation (IBF), can take if its guidelines are defied is refer the complaint to the I&B Ministry, a process that is rather vague. In the news sector, the jurisdiction of the News Broadcasting Standards Authority (NBSA) is restricted only to members, which signifies that it is powerless when it comes to violation of content regulation by non-members of NBSA.

It is evident that the current self-regulation as state regulation mechanisms lack uniformity, predictability and enforceability. While a draft of the Broadcasting Services Regulation Bill was proposed in 2007, complete state regulation of media content may lead to imposition of draconian rules, as has been explained in the context of print media too.

Therefore, we propose the institution of a body on the lines of TRAI, but one which is constituted of members more suitable to deal with broadcast media regulation. This body, which we shall name BRAI (Broadcast Regulation Authority of India) here, shall be the regulator in this sector which shall make it compulsory for all broadcast media service providers to be compliant with a content code. The content code, however, shall be developed by the providers themselves, following basic guiding principles enumerated by the BRAI. Challenges to the content code, as well as complaints regarding violation thereof, shall be handled by BRAI. Therefore, the adjudicatory

²⁶*Policy Guidelines for Uplinking Of Television Channels from India, 2011*, available at <http://www.scatmag.com/govtpolicies/POLICY-GUIDELINES-FOR-UPLIKING-OF-TELEVISION-CHANNELS-FROM-INDIA-05-12-2011.pdf> (Last visited on August 10, 2014).

power of BRAI shall be akin to that of the SEBI (Security and Exchange Board of India) for capital market regulation; but the quasi-legislative power shall be shared by BRAI with the providers who are both experts as well as stakeholders.

Reference may be made to the arrangement followed in the advertising sector. The Advertising Standards Council of India (ASCI) is the self-regulator for advertisements (print and broadcast), and it has developed the Code for Self-Regulation in Advertising. It has been given formal statutory recognition by Rule 7(9) of the Cable TV Networks Rules, 1994 which mandates advertisement aired on television to follow this code²⁷. This model has been largely successful due to precision in definition of important terms as well as clarity and pragmatism in the way the grounds of prohibition or objection have been explained. This precision can be attributed to the fact that the industry insiders, who have thorough knowledge about the field, are the ones who formulate the code. The complaint mechanism is free of cost, each complaint is handled within 4 to 5 weeks of its registration, the Principles of Natural Justice are followed, and in the past year 80% compliance has been observed.²⁸ The complaint mechanism is highly efficient because the system is not clogged by bureaucratic hurdles characteristic to most governmental bodies. ASCI can also take *suo motu* action in the absence of a consumer complaint against any advertisement which seems to have violated the Code.²⁹ It has the power to ban, or order the modification of, an advertisement released in the print and broadcast media by a member; and that of an advertisement broadcast on TV even for non-members, owing to the aforesaid Policy Guidelines. If a similar model is implemented for other forms of broadcast media, as also print media as mentioned above, it should lead to a good regulatory mechanism for media.

The procedure to be followed, in terms of the complaint mechanism, must have concrete timelines to ensure speedy but reasoned decision making. Criminal penalties may be imposed for non-adherence to licensing norms as well as grossly misleading reportage

²⁷Agency faqs News Bureau, *Advertising Standards Council of India Gets Legal Recognition*, August 11, 2006, http://www.afaqs.com/news/story/15720_Advertising-Standards-Council-of-India-gets-legal-recognition (Last visited on August 12, 2014).

²⁸ Advertising Standards Council of India, *Consumer FAQ's*, available at <http://www.ascionline.org/index.php/faqs.html> (Last visited on August 10, 2014).

²⁹*Id.*

(standards of which must be clearly delineated). Thus, there should be clear demarcation of criminal penalties and civil liabilities, and the quantum for both should be arrived at scientifically by experts in the field of media and law.

The decision of the BRAI shall be mandatory to be followed and acted upon by the stakeholders. Appeals may be preferred to the High Court and, subsequently, to the Supreme Court.

Alternatively, we have also explored another regulatory mechanism in succeeding parts of this paper. This model envisages a more stringent form of self-regulation, and includes suggestion as to federalisation of the regulatory mechanism so that regional media can be dealt with greater ease and efficiency. This has been thoroughly explored in the sections dealing with **Paid News** and **Publications and Trial by Media**.

Specifically:

a. How should members of such regulator be appointed?

The appointment of the Chairperson and the members should be independent. To ensure this, an independent appointments panel should make the appointments, of which *majority* of members should be independent of the industry, the government and commercial interests.³⁰ This will ensure that the Freedom of the Press, couched in the Constitutional Right to Freedom of Speech and Expression, is not curbed by the State, and the commercial interests of media moguls do not dominate the regulation.

b. What should the eligibility conditions of such members be?

Currently, 20 of the 28 members of PCI are media representatives. This should be changed as it diminishes credibility of the body. In the words of the former Union Minister of Information and Broadcasting Mr. Manish Tewari, “the media cannot check its own homework”.³¹ The composition of the regulatory body should be such that it is not dominated by the media, the government or commercial interests. The same should be followed for constitution of BRAI; i.e. there should be optimum representation from the broadcast media sector experts as well as the

³⁰*Id.*, ¶58, 59

³¹Prashant Jha, ‘Statutory, mandatory self-regulation’ emerging as consensus model for media, August 6, 2013, available at <http://www.thehindu.com/news/national/statutory-mandatory-selfregulation-emerging-as-consensus-model-for-media/article4996150.ece> (Last visited on August 4, 2014)

legal profession. While selecting representatives of the media, care must be taken such that not only media giants, but also smaller media houses, are optimally represented and have powers similar to bigger market players. Regional media should also have direct or indirect representation; an alternative to this being a federal structure of regulatory mechanism as explored in the section dealing with **Paid News**. This can ensure that decisions arrived at are legally sound while at the same time informed by interests of the media sector.

c. What should their terms of service be?

The following terms of service have been borrowed from the National Commission for Women Act, 1990. It must be understood that while penning the terms of service of the members of the Council/BRAI, all necessary steps must be taken to ensure the independence of the members. Therefore, we have made certain amendments to the said provision to ensure the independence of the members. We suggest terms of service to be framed on the following line:

- (1) The Chairperson and Member shall hold office for such period, not exceeding three years, as may be specified by the Central Government in this behalf.
- (2) The Chairperson or a Member (other than the Member-Secretary who is a member of a civil service of the Union or of an all-India service or holds a civil post under the Union) may, by writing and addressed to the Central Government, resign from the office of Chairperson or, as the case may be, of the Member at any time.
- (3) The Central Government shall remove a person from the office of Chairperson or a Member referred to in sub-section (2) if that person, -
 - (a) becomes an un-discharged insolvent;
 - (b) gets convicted and sentenced to imprisonment for an offence which in the opinion of the Central government involves moral turpitude;
 - (c) becomes of unsound mind and stands so declared by a competent court,
 - (d) refuses to act or becomes incapable of acting;
 - (e) is, without obtaining leave of absence from the Commission, absent from three consecutive meetings of the Commission; or
 - (f) in the opinion of the Central Government and the Council has so abused the position of Chairperson or Member as to render that person's continuance in office detrimental to the public interest. Provided that no person shall be removed under this clause until that person has been given a reasonable opportunity of being heard in the matter.

(4) A vacancy caused under sub-section (2) or otherwise shall be filled by fresh nomination.

(5) The salaries and allowances payable to, and the other terms and conditions of service of, the Chairperson and Members shall be such as may be prescribed.³²

The proviso would ensure that every time the Central Government feels that it has the grounds to remove a member of the council it must take a vote of the council/BRAI, which must pass with a simple majority. In the event of a tie, the Chairperson holds the deciding vote. This would ensure equality on both sides- in the event that the media feels it has been wronged, they can vote in negative.

d. How should they be removed?

In order to secure independence of the body, it should be difficult to remove them due to political, commercial or industry pressure. However, we have recommended above that the members of the body should be held accountable for their own lapses. Thus, the legislation must contain provisions ensuring the same. For further information, please refer to the terms of service listed above.

e. What should their powers be?

See general recommendations above. Additionally, the body should have the power to penalize newspapers or TV/Radio channels for violation of guidelines issued. Regulators such as TRAI utilize this power in ensuring compliance.

f. What consequences will ensue if their decisions are not complied with?

The PCI's existing powers of censure must be strengthened. Also, it should take disciplinary action against erring journalists. Editors, who are ultimately responsible for what is published in a newspaper, should be held strictly accountable.

The BRAI should be given the power to hear complaints from both state and non-state players, including individual citizens, adjudicate upon them, and impose penalties on the basis of pre-determined guiding principles on such imposition. Non-adherence to BRAI decisions shall be met with higher quantum of damages and/or criminal penalty. In extreme cases, revocation by BRAI of permission to broadcast should be allowed.

The practice of awarding *exemplary damages* should be adopted for both PCI and BRAI.

³²See, §4 The National Commission for Women Act, 1990.

3. Should any such change be uniform across all types of media or should regulators be medium-specific?

Regulators should be medium specific. An acute need of having a coherent and comprehensive media policy exists in India. However, this does not mean that any change adopted should be uniform across all media. Rather, in recognition of the particular requirements and exigencies of each type of medium, regulators should be medium-specific. Public access to the print and broadcast sector is different by nature; thus the tolerance level for each is different too. This mandates differences in the content code. Moreover, since the proposed model calls for expert opinion from industry insiders, having one regulator each for print and broadcast sector would increase legislative insight into each particular sector, and this raise the level of discourse and jurisprudence in each respective sector of media. Having a body of sector-specific experts working on the self-regulatory content also goes on to strike a better balance between the interests of the media and that of the citizens who are exposed on a daily basis to media content.

2) PAID NEWS

Should paid news be included as an election offence under the Representation of the People Act, 1951? How should it be defined?

We feel that the offense of paid news should not be confined to the realm of election time offences but should be recognized as either a statutory offence under the Indian Penal Code, 1860 or in the alternate and as elaborated upon below, there should be a separate statute recognising offences relating to the press wherein it should find recognition

The reason for the same lies in the fact that while earlier, the concept of freedom of press essentially implied non-intervention by the State, in the 21st century, a truly independent press is one which is not only uninfluenced by the State but also by private interests. While a lot of focus has been directed towards ways of limiting the former, the *Hackgate* scandal³³ has brought to light the need to protect the integrity of the Press from private forces.

In India, despite the lively vibrancy of the fourth estate, its freedom from influence has always been a contentious issue and it often finds itself dismally low in the Freedom of Press Index.³⁴ Such an abysmal position is attributed to numerous factors from constant intervention by the State, ownership patterns of the media, increasing Internet censorship, growing violence against journalists and the snowballing phenomenon of paid news. Amongst these factors the phenomenon of paid news has acquired a serious dimension and has become a major concern of the democratic society especially since India houses the largest newspaper industry in the world.

The fierce competition in the newspaper industry combined with a lack of regulation has created a dangerously competitive environment in which ethical and professional standards of the press have been sidelined in the fight for survival and profits. As a result, the press in India has become highly tainted and compromised with entities like advertising agencies,

³³ The Hackgate scandal refers to the infamous phone-hacking scandal that the now defunct News of the World was involved in which included the news-house indulging in criminal and unethical conduct like phone-hacking, bribery of public officials and using improper influence for the purpose of securing stories.

³⁴ World Press Freedom Index 2013

public relations firms, politicians, journalists, media companies and big corporations indulging in the practice of paid news on a widespread scale and regular basis.³⁵

Thus, there is a need to recognize that the offense of paid news is not only confined to the arena of election offences but has come to acquire the status of a universal offense.

The Press Council Report on Paid News goes to define paid news as “*any news or analysis appearing in any media (Print & Electronic) for a price in cash or kind as consideration*”³⁶ and goes on to state that paid news today goes beyond individual players and has become a highly structured and organized force³⁷ thereby acquiring institutional status.

However, given the complex nature of the offense, we feel that the definition of paid news must go beyond the traditional conception of the same and must include:

1. Any news or analysis appearing in any media (Print & Electronic) for a price in cash or kind as consideration.³⁸
2. Suppression of news or analysis in any media (Print & Electronic) for a price in cash or kind as consideration.
3. Passing off paid advertisements as independently produced news content.³⁹
4. Publishing or suppression of news influenced by considerations of private treaties.⁴⁰

We feel that if news or advertisements which are paid for, and the same has been substantially disclosed to be paid in the medium which is carrying, it shall be excluded from the purview of the above suggested definition.

1. What enforcement mechanisms should be put in place to monitor and restrict the proliferation of paid news?

³⁵ Press Council of India, *Report on Paid News* 5 (30/07/2010)

³⁶³ *Id.*, 1

³⁷⁴ *Id.*

³⁸⁵ *Id.*

³⁹⁶ *Id.*

⁴⁰⁷ *Id.*, 4

In order to monitor and restrict the proliferation of paid news, there must be a substantial institutional and legal overhaul of the Press Council of India. We would first like to highlight the inefficiencies of the Council and thereafter go on to suggest ways to reform the same. In essence, we believe that a strong statutory regime establishing press offences should be enacted along with providing the Press Council some punitive powers. Bestowing the suggested powers on the Council and statutory regulation can often be viewed as being draconian and violative of the freedom of Press but this contention can be rebutted on three grounds. First, at the time of the enactment of the Press Council Act of 1978, the legislature could not have reasonably foreseen how commercialization of the media would affect the integrity of the fourth estate. The struggle for survival and profits has led to the genesis of a press which does not see the need to conform to a law that relies on moral force to ensure integrity, and thus there is a pressing need to introduce penalties which have reasonable deterrent force.

Second, the defiant mood and insensitivity of newspapers in complying with the directives of the Council necessitates the need for an enforcement mechanism that acts as a powerful deterrent. While freedom of press is desirable, the indiscriminate exploitation of this freedom cannot be justified at the cost of democratic dilution and violation of the freedom of choice and as aptly put by the Leveson Committee Report, there is no organized profession, trade or industry wherein the faults of a few are overlooked for the good done by many.⁴¹

Finally, the concerns surrounding statutory regulation resulting in excessive government intervention and contravention of the freedom of press are unfounded. First, statutory regulation does not mean the same as regulation by the State. It is simply regulation backed by the law and whether statutory regulation can lead to excessive intervention by the State depends on the nature of regulation proposed. In this case, the proposed regulation in fact increases accountability.

⁴¹ Lord Justice Leveson, *An inquiry into the Culture, Practices and Ethics of the Press*, 5 (Executive Summary, November 2012)

Moreover, the model of regulation suggested by the authors, i.e. empowering the Press Council and the Court for enforcement of press ethics and compliance respectively, are sufficiently divorced and independent from the State such that the concerns surrounding excessive state intervention are groundless.

In the first part of our recommendations we deal with the institutional revamp of the Press Council itself, the necessary amendments that should be enacted in the Press Council Act and the need for enacting a consolidated statute which recognizes Press Offences.

1) **The Inefficiencies of the Council and the Need for an Institutional Revamp**

a) **Separation of Powers**

The nature of criticisms meted against the Council can primarily be placed in two categories. First, because of its limited powers of condemnation, the Council is often denounced as being a toothless body whose moral supervision is a hoax and second, the number of cases that come up before the Council is appallingly low.⁴²

While the present structural arrangement of the Press Council has not been the subject of much scrutiny, we feel that there is a pressing need to remodel the Council to meet the demands of the existing press environment. Such remodeling is essential not only for the purpose of maximizing efficiency but also to ensure that the Council is able to effectively handle the workload that comes with a market of 330 million publications. As far as an effective model is concerned, inspiration is sought from the model prevailing in South Africa. The year 2012 witnessed sweeping reforms in the field of press regulations in South Africa with considerable changes being made to the existing structure with a shift from self-regulation to independent co-regulation by introducing public voices in the Council.⁴³

⁴² Press Council of India, Annual Reports, 2007 to 2012.

⁴³ Press Council of India, *Sweeping reforms on press regulation coming*, 28 September 2012, available at <http://www.presscouncil.org.za/News/View/sweeping-reforms-on-press-regulation-coming-69>. (Last Visited on 3rd August, 2014)

ne lesson that can be learnt from South Africa is to incorporate the principle of separation of functions to ensure maximum efficiency. As already pointed out, the 28-member body is responsible for both playing policy maker and adjudicator. A separation of the adjudicatory function from the monitoring and policy functions associated with the Press Council will, in our opinion, contribute to its better working.

The Press Council of South Africa provides for both a Director and an Ombudsman. While the former's role is restricted to leading the Press Council, promoting the press code and encouraging an ethical environment, the Ombudsman's role is confined to adjudicate matters.⁴⁴ There are elaborate mechanisms, which supplement the roles of the respective parties, but what is of essence is the fact that South Africa chooses to separate policy making from adjudication. This is also the case with the Press Council in Sweden where the role of the ombudsman is kept separate and distinct from the Council itself thus in turn lightening the load of the Council.⁴⁵

The argument for separating functional responsibility also finds strength in the second set of criticisms meted out against the Council, i.e. the number of cases that come up before the Council is egregiously low. This is especially shocking in light of the fact and as highlighted before that India is the largest market for publications and also one of the largest as far as paid news as a commodity is concerned. Statistics derived from the last five year's Press Council Annual Reports⁴⁶ bring to light the abhorrently miniscule proportion of paid news cases that come up for consideration before it.

As per the Council's reports, offenses regarding the press primarily fall into two categories, namely, by the press against the authorities and complaints against the press.⁴⁷ For the purpose of this paper, we are primarily concerned with the latter category of offenses and in it the subcategory of offenses relating to principle and publication

As per the PCI Annual Report, offenses relating to principles and publication can be summarized, as "*publication of inaccurate reports, write-ups etc. and the refusal to publish*

⁴⁴ All Africa, *South Africa: Sweeping Reforms to Press Regulations Announced*, 5 October 2012, available at

⁴⁴<http://allafrica.com/stories/201210051160.html?page=2>. (Last visited on 6th August, 2014)

⁴⁵ The Hoot, *How effective is the Press Council*, 17 September, 2012, available at <http://www.thehoot.org/web/How-effective-is-the-Press-Council-/6292-1-1-9-true.html>. (Last visited on 4th August, 2014)

⁴⁶ Press Council of India, Annual Reports, 2008, 2009, 2010, 2011 and 2012.

⁴⁷ Press Council of India, Annual Report, 2011-2012.

rebuttals...”⁴⁸, thus bringing paid news within its domain. An analysis of reports from 2007 to 2012⁴⁹ reveal that of the total complaints, the percentage of complaints concerning paid news

⁴⁸ *Id.*, 102

⁴⁸

⁴⁹ Press Council of India, Annual Report, 2011-2012

⁴⁹Total number of complaints: 885

⁴⁹Total number relating to principles and publications: 19

⁴⁹Percentage: 2.15 %

⁴⁹Out of these 19, not one was upheld.

⁴⁹2010-2011

⁴⁹Total number of complaints: 900 (Page no 184 of the Report)

⁴⁹Total number relating to principles and publications: 45

⁴⁹Percentage: 5 %

⁴⁹Out of these only 13 were upheld and how many not upheld?

⁴⁹2009-2010

⁴⁹Total number of complaints: 950

⁴⁹Total number relating to principles and publications: 39

⁴⁹Percentage: 4 %

⁴⁹Upheld: 15

⁴⁹2008-2009

⁴⁹Total number of complaints: 726 (Page no. 8 (actually))

⁴⁹Total number relating to principles and publications: 21

⁴⁹Percentage: 3 %

⁴⁹Upheld: Only 6

⁴⁹2007-2008

⁴⁹Total number of complaints: 678

⁴⁹Total number relating to principles and publications: 18

⁴⁹Percentage: 2.7 percent

were 2.15%, 5%, 4%, 3% and 2.7% respectively. A further examination of the data (as contained in the footnote) goes on to show that the total number of complaints have never crossed the 3 digit mark and a majority of them are confined to defamation cases.

In addition, for the year 2013, the Press Council has taken *suo motu* cognizance of a meagre 4 cases.⁵⁰ Such dismal numbers go on to show that the problem is not only confined to the Council lacking punitive powers but the failure of the same to take cognizance of the numerous cases that go undetected, thus encouraging impunity on part of the culprits.

It is in light of this that we seek to justify our proposal for a revamp of the existing model. The proposed revamp is predominantly aimed at streamlining the functioning of the existing framework, including the Press Council of India. While the general tenor of the Report is favouring a Co-regulatory model, we would like to submit here that the model that we suggest here with respect to Paid News may be a pragmatic first step towards achieving the ultimate desired goal.

The inspiration for separation of functional responsibilities comes not only for the purpose of efficacy as demonstrated by South Africa but also from the Election Commission's initiative to check paid news before and during elections via the establishment of Media Certification and Monitoring Committees.⁵¹ The Election Commission Guidelines on measures to check paid news during elections provides for the setting up of MCMCs at both the District and State Level which have been bestowed with the function of certifying advertisements and examining complaints related to paid news.⁵² The MCMCs have a duty to *create suitable mechanisms for monitoring the media*⁵³ and have been equipped with the requisite infrastructure and manpower for the same.⁵⁴ Upon detection of cases of paid-news they have the responsibility to forward the same to the Press Council for further action.⁵⁵ Thus, the role of the EC appointed MCMCs is that of a

⁴⁹Upheld: 4

⁵⁰ Press Council of India, Annual Report, 2013

⁵¹ Hereinafter referred to as “MCMC”

⁵²Election Commission of India, *Paid News Guidelines*, available at http://eci.nic.in/eci_main/CurrentElections/ECI_Instructions/PaidNewsGuidelines27082012.pdf (Last Visited on 3rd August 2014)

⁵³ *Id.*

⁵⁴ *Id.*

⁵⁵ *Id.*

watchdog and in cases of any irregularity or suspected paid news they are required to report it to the designated authority for effecting action.

The EC's initiative to detect paid news cases has been reasonably successful especially in States like Karnataka, Gujarat and Himachal Pradesh where a considerable number of paid-news cases have come to light thanks to the efforts of these monitoring committees.⁵⁶ Such monitoring mechanisms are important given that a substantial proportion of readers are either uneducated or indifferent about the existence of paid news, especially in a community like India wherein a majority of readers fail to grasp the implications of compromising the integrity of the press.

Thus, separating the adjudicatory functions from policy making is essential, such that the body responsible for promoting an ethical press environment can also play a watchdog by developing suitable mechanisms to constantly keep vigil on the press.

As demonstrated, the phenomenon of paid news is not only confined to election time and thus there is a need for effective monitoring all year long. The Press Council must seek inspiration from the working of the MCMCs and commit itself to keeping a careful eye on the press environment by carrying out surveys, analyzing the nature of contents published in papers etc. instead of restricting itself to passive moralistic symbolism. Hence, the argument for separation of functional roles becomes even more relevant since it is the proposal of the authors that the Council actively involve itself in vigilance activities. Keeping adjudicatory role from policy making and monitoring will reap the benefits of enhanced efficiency.

As far as constitution is concerned, the Press Council can continue with its existing composition but as far as the adjudicatory body is concerned, seeking inspiration from South Africa once more, we suggest that it must be headed by a retired judge of the Supreme Court not being the Chairman of the Council and appointed by the Judiciary and must comprise of a bench of 5 members, each from one of the distinct fields which find representation on the Council with the procedure of inquiry remaining the same. In order to ensure fairness and independence, these five members on the adjudicatory body must be voted for by the members of the Council itself and must serve for a year on a rotational basis. Such rotation will also have the added benefit of

⁵⁶ The Hindu, *ECI calls for district level committees to monitor paid news*, 30 June 2013, available at

⁵⁶ <http://www.thehindu.com/todays-paper/tp-national/eci-calls-for-district-level-committees-to-monitor-paid-news/article4865028.ece>. (Last visited on 3rd August 2014)

ensuring that those who adjudicate have the first hand experience that comes from serving in the Council as a policy maker.

b) Regional Representation

In addition, it is essential that a federal model be developed for the Press Council. A central body confined to the national capital is incapable of efficiently regulating a market of 330 million. An analysis of the Annual Reports of the Council goes to reveal that in cases concerning offenses by the press, the majority respondents happen to be regional newspapers, with them comprising 72.9% of the total respondents in the year 2012.⁵⁷ The fact that local newspapers tend to have a far-reaching effect due to the large readership base, it is essential that their activities be closely scrutinized. In addition, the fact that the market for local newspapers is the most contaminated by unethical practices amplifies the need for regional bodies that can play watchdog.

Countries like Canada have adopted a federal model and have councils at the regional levels for the purpose of regulating the press. We feel the need for the same in India given the sheer size of the newspaper market prevailing in our country. However, instead of having a Press Council in every State, we believe that there must be monitoring mechanisms containing representatives from the respective vernacular newspapers established at the State level, which should have jurisdiction over the regional newspapers of the respective State.

The responsibility of such monitoring committees must be akin to that of the Central monitoring and policy-making unit of the Press Council and they must, apart from promoting an ethical environment keep a strict vigil on the activities of local newspapers. Such vigilance activities can be carried out by developing suitable monitoring mechanisms and whenever suspected violations come up for consideration, it should be the job of the monitoring unit to investigate into the same and forward the case to the Press Council for due consideration.

Such a federal model is imperative for a country like India since the sheer territorial vastness and the gargantuan size of the newspaper market requires a decentralized mechanism for regulation

⁵⁷ Press Council of India, Annual Report, 2012.

of the press. Thus it is our view that seeking inspiration from Canada's system of decentralized regulation would be prudent.

2) Arming the Council- Amendments to the Press Council Act, 1978

a) Punitive Powers

As mentioned, the lack of punitive powers is another shortcoming of the Council and thus apart from an institutional makeover, it is also essential to man it with the necessary ammunition to enable it to deal with the inimical forces that have taken over the fourth estate. Before we dwell into this aspect, it is important to look into other jurisdictions wherein the Council has come under attack for lacking adequate powers to reprimand the violators.

Just like the Press Council of India, the highest sanction that can be imposed by the Press Complaints Commission in the United Kingdom is a directive to publish a critical adjudication by it on the disputed issue. While such a publication can do considerable damage to the reputation of the entity concerned, an analysis of the Press Council Reports from 2008 to 2012 go to reveal that they are rarely imposed. In addition, even when the Council passes such directives, it is not known whether such directions are complied with and whether non-compliance leads to some sort of punitive action against the offenders.

The Leveson Committee Report has a lot to teach India given the woes associated with the regulatory bodies in both countries are similar i.e. inadequate powers to penalize. Apart from lack of punitive powers, one common area of concern plaguing both the Press Complaints Commission and the Press Council is that even in cases wherein the complaints are upheld, the remedies at the disposal of the concerned bodies apart from being pitifully inadequate are enforceable only by persuasion.

The Report suggests that apart from the power to require publication of corrections and apologies and also direct the nature, extent and placement of the latter, the Commission must also be

equipped with the power to investigate serious or systemic breaches and impose appropriate fines on such offenders.⁵⁸

The power to impose fines has always been a contentious issue when it comes to bodies regulating the press and is restricted to very few jurisdictions like Sri Lanka, Sweden and Denmark.⁵⁹ The power to impose fines as witnessed in the jurisdiction of Sweden is contained in the Charter of the Press Council that provides for the censured newspaper to pay a fine proportion to its circulation with the same then being directed towards the management of the Council. The fine is more in the nature of an administrative fee to cover the costs of the inquiry and investigation as opposed to having a deterrent effect.

The Danish Council on the other hand does not have the power to impose a fine. However, the enforcement of the decision of the Council is ensured via state-mandated fines. In Denmark, the press is statutorily regulated by the Media Liability Act, 1992 which not only recognizes criminal liability for press related offenses for the designated individuals but also under Part 8⁶⁰ entitles the Courts to either fine or imprison guilty parties in case of non-compliance with the directives of the Council, thus ensuring that the moralistic nature of reprimands issued by the Council is not taken casually and are complied with.

⁵⁸ Lord Justice Leveson, *An inquiry into the Culture, Practices and Ethics of the Press*, 34 (Executive Summary, November 2012)

⁵⁹ Lara Fielden, *Regulation the Press, A Comparative Study of International Press Councils*, available on <http://reutersinstitute.politics.ox.ac.uk/sites/default/files/Regulating%20the%20Press.pdf>

⁶⁰ PART 8

⁶⁰**Section 53.** Violation of section 3(1), cf. (3), section 4, section 5(1), cf. (4), section 5(3), sections 6, 7 and 8(2) of this Act shall be punishable by a fine or imprisonment for up to four months.

⁶⁰**Subsection 2.** Failure to comply with an order for publication under sections 49 and 54 of this Act shall be punishable by a fine or imprisonment up to four months.

⁶⁰**Subsection 3.** Where an offence has been committed by a company, an association, an independent institution, a foundation or the like, the legal entity as such can be liable to a fine. Where the offence has been committed by the state, a municipality or local government authorities cf. section 60 of the Local Government Act, the state, municipality or local government authorities shall be liable to a fine.

⁶⁰**Section 54.** A verdict of guilty rendering someone liable to punishment, payment of damages or cancellation of the content of a mass media may rule that the content of the verdict be published soonest possible by the media to an extent specified by the court. The obligation to publish the verdict rests with the editor.

⁶⁰**Subsection 2.** The publication shall be free of charge and in any such conspicuous manner as may reasonably be demanded.

In India with respect to offenses against the press, in adjudications against police authorities, the Council's directions have to be acknowledged in the form of an Action Taken Report, a copy of which has to be submitted with the Council but there is no such provision for ensuring compliance when adjudications are against the press.⁶¹ Following the lacunae with respect to the compliance mechanism, it is usually not known whether any directions of the Council especially with respect to issue of compliance for publication of corrections, apologies or details of inquiries are actually followed or not.⁶²

In light of this dismal situation and in pursuance of the mechanism proposed in the United Kingdom and as already existing in Sweden and Denmark, it is necessary to effect changes to the Press Council Act so as to arm the Council with sufficient powers to reprimand the wrong-doers. The Standing Committee Report on Paid News too recommends enhancement of the punitive powers of the Council such that strong actions against offenders can be taken.⁶³

The suggested punitive powers range from withdrawal of accreditation, deregistration of the paper and stoppage of government and public sector advertisements, all for a specified period of time such that the economic damage from imposition of such penalties act as a deterrent for erring newspapers.

However we feel that granting such powers to a regulatory body can prove to be the source of a lot of controversy and debate, with many arguing that grant of such power is not justified in light of the fact that endowing the Council with the same will hinder freedom of press and invite government intervention.

Thus, there is a need to establish a golden balance, such that the integrity and the freedom of the press are protected. In the view of the authors, the Press Council must draw from the Leveson Committee Report and Swedish practices and be armed with the power to impose financial penalties in addition to powers to warn, admonish, censure and pass directives requiring the newspaper to publish the particulars of an inquiry carried out against it in case of guilt. We feel

⁶¹The Hoot, *How effective is the Press Council*, 17 September, 2012, available at <http://www.thehoot.org/web/How-effective-is-the-Press-Council-/6292-1-1-9-true.html>. (Last visited on 4th August, 2014)

⁶² Id.

⁶³Standing Committee Report on Paid News, 15/11/2013, available at <http://presscouncil.nic.in/WriteReadData/Pdf/PaidNews.pdf>. (Last visited on 4th August, 2014)

that whenever an inquiry and the subsequent adjudication process leads to a finding of guilt, irrespective of the nature of the offense, the offending party must be required to publish the findings and the decision of the Council as per the directions of the same given that loss of goodwill is the biggest disincentive for publishing houses.

In addition, every time an inquiry leads to a finding of guilt the Council must espouse the *Polluter Pays* principle as adhered to by the Swedish Press Council. As mentioned, in Sweden, every time a breach of the Code is affected, a financial penalty is imposed in the form of an administrative fee on the offending party so as to cover the costs of investigation and adjudication. In addition, following the Leveson Committee's suggestion, the power to impose fines, specifically in cases of serious and repeated breaches of the Code and also in cases where there is a significant drain on the Council's resources could be considered with their being statutorily recognized caps which could be decided on basis of factors like the nature of the breach, the number of breaches and/or the circulation of the paper.

Another issue for consideration is that of a compliance mechanism. Concerns about the absence of a compliance mechanism have been voiced for quite some time now with many propounding penal provisions as a penalty for failure to do the same.⁶⁴ As mentioned, while accountability is ensured in cases of complaints against the police in the form of Action Taken Reports, the same is not true for cases where the offending party is the press. The mechanism incorporated in Media Liability Act of Denmark can be considered for our jurisdiction to address this problem. To ensure compliance, failure to comply with the Press Council's direction for publication must be viewed as contempt and made punishable by a Court of law either with fine or imprisonment as deemed appropriate and after following due procedure.

All the above-suggested measures can be incorporated in the form of amendments in the Press Council Act with the compliance mechanism being incorporated in a statute recognizing offenses against the Press as discussed subsequently.

Arming the Council with punitive powers and setting in place a compliance mechanism can prove to be a sufficiently effective top-down approach in ensuring observance of press ethics.

⁶⁴Justice GN Ray, *Statutory Regulation: The Indian Experience*, available at <http://presscouncil.nic.in/OldWebsite/speechpdf/Statutory%20Regulation%20the%20Indian%20Experience%20Kenya.pdf> (Last Visited on 2nd August 2014).

b) Appointing a Readers' Editor

Another amendment that can be incorporated to the Press Council Act is the mandatory appointment of a Readers' Editor in newspapers with circulation exceeding a certain limit. The Readers' editor can cause the newspaper to undertake various measures of varying moral severity in answer to a complaint. It can, at the very least, compel the particular journalist who has written the article against which a complaint has been made, reply to the complainant. Some complaints may only require a correction to be published. At the other times, when the complaint is of a more general and serious nature, it could be discussed in the column written by the readers' editor.

The idea of establishing such a post can stem from several reasons. Firstly, such a position can act as an effective way of channeling complaints from readers. It also fulfils the role of a facilitator of communication between the corporate organizations and the readers. Due to the fact that such a post usually commands greater resources, it can effectively deal with complaints.⁶⁵

Several renowned newspapers in the United States like *Washington Post*, have appointed a deputy managing editor to look into the complaints that readers may have. Such an editor was also required to write a regular column which would be used as an interactive forum for discussing common criticisms against the newspaper and defend the journalists where necessary.⁶⁶

In France too, such a practice has found place in the *Le Monde*. In this newspaper, the readers' editor acts in total independence of the editor in chief. Although he cannot impose sanctions, he nonetheless is free to express his opinions in a weekly column and such a column can usually not be edited, modified or cancelled in any manner.⁶⁷

In India, the practice has been slow in gaining recognition, with only one newspaper, *The Hindu*, having employed reader's editor.⁶⁸

⁶⁵ *Id.*

⁶⁶ John A. Hannigan, 'The Newspaper Ombudsman and Consumer Complaints: An Empirical Assessment' *Law & Society Review*, Vol. 11, No. 4 (Spring, 1977), 679-699.

⁶⁷ *Id.*

⁶⁸ The mandate given to the Reader's Editor of *The Hindu*, under the terms of reference, was (1) to investigate and respond to readers' concerns and complaints, (2) ensure accuracy, standards and fairness, (3) create new channels of

The post of the readers' editor has also come in for criticism due to the elitism attached to it. It is argued that most of the readers who make complaints to the readers' editor come from socially upward, upper middle class backgrounds who anyway have other forums for redressal.⁶⁹ A vast majority of newspaper readers in India do not have the means or a significant level of literacy to take on an assessment of the newspaper and therefore even if the newspaper they read employs a readers' editor, it will be of little value to many readers.

Most of the above mentioned criticisms are quite valid. For the office of the ombudsman to have any value, a lot will depend on the way each of these criticisms is tackled. At the very least, it must be remembered that the position of a readers' editor can to a certain extent, promote ethical practices. Having a readers' editor may not alter excessive corporatization completely, but can nonetheless act as an effective forum for voicing the grievances of the readers against biased, one-sided content.

i) Securing the Independence of the Readers' Editor

The Readers' Editor appointment and related procedure should be specified in the proposed amendments to the Press Council Act. A provision should be incorporated to the effect that all newspapers in the country which have a circulation level⁷⁰ above a certain limit should mandatorily have the position of the Readers' Editor.

The question of independence of this position is a slightly problematic one. Since the readers' editor is usually appointed from within the newspaper, by the management, the degree of independence enjoyed by this post seems minimal. Some minimal safeguards should be provided though. For instance, the column written by the readers' editor is not subject to the usual editorial process and no changes can be made to the column without the prior permission of the readers' editor. Additionally, this post is not subjected to the editorial hierarchy of the newspaper and is independent of editorial directions. Ultimately though, the real source of independence that a readers' editor can enjoy will depend on the popularity of the column among the readers and

communication with greater responsiveness to readers, and (4) look for ways to improve the paper's performance by analysing readers' ideas and suggestions. Available at <<http://www.thehindubusinessline.com/opinion/readers-editor-papers-guide/article4699369.ece>> (Last visited on 2nd August, 2014).

⁶⁹ Such a claim has been addressed briefly in Frank S. Palen, *Media Ombudsmen: A Critical Review*, Law & Society Review, Vol. 13, No. 3 (Spring, 1979), pp. 799-850 Vol. 13, No. 3 (Spring, 1979), pp. 799-850

⁷⁰ This number can be debatable and all stakeholders must come to a consensus regarding the same.

staff themselves. Abolishing the post of the readers' editor does not often bode well for the newspaper as it sends out the wrong signals to the public. For instance, in recent times certain American newspapers did away with the position of the readers' editor as a part of a cost-cutting drive and put in its place a 'communicator' who acted more as a mouthpiece for the newspaper rather than the voice of conscience for the newspaper. However, such an action did not fool people for long and resulted in a loss of faith in these newspapers.

A proposal that is often put forth to secure the independence of the readers' editor is to have such an office funded by readers themselves by charging a nominal cess from the subscribers. At the same time, while the newspapers can themselves nominate a member from amongst themselves as the readers' editor, the person should be someone who has a demonstrable record of an ethical career as a journalist. Further, such nominations should be mandatorily scrutinised by the Press Council to ensure that the person chosen for the post has the requisite credentials. This scrutiny should be made mandatory by the Press Council Act. Even the suggested monitoring cells, akin to the Media Certification and Monitoring Committee (MCMC), could play a pivotal role here in verifying the credentials of those chosen and the function performed by the readers' editor. However, scrutiny should not be interpreted as interference, which should be extremely rare and only for legitimate causes.

Finally, the post of the readers' editor cannot be arbitrarily abolished nor the person designated so be removed without due process. If at all she must be removed, then it must be done only after consultation with the Press Council. This provision should be incorporated in the proposed amendments to the Press Council Act. The council must take initiative in this regard must develop fair and transparent procedures regarding the same.

c) A Code of Ethics and Conscience Clause

The conscience clause is a tool that is usually used in medical services that enables medical professionals to refuse to perform any action that goes against their system of ethics. Such a refusal is usually not problematic if a doctor and patient are not in a professional relationship. However, refusing to perform any particular procedure or line of treatment while being in such a professional relationship could expose the doctor to liability for medical malpractice. This is where the conscientious objection laws provide a degree of protection to medical professionals who refuse to perform a certain kind of treatment if it violates their code of ethics. The question

of what qualifies as a valid ground for refusal in a conscience clause is often ambivalent and is wide enough to include not just religious beliefs but also ethical and moral considerations. The real challenge in determining the scope of applicability of a conscience clause therefore lies in striking a perfect balance between deeply held conscientious beliefs and self-serving motives that are based on politics, pragmatics and opportunism.

It is not a matter of coincidence that the emergence of paid news coincides with the weak position that most journalists hold in newspaper or other media industries. Take for example, the *Indian Express*. Among its code of ethics, staffers should “*avoid becoming participants in partisan causes*”. Further, permission from higher authority is necessary in order to sign any petition furthering any cause. This is a problematic clause because it arguably raises the pertinent questions on the right of journalists to collectivise and advocate better working conditions. Further, many contracts of employment for journalists precludes them from participating in collective bargaining and participation in independent trade unions.

In the media industry, typically in a newspaper, a conscience clause can empower the journalist, at an individual level to refuse to perform a host of unethical practices. However, of more interest and potential are the norms and standards laid down for the newspaper, as a whole. For example, the Press Council Norms of Journalistic Conduct lays down that a newspaper should not engage in ‘crass commercialism’. Such a norm clearly stipulates that there must be a strict wall of separation between the commercial and editorial departments of a newspaper and the latter should not become subservient to the former. If the conscience clause is interpreted broadly to include the institutional practices of the newspaper as a whole, it could lead to more reporting of unethical practices in the newspapers while at the same time, pressurizing newsrooms to become more ethical. The conscience clause, if thus interpreted could serve as a powerful way to empower the ordinary journalists.

The requirement of having a conscience clause should be mandatorily provided for in the Press Council Act, 1978. This may to an extent, empower them to avoid unethical practices such as private treaties by claiming that such practices fall under the category of ‘crass commercialism’ and the dilution of the wall of separation between the commercial and the editorial departments. Even the paid editorials that journalists have to write for different politicians during election time would be covered by such a conscience clause. A lot would depend on how the clause would be

drafted and it would also be an important to note whether the clause would enable a journalist to not only avoid acts where personal integrity is at stake but also acts which compromised the high ideals of journalistic ethics that are expected of a newspaper establishment.

Such a clause would also ensure a certain level of job security for the journalist who would not stand to lose her job on ground of objecting to perform an action that violates their conscience and ethical code of conduct.

Even with such a clause in place, contrary to an employer's belief, recourse to it would not be frequent and disruptive since such an action would hardly give a boost a journalist's career. Nonetheless, a minimum floor protection like this clause would still provide the journalist employee a tool to protest against blatantly unethical practices.

Ensuring that such a clause exists could contribute to promoting a healthier workplace culture in most newspaper industries. Empowering journalists this way may even prevent unacceptable interference by the management over editorial content and thereby reinstall the wall of separation between the two.

Having a conscience clause cannot certainly be a panacea for all of journalism's ills. In more insidious cases of influence, where the newspaper though may not be engaging directly in unethical practices, but only adopts an ideological line in keeping with that of the management, the role of a conscience clause might be questionable. However, it continues to be a modest proposal that is worth a try as it, to some extent, addresses the powerlessness that most journalists face in the newsroom.

An associated amendment along with the mandatory incorporation of a conscience clause is the inclusion of a mandatory, enforceable code of ethics in the same for all journalists and editors in the Press Council Act. Both the management of a newspaper and the journalist should be bound by such a code. A violation of the same must entitle either the journalist or the editor to approach the Press Council. This code, formulated by each newspaper, and in keeping with the broad principles stipulated by the Press Council should be made a mandatory requirement on the basis of which, the conscience clause can be enacted. In other words, journalists would have the power to refuse to perform any action which goes against the established code of conduct on

the basis of the conscience clause. This would ensure that the code of ethics does not merely remain on paper but can instead find a forum for enforcement.

d) **The Revival of Journalists' Union**

Arguably the most effective and long term way of curbing corruption in the media is by quelling the excessive corporate power. The growth of unions can be another way of measuring up to corporatisation of the media. Across the board and in most media houses, the management is keen on cost cutting. The unceremonious dismissal of several journalists from Network 18 is only one example of the same.⁷¹ Newspaper industries are no different. One of the reasons why journalists are dismissed with such impunity is because of their relative vulnerability and weak bargaining powers. Unfortunately, the journalist trade unions have declined significantly in the recent past, especially since the 1980s when the Jain brothers of the *Times of India*, led a systematic battle against the journalist unions and weakened them effectively.⁷² This weakening has been a contributing factor for the decline in the quality of journalism. As mentioned, poor working conditions, little or no job security, industry cutbacks, corporate manipulation and a proliferation of unethical practices in the media are some of the challenges faced by journalist unions today. The management of most media houses is engaging in cost cutting, which downgrades the quality of work.⁷³

Journalist trade unions can play a positive role in such scenarios and act as a buffer between the management and journalists. Not only can the trade union act as a buffer but it can also play a proactive role in promoting better practices in the media as a whole. Additionally, unions need to promote collective agreements which will adequately safeguard the right of the employee journalists. There is an urgent need to denounce the contractual system of employment for journalists and ensure that arbitrary dismissals, contrary to the provisions of the law are challenged. Further, they need to agitate for better laws and working conditions. Unions should

⁷¹ Indulekha Aravind, *No country for good journalists?*, Business Standard (Kolkata) November 16, 2013.

⁷² For a brief idea of the causes of the decline in Journalist unions, see, Neerakshak, 'Fourth Estate: The Lost Battles' Economic and Political Weekly, Vol. 8, No. 13 (Mar. 31, 1973), p. 618. Unfortunately, literature on journalist unions is scarce and has been much neglected by both academicians and journalists. For a general claim on why recognition of unions remain important, see, Sarath Chandra Davala, 'Question of Union Recognition', Economic and Political Weekly, Vol. 24, No. 47 (Nov. 25, 1989), pp. 2592-2594

⁷³ 'Journalism – Unions in Touch with the Future' – Report of the International Federation of Journalists, 2010.

ensure that no journalist is prevented by his/her contract of employment to join a union. Further, to incentivise membership, they should agitate for policies that provide special reporting privileges to journalists who are members of a recognized union of journalists. At the same time, there is a need to collectivise an otherwise disjointed movement. With this in mind, various unions should come together and provide a common, united front.

Unfortunately, most journalists today seem unaware of the provisions of the Working Journalists and other Newspaper Employees (Condition of Service) and Miscellaneous Provisions Act, 1955 and are unsure as to its applicability. Since unions should be engaged in promoting proper labour practices, they should educate journalists about their rights under the concerned legislation. Moreover, unions should stand in solidarity and support with journalists who are dismissed unfairly and need to ensure that such persons get adequate representation in the appropriate court and forum to address their claims. In other words, the unions should act as strong lobbies for the promotion of labour rights among journalists and must agitate for the same in an effective manner.

One way of strengthening journalist unions is by providing for their recognition under the law.

The right to form unions and other forms of association is a fundamental right guaranteed under Article 19(1)(c) of the Constitution of India. The Constitution recognizes that citizens have the democratic right to form a union to agitate and bargain for the promotion of their needs, politically as well as in the workplace. However, this fundamental right only extends to the formation of a union and not the realizing of all its objects necessarily. Thus, it cannot be extended to include within its ambit, an obligation on the management to *recognize* a trade union.⁷⁴

Although any group of individuals can form an association or a union, the law provides for the registration of those unions that are involved in trade and business. Since the newspaper industry would come under such a definition, journalist unions can and are registered under the Trade

⁷⁴ In the case of the *All India Bank Employees' Association v. National Industrial Tribunal, Bombay*, 1962 SCR(3)269, the Supreme Court gave the opinion that not even a wide interpretation of Article 19(1)(c) to form a union could include within its ambit the right to collective bargaining, strike or even achieve the purpose for which they were created

Unions Act, 1926. However, it must be specified that though the law in India provides for the registration of a union, it does not lead to an automatic recognition of the same.

Recognition entails the management conferring a right to a union to appoint a bargaining agent to represent its members on matters relating to terms of employment and working conditions. Such a right of recognition would provide greater voice to a union and enable it to make representations and be heard in all matters relating to employment. Further, recognition would also enable the union to enter into collective agreements or settlements on behalf of the employees. We feel that such recognition could be provided for in the Press Council Act as an amendment.

For a truly grassroot level revolution of journalism, the unions need to be at the forefront of agitation to ensure that ordinary journalists are empowered to avoid unethical practices like paid news.

e) Recognition of Press Offences

While endowing the Press Council with punitive powers and ensuring statutory compliance can play a considerable role in purging the press environment, financial penalties alone do not always act as a sufficient detriment.⁷⁵ This is especially true in light of the fact that publishing houses today usually have considerable financial security and material penalties does not deter them from indulging in unethical pursuits.

As has been already mentioned earlier in the Report, jurisdictions like Sweden, Denmark and Finland have incorporated a regime of statutory regulation for the press by enacting specific laws which deal with offenses relating to the press. While the regime as existing in the aforementioned jurisdictions cannot be strictly conformed to by India given the substantial differences in the socio-political environment of these countries, certain feasible practices can definitely be considered.

⁷⁵ Leveson Inquiry, *Briefing on International Approaches to Press Regulation Royal Courts of Justice*, 5 October 2011 Mark Thompson, Open Society Media Program, 3.

The first is the recognition of liability for what the statutes in these three nations define as “responsible editor” and in case of Denmark even the author of the disputed publication.

In India, while the Press and Registration of Books Act, 1867 provides for the definition of an editor and imposes certain responsibilities on him, they are primarily procedural. Recognizing criminal liability for the editor and author of a publication can go a long way in curbing unethical practices. Holding the editor accountable on the principle of vicarious liability does not only ensure that there is a stringent review of the publication before it is made available to the reader thus compelling adherence to the code of ethics but also compels him to resist pressure from the management to compromise the integrity of the paper. The same is the case with the author of the concerned publication, as the threat of criminal penalty is a strong detriment.

In addition, while in countries like Sweden⁷⁶ and our own neighbor Sri-Lanka⁷⁷ there are consolidated laws recognizing offenses relating to the press, in India there is no such consolidated law. While statutes like The Indecent Representation of Women Act, The Defamation Act, The National Security Act etc. exist, there still exist major lacunae in the law.

In addition, while it may be possible to include paid news into the existing penal provisions as contained in the Indian Penal Code, they still prove to be deficient, given the difficulties associated with finding evidence and proving the crime beyond reasonable doubt. Also, compliance to the Press Council Guidelines for Journalistic Conduct⁷⁸ wherein paid news is recognized as a violation is based primarily on persuasion.

In light of the existing lacunae, there is a pressing need to statutorily recognize these deleterious practices as offenses and provide for criminal liability for the same. An attempt is being made to fill this gap via The Press and Registration of Books and Publications Bill 2013, wherein the definition of paid news as “*publishing any news or analysis in the publication for a price in cash or kind as consideration*” and penalty in the form of cancellation or declaration of the offending newspaper is provided for.

⁷⁶ Daniel Pearl Freedom of the Press Act, 2009.

⁷⁷ The Sri Lanka Press Council, 30th March 1973 available at http://www.commonlii.org/lk/legis/consol_act/slpc378283.pdf. (Last visited on 2nd August 2014)

⁷⁸ Press Council of India, *Norms of Journalistic Conduct*, 2010 edition, available at <http://presscouncil.nic.in/OldWebsite/NORMS-2010.pdf>. (Last visited on 4th August, 2014)

However, this does not seem to be the best route since the implication of cancellation of declaration of newspapers implies that the concerned paper can no longer continue being published. The economic consequences of such a penalty are inimical since the same can affect the entire workforce of the concerned newspaper instead of targeting those responsible and thus instead it is advisable that individualized criminal liability be considered as the alternative.

Apart from paid news, it is recommended that activities like passing off advertisements as editorials and non-compliance with the Council's directives be recognized as offenses. Also, statutorily mandating the need to conspicuously disclose holdings in the entity being written about in the title or the end of the article as witnessed in the Code of Conduct for the Mint. A consolidated law incorporating these suggestions can be taken considered.

3) OPINION POLLS

1. DO OPINION POLLS REQUIRE ANY KIND OF REGULATION? IF SO, WHAT KIND?

We believe that the opinion polls which aim to reflect the choices of the citizens with regards to the electorate require regulations. Such regulation refers to regulation at two levels: firstly, at the time of their conduction by the psephologists, and secondly, at the time of their publication.

(i) Regulation on the methods of conducting Opinion Polls

The provisions should be of two types –

- Requirement of Scientific conduction (non-mandatory guidelines) – The authors believe that there should be guidelines, similar with to those provided by the EU provisions. These guidelines need not be necessarily mandatory, creating divergent and antagonistic sources of information. Any number of non-mandatory guidelines geared towards scientific conduction of the polls, such as a particular sample size, diversity in responses, may be issued in this regard.
- Requirement of Recording Details (mandatory provisions) – The second type of check should be mandatory in nature. This includes provisions such as full recording of information regarding who finances these polls, the sample size of the population, what questions they were asked, their precise response, etc.

We are against the introduction of very stringent mandatory provisions regarding methods of conduction itself. This practise is followed in Greece, for example, which has enacted such a legislation which prescribes minimum standards that must be adhered to by the research agencies while conducting opinion polls. While minimum standards may be an acceptable compromise, any legal regulation that seeks to prescribe every contour of the methods of conducting opinion polls has the potential to affect creativity of the researchers in coming up with new methods of opinion polls. As a minor point, it may also limit the number of agencies who are able to adhere to such regulations, and lead to dominance by larger industries resulting in restraint of trade. Thus, “minimum standards coupled with non-

mandatory guidelines” suggests itself as an acceptable method, as long as it is coupled with full disclosure discussed hereafter.

(ii) Regulation on their publication

The regulations at the second level refer to the information that is required to be published along with the opinion poll. Currently, the general trend among the television and the print media is to give the name of the agency which conducted the survey along with the sample size. It is necessary that with the proliferation of daily opinion polls, information regarding the poll is given to the viewers. Illustrations of such information are the date on which the poll was conducted, the sample size, the geographical area where it was conducted, the questions that were asked to the people taking the survey, the margin of error in respect of the data so obtained, the agency conducting the survey and the sponsor and other such details. Essentially, all the information that is mandatorily required to be recorded in the previous section should be mandatorily published.

Additionally, the statute must impose a penalty for influencing the opinion poll results in any manner, or omitting to disclose any of the mandatory information requirements. In the event of any discrepancy in the disclosure of sources of funding, both the funder and the media house must be held liable.

In this regard, we look at other countries which also have tackled this issue. The Canadian government, for example, has enacted a statute which has the stipulation that opinion polls be accompanied with the following information: the name of the sponsor of the survey, the name of the person or organization that conducted the survey, the date on which or the period during which the survey was conducted, the population from which the sample of respondents was drawn, the number of people who were contacted to participate in the survey, and if applicable, the margin of error in respect of the data obtained.⁷⁹ We believe that this is the model that should be looked at regulation and disclosure of all such information should be made mandatory.

⁷⁹ Section 326, Canada Elections Act, 2000.

These suggestions are similar to the Guidelines that were issued in 1998 by the Election Commission of India⁸⁰ which required that organisations conducting and publishing the results of an opinion poll to indicate the survey's sample size, the geographic spread of the survey, the margin of error, details regarding the methodology, and information about the organization.⁸¹ However, those guidelines were withdrawn post challenges before the Supreme Court claiming that the Election Commission did not have such power vested in it by way of Article 324.⁸² The inclusion of these mandatory requirements in a statute would ensure that such challenges upon the power of the Election Commission do not arise in the future and also gives the required information a sanction of law.

Further, penal action should be imposed upon such persons or news media which do not provide the information along with the opinion poll. The sanctions can be similar to as provided under the Representation of People Act, 1951 in Section 126A and 126B.

(iii) Regulatory authority

There should be instituted a regulatory authority that will serve as a watchdog to ensure that information is not in violation of any of the mandatory provisions, and ensure substantial concurrence with the non-mandatory guidelines. This can be done by creating a specific authority, created solely for such purposes (Germany has a supervisory body termed 'Rat der deutsche Markt-und Sozialforschung' to monitor whether the polling agencies adhere to the rules and which provides an arbitration mechanism in cases where the actions of research agencies violates the principles and rules of professional conduct for German market and social research). With somewhat greater power, the authority we recommend should have the power to ensure that such practices do not take place, by being allowed to access the data which the agencies obtained, while also having the power to initiate criminal proceedings against such persons and organizations which have falsified the data. In the alternate, the PCI or BRAI can also be empowered to monitor the same, by making suitable amendments to the parent statutes.

2. WHAT ARE THE REASONS FOR SEEKING SUCH REGULATION, IF ANY?

⁸⁰ Available online at http://eci.nic.in/archive/instruction/recent/media/pnxitpoll_FINAL.html (Last visited on August 12, 2014)

⁸¹ *Guidelines for Publication and Dissemination of Results of Opinion Polls/Exit Polls*, available at http://eci.nic.in/archive/instruction/recent/media/pnxitpoll_FINAL.html (Last visited on August 12, 2014)

⁸² R. Rajagopal .Vs. U.O.I. & anr, Writ petition (Civil) 80 of 1998

Right from its inception there has been controversy regarding the conduct and regulation of opinion polls. While we were unable to come across any study conducted specifically pertaining to India upon the issue, a 2001 report holds that the various studies conducted on the question of opinion polls affecting voting patterns have yielded inconclusive results.⁸³ This report does concede that there might be a possibility of influence under certain circumstances, but finds the overall influence to be minimal in nature.⁸⁴ Other studies have also opined that there seems to be a minimal effect on voting pattern, and on an overall scheme of things, the effects tend to cancel each other out. However, the number of contradicting surveys gives us adequate room to question the wisdom of a complete lack of regulation.

Traditionally, as J Ronald Milavsky observes⁸⁵, there are two ways in which the public expresses dissatisfaction with the product offered by an entrepreneur – regarding the media as the entrepreneur in this situation. The first is the marketplace – but the application of this logic is limited in scope considering that every media house displays this kind of information and thus consumers do not have the scope of choosing between alternatives. More importantly, even if the consumers do not want to see opinion polls at the time of the elections when that is clearly all they are being shown, it is not that they would actively refrain from watching it, thus sending a signal of disinterest. The TRP-oriented media of today suffers from the problem of not being able to distinguish between positive interest and negative interest – it treats all consumers as mere eyeballs. The other way the public sends effective signals is through the government. Even though this is something that may have significant impact on the Freedom of Speech, we believe that statutory interference would be the only possible route, as well as the institution of a regulatory watchdog to ensure that the mandatory provisions are followed.

We have observed in this context the British model, where there are currently no restrictions on the publication of the opinion polls, which has been explained by “the British media's

⁸³ Wolfgang Donsbach, *Who's Afraid of Election Polls*, available at <http://wapor.org/pdf/who-is-afraid-of-opinion-polls.pdf> (Last visited on August 10, 2014)

⁸⁴ Id.

⁸⁵ J. Ronald Milavsky, Al Swift, Burns W. Roper, Richard Salant and Floyd Abrams, *Early Calls of Election Results and Exit Polls: Pros, Cons, and Constitutional Considerations*, *The Public Opinion Quarterly*, Vol 49 No 1 Spring 1985

commitment to self-regulation and impartiality.”⁸⁶ The British Broadcasting Corporation (BBC), for example, has extremely stringent internal guidelines relating to the reporting of opinion polls. These guidelines refer to reporting of expected margin of error, the date on which the poll was conducted, the sponsor of the poll and the agency which carried it out, not leading a program with the results of a pre-election poll, not using the results of an election survey in a headline, among others.

However, the possibility of self-regulation is faced with two problems: first, with the varied and vested interests in the conduct and publications of opinion polls, it is likely that only a very minimal generalised guidelines are formed and, second, even if the guidelines are formed, in the absence of a watchdog authority, there is no guarantee that these guidelines will be actually adhered to. Hence, a need for a specially empowered body to keep a check on such practices arises.

The focus should be on checks to ensure that the agencies and media houses are not falsifying information with regards to their methods adopted in their opinion poll. There are allegations of cases wherein the results of opinion polls have been published without the opinion poll ever taking place. Our concern is regarding the falsification of the data, the negative impact of which is fairly predictable. The First Past the Post System, as adopted by India, encourages “strategic voting” or “tactical voting.” Different systems encourage different forms of tactical voting, but in this particular system, most commonly this takes the form of voters opting for a candidate they believe has a greater chance of winning as opposed to the option they actually prefer. Duverger's law suggests this as being the reason why the First Past the Post System leads to two party systems, and is unfriendly to minority candidates. Thus falsification of opinion polls can significantly distort actual electoral preferences as well as make the entry of newer parties difficult.

Such falsification is triggered by various influences such as constant interference by the State, ownership patterns of the media, pressure by political and criminal elements against journalists, among others, which result in distortion of information. These influences range from direct pressure to change the results of the opinion poll to more indirect methods; wherein the questions

⁸⁶ Article 19 Global Campaign for Free Expression, *Comparative Study of Laws and Regulations Restricting the Publication of Electoral Opinion Polls*, available at <http://www.article19.org/data/files/pdfs/publications/opinion-polls-paper.pdf> (Last visited on August 10, 2014)

are framed in a manner to show a particular side in favourable/unfavourable light. All of these lead to the requirement of a well founded regulatory regime.

With the increasing amount of competition among the print and news media, profits have become of vital importance. This has led to the rising incidents of paid news offenses, which also are needed to be noted while creating regulations upon the conduct and publications of opinion polls. The recent allegations by a TV news channel which claimed that certain agencies conducting opinion polls were willing to make changes in their findings for money highlights the importance of regulating not only the publication, but also the method in which such surveys are carried out.

Currently, under the Representation of People Act, 1951, there exists no ban on opinion polls in the print media, however, televised media are prohibited to display opinion polls during 48 hours before the poll. Further, the Election Commission has issued guidelines to the media, reminding them that telecasting or printing opinion polls relating to the constituencies where polling has already taken place would be considered akin to dissemination of results of exit poll, which is an electoral offence under the RP Act.⁸⁷ We feel that such guidelines are correct as exit polls can lead to various issues discussed below:

- 1) The Bandwagon Effect: This refers to situations where information about majority opinion, widely dispersed in the media, causes some people to alter their opinion to accord with the majority view. “This change could be a result of a conscious decision on the part of individuals to conform to what they perceive as the political norm; or it could be a subconscious decision, caused by the prevailing attitudes and values of the wider social context.”⁸⁸
- 2) The Underdog Effect: By contrast, the underdog effect refers to a situation where the same information will cause some people to adopt a minority opinion (unlikely in the case of FPTP, more prevalent in the proportional representation system), and this change is likely to be more conscious.

⁸⁷ Press Trust of India, *Lok Sabha elections: Election Commission Cautions Media Against Broadcast, Print of opinion polls*, April 16, 2014, available at http://articles.economictimes.indiatimes.com/2014-04-16/news/49185205_1_publication-and-dissemination-opinion-poll-exit-polls (Last visited on August 12, 2014)

⁸⁸ Ian McAllister and Donley T. Studlar, *Bandwagon, Underdog, or Projection? Opinion Polls and Electoral Choice in Britain, 1979-1987*, *The Journal of Politics*, Vol. 53, No. 3 (1991)

- 3) The West Coast Effect: When a particular result seems to be decided from the exit polls, voters in the later phases tend to not turn up fearing that their vote would be useless, or change their electoral preferences. This is known as the West Coast Effect.

Pratap Bhanu Mehta offers an argument about how exit polls may be violative of the principle of “equal value of the vote” by disturbing the simultaneity of the poll.

He states that -

*“The requirement that voters are not supposed to adjust their votes in relation to knowledge about how others vote is a basic requirement of democracy. In part that is why ballots are secret and final. If all citizens vote at the same time the value of each citizen’s vote is no greater than that of any other citizen. Exit polls distort the process by giving some voters specific information other voters lack (even if the information is accurate). Surely, elections are unjust when information is unevenly distributed in this way.”*⁸⁹

He goes on to argue further that by letting the knowledge of previous voters determine the preference of later voters, the earlier voters are in effect being given double votes: one to elect a government, and one to influence other voters by their choices.

3. WILL SUCH REGULATION BE CONSTITUTIONALLY VALID?

Scholars argue that in the United States, a complete ban on opinion polls violates the First Amendment right to gather news. This right is also protected under Article 19(1) in India in *K K Birla vs. Press Council of India*⁹⁰. Second, it violates the freedom of speech of people present at the exit poll area who may freely wish to discuss who they voted for, as well as the right of the press to publish such results. Even though the Indian Constitution does not protect freedom of the press expressly, all the facets of this freedom have been included under Article 19(1) through various case laws. Further, the Hon’ble Supreme Court in the *Indian Express Newspaper* case has noted that “*the public interest in freedom of discussion (of which the freedom of the press is one aspect) stems from the requirement that members of a democratic society should be*

⁸⁹ Pratap Bhanu Mehta, Tehelka, *Exit from Exit Polls*, available at: http://archive.tehelka.com/story_main1.asp?filename=op050104Exit.asp (Last visited on August 10, 2014)

⁹⁰ (1976) ILR 1 Delhi 753

*sufficiently informed that they may influence intelligently the decisions which may affect themselves.”*⁹¹

Since a complete ban may amount to pitting one fundamental right against another, we believe that the middle path evinced by the recommendations whereby neither a complete ban nor a model of pure self regulation is advocated would be the appropriate way to tackle this issue. This, we believe, is an appropriate way to deal with the evils of opinion polls without encroaching on Article 19.

⁹¹ Indian Express Newspapers (Bombay) Private Ltd. v. Union of India, 1986 AIR 515

4) CROSS-MEDIA OWNERSHIP

INTRODUCTION

Cross-ownership of media occurs when a person or company owns outlets in more than one medium (i.e., newspapers, radio, and television) in the same geographical market. It is a business strategy driven by advances in technology and also a public policy issue due to concerns over increased concentration of ownership. Costs may be reduced through the “synergy” of sharing of staff and content between outlets in different media, and revenues may be increased through the sale of multimedia advertising packages. On the other hand, diversity of media ownership is considered crucial to ensuring diversity of news information and in order to protect plurality. Here it would be pertinent to discuss the famous *Hero Cup* case⁹² : “True democracy cannot exist unless all citizens have a right to participate in the affairs of the polity of the country. The right to participate in the affairs of the country is meaningless unless the citizens are well informed on all sides of the issues, in respect of which they are called upon to express their views.” Therefore: the importance of pluralism in a democracy cannot be compromised. Viewpoint pluralism may be defined to mean ensuring fair, balanced and unbiased representation of a wide range of opinions. In democracies, pluralism is a guiding principle which permits the peaceful coexistence of different interests, convictions and lifestyles.

Further, media markets, in the pursuit of efficiency through economies of scale and network effects, generally have a tendency to move away from the competitive form of organization towards oligopoly or monopoly. Such a situation raises concern as the efficiency that results from large economies of scale also leads towards a smaller number of competitors and can degenerate into inefficient abuse of monopoly power. Concentration in media markets, apart from the usual economic effects, can influence opinion and ideas. Fewer independent owners of media outlets has a negative effect on diversity. The economic interests of media owners influence their advertising, programming choices, and how they provide access to information.

⁹² *Union of India through Secretary, Ministry of Information and Broadcasting vs. Cricket Association of Bengal and ANR*, 1995 AIR 1236

There are three ways in which ownership can impact on news output, which include the following:⁹³

- (i) Direct intervention by an owner;
- (ii) Indirect influence of an owner through the appointment of an editor who shares his views; and
- (iii) The influence of the business approaches that an owner can take different approaches to journalism

INTERNATIONAL PERSPECTIVE

With regard to the international perspective on principles of Media ownership and the concerns in the international community with regard to cross-media ownership:

- The Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, and the European Convention on Human Rights recognize a right of individuals to receive information and opinions from a diversity of sources (Freedom of Information). Thus, they impose an obligation on government to ensure media pluralism.
- Article 10 of the European Convention on Human Rights has been interpreted as requiring member states to take positive actions against press monopolies. In 1994, for example, the European Court of Human Rights held that the Austrian public broadcasting monopoly was incompatible with Article 10 because it violated the freedom of individuals to communicate their ideas on the audiovisual media (*Informationsverein Lentia v. Austria*⁹⁴). A dozen years earlier, the Council of Europe's Committee of Ministers stated: "States have the duty to guard against infringements of the freedom of expression and information and should adopt policies designed to foster as much as possible a variety of media and a plurality of information sources, thereby allowing a plurality of ideas and opinions"

INDIAN PERSPECTIVE

⁹³ The 1st Report (2007-08) of the Select Committee on Communication (House of Lords), United Kingdom

⁹⁴ *Informationsverein Lentia v. Austria*, 17 E.H.R.R. 93 [1994]

This section aims to explore the origin and relationship between Paid News, Private Treaties and Cross-ownership.

- **Private Treaties and Paid News**

Private Treaties can be said to be formal agreements between the media company and another non-media company in which the latter transfers certain shares of the company to the former in lieu of advertisement space and favorable coverage.

In order to delve into a better understanding of the same, it is important to note that such treaties have come to be recognized as falling within the ambit of the much controversial practice that has been labelled as ‘paid news’. Simply put, paid news can be classified as an article in a newspaper/magazine or a television broadcast that appears as a news item, where, though the contents appear to have been independently produced, in reality and in fact, a financial transaction has taken place that has facilitated the publication or broadcast of the news item.

The Press Council of India has explicitly accorded the reason for the proliferation of this phenomenon to the dwindling role and status of editors in media groups. It has noted that with the increasing number of journalists choosing to work under fixed term contracts, the protection advanced to them under the Working Journalists Act was opted out of, thereupon making the managers and not the editors influential in the decision of the news content.⁹⁵

Moving further from the political arena where this practice is rampant, paid news manifested itself into the corporate world through private treaties in the 1980’s after Sameer Jain became the executive head of Bennett, Coleman Company Limited (hereinafter, ‘BCCL’), publishers of the Times of India group of publications.⁹⁶

BCCL started a paid content service called Medianet which sent journalists to cover product launches or personality-related events for a price. Taking lead from the same, it even accepted

⁹⁵ PRESS COUNCIL OF INDIA, SUB- COMMITTEE, ‘Paid News: How Corruption in the Indian Media undermines Democracy’, available at <http://presscouncil.nic.in/Sub-CommitteeReport.pdf>

⁹⁶ See S. NINAN, ‘The Leader Cons the Reader’, available at <http://www.thehoot.org/story.asp?storyid=Web210214207128Hoot45437%20PM1202&pn=1> (last visited 5th August, 2014); See also HEMAL ASHAR, ‘Is this journalism? Would you like to be in the news? Want a picture on the front page of Bombay Times? Just pay and get it’, available at <http://ww1.mid-day.com/news/city/2004/may/83022.htm> (last visited 5th August, 2014).

the allotment of equity shares of companies including Videocon India and Kinetic Motors as part of a deal to enable these firms to receive advertising space in BCCL-owned media ventures.⁹⁷ The success of the scheme turned BCCL into one of the largest private equity investors in India. What followed was a trend that was unprecedented as media houses competed with themselves and offered lucrative deals to corporate houses in an attempt to drastically amplify their market profit.

- **Ethical Considerations Involved [Commercialization of Media]**

The effects of media commercialization have not only contributed to shifts in media ownership, content and structures, but it has also wielded influence on the level of professional ideologies, ethical frameworks and practices of media workers. It has been remarked that the consequence of liberalization in India has been a shift in communication priorities from a pro-development to a pro-market focus'.⁹⁸ We argue here that such pro-market globalization of the Indian media has consequently led to over-commercialization and profit driven journalism.

It has been stated that a key role of the journalist has always been to preserve standards under the continuous and inevitable pressures for compromise, whether they are commercial pressures, logistical pressures, social or political pressures. A market driven media often encourages editors to prioritize commercial goals and journalists to avoid specialized or investigative work. It is therefore inevitable that in such a media terrain, the distinction between journalism and non-journalism is constantly getting blurred, relegating the audiences to the role of spectators (rather than participants) and consumers in society and politics. It has been remarked that during such transformations and focus on sheer commercialization, the pre-existing ethical codes are often being disregarded by the owners and proprietors.

It is submitted that such a drive distorts parliamentary democracy in multiple ways: (a) media ceases to be objective and, therefore, distorts public perception; (b) it distorts the electoral political choices of the people by providing undue advantage to those candidates/political parties who are able to afford these packages, (c) it manipulates democracy, negating it completely by

⁹⁷ See S. K. POOLANI, *Rape of News? The Ethics (or Lack of it) of Selling Editorial Space*, 184 (2004).

⁹⁸ See P. THOMAS, '*Contested Futures: Indian Media at the Crossroads*', in R.A. HACKETT AND Y. ZHAO (eds), *Democratizing Global Media*, 81-99 (2005).

denying or by not providing equal access to those who cannot afford to indulge in such malpractices thereby breaching the provisions of the Constitution of India, and (d) it demeans the idea and essence of journalism itself.⁹⁹

Indian journalists are well acquainted with two basic codes of ethics, namely the Press Council of India's 'Norms of Journalistic Conduct'¹⁰⁰ and the All India Newspaper Editors' Conference's 'Code of Ethics'.¹⁰¹ Although these codes explicitly mention the problem of corporate influence over media, they have been constantly disregarded by the target community on account of such associations not having the requisite powers to implement these ethical guidelines.

- **Why Does Ownership Matter?**

Monopoly in media markets is however quite different in its impact from monopoly in products and services markets. Concentration in media markets, apart from the usual economic effects, can profoundly influence opinion and ideas. Empirical evidence suggests that concentration in media markets – fewer independent owners of media outlets— has a negative effect on diversity. The economic interests of media owners influence their advertising, programming choices, and how they provide access to information.

TRAI in its Report dated 26.02.2009¹⁰² recommended that there should be necessary safeguards in place to ensure that diversity is maintained across the 3 media segments i.e. print, television and radio. TRAI also recommended that a detailed market study be conducted for identifying safeguards. In pursuance of TRAI's report dated 26.02.2009, the Ministry of Information & Broadcasting awarded a study to Administrative Staff College of India (ASCI) to study the nature and extent of cross media ownership, existing regulatory framework, relevant market and international experience. The ASCI Report released in July 2009 recommended that cross media ownership rules be put in place by an appropriate market regulator based on a detailed market

⁹⁹ See RAJYA SABHA DEBATES, 05.03.2010, a copy available at <http://164.100.47.5/newdebate/219/05032010/Fullday.pdf> (last visited 5th August, 2014). See also LAKSHMI L LUND, 'Concept of Paid News in Indian Print Media', 3 Media Watch Issue 1, 2012, 19-26.

¹⁰⁰ PRESS COUNCIL OF INDIA, Norms of Journalistic Conduct, 2010 edition, guidelines for financial journalism, 62, available at <http://presscouncil.nic.in/NORMS-2010.pdf> (last visited 5th August, 2014).

¹⁰¹ Code of Ethics of the All-India Newspaper Editors' Conference, 2007, available at <http://www.unesco.org/new/fileadmin/MULTIMEDIA/HQ/CI/4.%20India%20AINEC%20code%20of%20ethics.pdf> (last visited 5th August, 2014)

¹⁰² Available at: http://www.trai.gov.in/WriteReadData/ConsultationPaper/Document/CP_on_Cross_media_%2015-02-2013.pdf

analysis. Taking into account this report, on 15.03.2013, TRAI released a consultation paper seeking to examine the need and nature of restrictions relating to cross media ownership.¹⁰³

SUGGESTIONS AND THE WAY FORWARD

Monopolies in the field of media ownership have a severely negative impact on the quality of media freedom and plurality in the country, specifically with respect to news coverage. Issues related to ownership of media entities have been raised repeatedly in the last few years by both private observers and government bodies. The overarching concern is that media ownership does not receive sufficient public scrutiny and is under-regulated. On the other hand, hastily imposed regulations in this space could infringe on the freedom of the media, and pave the way towards unwarranted state control. Any regulation on vertical integration, which connotes ownership of both broadcast and distribution, and on horizontal integration, that takes the shape of cross-media holdings, must balance these two competing considerations.

At this point of time, there are no cross media ownership restrictions across print, television and radio in the country. Some restrictions on vertical integration are in place in the shape of guidelines for obtaining Direct-to-Home platforms. Restrictions also exist on the number of licenses allowed to FM radio operators in a given area. Apart from these specific laws, the general competition law in India applies to the media sector.

The Questions put forth by the law commission have been specified and answered below:

1. Is there a current need for restrictions on cross control/ownership across the media sector? If so, what shape should such restrictions take?

With regard to the first question we broadly concur with the TRAI consultation paper,¹⁰⁴ once again intending to look at some international models of Media Regulation:

The method can be one of the three or a combination any of these methods:

A) (1) Restriction on the Basis of a Threshold Market Share in a Media Segment:

¹⁰³ *Id.*

¹⁰⁴ Telecom Regulatory Authority of India, “Consultation Paper On Issues relating to Media Ownership”, Consultation Paper No. 01/2013, February 15, 2013, available at: http://www.trai.gov.in/WriteReadData/ConsultationPaper/Document/CP_on_Cross_media_%2015-02-2013.pdf (last visited 5th August, 2014).

An entity having ownership/ control in a media segment of a relevant market with a market share of more than a threshold level (say 20%) in that media segment cannot acquire or retain ownership/ control in the other media segments of the relevant market.

(2) Restriction on the Basis of Concentration in At Least Two Media Segments:

In this method, cross-media restrictions are applied only when at least two media segments in a relevant market are highly concentrated i.e. the HHI of at least two media segments is more than 1800.

The method may be described as below: A media segment in a relevant market is considered to be highly concentrated if the HHI [*The Herfindahl-Hirschman Index (HHI) is a commonly accepted measure of market concentration. It is also used by the US Anti-Trust Division of the Department of Justice. It is calculated by squaring the market share of each media outlet operating in a market, and then summing the resulting numbers of the market segment*] is 1800 or more. Cross media ownership is not restricted in those relevant markets in which not even two media segments are highly concentrated. For any relevant market where at least two media segments are highly concentrated, restrictions on cross media ownership may be applied as below:

- (i) No restriction on cross media ownership is applied on any entity having ownership/ control in the media segments of such a relevant market in case its contribution to the HHI of not more than one concentrated media segment is more than 1000.
- (ii) In case an entity having ownership/ control in the media segments of such a relevant market contributes 1000 or more in the HHI of at least two concentrated media segments separately, the entity shall have to dilute its equity in its media outlet(s) in such a manner that its contribution in the HHI of not more than one concentrated media segment of that relevant market remains above 1000 within three years. In this method, the contribution of an entity in the HHI of a media segment shall be regarded as same as the cumulative contribution of the media outlets owned/ controlled by the entity

3) Restriction on the Basis of a Threshold Overall Concentration in a Relevant Market:

In this method, restrictions are applied in only highly concentrated relevant markets i.e. relevant markets having high overall concentration (including within media concentration and cross media concentration). The method may be described as below:

A relevant market is considered to be highly concentrated if its Diversity Index Score is 1800 or more. Cross media ownership is not restricted in any relevant market which is not highly concentrated i.e. a relevant market having Diversity Index Score less than 1800.

For highly concentrated relevant markets i.e. having Diversity Index Score of 1800 or more, restriction on cross media ownership may be applied as below:

- (i) No restriction on cross media ownership is applied on the entities contributing less than 1000 in the Diversity Index Score in such a relevant market.
- (ii) In case any entity contributes 1000 or more in the Diversity Index Score of such a relevant market, the entity shall have to dilute its equity in the media outlets in such a manner that the contribution of the entity in the Diversity Index Score of the relevant market reduces below 1000 within three years. In this method, contribution of an entity in the Diversity Index Score of a relevant market shall be regarded as same as the cumulative contribution of the media outlets owned/ controlled by the entity.

2. Are mergers and acquisitions guidelines necessary for the sector to regulate concentration of media ownership? If so, what are the key factors such regulations must capture?

This question is answered with Q3. Please see below.

3. Do mandatory disclosure norms need to be imposed on media entities?

It is understood that mergers and acquisitions (M&A) in the media sector may have a profound effect on viewpoint plurality. The rules relating to media ownership and control may also be applied to merged entities created through M&A. With a view to protect media plurality, some countries have laid down additional restrictions on M&A.¹⁰⁵ In Australia, no new transactions (for M&A) can proceed unless a minimum of 5 independent media operations or groups are

¹⁰⁵ *Id.*

maintained in metropolitan markets and four in regional markets. In some other countries, cross media M&A is restricted in case it increases concentration in the media sector significantly. The small size of the media market led to it being dominated by a few major owners, creating resistance to dropping a prohibition on cross-ownership without allowing more foreign ownership in order to prevent increased concentration. The ban on cross-ownership of print and electronic media had been introduced by the Labour government in 1987, forcing the country's multimedia owners to choose between their television and newspaper holdings. Nonetheless, the Australian government under liberal Prime Minister John Howard enacted a broad package of reforms in July of 2006. It abolished restrictions on foreign ownership and permitted cross-ownership starting in 2007, subject to a "diversity test" to ensure a minimum of five owners in metropolitan markets and four in regional markets.¹⁰⁶

The use of such diversity tests and minimum-players restrictions could be the way forward for the Indian Market as well.

4. Should certain categories of entities be restricted from entering into broadcasting activities?

Mandatory Disclosures

It is important that if the regulatory provisions with regard to cross media holdings in the media sector and vertical integration in the broadcasting sector are in place then the same should be easily monitorable and enforceable. It is also important that, during the entire period of currency of license/permission, the licensee/permission holder complies with all the terms and conditions of the license/permission, including the eligibility criteria. Amongst various rules for the same, one of the most effective tools could be a well defined system of periodic mandatory disclosures by the entities providing the services in the sector. Therefore, it would be desirable to have a regulatory framework of periodic disclosures as a mechanism for monitoring and enforcing of the media ownership rules in case the same are prescribed.

¹⁰⁶ 'Focus: Australia's New Media Ownership Laws', available at: <http://www.allens.com.au/pubs/tmt/focmtjun07.htm>, (last visited 5th August, 2014).

¹⁰⁶

Therefore the parameters to be looked at for this disclosure:

The parameters that are likely to be handy in monitoring and enforcing compliance of restrictions with respect to cross media holdings and vertical integration, if any, as well as determining control/ concentration of different entities/ companies in different media sectors are:

I) a. Equity structure of the entity/ company

b. Shareholding pattern of the entity/ company

c. Foreign direct investment pattern of the entity/ company

d. Interests of the entity/ company in other entities/ companies engaged in media sector

e. Interests of Entities/companies, having shareholding beyond a threshold (say 15%) in the media entity/company under consideration, in other media entities/companies

f. Shareholders Agreements, Loan Agreements

g. Details of Key executives and Board of Directors of the entity/ company.

h. Market share of the entity/ company

i. Viewership / Readership details

j. Subscription and Advertisement Revenue of the entity/ company.

The percentage of equity holding is commonly used as a measure of control/ownership in a company e.g. in Telecom sector equity holding is one of the key parameters used to identify control. Equity participation is quantifiable and can be monitored and enforced. However, there are some entities who are not registered companies; in such cases the equity holding would not be relevant. Besides it may also be noted that a sole proprietorship, an association of persons, a body of individuals, a partnership firm, a corporate body or company, a public sector business enterprise, etc. are all entities. In law, an entity is something capable of bearing legal rights and obligations. TRAI had recommended that for the purpose of putting in place effective safeguards to prevent vertical integration between the broadcasting sector and its distribution platforms, the word entity be given a broad meaning so as to include any person including an individual, a

group of persons, a public or private body corporate, a firm, a trust, or any other organization or body and also to include inter-connected undertakings. Thus any effective system for mandatory disclosure should also apply to all interconnected undertakings be it for monitoring/ enforcing compliance with respect to cross media holdings or vertical integration.¹⁰⁷

¹⁰⁷ Telecom Regulatory Authority of India, “Consultation Paper On Issues relating to Media Ownership”, Consultation Paper No. 01/2013, February 15, 2013, available at: http://www.trai.gov.in/WriteReadData/ConsultationPaper/Document/CP_on_Cross_media_%2015-02-2013.pdf (last visited 5th August, 2014).

5) MEDIA AND INDIVIDUAL PRIVACY

INTRODUCTION

While the Supreme Court has held privacy to be a fundamental right, it is restricted to certain aspects of a person's life. These aspects include the privacy of one's home, family, marriage, motherhood, procreation and child-rearing.¹⁰⁸ Therefore, to claim privacy in any other aspect, individuals have to substantiate these are 'private' and should not be subjected to state or private interference. For instance, in 1996, petitioners had to argue before the Court that the right to speak privately over the telephone was a fundamental right.¹⁰⁹ This response will entail recommendations to the four questions posed by the Law Commission with regard to how the media affects individual privacy, whether there is scope for reconciliation and how in certain instances, putting certain restrictions on the media may be called for.

Q1. Should a statutory body have powers to adjudicate complaints of false sting operations? Should there be a specific statutory provision for treating false sting operations as a punishable offence?

A. While contributions made by sting operations in unearthing crimes is indeed noteworthy, allowing them to operate in a legal vacuum is harmful to our judicial system as well as the people at large. In *Aniruddha Bahal v State*¹¹⁰ the Delhi High Court cited existing practical considerations like unwillingness of public servants to act against powerful persons, while expressing solidarity with individuals who ventured into such operations to expose corruption. However, the Court did not examine the aspect of extent of admissibility or regulation of such programmes. In the recently decided case of *Rajat Prasad v CBI*¹¹¹, the Supreme Court held that one must look at such operations in a comprehensive manner and acknowledge that merely

¹⁰⁸ The PRS Blog, "Are we closer to a law on privacy", 19th October 2012, available at <http://www.prsindia.org/theprsblog/?p=2042> (last visited on 12th August 2014)

¹⁰⁹ Harsimran, Are We Closer to Privacy?, PRS (19th October 2012), available at <http://www.prsindia.org/theprsblog/?tag=right-to-privacy>

¹¹⁰ *Aniruddha Bahal v State*, 172 (2010) DLT 268

¹¹¹ *Rajat Prasad v CBI* (2014) 6 SCC 495

proving that someone acted in a wrongful manner does not obliterate or extinguish any possible crimes committed by the person carrying out the sting operation.¹¹² This judgment also laid down that there could be no fixed set of guidelines to adjudicate such matters and every case must be examined on merits. The Court also held that *“the criminal intent behind the commission of the act which is alleged to have occasioned the crime will have to be established before the liability of the person charged with the commission of crime can be adjudged. Whether the operation was really an exercise in public interest to expose graft, or giving of the bribe was with expectation of favours in connection with mining projects, are questions that can only be answered by the evidence of the parties which is yet to come. Such facts cannot be a matter of an assumption”*, it was observed. The court also cautioned to the dangers of such sting operations being misused as it said: *“The inherent possibilities of abuse of the operation as videographed, namely, retention and use thereof to ensure delivery of the favours assured by the receiver of the bribe has to be excluded before liability can be attributed or excluded”*.¹¹³

The News Broadcasters Association (NBA), which is a self-regulatory body of news channels claims to *represent the private television news & current affairs broadcasters. It is the collective voice of the news & current affairs broadcasters in India. It is an organization funded entirely by its members. The NBA has presently 26 leading news and current affairs broadcasters (comprising 59 news and current affairs channels) as its members*.¹¹⁴ The Association prescribes certain guidelines regarding conducting sting operations and denounces the use of sleaze, narcotics etc in such operations while even going to the extent of characterising sting operations as a ‘last resort mechanism’.¹¹⁵

Despite such steps, the Association has failed to tackle the problems associated with false sting operations. The lack of legal enforceability and the weak punishment prescribed (read maximum fine of Rs. 1 lakh) are the main obstacles that block implementation of the code of ethics.

Recommendations

¹¹² *Id.*

¹¹³ *Id.* Para 14

¹¹⁴ News Broadcasters Association, available at <http://www.nbanewdelhi.com/about-nba.asp>, (last visited on 5th August 2014)

¹¹⁵ Section 2 (9), NBA Code of Ethics, available at http://www.nbanewdelhi.com/pdf/final/NBA_code-of-ethics_english.pdf, (last visited on 5th August 2014)

The lack of jurisprudence in this area is problematic as sting operations carry serious consequences on public opinion as well as for the reputation of the persons concerned. Therefore, the legislature should constitute a statutory body to examine complaints of malicious or false sting operations. Further, this body must be empowered to act on cases of false sting operations by imposing substantial fines along with other punishments such as forcing the channel to air an apology for a set period of time and may even include a jail sentence in the most serious cases. Enacting such provisions would serve the dual purpose of deterring flimsy or malicious sting operations from being undertaken as well as protecting citizens against such questionable methods of information gathering.

Q2. Should the existing framework of laws be suitably amended to include specific guidelines governing disclosure of private information by the press?

This part intends to cover the issue of the role of press in the disclosure of private information in the name of public interest on ethical grounds. It would examine whether it is “ethically correct” to disclose such information in all cases and if not, what is the course of action in such cases.

One must not only question the media’s intention behind disclosing private information, but also ask questions regarding the repercussions of such disclosure. The thought that might come to play at this juncture is kind of impact of such disclosure on the society (either on a particular individual or public at large). Disclosure of private facts is routine in Indian media leading to various issues in the political as well social spheres of the society and has become a matter of concern of the hour.

Media Ethics: Few Instances where boundaries have been blurred in the past

The Guwahati Molestation case in July, 2012, was given extensive coverage on news channel, though it certainly raised ripples of consciousness amongst people, showcased through nationwide protests¹¹⁶. Various National Hindi News Channels, IBN7 channel¹¹⁷, Zee

¹¹⁶ IBN Live, *Guwahati molestation case: Hundreds protest, demand justice for girl*, July 15, 2012, available at <http://ibnlive.in.com/news/guwahati-hundreds-protest-demand-justice-for-girl/271500-3-251.html> (Last visited on August 2, 2014).

News¹¹⁸ and India TV¹¹⁹ covered this story in the same obnoxious way as the victim was harrowed on that night and the video of the incident which ran on the channels evinced acute lack of sensitivity towards the victim and the outrageous scripts used to report the news.

Was the manner in which the girl's private grief, impotence, and despair put on display for all viewers, without her consent and regardless of any sympathy in consonance with this deeper motivation? In the very act of deploring the tragedy, the underlying motivation behind the Guwahati video seems to be an appalling curiosity and morbid delight in the tragedies of others. And, therein lies the problem. In fact, such depiction is routine in the media. We have seen in the past journalists asking someone whose friends or parents have been killed in a plane crash "how they feel!"¹²⁰

The Guwahati Molestation incident is not a case in isolation. In 2007, *Telegraph* carried a front page picture of an *Adivasi* girl running naked down a Guwahati street after being stripped by ethnic rioters¹²¹. Three readers from Tezpur University said in a letter to the paper that while the strippers showed their barbarism, the editorial board of the *Telegraph* demonstrated its sadism by publishing the plight of the one stripped¹²².

In July 2006 when Prince fell into an open bore well in Kurukshetra, a massive rescue operation was launched and amid heavy media coverage. Prince was rescued after a 48 hour ordeal. Without even recognising, the five-year old boy who fell into the well while playing became a public person over night without even understanding the reasons and consequences of the same. Is this something really ethical to infringe into someone's private life like this?

Photographer Arko Datta is credited with one of the most defining images, taken on February 28, 2002, in Ahmedabad during the Gujarat riots. The man in the picture, Qutubuddin Ansari, a 29-

¹¹⁷ IBN7, *Guwahati Girl Molestation Case*, July 13, 2012, available at <http://khabar.ibnlive.in.com/news/77081/1> (last visited on August 3, 2014).

¹¹⁸ Zee News, *School Girl molested in Guwahati*, July 13, 2012, available at http://zeenews.india.com/videos/school-girl-molested-in-guwahati_17244.html (Last visited on August 3, 2014).

¹¹⁹ India TV, *Guwahati Molestation Case*, July 14, 2012, available at http://www.indiatvnews.com/live-video/top-reporter_6637.7.html (Last visited on August 3, 2014).

¹²⁰ The Hindu, *To shoot, or to help?*, July 19, 2012 available at <http://www.thehindu.com/opinion/op-ed/article3654469.ece> (Last visited on August 4, 2014).

¹²¹ The Telegraph, *Shame on Guwahati Streets*, November 27, 2007, available at http://www.telegraphindia.com/1071127/asp/frontpage/story_8597904.asp (Last visited on August 4, 2014).

¹²² The Hoot, *Stripped Again*, November 29, 2007, available at <http://thehoot.org/web/home/story.php?storyid=2823&mod=1&pg=1§ionId=&valid=true> (Last visited on August 4, 2014).

year-old tailor, captured in the camera looking out from the first floor of a building as an angry mob approached while The ground floor of the house was already ablaze. The red spots of blood on his shirt a grim reminder of the violent mobs that were on a rampage in Gujarat at the time. The picture, splashed across newspapers and television channels, became so popular that Ansari soon lost the privilege of being a mundane man. He became the face of the riots. The photograph has haunted him since then. People taunted him for begging to be spared and for crying in public. He struggled to find a job because employers wanted to stay clear of all trouble. Datta, was later quoted as saying he was sorry for the troubles Ansari faced, but that he was only doing his “job”¹²³.

The fashion in which media conducted itself raises several questions. Are these news channels actually telecasting news or running daily soaps and adding spice to it to increase the TRP?

I. MEDIA ETHICS- PREDICAMENT AND PRACTICE

Before we condemn media, we need to explore other facets of the story. Are we brickbatting the media without analysing this issue from their perspective? Are they just doing their “job”?

The journalists play an important role in telling the story to the world. The ripples of repercussions raised after reporting the above-mentioned cases would not have been the same, if populaces did not get a chance to see them on television. The cases would have been among the other ones to the closet that is full of incidents of various dormant incidents. The commonness of these incidents, have made people acquire a thick skin towards such events. However, does that justify callous attitude of journalist and the focus on the job in hand?

A. **Looking at the Wider Picture, Treading From the Path of Professionalism to the One of Ethics**

“The first step in the evolution of ethic is a sense of solidarity with other human beings”

¹²³ India Real Time, *Picture Focus: Ansari and the Anatomy of Fear*, February 28, 2012, available at <http://blogs.wsj.com/indiarealtime/2012/02/28/picture-focus-ansari-and-the-anatomy-of-fear/> (Last visited on August 3, 2014).

-Albert Schweitzer, German Nobel Peace Prize Winner

Although most journalists would consider it to be their professional duty to catch events like the ones mentioned above on tape and later put them up for display, journalistic professionalism need not come apart from ethical responsibility. As Oakley and Cocking claimed in regard to virtue ethics and professional roles, “goodness is prior to rightness”¹²⁴.

Given that the news media's function, at least in part, is to seek out and expose wrongdoing, it would bear the charge of hypocrisy if it is guilty of the very same sins it exposes in others. Journalists and the news media must themselves consistently aim to respect the very same ethical standards of behaviour that they demand others should adhere to.

However, as Andrew Belsey in his article ‘Journalism and Ethics, can they co-exist’¹²⁵, opined, that in today’s scenario, journalism and ethics stand apart. Media is supposed to follow the virtues of ‘accuracy, honesty, truth, objectivity, fairness, balanced reporting, respect or autonomy of ordinary people’¹²⁶. These virtues, nonetheless, is overshadowed by practical considerations, namely, pursuit of successful career, promotion to be obtained, compulsion of meeting deadlines and satisfying Media Managers by meeting growth targets, are recognized as factors for the ‘temptation to print trivial stories salaciously presented’¹²⁷.

II. MEDIA ACCOUNTABILITY: DO WE HAVE A CODE OF MEDIA ETHICS?

How do we make media accountable and ensure that they adhere to basic standard of ethics?

¹²⁴ OAKLEY J. & COCKING D., VIRTUE ETHICS AND PROFESSIONAL ROLES, (2001).

¹²⁵ Andrew Belsey, *Journalism and Ethics, can they co-exist* in MEDIA ETHICS : A PHILOSOPHICAL APPROACH (Mathew Kieran ed., 1997).

¹²⁶ *Id.*
¹²⁶

¹²⁷ Law Commission Of India, 200th Report on *Trial by Media- Free Speech and fair Trial under Criminal Procedure Code, 1973*, August 2006, available at <http://lawcommissionofindia.nic.in/reports/rep200.pdf> (Last visited on August 4, 2014).

A. Media Accountability System

Generally, many countries have a Media Accountability System that is the non- governmental means of inducing media to respect the ethical rules set by the profession by deciding amongst themselves.¹²⁸

In India we have News Broadcasters Association that represents the private television news & current affairs broadcasters.¹²⁹ The other body is Broadcast Editors' Association¹³⁰ that is a self-proclaimed regulating body with a representation of few channels in its committee, thus not accounting much for the regulation of media standards.¹³¹

As far as providing for code of ethics and broadcasting standard is concerned, the National Broadcasting Association lays down certain guidelines that primarily prescribe¹³²:

- Impartiality
- Neutrality
- Ensuring National Security
- Exercise of restraint to ensure that any report or visuals broadcast do not induce, glorify, incite, or positively depict violence and its perpetrators
- Ensure that no woman or juvenile, who is a victim of sexual violence, aggression, trauma, or has been a witness to the same is shown on television without due effort taken to conceal the identity.
- As a rule channels must not intrude on private lives, or personal affairs of individuals, unless there is a clearly established larger and identifiable public interest for such a broadcast.

The other guidelines focus on constraining the promotion of superstition, sting operation, accuracy of the information, and provision of viewer's feedback.

¹²⁸ CLAUDE-JEAN BERTRAND, MEDIA LAW AND ETHICS: READING IN COMMUNICATION REGULATION (Kiran Prasad ed., 2008).

¹²⁹ News Broadcasters association official website, available at <http://www.nbanewdelhi.com/national.asp> (Last visited on August 7, 2014).

¹³⁰ Available at <http://www.beaindia.org/index.htm> (Last visited on August 5, 2014).

¹³¹ Media Law and Policy, *Self regulation or serving self interest?* November 24, 2011, available at <http://thehoot.org/web/Selfregulationorservingselfinterest/5607-1-1-7-true.html> (Last visited on August 4, 2014).

¹³² News Broadcasters Association, New Delhi, *Code of Ethics & Broadcasting Standards*, available at http://www.nbanewdelhi.com/pdf/final/NBA_code-of-ethics_english.pdf (Last visited on August 7, 2014).

Again, NBA does not have the luxury to enforce these guidelines in case of a breach, given its limited or lack of power. The prime example was the case of India TV. The NBA, in the past, had given notice to India TV for deceptively recreating a US-based policy analyst's interview. It slapped a penalty of Rs 1 lakh on the channel which simply walked out of the Association¹³³. NBA, in this case, was not able to take the requisite action due to lack of adequate power.

It has been to be made sure that there is no option for channels infringing the rules to function as reckless as mentioned above. Regulatory penalty methods have to be implemented to stop commission of such acts at the very first place.

B. Ethical Code of Conduct in India vis-à-vis the Other Countries

Europe provides for Resolution on the Ethics of Journalism¹³⁴, while the UK has Editor's Code of Practice with a provision of Press Complaint Commission¹³⁵. Even countries such as Bulgaria have a National Council for Journalistic Ethics which is a self-regulatory body for print and electronic media¹³⁶. These institutions have been developed in line of Professional Journalistic Standards and Code of Ethics doled out by UNESCO.¹³⁷

Unlike other countries that provide for new council to look into complains about irregular behaviour by media institutions, India does not have any statutory regulation to prescribe code of conducts.

¹³³ Media Law and Policy, *Self regulation or serving self interest?* November 24, 2011, available at <http://thehoot.org/web/Selfregulationorservingselfinterest/5607-1-1-7-true.html> (Last visited on August 4, 2014).

¹³⁴ Parliamentary Assembly, Council of Europe, *Resolution 1003 (1993) on the ethics of journalism*, 1993 available at <http://assembly.coe.int/main.asp?link=http://assembly.coe.int/documents/adoptedtext/ta93/ERES1003.HTM>

¹³⁵ <http://www.pcc.org.uk/cop/practice.html> (Last visited on August 6, 2014).

¹³⁶ *National Council for Journalistic Ethics*, June 24, 2014, available at <http://www.mediaethics-bg.org/> (Last visited on August 7, 2014).

¹³⁷ UNESCO, Communication and Information, *Professional Journalistic Standards and Code of Ethics*, available at http://portal.unesco.org/ci/en/ev.phpURL_ID=28975&URL_DO=DO_TOPIC&URL_SECTION=201.html (Last visited on August 8, 2014).

Proposal to Regulate Media Code of Code in India

Justice Markandey Katju, Chairman of Press Council of India, in May, 2012, proposed the inclusion of electronic media under the Press Council which then shall be renamed as the Media Council¹³⁸.

Also, a private member bill, called the Print and Electronic Media Standards and Regulation Bill, 2012, that provides for a media regulatory authority with a sweeping set of powers that include imposing a ban or suspending coverage of an event or incident that may pose a threat to national security from foreign or internal sources¹³⁹ was scheduled to be introduced, but was subsequently withdrawn by the member concerned.

Given that India is a democratic country that guarantees freedom of speech and expression, an outright autocratic regulation of media would be uncalled for, nonetheless, practicing some core ethical practice would help media in avoiding mudslinging and spattering of accusation for its reckless behaviour.

I. CONCLUDING ON THE NOTE OF ETHICAL CONSIDERATIONS

Though, India does not have a strong self-regulatory mechanism that could provide for code of conduct for media nor we have any international standards to adhere by, the guidelines provided by NBA comes under the ambit are certain globally recognised ethical standards that media ought to abide by.

Ethical Considerations

As was pointed by Press Council of India Chairman, with the advent of private TV channels, the media has overtaken over the reins of human life and society in every walk of life. The media today does not remain satisfied as the Fourth Estate; it has assumed the foremost importance in society and governance. While playing the role of informer, the media also takes the shape of a motivator and a leader. Such is the influence of media that it can make or unmake any individual,

¹³⁸ The Hindu, *Media cannot reject regulation*, May 23, 2012, available at <http://www.thehindu.com/opinion/lead/article3374529.ece> (Last visited on August 6, 2014).

¹³⁹ The Indian Express, *Ban & seize: Congress MP Bill out to gag media*, May 1, 2012, available at <http://www.indianexpress.com/news/ban-&-seize-congress-mp-bill-out-to-gag-media/943799/> (Last visited on August 8, 2014).

institution or any thought. So all pervasive and all-powerful is today its impact on the society. However, to enjoy these privileges, Media is mandated to follow certain ethics in collecting and disseminating the information viz., ensuring authenticity of the news, use of restrained and socially acceptable language for ensuring objectivity and fairness in reporting and keeping in mind its cascading effect on the society and on the individuals and institutions concerned¹⁴⁰.

If media could take care of the language used, report objectively and eschew sensationalising of news that leads to lowering of journalist standard, media can instead be a catalyst in tackling taboos, dogmas and violation of law and policy.

Ethics is a code of values, which govern our lives, and are thus very essential for moral and healthy life. Journalists need to preserve and promote it so as to defend trust of the people and to maintain their own credibility and not betray the faith and confidence of the people¹⁴¹.

Even from the “Practice of Professionalism” point of view, legal and ethical transgression can be a costly affair for journalists. Defamation action have the potential to leave journalists penniless and to send their company into receivership while professional awareness of issues like Media Ethics can set them apart from amateurs and charlatans¹⁴².

With so much power and strength, the media cannot lose sight of its privileges, duties and obligations. Journalism is a profession that serves. By virtue thereof it enjoys the privilege to 'question' others¹⁴³. However, it needs to use the power bestowed to it judiciously; otherwise, the media could turn out to be one of our greatest banes¹⁴⁴.

Q3. Is there a need for detailed guidelines for reporting of sub judice matters?

¹⁴⁰ Press Council of India, *Media Ethics*, January 18, 2007, available at <http://presscouncil.nic.in/speechpdf/Media%20Ethics%20at%20IIMC,%20Dhenkanal.pdf> (Last visited on August 5, 2014).

¹⁴¹ *Id.*

¹⁴² MARK PEARSON & MARK POLDEN, *THE JOURNALIST’S GUIDE TO MEDIA LAW- DEALING WITH LEGAL AND ETHICAL ISSUES* (2011).

¹⁴³ *Media Ethics*, *supra* note 24.

¹⁴⁴ The Hoot, *Televised assault, molestation*, July 16, 2012, available at <http://thehoot.org/web/home/story.php?storyid=6079&mod=1&pg=1§ionId=&valid=true> (Last visited on August 6, 2014).

The term *sub judice* refers to a situation “*under judicial consideration and hence prohibited from public discussion elsewhere*”.¹⁴⁵ However, in India, there are no restrictions under the law on *sub judice* with regard to the media.¹⁴⁶

The arguments for and against such guidelines span a huge spectrum:

- 1) The first argument against guidelines would be the Fundamental Right to Freedom of Speech and Expression under Article 19(1)(a) of the Constitution of India. Those against the guidelines would allege a violation of their fundamental right in the event of blanket restrictions.
- 2) The second argument against the guidelines would be an extension of the first and would involve highlighting the positive outcomes of media reporting of *sub judice* matters like the Nirbhaya case, where the media attention fast tracked the process for obtaining justice for the victim. Even in cases involving certain celebrities, the media has brought to people’s notice how celebrities enjoy certain privileges by virtue of their fame that ordinary citizens do not.
- 3) A major aspect of this debate would concern reportage and Contempt of Courts Act, 1971- Section 2(c) of the Act provides that “*any publication which scandalises or tends to scandalise, or lowers or tends to lower the authority of any court or interferes or tends to interfere with the due course of any judicial proceeding or obstructs or tends to obstruct, the administration of justice in any other manner constitutes criminal contempt.*”¹⁴⁷ The reasoning behind this concerns influences over the public as well as the judicial system.

¹⁴⁵ S. Murlidharan, *The Meaning of Sub Judice*, The Hindu: Business Line, 24th November, 2010, available at <http://www.thehindubusinessline.com/todays-paper/tp-opinion/the-meaning-of-subjudice/article1010073.ece>, (last visited on 5th August 2014)

¹⁴⁶ S. Murlidharan, *Sub judice is a convenient, self-serving alibi*, Business Standard, 11th May 2014, available at http://www.business-standard.com/article/opinion/sub-judice-is-a-convenient-self-serving-alibi-114051100694_1.html (last visited on 5th August 2014)

¹⁴⁷ Contempt of Courts Act, 1971, S. 2(c)

In 2012, the Supreme Court, while refusing to frame uniform guidelines with regard to reporting *sub judice* matters laid down a constitutional principle using which it would be possible for aggrieved parties to seek postponement of publication of court hearings.¹⁴⁸

It was held that that the concerned court would decide on the question of postponement of reporting court proceedings on a case-by-case basis and the postponement would be required in cases of a substantial risk of prejudice to the trial and administration of justice.¹⁴⁹ This response was the result of a petition filed due to a breach of confidentiality during the hearing of a dispute between the Sahara Group and Securities and Exchange Board of India.¹⁵⁰

Recommendations: While it has been recognized that the media has played a crucial role in bringing awareness to the masses about issues at various points of time and enjoys its right under Article 19(1) (a), it must be acknowledged that in cases where such reportage leads to affecting another's right to a fair trial, there must in fact be a curb on such reportage. In many cases, unscrupulous reporting leads to a decision about the innocence/guilt of the accused before the trial has concluded itself.

Concerns have been raised over extensive media trials of economic scandals involving politicians and industrialists in addition to crimes committed by individuals. An example could possibly be the Aarushi Talwar Murder case. Actions like this have led to the general public believing in the complicity of the person indicted by the media as opposed to waiting for a conclusion to a fair trial, and a disregard of the right to be assumed innocent until proven guilty.¹⁵¹ Another example would be *M.P. Lohia vs. State of West Bengal*¹⁵², where the Supreme Court expressed its disapproval over an article in a newspaper regarding an alleged dowry case

¹⁴⁸ First Post, *SC refuses to set guidelines for media on reporting sub-judice matters*, 11th September 2012, available at <http://www.firstpost.com/politics/sc-refuses-to-set-guidelines-for-media-on-reporting-sub-judice-matters-451132.html> (last visited on 5th August 2014)

¹⁴⁹ DNA, *No guidelines to regulate media reporting of sub-judice matters: SC*, 11th September 2012, available at <http://www.dnaindia.com/india/report-no-guidelines-to-regulate-media-reporting-of-sub-judice-matters-sc-1739372> (last visited on 5th August 2014)

¹⁵⁰ Id.

¹⁵¹ G.N. Ray, *Gora Chand Pattnaik Memorial Trust on Reasonable Restrictions on reporting on Sub Judice matters*, Press Council of India, 31st August 2008, available at <http://presscouncil.nic.in/OldWebsite/speechpdf/Bhubaneswar%20Law%20Lecture.pdf> (last visited on 5th August 2014)

¹⁵² *M.P. Lohia vs. State of West Bengal* (AIR 2005 SC 790)

stating that the publication of the article led to the creation of a pressurised atmosphere before the judge who was to originally hear the bail petition of the husband and his family.¹⁵³

We of the opinion that the Supreme Court would not be overstepping its jurisdiction in providing guidelines in such cases. The guidelines could be along the lines of those provided by the National Broadcasting Authority's guidelines. The guidelines prohibit conjecture and speculation with regard to pending court/ tribunal proceedings and allow for "*a news channel to report on pending judicial proceedings provided the report so broadcast is accurate, authentic and correct version of what has transpired in Court; and is fair and reasonable to the contesting parties*".¹⁵⁴

Safeguards are put in place by a prohibition of a broadcast of any news item which purports "*to report a journalist's or the news channel's own opinion, conjectures, reflections, comments or findings on issues that are sub judice or which tend to be judgmental in relation to the subject matter that is pending in a Court, Tribunal or other judicial forum*"; or "*which is a comment on the personal character, culpability or guilt of the accused or the victim*".¹⁵⁵

To succinctly **answer** the question:

Yes, there is a need for detailed guidelines on the reporting of *sub judice* matters. The guidelines can incorporate the spirit of those provided by the National Broadcasting Authority. The guidelines may allow reporting of (subject to prohibitions in criminal law already in place):

- 1) Matters that have been adjudicated upon with respect to the particular case
- 2) Objective sequence of events, etc that have taken place as the case has progressed

The guidelines should prohibit:

- 1) Any speculation about the character, etc of the parties involved in the case
- 2) Any speculation about whether the person involved is guilty or innocent

The NBA Specific Guidelines for Reporting Court Proceedings guidelines provide very clearly what rights members of the press can enjoy during *sub judice* proceedings and what obligations they have towards the rights of others. They provide ample room for exercise of the media's

¹⁵³ The Hoot, *Sub Judice*, 18th September 2012, available at <http://www.thehoot.org/web/Sub-judice/6287-1-1-51-true.html> (last visited on 5th August 2014)

¹⁵⁴ National Broadcasting Authority, *Summary of Order Dated 19th October 2011*, , available at <http://www.nbanewdelhi.com/images/Upload/website-matter-times-now.pdf> (last visited on 5th August 2014)

¹⁵⁵ Id.

right under Article 19(1) (a), as long as the expression of that right does not affect another individual's right to have access to a fair trial or obtain justice. I believe the guidelines can be used as a standard (and must be) in a form that is mandated to be followed by the press.

Q4. Is the current definition of “Identifiable larger public interest” under the Cable TV Networks (Regulation) Act, 1995 comprehensive?

The media is incredibly important when it comes to uncovering information for the people; especially when it concerns the functioning of the government given the democratic nature of our country. This is the reason that attempts to harm journalistic freedom are mostly rejected. That said, the media owes certain duties and responsibilities towards the society. Given the exponential growth over the last two decades of media (television in the 90's, and the internet in the new millennium) investigative journalism, too, has evolved to keep up with the times. 'Sting Operations' seems to be the trending, albeit a very effective, method used by investigative journalists. An example would be NDTV's sting operation in the case against Sanjeev Nanda, or the infamous “BMW hit-and-run” case¹⁵⁶. In this case, the Supreme Court allowed the material gained by the sting operation to stand, favouring free media.

Another example of ‘Sting Operations’ would be that done on schoolteacher Uma Khurana. In 2007 Live India conducted a ‘Sting Operation’ on Ms Khurana and found that she was forcing a girl student into prostitution, which led to Ms Khurana being attacked in public, further, being suspended by the Directorate of Education, Govt. of Delhi. However, after investigations took place and certain reports came to light, it was found that the ‘Sting Operation’ was staged by a journalist posing as the girl student. The High Court of Delhi charged said journalist with, “impersonation, criminal conspiracy and creating false evidence”.¹⁵⁷ Further, the Ministry of Information and Broadcasting issued a show cause notice to Live India making allegations such as the channel being “defamatory, deliberate, [and] containing false and suggestive innuendos and half-truths”.¹⁵⁸

¹⁵⁶ *State v Sanjeev Nanda*, (2012) 8 SCC 450

¹⁵⁷ WP(Crl.) No.1175/2007

¹⁵⁸ Id.

Herein lies the issue with journalistic freedom, and the defence of “identifiable larger public interest”-defined under ‘Content Certification Rules’, 2008 under *Self-Regulation Guidelines for the Broadcasting Sector*, 2008 and reading as “*identifiable larger public interest’ include revealing or detecting crime or disreputable behaviour; protecting public health or safety; exposing misleading claims made by individuals or organizations; or disclosing significant incompetence in public office for the larger public interest*”.¹⁵⁹ Section 5 of the Cable Television Networks (Regulation) Act, 1995, which lays down the Programme Code, and Rule 6(d) of the Cable Television Network Rules, 1994, in the Programme Code itself, cumulatively entail that no programme can be transmitted or retransmitted on any cable service which contains anything obscene, defamatory, deliberate, false and suggestive innuendos and half-truths.

In the aforementioned *Uma Khurana* case, the Court suggested that guidelines be set up for the media to follow (in 2008), and stated that a ‘Sting Operation’ should not violate a person’s right to privacy *unless* there is an “identifiable larger public interest”, however the court *did not* define “larger public interest”. Under PCI norms, as well as the National Broadcasting Standard Authority, a self-regulatory body set up by the National Broadcasters Association, a journalist carrying out a ‘Sting Operation’ must verify by signing certificates as to the genuineness of the operation; however, the decision to broadcast it lies solely with the editor, and the decision as to whether it is in public interest is also upon the editor’s interpretation. As such, though there is a incredulously brief description as to what “identifiable larger public interest” means, under the Cable Television Networks (Regulation) Act, 1995, (and so under the ‘Content Certification Rules, 2008) the definition of “identifiable larger public interest” remains incredibly broad and open to interpretation. It is neither concise nor exhaustive, and lacks comprehension and can be misinterpreted without malice, or even maliciously twisted to a journalist’s whims and fancies.

¹⁵⁹ Indian Broadcasting Foundation, Self Regulatory Content Guidelines for Non-News and Current Affairs Television Channels, available at <http://www.ibfindia.com/sites/default/files/pdf/Self%20Regulatory%20Guidelines%20for%20non-news%20%26%20current%20affairs%20programmes.pdf> (last visited on 13th August 2014)

6) TRIAL BY MEDIA

INTRODUCTION

The concept of “Open Justice” is widely recognized to be the backbone of most judicial systems around the world including our own. Yet, merely giving the general public access to an open courtroom is grossly inadequate as a means of facilitating openness. The enjoyment of the various benefits of open justice rests on such publication and broadcasting of court proceedings that would empower the members of the public to form independent opinions on the basis of an elaborate understanding of the judicial process. The role of the media, therefore, to act as surrogates for the public is well established. In pursuance, therefore, of the widely quoted aphorism “justice should not only be done, but should manifestly and undoubtedly be seen to be done”¹⁶⁰, a free and independent media should stay true to its primary responsibility, which is to inform, guide, advocate, educate and criticize. With the freedom of press having been recognized as a fundamental right under Article 19(1) (a) of the Constitution of India, the media is open to subject the whole field of public affairs including judicial happenings to fearless and harsh comment. However, in order to exercise this function properly, it is imperative that the media has a lively sense of responsibility.

In this context, we would like to point our focus at two issues of contemporary relevance which, if implemented, could go a long way in regulating this phenomenon of Trial by Media.

1. TELEVISIONING OF TRIALS

The Lord Chief Justice of England and Wales welcomed the move to televise the proceedings of the Court of Appeal.¹⁶¹ In his opinion the televising would lead to more awareness about the functioning of the court.¹⁶² The act allows for the appointment of 4 journalists, by the UK Press Council, for 15 courts. The journalists have the discretion to choose which courts to televise. The journalists represent a conglomerate of various media houses. A delay of 70 seconds is put in

¹⁶⁰ R v Sussex Justices, ex parte McCarthy [1923] All ER Rep 233

¹⁶¹ Lord Chief Justice of England and Wales, *Justice in one Fixed Place or Several?*, (Birkenhead Lecture, 2013) <http://www.judiciary.gov.uk/wp-content/uploads/JCO/Documents/Speeches/lcj-birkenhead-lecture-21102013.pdf>

¹⁶² *Id.*

place to enable editing of the video.¹⁶³ As per the legislation, the judge may refuse televisionisation of a particular case and the journalists so appointed would have the right to record court proceedings.¹⁶⁴

Another recent case is that of the trial of Oscar Pistorius, where the High Court of Pretoria allowed for the televising of the trial. The judge, Dunstan Mlambo, stated “Court proceedings are in fact public and this objective must be recognised”.¹⁶⁵

We propose the implementation of a similar model in India, where the Supreme Court or High Court may authorize certain journalists to record proceedings. These journalists would have the right to record the proceedings of the Supreme Court or High Courts only subject to the refusal of the Courts, for which the court will be bound to provide grounds of refusal. A delay in the televising may be put in place to ensure that sensitive information can be protected. However this delay will have to be uniform and applicable in all cases.

Recording of proceedings, would ensure that no sensationalism or exaggeration or misquoting is done in the reporting of court proceedings. Certain guidelines may be laid down to ensure fairness such as televisionisation of an entire proceeding and not merely the arguments of one side, etc. The control mechanisms would be ensured by the Courts in accordance with its contempt powers.

2. QUALIFICATIONS OF REPORTING JOURNALISTS

In a sphere where the use of one word makes a marked difference in the implications of a law, its reporting is usually entrusted to people with no specific qualifications. An instance is found in the reporting of the non-elevation of the retired Chief Justice of the Gujarat High Court, Justice Bhaskar Bhattacharya to the Supreme Court.¹⁶⁶ The skewed reportage highlighted the issue that

¹⁶³ Joshua Rozenberg, *Televising the Courts: the time has come*, THE GUARDIAN (Oct 23, 2013) <http://www.theguardian.com/law/2013/oct/23/televising-courts-live-broadcasting-joshua-rozenberg>

¹⁶⁴ Crime and Courts Act, §32, available at http://www.legislation.gov.uk/ukpga/2013/22/pdfs/ukpga_20130022_en.pdf

¹⁶⁵ *Oscar Pistorius trial can be broadcast live on TV, court rules*, THE GUARDIAN (Feb. 25, 2014) <http://www.theguardian.com/sport/2014/feb/25/oscar-pistorius-trial-broadcast-live-tv-south-africa>

¹⁶⁶ LIVE LAW, *JUSTICE ALTAMAS KABIR ISSUES PRESS RELEASE AGAINST TOI AND INDIAN EXPRESS REPORTS; CLARIFIES STAND IN SAHARA-SEBI MATTER*, (JUL. 23, 2013, AVAILABLE AT, [HTTP://WWW.LIVELAW.IN/JUSTICE-ALTAMAS-KABIR-ISSUES-PRESS-RELEASE-AGAINST-TOI-AND-INDIAN-EXPRESS-REPORTS/](http://WWW.LIVELAW.IN/JUSTICE-ALTAMAS-KABIR-ISSUES-PRESS-RELEASE-AGAINST-TOI-AND-INDIAN-EXPRESS-REPORTS/))

the journalists failed to understand even the basic knowledge of the collegium system. In his opinion, this misquoting led to lowering of his image in the eyes of the public.

Thus, the second suggestion pertains to imposing basic qualifications for journalists to enable them to report Court proceedings. Journalists reporting on on-going cases should have had basic training of law. E.g. Journalists must be able to differentiate between the *obiter* observations of the court and the binding portions of the court orders or judgments. For that purpose, there has to be specialized training of journalist in universities, which would licence them in 'law reporting'. Only such journalists should be allowed in the courts to report the dispute. This would ensure that reporting would be fair and without error.

Q1. What form of regulation, if at all, is required to restrict media reporting of *sub judice* matters?

Of late, the abuse of access to courts by broadcasters coupled with the difficulty in regulating the use of technologies that transcend borders has created an atmosphere of widespread discontent with the media. In what has been a matter of mounting concern, the media has become increasingly proactive in reporting on criminal incidents much before the official investigation is complete, thereby swaying public opinion by making allegations, criticizing the process of police investigation, exposing the past behavior of the accused and asking potential witnesses contextual questions. More often than not, the private lives of individuals are subject to gross intrusions, not necessarily with regard to the issue at hand. Such operation convinces the general public of the complicity of those arraigned by the media, leading to the formation of a concrete opinion about the case prior to the start of the investigation itself. Consequently, such angular coverage by the media invariably leads to the abandonment of the presumption of innocence, to which every accused is entitled as a matter of right.

In light of the above, the purpose behind imposing certain restrictions on media reporting of *sub judice* matters is to prevent the dissemination of certain information, which may prejudice court proceedings and impair the right to a fair trial. More pointedly, it is required to protect the various cogs in the judicial machinery, the judges, parties and witnesses from the likelihood of influence by material, which did not and could not have been used in court under technical rules

of evidence. The objective, therefore, should be to institute a regime, which balances perfectly, the public interest in safeguarding the due process of administration of justice on the one hand, and the public interest in the right to freely express and opionate on the other.

RECOMMENDATIONS

Better Clarity in the Contempt of Courts Act, 1971

The first objective should be to achieve clarity with regard to the law on sub judice contempt. Under the Contempt of Courts Act, 1971, contempt measures can be instituted against publications only when judicial proceedings are ‘pending’ in a court of law. Under the Act, said proceedings become pending, in a civil case, once the plaint is filed¹⁶⁷, and in criminal cases, when the charge sheet or challan is filed, or when the court issues summons or warrants.¹⁶⁸ The proceedings continue to be pending till the matter is subsequently disposed of and during this interval the matter is said to be ‘*sub judice*’. The media is allowed coverage of *sub judice* cases unless the court seized of the matter expressly bars it from the same. It is stated under s.4 of the Contempt of Courts Act, 1971, that “Subject to the provisions contained in section 7, a person shall not be guilty of contempt of court for publishing a fair and accurate report of a judicial proceeding or any stage thereof.”¹⁶⁹ However, what exactly constitutes “fair and accurate reporting” is highly contested. Furthermore, the Hon’ble Supreme Court stated in the *SEBI v Sahara* case (‘*Media Guidelines case*’)¹⁷⁰ that the test to determine postponement of publication is that of “real and substantial risk” of prejudice to the fair and proper administration of justice. Yet, in many cases, a ‘fair and accurate’ reporting of a trial might nonetheless give rise to the ‘real and substantial’ risk of prejudicing associated trials. Precision in defining what standard a media report will have to adhere to in order to be fair and accurate or defining certain acts or omissions by the media that would not come under the purview of fair and accurate reporting is required and will add a welcome clarity to the Act. Although, there are certain restrictions on media reporting of *sub judice* matters in the Act itself, they are riddled with ambiguities. Section 2(c) of the Act, which deals with these restrictions is also too broad and imprecise in its

¹⁶⁷ Contempt of Courts Act, 1971, § 3

¹⁶⁸ *Id.*

¹⁶⁹ *Id.*, § 4

¹⁷⁰ (2012) 10 SCC 603

language.¹⁷¹ The issue in question In that event, it is imperative that the principles of liability be defined with far greater precision so that the media and members of public can know as to what conduct will render them vulnerable to criminal punishment. Furthermore, the Hon'ble Supreme Court stated in the *Media Guidelines* case that the test to determine postponement of publication is that of "real and substantial risk" of prejudice to the fair and proper administration of justice. Yet, in many cases, a 'fair and accurate' reporting of a trial might nonetheless give rise to the 'real and substantial' risk of prejudicing associated trials.

Increased Co-operation between the Media and Judiciary

Secondly, a co-operative relationship between the media and the courts cannot be emphasized enough to ensure minimum risk of prejudice to sub judice matters. Free communication between the media and the judicial establishment is an important step in ensuring that the proper course of administration of justice is not compromised by popular media opinion. The office of a special media information officer can be established responsible for liaising between the media establishment and the various courts present in the judicial hierarchy. Further, with the growing need for professionalism in legal journalism across media houses, it is imperative that the 'legal credibility' of those reporting judicial matters be definitively established. Having a valid legal qualification before being allowed to report on legal matters is an important step towards adopting a more thorough approach towards legal reporting. Understanding the nuances of the law (laws of procedure, evidence, structuring of arguments etc.) is an important prerequisite to reporting it, and courses in legal journalism can help significantly in achieving this end.

Right to Televisе Trials

Thirdly, as a general rule, legal proceedings should be televised. This can be an important step in circumventing an otherwise rough imposition of restrictions on media coverage of *sub judice*

¹⁷¹ Contempt of Courts Act, *supra* note 8, § 2(c) : "criminal contempt" means the publication (whether by words, spoken or written, or by signs, or by visible representation, or otherwise) of any matter or the doing of any other act whatsoever which—"

¹⁷¹(i) scandalises or tends to scandalise, or lowers or tends to lower the authority of, any court; or tc" (i) scandalises or tends to scandalise, or lowers or tends to lower the authority of, any court; or"

¹⁷¹(ii) prejudices, or interferes or tends to interfere with, the due course of any judicial proceeding; or tc" (ii) prejudices, or interferes or tends to interfere with, the due course of any judicial proceeding; or"

¹⁷¹(iii) interferes or tends to interfere with, or obstructs or tends to obstruct, the administration of justice in any other manner;

¹⁷¹

matters. This conclusion is arrived at following the premise that legal proceedings are open to the public, and modern technology allows for the widest possible public audience. There will, inevitably, be cases or parts of cases, which cannot be televised. Public interest, national security and the rights of vulnerable victims need not be compromised in so far as there exists a compelling case for privacy which overrides the general public's right to appraise the judicial process. In pursuance of the same, the media should be given the right to televise legal proceedings subject to an appropriate delay, which the judge can use to selectively remove sensitive information. A committee can be established which decides on the duration of the delay and checks for abuse of discretion by the judge in deciding what part of the proceeding is to be edited. This will have the effect of channeling raw, unfiltered courtroom happenings into the homes of the general public, giving them the option to judge the progress of a particular trial for themselves. Whether the proceedings are fair or not, in what manner are the prosecution and defence structuring their respective cases and whether, on the basis of the evidence adduced, the accused actually looks guilty are all questions that the public can answer for itself without the media informing the debate in line with its biases. Media reporting of legal proceedings more often than not limits the contours of the debate to two or three select issues, which are increasingly driven by bitter competition, blinding the public to the bigger picture. Furthermore, televising trials can also be equally instructive to the general public as is evidenced by one of the earliest filmed trials in history, namely the 'Nuremberg trials', wherein distinguished jurists from around the world presented arguments in unprecedented circumstances. Those that argue against the televising of courtroom procedure today were arguing against televising the deliberations of legislative bodies as well, and these arguments have been resoundingly rejected in the public sphere.

Q.2 Should the application of postponement orders be narrowed down by introducing guidelines/parameters such as kinds of publications to be covered, categories or proceedings which may be covered?

As has been pointed out in the *Media Guidelines case*, the threshold to determine whether or not postponement order is required is determined by the judiciary to be that of "where there is a real and substantial risk of prejudice to fairness of the trial or to proper administration of justice" In

light of this The question has been posed that the vague threshold used by the *Media Guidelines case* bears a risk of abuse of law and such a risk is even likely.

First, we advocate a situation of lesser judicial intervention and methods of improving the quality of and decreasing the sensationalism of legal reporting. In this respect specific guidelines should be given. Enforcing specific guidelines where therefore bring about predictability to the process which is a desirable outcome. However in the process, the fundamental right to speech and the concomitant freedom of press should not be subjected to onerous restrictions. In the *Media Guidelines case* on behalf of the Editor's Guild, Rajeev Dhavan had argued against establishing specific guidelines as they would restrict and put pressure over the right to freedom of speech. We agree with his view in part and hence the guidelines proposed should not be restrictive in the sense of defining fields of operation or coverage. But these should govern the manner in which reporting is conducted. E.g. ensuring that if the highlights of the prosecution arguments are published and evidence pertaining to it has been published, then the highlights of the defence arguments along with evidence also be published. The above example regulates the manner of publication but does not restrict the reportage of legal news. Thus we as the primary mechanism we propose that the postponement powers be regulated, in so far as fair reporting can be ensured..

In the past, the Lok Sabha has attempted to regulate print and electronic media, through the Print and Electronic Media Standards and Regulation Bill, 2012. The bill seeks establish a Print and Electronic Media Regulation Authority with a view to lay down standards to be followed by the print and electronic media and to establish credible and expedient mechanism for investigating *suo motu* or into complaints by individuals against print and electronic media, and for matters connected therewith or incidental thereto.

Around the same time, the Hindu published an article ¹⁷² where the argument was that media is already governed by law as it is regulated by defamation, indecency, obscenity and incitement laws. This argument would also partially be true insofar as these restrictions constitute the broader parameters which ought to be followed. However, this should not repel the legislature to form an authority competent to regulate matters on the manner in which reportage is done.

¹⁷² Swapan Dasgupta, *The media is already governed by law*, THE HINDU (May 15, 2012) <http://www.thehindu.com/opinion/op-ed/the-media-is-already-governed-by-law/article3381143.ece>

Rather than a judicial determination of the reportage of a matter, this could constitute and administrative determination by the so-established authority to decide the extent and manner of reportage pursuant to the guidelines and the facts and circumstances.

Third, this determination and enforcement however cannot be done at the exclusion of the judiciary. Should there be a need to curb the judicial interference then the most efficient mechanism is to make an administrative determination of the dispute subject to appeal. The judiciary would not intervene with the outcome of an administrative determination, so long as the manner of it is reasonable. However the judiciary cannot be entirely excluded from the matter due to reasons of judicial review under Article 136 as well as, the powers of the Court under the Contempt of Courts Act. The reforms in contempt law need to be tied up with the regulation of press so that there is a fair balance between the regulation of media, judicial discretion from a case to case basis and the freedom of speech and expression. Although the Contempt of Court provisions stem from the Constitution, it is important to note they are established through the Contempt of Courts Act. Thus the regulation of fundamental rights by the Court in exercise of its contempt power is subject to reasonable restriction as are the provisions of this Act. Therefore, reforms of contempt law would in fact aid in achieving the balance.

RECOMMENDATIONS

In summary we propose 3 methods which form a comprehensive answer to the question.

1. There is a need to issue guidelines which regulate the method of reportage but do not restrict the freedom of press
2. A body may be constituted which would establish guidelines, revise them and administer their adherence
3. There should be reforms in contempt law, which would also resist judicial interference in these matters.

Q.3 If some form of media regulation is required in reporting of matters which are sub judice, should the same be in the form of a self regulated media or should the courts apply the present law of contempt to check such prejudicial publications?

The regulation of publications made by the media, whether it is print or broadcast, has been viewed to be quite the tight-rope act. Through a five-judge Constitutional Bench, the Supreme Court noted that the balance is drawn between Article 21, right to life and liberty, and Article 19 (1) (a), right to freedom of speech and expression, including freedom of the press.¹⁷³ This is especially true when one looks at publications regarding ongoing trials in Courts. Therefore, the scheme of understanding the nature of the problem at heart is not only to understand the role that media plays in the society, but to what extent.

The law very succinctly notes that any form of disruption or interference in the administration of justice is in clear violation of the rights of the accused/litigant of a free and fair trial.¹⁷⁴ In fact, any form of prejudicial publication of matters *sub-judice* has been noted to be a form of criminal contempt.¹⁷⁵ However, a matter of discourse for many years has been whether this was enough; whether there was a need for a separate form of regulative mechanism which would improve the transparency and better implement the duties imposed upon the media.

Self-Regulating Mechanisms

While noting the freedom of the press as a concomitant right accruing from Article 19(1)(a), independence of the media in a democratic country is paramount. In the words of a recent Chief Justice of India, freedom of press is the “Ark of the Covenant of democracy [as] public criticism is essential to the working of its institutions”.¹⁷⁶ Therefore, it is important that there is some form of self-regulation of the media, so as to keep its independence and integrity.

Regulation in this country of the media has primarily been under the guise of various institutions, be it the Press Council of India, News Broadcasters Association, or the Broadcast Editors Association, all of whom are constituted by a majority of news agencies. However many have noted that these organizations are futile due to their toothless powers. This was admitted even by the chairmen of these respective organizations, where they noted that many channels or news

¹⁷³ J. Venkatesan, *Supreme Court to frame norms for media on reporting court proceedings*, THE HINDU (Mar. 28, 2012) <http://www.thehindu.com/news/national/supreme-court-to-frame-norms-for-media-on-reporting-court-proceedings/article3251747.ece>

¹⁷⁴ 200th Report on Trial By Media, *Free Speech and Fair Trial Under Criminal Procedure Code*, 1973, (Law Commission of India, 2006) <http://lawcommissionofindia.nic.in/reports/rep200.pdf>

¹⁷⁵ Id.

¹⁷⁶ Prashant Jha, *CJI criticises media excesses, but bats for ‘self-regulation’*, THE HINDU (Jul. 24, 2013) <http://www.thehindu.com/news/national/cji-criticises-media-excesses-but-bats-for-selfregulation/article4946645.ece>

outlets opt out of voluntary membership of these associations if they do not want to follow its rules or pay the fine¹⁷⁷. In fact, the only power of reprehension provided to the Press Council of India in its constituting statute is under Section 14, which allows the regulating body to only warn, admonish or censure the newspaper, the news agency, the editor or the journalist for offending the standards of journalistic ethics or public taste¹⁷⁸. Therefore, the need of the hour is a stronger regulating agency which has the tools to better implement its role of preserving the freedom of the media while maintaining its standards.

In this regard, an interesting model was formulated by the Leveson Inquiry¹⁷⁹, which was sanctioned by the British Government in 2011. Its purpose was to essentially consider the extent to which the current regulatory regime has failed and whether there has been a failure to act upon any previous warnings about media misconduct, and furthermore to recommend a format which would adequately tackle the problem of unlawful or improper conduct. The report supported a model where a new independent body would be formed which would be entrusted with certain sanctioning powers, including fines and direction of the prominence of apologies and corrections. It noted that membership to the body must be voluntary, and incentivised by schemes such as standard certifications and an inquisitorial arbitration service for handling tort claims such as libel and breach of privacy, and by allowing exemplary damages to be awarded in cases brought against non-participants of the body.

A similar scheme was also propounded by Justice Markandey Katju, the present Chairman of the Press Council of India, who noted that the lack of teeth of the Press Council has proven the institution to be redundant; a similar dilemma suffered by the other media regulatory authorities such as the NBA and the BEA.¹⁸⁰ Therefore, he asked for a singular body, the Media Council of India, which would have regulatory authority over print and broadcasting media, and be entrusted with punitive sanctioning powers. He noted that the membership of the Board can be similar to the present structure of the Press Council, where a majority of membership would

¹⁷⁷ Mahima Kaul, *India's media watchdogs discuss need for universal regulation*, INDEX (Sept. 10, 2013) <http://www.indexoncensorship.org/2013/09/indias-media-watchdogs-discuss-need-universal-regulation/>

¹⁷⁸ Press Council of India Act, 1978, available at http://presscouncil.nic.in/Content/12_1_PCAct1978.aspx

¹⁷⁹ Levenson Inquiry on Media Regulation, 2011, available at <http://webarchive.nationalarchives.gov.uk/20140122145147/http://www.levesoninquiry.org.uk/rulings/>

¹⁸⁰ Markandey Katju, *Media cannot reject regulation*, THE HINDU (May, 23, 2014) <http://www.thehindu.com/opinion/lead/media-cannot-reject-regulation/article3374529.ece>

accrue from the various media organizations, while a certain stipulated number would be selected from various organizations, as well as the Parliament¹⁸¹.

RECOMMENDATION

In propagating such a solution, we recommend the creation of an independent regulatory authority comprising of media agencies, both print and broadcast, along with members nominated from the Parliament and other eminent and relevant governmental and non-governmental organizations. We submit that apart from its essential role of promoting the independence and integrity of media's role in our country, such an authority must be empowered with such punitive sanctioning powers which would create adequate disincentives, such as imposition of fines and prominence of apologies and corrections, as noted by the Leveson Inquiry.

¹⁸¹ *Id.*

7) DEFAMATION

INTRODUCTION

At present, defamation in India is dealt with both under criminal law (section 499 of the Indian Penal Code, 1860) as well as civil law (law of torts). While the Constitution of India under Article 19(1)(a) guarantees the freedom of speech and expression, it is limited by reasonable restrictions under Article 19(2). There is no separate standard for the applicability of the same to journalists despite the seminal nature of their work in our democracy. As pointed out by the Law Commission, there is “an urgent need to balance the instances of fake sting operations or trial by media which give credence to allegations of irresponsible journalism on one hand and on the other, the threats of legal action with punitive damages under the laws of defamation leading to a ‘chilling effect’ on the publication of free and independent news articles which puts undue pressure on journalists and publishing houses”. Therefore, the question posed by the Law Commission deserves extensive consideration as to whether there should be modifications in the law of civil and criminal defamation as it applies to journalists and of what nature.

On reading of various opinions and discussions, the following problems with respect to defamation laws in India have been identified and briefly discussed, followed by possible solutions including opinions from various forums:

1. Decriminalising defamation – international opinion:

The UN Human Rights Committee, on 21 July 2011, adopted General Comment 34 on State parties' obligations under Article 19 of the International Covenant on Civil and Political Rights (ICCPR). Of particular importance was the emphasis laid on the fact that in cases of defamation, “imprisonment was never an appropriate penalty”.¹⁸² Paragraph 23 particularly stated that “effective measures to protect against attacks aimed at silencing those exercising their right to freedom of expression” must be taken by States and defamation laws should not in practice serve to stifle freedom of expression.¹⁸³

¹⁸² Office of the High Commissioner for Human Rights, United Nations Human Rights Committee, Regional Office for South East Asia, General Comment No. 34 on Article 19 of the ICCPR, available at

¹⁸² <http://bangkok.ohchr.org/programme/documents/general-comment-34.aspx> (Last visited on August 12, 2014).

¹⁸³ See *id.*

While defamation is a reasonable restriction to the freedom of speech and expression guaranteed under the Constitution, criminalising defamation is a measure which is more harmful than other alternative ways to regulate defamation. International opinion on the topic seems to be in favour of the same.¹⁸⁴

2. Punishing through the process:

- Criminal trials tend to take years to be completed, and prolonged pre-trial detention of suspects is common.
- Those who can't afford money for bail bond languish in prison for years as under-trials.
- Compensation for wrongful arrests is rarely awarded.
- The threat of being arrested, held in pre-trial detention and subjected to tedious criminal trials creates a situation where “the process is the punishment”.
- Criminal defamation charges have become a tactic to intimidate the media as filing a suit costs nothing but defending it is not a situation any journalist or media house would want to be in, given the reasons cited above
- This leads to a ‘chilling effect’ on the media.

3. No check on SLAPP:

¹⁸⁴ The UN Human Rights Committee (HRC), which also monitors state compliance with the ICCPR, has urged states to consider decriminalizing defamation. *See also* International Press Institute, *IPI White Paper: Our Stand on Criminal Defamation*, available at

¹⁸⁴http://www.freemedia.at/fileadmin/resources/application/IPI_White_Paper_Website_Version_Final.pdf (Last visited on 1st August, 2014); *See also* International Press Institute, *Ukraine puts a halt to plan to re-criminalise defamation*, available at

¹⁸⁴<http://ipi.freemedia.at/special-pages/newssview/article/update-ukraine-puts-a-halt-to-plan-to-re-criminalise-defamation.html> (Last visited on August 1, 2014); *See also* Human Rights Europe, *Human rights commissioner urges defamation law re-think*, available at

¹⁸⁴<http://www.humanrightseurope.org/2014/06/italy-human-rights-commissioner-urges-defamation-law-re-think/> (Last visited on August 1, 2014); *See also* Amnesty International India, *India: Legal reform crucial to protect right to free speech*, available at

¹⁸⁴<http://www.amnesty.org/fr/library/asset/ASA20/024/2014/en/f6f8e202-8fec-48a9-b1f9-b07abdacbf8c/asa200242014en.pdf> (Last visited on August 1, 2014)

Even if a defamation suit ends in favour of the accused, the only remedy available to him for all the trouble undergone is another tiring legal battle – a suit for malicious prosecution. There is no mechanism to check a Strategic Lawsuit against Public Participation (SLAPP), which results in easy heckling of free speech by any person with the resources to initiate proceedings that are SLAPP in nature.

There is an urgent need to curb heckling of the press and journalists with vexatious criminal suits. Indeed, just the threat of punitive criminal action can be enough to serve as an effective deterrent to the publishing of future allegations. Of course, along the way it also scuttles legitimate criticism and opinion. Only the thick-skinned will point fingers at public figures, since the uninitiated would want to avoid getting involved in court proceedings.

At the same time, defamation is not a matter to be treated callously, since damage done to reputation is often irreparable and must have consequences to serve as deterrent to protect people from defamation. What becomes critical therefore is balance: The fine equilibrium required between protecting freedom of speech, fair comment and criticism (including investigative journalism and whistleblower action) on the one hand and transgression into malicious defamation of a person for oblique or political purposes on the other.

This also calls for differential standards when dealing with different groups of people in a defamation suit.

4. Chilling effect – maintaining a balance while creating differential standards:

The U.S. toyed with the legal concept of the “chilling effect” to get this balance right. Anything – law, legislation or threat of lawsuits – that stifles legitimate expression or political debate amounts to having a chilling effect on the freedom of speech.

Justice Brennan of the U.S. Supreme Court in the landmark 1964 case of *New York Times v. Sullivan*¹⁸⁵ provided for a constitutional guarantee where a public official would only have a claim to damages in case of defamation if he could prove that the statement was made with actual malice, that is, with knowledge that it was false or with reckless disregard for truth. This high burden of proof on a public official indicates the need for different standards when treating

¹⁸⁵ *New York Times v. Sullivan*, 376 U.S. 254 (1964)

cases of defamation of any private individual versus that of a public official and ensures that there is scope for legitimate public criticism and opinion. “The censorial power is in the people over the Government and not in the Government over the people.”¹⁸⁶

The threshold for treating political libel as defamatory has to be higher to prevent suppressing of criticism that is not malicious.

5. Varying Thresholds for Journalists:

As per the recommendations of the First Press Commission of 1952-54, it was stated that criminal defamation should be used only under the **threat to peace**. There are reasonable restrictions which are placed under Article 19(1)(a) with regard to the restrictions on the freedom of speech which must necessarily be reasonable in nature. The fundamental nature of the right of an individual being able to speak freely is essential considering the nature of the right. In *Bennett Coleman v. Union of India*¹⁸⁷, such reasonable restriction must **necessarily be aimed at regulation and must not result in a scenario where there exists a total lockdown**.

Journalists deserve in this regard a far higher threshold with regards to individuals who may be a part of any other profession. The nature of journalism is, in itself, a profession where freedom of speech is a necessity. The freedom of the press to be allowed to express their opinions freely has numerous advantages. Such power vested in their hands allows for the weak and disadvantaged in society to have a voice, and in this regard the media has a protective role. It is important to note that according to Amartya Sen¹⁸⁸, there has been no substantial famine which has ever occurred in an independent country with a democratic government and a free press. A free media allows for public criticism, and for the sake of the elections, there is a stronger incentive to avert a crisis would be present than in the absence of such criticism. The media plays a large role in the dissemination of knowledge and allows for critical scrutiny. Investigative journalism can often unearth information which would have otherwise remained unknown. The media also, quite importantly allows for a stage for free argument and communication. Values evolve over time and in a free press, where interaction is possible, newer norms are established over time,

¹⁸⁶ Id. James Madison, as quoted by Justice Brennan in *New York Times v. Sullivan*.

¹⁸⁷ *Bennett Coleman v. Union of India*, AIR 1973 SC 106

¹⁸⁸ Amartya Sen, *What's the Point of Press Freedom*, May 3, 2004, available at www.wan-press.org/IMG/doc/int-en_sen.doc (Last visited on August 1, 2014).

which emerge through public discussion and spreads over regions through the media as well. The present call for gender equality is a case in point.

Where the media plays such a crucial role in development of society over a period of time, journalists arguably need a special degree of protection. Where the role of journalists is overly critical in a country where the media is largely free and relies largely on a self-regulatory framework, there must be the opportunity for journalists to be able to use the freedom of speech to the utmost. A criminal defamation lawsuit especially can have a crippling effect on the right of the press to practice their freedom of speech. An offence under the IPC is to put an absolute bar on the process. There is a necessity to guarantee public order, and as such is very different from protecting reputations. In *Castells v. Spain*¹⁸⁹, it was held that the dominant position of the Government makes it necessary for restraint to be shown in resorting to criminal proceedings where there are adequate means for replying to unjustified attacks and criticisms. There have been OAS Special Mandates¹⁹⁰ which have specifically sought to completely replace criminal defamation laws with only civil defamation laws.

For journalists who go to great lengths to possibly publish findings on the matter of public interest, it is imperative that a shield is available to them against criminal proceedings. Unless statements are to be shown to be made in a reckless manner with no findings to base such statements upon, there cannot be case for the application of criminal defamation. There have been numerous reports on journalists being suppressed through criminal defamation of lawsuits in spite of there being substantial evidence to make inferences from.¹⁹¹ As long due care was taken and the statement was published in public interest, as was decided in *Rajagopal v. State of Tamil Nadu*¹⁹² criminal defamation should not be made applicable to journalists.

¹⁸⁹ *Castells v. Spain*, 14 EHRR 445.

¹⁹⁰ Report of the Joint Declaration, OSCE Representative on Freedom of the Media and the OAS Special Rapporteur on Freedom of Expression, *UN Special Rapporteur on Freedom of Opinion and Expression*, U.N. Doc. A/HRC/14/23 (April 20, 2010).

¹⁹¹ DNA Correspondent, *Pradeep Sharma files defamation case against Madhu Kishwar* DNA INDIA (Ahmedabad) November 29, 2013.

¹⁹² *Rajagopal v. State of Tamil Nadu*, AIR 1995 SC 264

There are arguments to do away with criminal defamation for journalists, however, a piece of news in the media can have a lasting impression on the public at large and thus call for stringent measure to prevent misuse of such power. Journalists in popular newspapers have the readership of millions of readers. There must necessarily be a certain amount of care taken to not put up malicious statements purely aimed at defaming an individual. Eminent journalist Mr. Prannoy Roy has asked for strong defamation laws to discipline journalists, many of whom take the advantage of a lax framework in self-regulation to take up a free hand in defaming personalities.¹⁹³ A baseless claim, having the potential to defame a person must be discouraged and in the absence of better laws, the presence of Section 499 of the Indian Penal Code may still be a wise presence. **A criminal sanction amounts to total prohibition** and for journalists, being within the ambits of being able to approximately base their findings, there should be some leeway given to them instead of threatening criminal proceedings against them.

Unless there is a threat to public security due to statements which may have been made in a reckless manner¹⁹⁴, there cannot be an argument for criminal defamation suits. However, journalistic freedom must include the platform for a journalist to present his or her own views irrespective of intolerance. The importance of journalistic freedom has already been highlighted and any clamping down on the same can be disastrous. There must an attempt to protect responsible journalism through legislation. There are the two issues of the importance of a free media and the problems with irresponsible reporting which must be balanced in amending or introducing new laws dealing with defamation, especially relating to journalists.

Recommendations

- In keeping with the discussion above, we propose the decriminalisation of defamation and codification of civil defamation laws to ensure regulation. The civil defamation laws can look at alternative remedies in the form of recognising speedy apologies, retractions and corrections as remedies along with damages. Damages could be regulated on a case to case basis and need not be exemplary in nature unless necessary. Codification would have the

¹⁹³ Shuchi Bansal, *We need tough defamation laws: NDTV's Prannoy Roy*, LIVEMINT (New Delhi) March 19, 2014.

¹⁹⁴ Jerome Taylor, *Editor arrested for 'outraging Muslims'*, THE INDEPENDENT (Kolkata) February 12, 2009.

added benefit of removing uncertainty from the judicial process that often accompanies tort cases.

- We support suggestions by other organisations such as iProbono’s recommendation¹⁹⁵ that there is a need to carve out law to protect what it called “legitimate voices” from defamation allegations. Alternatively it suggested amendments to Indian procedural laws to enable courts to summarily dismiss defamation suits that are SLAPP.¹⁹⁶ Order 7 Rule 11 of the Code of Civil Procedure (CPC), 1906 provides for “rejection of plaint” and in keeping with these suggestions, it could be amended to allow for the same. This would prevent the judicial process from becoming a weapon against public participation.
- We also support the suggestions put forth by Amnesty International India, arguing for the codification of the law on civil defamation.¹⁹⁷ By allowing for correction and apologies as remedies and limiting the damages awarded to claimants to being restorative and not punitive in nature, a balance can be struck between the degree and nature of defamation and the penalty for the same.
- With respect to different standards for treating political libel and journalists, we could draw from the various laws and models in place around the world to define these terms in a way which strikes an appropriate balance as discussed before. A definition for public figures would allow for a different standard to be applied to them in cases of defamation thereby countering the fear of snuffing out legitimate criticism and opinion on matters of public interest. Drawing from the example of the U.S. Supreme Court, public officials could be defined to include persons “seeking governmental office” and to those who involuntarily “occupy positions of such persuasive power and influence that they are deemed public figures for all purposes”.¹⁹⁸ The recently adopted concept of PEPs or Politically Exposed

¹⁹⁵ iProbono, News, *4 things that the Law Commission must fix in Indian freedom of speech laws: Amnesty, iProbono*, June 2014, available at

¹⁹⁵ <http://www.i-probono.com/news-more?id=51> (Last visited on August 12, 2014).

¹⁹⁶ *See id.*

¹⁹⁷ Amnesty International India, *Amnesty International India submission to the Law Commission of India*

¹⁹⁷ June 20, 2014, available at

¹⁹⁷ [http://www.amnesty.org.in/images/uploads/articles/Amnesty_International_India_submission_on_media_laws_\(with_summary\).pdf](http://www.amnesty.org.in/images/uploads/articles/Amnesty_International_India_submission_on_media_laws_(with_summary).pdf) (Last visited on August 12, 2014).

¹⁹⁸ *Gertz v. Robert Welch, Inc.* (1974) 418 U.S. 323.

Persons, in international money laundering law, offers a useful illustration as well.¹⁹⁹ It includes, “individuals who are or have been entrusted domestically with prominent public functions, for example, heads of state or of government, senior politicians, senior government, judicial or military officials, senior executives of state-owned corporations, important political party officials.”²⁰⁰

- In addition to this, the co-regulatory models proposed in this paper would allow for checks and balances to be placed ensuring responsible journalism to help eliminate the need for criminal defamation laws.

¹⁹⁹ Anish Dayal, The Wall Street Journal, India Real Time, *Inside Law: How Defamation Works in India*, November 15, 2012, available at <http://blogs.wsj.com/indiarealtime/2012/11/15/inside-law-how-defamation-works-in-india/> (Last visited on August 12, 2014)

²⁰⁰ *See id.*

8) GOVERNMENT OWNED MEDIA

INTRODUCTION

The media today has transformed from a mere information source to a body that could qualify as the fourth arm of the state, alongside the legislative, executive and judiciary. This body plays a pivotal role as a medium for speech and expression, through broadcast and publication of information or entertainment. For this purpose, questions grow of its ownership as a complete autonomy of power could lead to its abuse. While addressing questions of inadequate independence in government owned media, we shall restrict our scope to broadcast of news or any other public information. A key assumption within the arguments presented is that ownership bestows control. This however does not exclude other forms of control leading to structural ownership, such as, regulations, which may be either directly influencing content, or indirectly in the form of number of shares that are permissible to be held or prohibiting cross media ownership, government incentives and necessity of approvals such as appointment of the editor in chief.

Recommendations to the questions are provided below:

I. What regulations should be brought in to ensure independence?

One of the critical criticisms of government owned media through broadcasting, radio, print, etc. has been the underlying factor of politically motivated or biased reporting. In all such incidents the primary defense from the government lies in the fact that the reporters are private journalists who are not government employees.²⁰¹ In light of the above, we propose regulations that ensure content and financial independence and measures that enhance credibility. The regulations have been enumerated as follows:

A. Measures to create accountability within the Prasar Bharati Act, 1990

²⁰¹ Nireekshak, *Privilege and Partisanship*, January 11, 1975, available at <http://www.jstor.org/stable/4536789> (Last visited on August 5, 2014).

A key factor in ensuring accountability within government owned bodies is to promote autonomy and accountability. We recommend the division of powers between an Executive Board which would be primarily responsible to deliver media services and a Trust that would be the sovereign wing, which follows a non interference policy with the Executive Board while being the source of income and regulator of license fee payers. Similar to the Royal Charter constituting the British Broadcasting Corporation,²⁰² an explicit recognition of the body's editorial independence must be set out to the public²⁰³. In addition, there may be a promotion of commercial subsidiaries that could also provide an alternate source of finances for the body and allow for greater flexibility in content that may not necessarily focus on public interest. Apart from the need to change structure of these bodies, an overarching regulating body, such as an ombudsman as enacted within Swedish Laws²⁰⁴, could be created to allow for specific legal action.²⁰⁵

B. Measures to be undertaken to allow for coverage under other Regulators

While this group of media operates in a separate domain, specific coverage by competition regulators apart from application of the Right To Information Act, 2005 would promote transparency in the form of open accounts and increase quality of content. The exclusive character of government owned media restricts participants from the public from critiquing its operations due to a vacuum in information of its functioning. The above regulations would act as an additional check to monopolization that could curtail the right to freedom of speech and expression.

C. Measures to prevent selective funding

²⁰² Broadcasting- Copy of Royal Charter for the continuance of British Broadcasting Corporation, October, 2006, available at: http://downloads.bbc.co.uk/bbctrust/assets/files/pdf/about/how_we_govern/charter.pdf (Last visited on August 5, 2014).

²⁰³ *Fernando v. The Sri Lankan Broadcasting Corp & Ors* (1996) (1) SLR (157)

²⁰⁴ Freedom of the Press Act, 1766

²⁰⁵ DVR Murthy, *Question of Public Accountability of the Media: An Analysis of Journalists' Perceptions*, available at: <http://bibliotecavirtualut.suagm.edu/Glossa2/Journal/dec2007/Question%20of%20Public%20Accountability%20of%20the%20Media.pdf> (Last visited on August 5, 2014).

In the case of *Rust v. Sullivan*²⁰⁶ the United States Supreme Court highlighted the problem of pervasive control through selective funding. In these cases the government indirectly controls the media by allowing subsidies or incentives to certain groups that publish information most favored.²⁰⁷ This threatens both private and government owned media, as they function to cater to certain blocks or groups. In the alternative, efforts could be made to create divisions for nonprofit journalism that specific groups through disclosure could sponsor highlight issues of public interest and such initiatives.

D. Measures to create accountability of funds

While the Sovereign wing would promote the primary source of finance to the body, funds may be received through advertisements or sponsorships. Such funds while necessary must be regulated in a manner to create transparency and impartiality. Therefore, we recommend disclosure of the nature of the commercial relationship or clear messages of sponsorship credit.²⁰⁸ Further, we recommend placing mandatory application of the Code of Self Regulation in Advertising as evolved by the ASCI to ensure that the quality and credibility of content. In essence, any reasonable person in public with ordinary intelligence and imperfect recollection should be able to identify the source of promotional information whether that may be by a private body or by a political party.

E. Measures to be adopted to prevent motivated advertising

A primary basis of criticism of government owned media across the world is that of use of this platform to promote propaganda. Therefore we recommend prohibition of political advertising that is defined as any advertisement that is inserted on or behalf of any body

²⁰⁶ 500 U.S. 173, 192-200.

²⁰⁷ Neerakshak, *Not-so Hidden Persuasion*, available at: <http://www.jstor.org/stable/10.2307/4363616?Search=yes&resultItemClick=true&searchText=%22government%20owned%20media%22&searchUri=%2Faction%2FdoBasicSearch%3FQuery%3D%2522government%20owned%20media%2522%26amp%3Bacc%3Don%26amp%3Bwc%3Don%26amp%3Bfc%3Doff> (Last visited on August 5, 2014).

²⁰⁸ Advertising and Sponsorship Guidelines for BBC Commercial Services, § 2.5, available at: <http://www.bbcworldwide.com/media/72775/advertising%20&%20sponsorship%20guidelines%20feb%202013.pdf> (Last visited on August 5, 2014).

with partial or whole political nature to meet a direct political end or in connection with an industrial dispute. Further we define ‘political end’ as the advertisements²⁰⁹:

- (a) Influencing the outcome of elections or referendums, whether in the United Kingdom or elsewhere;
- (b) Bringing about changes of the law in the whole or a part of the United Kingdom or elsewhere, or otherwise influencing the legislative process in any country or territory;
- (c) Influencing the policies or decisions of local, regional or national governments, whether in the United Kingdom or elsewhere;
- (d) Influencing the policies or decisions of persons on whom public functions are conferred by or under the law of the United Kingdom or of a country or territory outside the United Kingdom;
- (e) Influencing the policies or decisions of persons on whom functions are conferred by or under international agreements;
- (f) Influencing public opinion on a matter, which in the United Kingdom, is a matter of public controversy;
- (g) Promoting the interests of a party or other group of persons organized, in the United Kingdom or elsewhere, for political ends.

In addition the above, prohibition of any form of religious advertising or that for pornography, tobacco products, banned substances, weapons apart from those mandated by the Advertising Standards Council of India.

II. How should these regulations be enforced?

In order to achieve the above, we suggest specific amendments to sections within the Prasar Bharati Act, 1990 that are enumerated below:

Section 12 (1)(b) –*“safeguarding the citizen’s right to be informed freely, truthfully and objectively on all matters of public interest, national or international, and*

²⁰⁹ Communications Act, 2003, § 321 (that defines advertising standards in the United Kingdom) available at: <http://www.legislation.gov.uk/ukpga/2003/21/section/321> (Last visited on August 5, 2014).

presenting a fair and balanced flow of information including contrasting views without advocating any opinion or ideology of its own;”

Within this section, we recommend creating a mandatory provision to disclose the sponsor, author or creator of the content to ensure a distinction between the opinion of the broadcaster and the sponsoring body. It must make it mandatory that a reasonable man may decipher a clear commercial relationship between content and sponsor.

Section 12 (6)- *“The Corporation shall be subject to no civil liability on the ground merely that it failed to comply with any of the provisions of this section”*

We recommend an amendment to this section in order to place a civil liability under the ombudsman created that checks abuse of power or corruption as well as any other form of liability that would ordinarily be imposed by competition regulators, RTI, Advertising Standards Council of India or any other legal liability under any laws that are operational within the jurisdiction of India. Such action must be permitted to be initiated by any concerned member of the public who need not have to establish the specific grievance caused to him.

- **Section 23- *Power of Central Government to give directions.—(1) The Central Government may, from time to time as and when occasion arises, issue to the Corporation such directions as it may think necessary in the interests of the sovereignty, unity and integrity of India or the security of the State or preservation of public order requiring it not to make a broadcast on a matter specified in the direction or to make a broadcast on any matter of public importance specified in the direction. (2) Where the Corporation makes a broadcast in pursuance of the direction issued under sub-section (1), the fact that such broadcast has been made in pursuance of such direction may also be announced along with such broadcast, if the Corporation so desires***

We recommend an amendment to sub-section (2) where we propose that instead of “may” it should be read as “shall”, implying that whenever the Corporation follows the direction

of the Central Government to make or not to make broadcast on a specified matter, the Corporation shall mandatorily announce to the viewers that the broadcast that is being made is under the directions of the Government and is not the view of the broadcaster. This would ensure that people can distinguish between mandatory Government guidelines and the broadcaster's views.

- ***Chapter II – Establishing and Composition of the Executive Board***

We recommend that this chapter be modified to bring about a clear and separate distinction between the members of the Executive Board that would be responsible for editorial content and creating a sovereign wing such as a Trust that would operate finances provided by the government. As per Section 3 of the Act, it is evident that the body functions as any other body corporate and therefore its employees must be appointed similar to that of any other corporation. The editor in chief may however be appointed as laid down as per Section 4, but other members must be appointed in consultation with a nomination committee in addition to the requirements of the present Prasar Bharati Act. Such nomination committee must consist of members of the judiciary, reputed members of the Press, chairman of the Competition Commission and follow a structure similar to the Lokayukta set up in several states to check corruption.

- ***Inserting a Section that brings the body under the purview of the Comptroller and Auditor General***

In order to meet the recommendations of financial independence we recommend annual audits of all accounts that hold records of not only government funding but other sources of income whether that may be from a political party, private individuals, foreign investment or sponsors so as to bring a check on content and credibility.

9) PUBLICATION AND CONTEMPT OF COURTS

INTRODUCTION

There is no denying the fact that freedom of the press has been recognized as a separate freedom under the ambit of the Fundamental Right of Freedom of Speech and Expression.²¹⁰ Though the press has been given ample freedom to express its opinions, the law of contempt of court has usually restricted the actual freedom of the press in reporting judgments and opinions on the judicial discourse, by means of the Constitutional limitation prescribed under Article 19(2).

The law of ‘criminal’ contempt of court as espoused in Section 2(c) of the Contempt of Court Act, 1971 seeks to protect the administration of justice and judicial proceedings. However, it has widely been used as a threat to deter journalists from making any unfavourable remarks or presenting any form of criticism against an individual judge or against the judiciary as a whole.²¹¹

Various case laws stand testimony to the fact that judges have emphasized on the importance of freedom of press to express their reasonable opinion, as was seen in the guidelines drawn in *Perspective Publications v State of Maharashtra*²¹² which include “It is open to anyone to express fair, reasonable and legitimate criticisms of any act of conduct of a judge in his judicial capacity or even to make a proper and fair comment on any decision given by him because ‘justice is not a cloistered virtue and she must be allowed to suffer scrutiny and respectful, even though outspoken, comments of ordinary men.’” and in *re S Mulgaokar*²¹³ wherein the Court laid “B) The second principle must be to harmonize the constitutional values of free criticism. A happy balance has to be struck, the benefit of the doubt being given generously against the judge, slurring over marginal deviations but severely proving the supremacy of the law over

²¹⁰ *Brij Bhushan and Another vs. The State of Delhi*, AIR 1950 SC 129; See also *Sakal Papers (P) Ltd vs. Union of India*, AIR 1962 SC 305.

²¹¹ The Hoot, *Press Laws Guide*, available at <http://www.thehoot.org/web/home/cyber2.php?cid=51&sid=6291> (Last visited on 10 August, 2014)

²¹² *Perspective Publications v State of Maharashtra*, AIR 1971 SC 221

²¹³ *in re S Mulgaokar* AIR 1978 SC 72

pugnacious, vicious, unrepentant and malignant contemnors, be they the powerful press. While invoking the power, constitutional value of free criticism and especially of the press had to be harmonised. Balance had to be struck, benefit of doubt being given generously against the Judge. While considering this, if it is found that the freedom of expression was fairly exercised, public justice could not gag it because free people are the guarantors of fearless justice.” Moreover, the Contempt of Court Act, 1971 has by itself granted these rights to the Press by declaring that innocent publication and distribution during the pendency of proceedings²¹⁴, fair and accurate reporting of judicial proceedings²¹⁵ before any Court sitting in chambers or in camera²¹⁶ and fair criticism on the merits of any decided case²¹⁷ would not constitute contempt, provided such reporting casted no aspersions on the judges, was not against public policy or scandalized the Court.²¹⁸

However, the decision of classifying the reporting as “justified” and “founded on reasonable facts” or even “reasonable and fair criticism” rests entirely with the judiciary, who have time and again been seen to pass orders against the press leading to fears of self-censorship. In 2004, Zee News’ Vijay Shekhar was made to produce an unconditional apology for causing grave disrepute to the judiciary by conducting a sting operation that claimed to show how a particular Magistrate was accepting bribes.²¹⁹ Though, Vijay Shekhar’s findings were validated by a CBI inquiry, there existed a great danger of him being imprisoned for contempt of court and he was lucky to have escaped with just providing an apology.²²⁰ In 2007, four journalists were sentenced to imprisonment in a *suo motu* contempt proceeding for publishing articles and a cartoon accusing a former Chief Justice of corruption, without allowing them to present truth as a defence or holding an independent inquiry to verify their claims. As recent as 2013, Justice Gyan Sudha Mishra of the Supreme Court was heard to have sent a letter to the Times of India, charging one

²¹⁴ The Contempt of Court Act, 1971, § 3

²¹⁵ The Contempt of Court Act, 1971, § 4

²¹⁶ The Contempt of Court Act, 1971, § 7

²¹⁷ The Contempt of Court Act, 1971, § 5

²¹⁸ Advocate General v. Abraham George 1976 Cr. LJ 158.

²¹⁹ Saurav Dutta, *The Supreme Court's Ruling On Contempt Is Boost For The Press, But Also Rule Of Law*, July 29, 2014 available at <http://www.scroll.in/article/671949/The-Supreme-Court's-ruling-on-contempt-is-boost-for-the-press,-but-also-rule-of-law> (Last visited August 10, 2014)

²²⁰ Id.

of its senior journalists with contemptuous reporting.²²¹ The journalist had remarked on the habitual unpunctuality of the Supreme Court judges based on factual evidence. Though, the charges were dropped eventually, it was evident that he escaped prosecution by a thin margin.²²²

Whilst some may say that the recent decisions of the Supreme Court dismissing the contempt proceedings against Arun Shourie on the grounds of the defence of truth, provide a positive indication towards the freedom of press to publish critiques of the judges or their judgments bona-fide, in public interest and after prior verification of facts, certain amendments need to be introduced in the law of contempt of court to ensure greater freedom to the press.²²³

SUGGESTIONS

1. Strengthening of the Defence of Truth promoting an atmosphere of criticism, fair and free reporting and judicial accountability

As the defence currently stands, the alleged contemnors not only have to prove the truth of their claims, but also prove that statements they made were in public interest and were made bona-fide, without any ill-will or malice. However, with the same Courts as have been criticized adjudicating upon the questions of what publications constitute “public interest” and “bona-fide”, there remains the sheer lack of any objective standard of determining whether a publication amounts to contempt of court.

Suggestions have been made in the past to remove the requirement of showing ‘public interest’ over and above bona-fide truth, in order to strengthen the defence and reduce the powers in the hands of the court, considering that the right to know is one of the fundamental rights of the public at large. In this context, Mr. Ram Jethmalani’s very pertinent suggestion to amend the phraseology to give less discretionary powers to the judges who would never permit the defence if imputations of dishonesty and corruption of judges are made, is as follows: *“No imputation against the Judge shall be punishable as contempt, if imputation is substantially true or in good*

²²¹ Times of India, *Judges Time Not Dirt Cheap*, June 19, 2013 available at <http://timesofindia.indiatimes.com/india/Judges-time-not-dirt-cheap/articleshow/20658201.cms> (Last visited August 10, 2014)

²²² Id.

²²³ Subramanian Swamy v Arun Shourie, Supreme Court, Contempt Petition No. 11 of 1990

faith believed to be true.” Due consideration to the above phraseology can be considered, keeping in mind the definition of good-faith under the Indian Penal Code. Perhaps, a definitive definition of “public interest” could be provided to ensure transparency and the effective use of the defence.²²⁴

Moreover, the amendment to Section 13 of the Contempt of Court Act, 1971 only allows the alleged contemnors to invoke truth as a valid defence to the alleged contempt at a later stage: at the time of sentencing and not earlier. Further amendments to the Section are thus necessary and have been suggested by the Parliamentary Standing Committee in its 12th Report on Personnel, Public Grievances, Law and Justice to include amendments to the phrasing as “*no one shall be held guilty of contempt of court by making or publishing any statement relating to a Judge or court which is true or which he, in good faith, believes to be true.*”

2. Free Trial

It is true that an accused is entitled to a fair trial and is presumed to be innocent till proven guilty by a court of law. The press/media is thus restrained publishing or covering interviews of witness or relative of a victim while the matter is pending adjudication in a court of law, thereby causing in a few cases interference with the administration of justice amounting to criminal contempt under the Contempt of Courts Act. However, there can be little argument over the fact that the media or the press sometimes play a pivotal role in divulging corruption or evidence which may truly help in reaching a more just order by the Courts and thus an argument can be made to protect its interests.

In order to balance the rights of the press and the right to free and fair trial, the Supreme Court came up with certain guidelines in the *Media Guidelines Case*²²⁵ allowing only the High Courts and the Supreme Court the discretion to postpone the reporting of any judgment in the interest of justice and to protect the right of free trial as provided by Article 21.

However, it is essential to introduce safeguards to ensure that such principles are only applied for short durations, and to prevent substantial risk of prejudice to the administration of justice or the

²²⁴ V Venkatesan, *Truth As A Defence: How Effective Is The Amendment Of The Contempt Of Courts Act, (2008)* 2 INDIAN J. CONST.L 164

²²⁵ *Sahara India Real Estate Corporation Ltd. and Ors.Vs. Securities and Exchange Board of India and Anr* (2012)10SCC603

fairness of the trial. Moreover, an attempt should be made to define in definite quarters the meaning of the terms “substantial risk” or “prejudice” to ensure that the freedom of press is not stifled for intrinsic and ulterior interests of the judges.

Moreover, the right to criticism and fair comment must be upheld by the Court and the press should be allowed to subject judicial decisions that appear arbitrary to ruthless scrutiny. Incidents like the *Wah India case*²²⁶ should not be repeated if fair opinions and criticisms are not being subject to contempt laws.

Apart from the above, procedural safeguards like regular trials as opposed to summary trials, ensuring natural justice to whatever extent possible by doing away with *suo motu* trials²²⁷, and lowering the threshold of contempt proceedings, as also discussed through the course of the next question, can help in ensuring freedom of the press.

SCANDALISING THE COURT: GROUND FOR CONTEMPT

In India, scandalising the court is a criminal offence, punishable as a contempt of court for any 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 scandalizes or tends to scandalise, or lowers or tends to lower the authority of, any court.²²⁸

India has inherited this concept from the British in colonial times in order to uphold public confidence in the administration of justice. As was stated in *In re: Arundhati Roy*²²⁹, the rule of law requires the judiciary to be respected and protected at all costs.

The offence of scandalizing has been surrounded by much controversy due to the inherent conflict between the freedom of the press under Article 19(1)(a) of the Constitution of India and the fetters imposed on the press in connection with comments made about the judiciary. Although contempt of court is recognized as a reasonable restriction under Article 19(2) of the

²²⁶ Shri Surya Prakash Khatri v Madhu Trehan, 2001 (59) DRJ 298.

²²⁷ Rakesh Bhatnagar, *SC Continues With Its Stay On Mysore Sex Scandal Cases*, July 5, 2009 available on <http://timesofindia.indiatimes.com/city/delhi/SC-continues-with-its-stay-on-Mysore-sex-scandal-cases/articleshow/766057.cms> (Last visited August 11, 2014)

²²⁸ The Contempt of Court Act, 1971, § 2(c)

²²⁹ *In re: Arundhati Roy* 2002 SOL Case No. 138.

Constitution of India, given that the exact contours of the offence are hard to determine, it can be argued that the restrictions imposed may exceed the limit prescribed under the Constitution.

At this juncture, it is pertinent to note that there have been no convictions for the offence of scandalizing the court in England since 1923 clearly exemplifying the fact that the relevance of this provision has diminished. Thus in *Defence Secretary v. Guardian Newspapers*²³⁰ Lord Diplock observed that “the species of contempt which consists of ‘scandalising the judges’ is virtually obsolescent in England and may be ignored”. In light of these facts, taking into account the importance of public opinion in a democratic setup, it is imperative that the law be abolished in totality or suitably amended, with a clear ambit and procedural safeguards.

RECOMMENDATIONS AND CONCLUSION

1) The first and most significant inadequacy in the legislation is with respect to the ambiguity the term ‘scandalising or tends to scandalize’. As a result, there is a need to refer to Indian and English judgments to determine if an offence would fall within the ambit of the aforementioned provision. In the absence of a specific definition of the offence, such restrictions would severely impede an individual’s right to express himself/herself/oneself freely.

Moreover, Indian Courts are known to initiate contempt proceedings merely when there is a threat to lowering their reputation. Proper thought can be given to introducing thresholds like the “Real and present danger” test as is seen in the United States to ensure no abuse of the provisions of the law.

2) In contempt proceedings, there may be conflict of interest as there is a possibility of the judge acting as victim, prosecutor and arbiter all at once which is a potential problem. Although it appears that Section 14 of the Act resolves the aforementioned possibility, practically it may not be the case.

Section 14(2) provides that if the contemnor seeks to have the charge against him tried by some Judge other than the Judge or Judges in whose presence or hearing the offence is alleged to have

²³⁰ *Defence Secretary v. Guardian Newspapers*, (1985) 1 A.C. 339 (347)

²³⁰

been committed, and the Court is of opinion that it is practicable to do so and that in the interests of proper administration of justice the application should be allowed, it shall cause the matter to be placed, together with a statement of the facts of the case, before the Chief Justice for such directions as he may think fit to issue as respects the trial thereof.²³¹

However, a very realistic possibility is a situation where such an application is rejected by the Chief Justice which would contravene the principles of natural justice.

Moreover, the inherent powers of the Supreme Court and High Courts pursuant to Articles 129 and 215 of the Constitution of India respectively to punish for contempt does not require the courts to adhere to the procedure or limitation prescribed under the Contempt of Courts Act, 1971. Therefore, theoretically there is a possibility of unfettered discretion vested in the courts warranting certain procedural safeguards to be incorporated or Constitutional amendments to be introduced.

3) Another aspect of the law which requires examination is whether publication of the alleged contemptuous statement is required. Although the purpose of the law is to prevent erosion of public confidence in the administration of justice, there have been instances where unpublished statements made in official court documents such as affidavits have irked the court. The Arundhati Roy case is a prime example where implicit in the court's reasoning was that publication was not a necessary precondition for contempt proceedings to be initiated.²³²

In a landmark case, Justice Krishna Iyer had remarked, "*The fourth functional canon which channels discretionary exercise of the contempt power is that of the Fourth Estate, which is an indispensable intermediary between the State and the people and necessary instrumentality in strengthening the forces of democracy, should be given free play within responsible limits even when the focus of its critical attention is the court, including the highest court.*"²³³

The media thus performs an integral function of dissemination of information and facilitates the formulation of public opinion. However, very often, publication of certain material is considered

²³¹ The Contempt of Court Act, 1971, § 14

²³² In re Arundhati Roy, AIR 2002 SC 1375.

²³³ In Re S. Mulgaokar, AIR 1978 SC 727.

to be contempt of court by the judiciary citing grounds such as erosion of public confidence in the administration of justice.

Contempt jurisdiction is now very sparingly exercised in these western countries and a similar standard should be exercised in India.

10) **SOCIAL MEDIA AND SECTION 66A OF THE INFORMATION TECHNOLOGY
Act, 2000**

INTRODUCTION

Section 66A of the Information Technology Act, 2000 (*hereinafter* I.T. Act) (as amended by the Information Technology (Amendment) Act, 2008 (*hereinafter* 2008 Amendment)) makes punishable with imprisonment up to 3 years and fine the sending via electronic device:

- (a) any information that is *grossly offensive* or has *menacing character*; or
- (b) any information which he knows to be false, but for the purpose of causing *annoyance, inconvenience, danger, obstruction, insult, injury, criminal intimidation, enmity, hatred or ill will, persistently*; or
- (c) any electronic mail or message for the purpose of causing *annoyance or inconvenience* or *to deceive or mislead the addressee or recipient about the origin of such messages*.
(emphasis added)

Section 66A I.T. Act was inserted via the 2008 Amendment so as to criminalise distribution of illegal content via social media. However, we question whether legislation specifically penalising illegal speech made on the internet is necessary. In *Life Insurance Corporation v. Manubhai Shah*,²³⁴ the Supreme Court held that freedom of speech extends to any communication channel. This was upheld in *Secretary, Ministry of Information & Broadcasting v. Cricket Association of Bengal*,²³⁵ where the Court stated that the right to communicate includes communication through any media, whether print, electronic or audiovisual. This was reiterated in *Director General, Doordarshan v. Anand Patwardan*.²³⁶ Thus, any speech made over the Internet, whether sent as an email, or a message on a social networking website, or published as a blog, is governed by the same penal and regulatory provisions as speech made orally or in print. Section 66A I.T. Act lacks value because all the offences it is intended to cover are already covered under relevant provisions of the Indian Penal Code (*hereinafter* I.P.C.). To

²³⁴ *Life Insurance Corporation v. Manubhai Shah* 1992 SCR (3) 595

²³⁵ *Doordarshan v. Anand Patwardan* 1995 SCR (2) 161

²³⁶ *Director General, Directorate General of Doordarshan & Ors. v. Anand Patwardhan & Anr.*, (2006) 8 SCC 433.

illustrate, speech of a “menacing character” may constitute criminal intimidation. Similarly, causing insult, injury, or enmity or hatred between communities are all offences under the I.P.C. Moreover, terms such as “grossly offensive”, “annoyance”, and “inconvenience” are extremely vague in nature.

Thus, we examine whether Section 66A I.T. Act can be adapted to cover situations not adequately covered by the I.P.C.

REWORDING SECTION 66A TO COUNTER HOAX MESSAGES

Section 66A(b) is purportedly to combat situations as that which occurred in parts of South and West India in 2012, when North-east Indians received hoax messages threatening them with violence, which caused widespread panic and flight.²³⁷ This is admittedly not a section that is covered under the I.P.C. or other penal statute. Section 505(1)(b) I.P.C. comes closest. Section 505(1)(b) prohibits the publication or circulation of “any statement, rumour or report, with intent to cause, or which is likely to cause, fear or alarm to the public, or to any section of the public whereby any person may be induced to commit an offence against the State or against public tranquility”. However, the fact of inducement of offence is a constituent element of the offence.²³⁸ Thus, the section does not penalise “falsely shouting fire in a crowded theater” to use Justice Oliver Wendell Holmes, Jr.'s words;²³⁹ in other words, causing panic by spreading false rumours or hoaxes.

On July 27, 2014, a women's rights activist spoke out on a social media website on the need for a scientific approach against superstitious practices. Subsequently, a daily columnist in a Kannada newspaper posted on the same website that women like her “should be caught by their hair, their faces burnt and raped”.²⁴⁰ He was arrested, and a case under Section 66A(a) I.T. Act, and

²³⁷ 'Persistent rumours and threats of attack fuel flight of North-East people' *India Today* (17 August 2012) <http://indiatoday.intoday.in/story/exodus-of-north-eastern-people-fear-factor-bangalore-hyderabad/1/213493.html>

²³⁸ Kedar Nath Singh v. State of Bihar, AIR 1962 SC 955

²³⁹ Schenck v. United States, 249 US 47.

²⁴⁰ *Columnist's FB post provokes men to rape Bangalore activist*, THE TIMES OF INDIA (Bangalore) August 3, 2014, available at <http://timesofindia.indiatimes.com/city/bangalore/Columnists-FB-post-provokes-men-to-rape-Bangalore-activist/articleshow/39521336.cms> (Last visited on August 10, 2014).

Sections 504 (intentional insult with intent to provoke breach of the peace), 506 (criminal intimidation), 109 (abetment) and 354A (sexual harassment) I.P.C. was registered against him. He is likely to be charged under the Karnataka Goondas Act²⁴¹ as well. Here, we can see that Section 506 describes the offence committed with regard only to the reference to the lady, and not to the general act of spreading panic. However, if that was the intention, then the addition of Section 66A (a) I.T. Act is entirely superfluous.²⁴²

REWORDING SECTION 66A TO COUNTER SPAM

Section 66A(c) was added to protect against spam.²⁴³ However, it does not define spam, nor does it, taking the definition given above, adequately cover it. Mr. Baijayant Jay Panda, MP, has filed a Bill in the Lok Sabha seeking to remould Section 66A into a provision prohibiting the sending of spam messages. Thus, we shall see if Section 66A can be reworded to penalise the sending of spam messages.

Sending someone an email or contact them on social media is no different from knocking on their front doors and must, therefore, be subject to the same demands of individual privacy. However, while errant callers may harass people in their homes, the internet creates the potential for harassing thousands of times the number of people.

'Spam' is defined under U.S. and E.U. law as “unsolicited emails that are sent in bulk”. Spam can be of two kinds: commercial and non-commercial. Spam of a commercial nature seeks to lure individuals into purchasing goods or services, whether of a legitimate or a spurious nature. Non-commercial spam seeks to harass, to mislead for the purpose of causing mischief, or to induce individuals into installing software which will spread computer viruses, trojans, spyware, etc. on

²⁴¹ The Karnataka Prevention of Dangerous Activities of Bootleggers, Drug-offenders, Gamblers, Goondas, Immoral Traffic Offenders and Slum-grabbers Act, 1985

²⁴² The registration of the case betrays confusion on the part of the police, as Sections 504 and 109 I.P.C. are clearly not applicable, as the person insulted, i.e. the lady, was not the person being provoked into an offence, and, in any case, there was no actual offence committed that could be abetted. The application of the State Act shows that the police do not believe that the provisions of the I.T. Act are sufficient in this case.

²⁴³ Pranesh Prakash, *Breaking Down Section 66A of the IT Act*, THE CENTRE FOR INTERNET & SOCIETY BLOG, November 25, 2012, available at <http://cis-india.org/internet-governance/blog/breaking-down-section-66-a-of-the-it-act> (Last visited on August 10, 2014).

their electronic devices (which is an act separate to the act of creating or distributing the software itself, which is an offence under Section 43 I.T. Act).

Non-commercial spam

As mentioned earlier, offences intended to be covered by Section 66A are already covered by provisions of the I.P.C. Spam that is intended to harass, annoy, shame, or intimidate is adequately covered by Section 503 I.P.C. (criminal intimidation). A tort remedy can be sought for nuisance of a private nature. However, it may be worth mentioning that the maximum punishment for nuisance of a *public* nature is Rs. 200 with no imprisonment. It would therefore be unfair to impose a punishment of up to three years imprisonment with fine up to Rs. 5 lakhs. Women, who are most often victims of such harassment, may additionally avail of Sections 354D (stalking) or 354A (sexual harassment) I.P.C. Thus, we cannot find a use-case for Section 66A for offences of this nature.

Phishing

The U.S. Department of Justice defines 'phishing' as a "general term for the creation and use by criminals of e-mails and websites – designed to look like they come from well-known, legitimate and trusted businesses, financial institutions and government agencies – in an attempt to gather personal, financial and sensitive information."²⁴⁴ The Delhi High Court has defined it as "a form of internet fraud [where] a person pretending to be a legitimate association such as a bank or an insurance company, in order to extract personal data from a user such as access codes, passwords, etc., which are then used to his own advantage, misrepresents the identity of the legitimate party".²⁴⁵ Phishing can also be done through 'email spoofing', i.e. through sending emails, generally of a fraudulent nature, by forging the email address of the sender. Phishing leads to people being cheated of lakhs of rupees by masquerading as messages from the RBI or their bank of choice asking for their personal account details. Thus, phishing is fraud committed over the internet. In the U.K., the general offence of fraud is wide enough to cover phishing as well. In India, the offences of 'cheating' 'cheating by personation' and 'cheating and dishonestly

²⁴⁴ *Report on Phishing: A Report to the Minister of Public Safety and Emergency Preparedness, Canada and the Attorney-General of the United States* 4 (Binational Working Group on Cross-Border Mass Marketing Fraud, 2006), available at http://www.justice.gov/opa/report_on_phishing.pdf (Last visited on August 10, 2014).

²⁴⁵ *National Association of Software and Service Companies v. Ajay Sood & Ors.*, 119 (2005) DLT 596.

inducing delivery of property' under Sections 415, 416 and 420 I.P.C. respectively adequately describe the offence which, when done online, is called phishing. The above offences also carry a maximum sentence of seven years imprisonment of either description with fine, and is therefore carries a more severe punishment than that under Section 66A I.T. Act. Moreover, Sections 66C and 66D cover the offences of identity theft and cheating by personation using a computer. Hence, Section 66A is not useful for covering the offence of phishing.

REGULATING SOCIAL MEDIA

The volume and velocity of content, and the number of content creators, on social media is too great for regulation in the manner that newspapers or television channels may be regulated. This means that any attempts will likely be prohibitively expensive as well as ineffective and highly selective in their implementation.

Self-policing of social media networks must be encouraged. The foreign origin of most popular social media websites, such as Facebook, Twitter and YouTube make policing them very difficult. Rule 3(4) of the Intermediaries Guidelines²⁴⁶ provides for an intermediary taking down content upon complaint. It is the need of the hour for our law enforcement agencies to embrace new technology. In the case of content that is intended to, or likely to, threaten the unity, integrity, defence, security or sovereignty of India, or public order, or to incite the commission of a cognisable offence, or cause fear, panic or alarm to the public, or to any section thereof, the police may be empowered to reach out to the intermediary social media network and demand it be immediately taken down, rather than within the 36 hour window provided by the Guidelines.

However, a note of caution must be advised with regard to these rules. Section 79 I.T. Act provides a “safe harbour” for intermediaries whereunder they are exempt from liability for content hosted or made available by them if they did not “initiate the transmission, select the receiver of the transmission, and select or modify the information contained in the transmission”, and had exercised “due diligence”.²⁴⁷ “Due diligence” involves publishing rules, etc. for users to

²⁴⁶ The Information Technology (Intermediaries Guidelines) Rules, 2011 (*hereinafter* Intermediaries Guidelines).

²⁴⁷ The Information Technology Act, 2000, §79 (as amended by The Information Technology (Amendment) Act, 2008), §40).

observe,²⁴⁸ not “hosting or publishing” content, as well taking down offending content. The first requirement would manifest in the Code of Conduct or Terms of Use that many websites publish. Most social media networks provide that they will remove content that violates their Terms of Use, and, in certain cases, block the user or his Internet Protocol (I.P.) from accessing the website, which is in conformity with the Guidelines.

The second requirement, under Rule 3(3), is clearly *ultra vires* the parent statute. Section 79(1) I.T. Act clearly states that an intermediary is not liable for data made available or hosted by it. However, Rule 3(3) of the Intermediaries Guidelines states that “due diligence” (which, if not observed, negates the safe harbour protection granted under Section 79(1))²⁴⁹ involves not hosting or publishing the data. This rule should therefore be omitted.

The third requirement, that of taking down content, encounters several issues. First, processing the complaint within 36 hours may not be feasible, especially for social media websites such as Facebook or Twitter, through whose servers vast quantities of data pass daily. There must be application of mind to each complaint on highly subjective criteria such as “grossly harmful”, “blasphemous” and “obscene”,²⁵⁰ which relies on the cultural sensibilities of mostly foreign parties. Further, the intermediary must determine the veracity, or at least *prima facie* plausibility of claims that the information concerned “belongs to another person to which the user does not have any right”, “infringes any patent, trademark, copyright, or other proprietary rights”, or “contains software viruses or any other computer code, files or programs designed to interrupt, destroy or limit the functionality of any computer resource”.²⁵¹ Given that failure to comply with the rules exposes the intermediary to direct liability for any offence caused by the publication or transmission of the data, the intermediary would prefer to take down the information without due consideration of the veracity of the complaint. A study done by research organisation Centre for Internet & Society showed that intermediaries usually removed content even on the basis of extremely frivolous complaints.²⁵² Moreover, a case of a fake court order ordering the removal of

²⁴⁸ *Id.*, rule 3(1).

²⁴⁹ I.T. Act, *supra* note, §79(2)(c).

²⁵⁰ Intermediaries Guidelines, *supra* note, rule 3(2)(b).

²⁵¹ *Id.*, rule 3(2).

²⁵² Pranesh Prakash, *Invisible Censorship: How the Government Censors Without Being Seen*, THE CENTRE FOR INTERNET & SOCIETY BLOG, December 14, 2011, available at <http://cis-india.org/internet-governance/invisible-censorship>, (Last visited on August 10, 2014).

certain content²⁵³ shows that the Guidelines can easily be abused. No appeal mechanism exists for a take-down notice, and it is entirely impractical to expect the writer of a blog or ordinary person sharing his views on current affairs on a social media website to approach the courts over his content being taken down. Thus, a chilling effect is produced on the free speech of individuals.

We also note two practices by governments in case of messages believed to threaten public order. First, in Jammu and Kashmir, temporary bans are sometimes imposed on SMS services or social media. Such a practice should not be followed in the rest of the country. The law and order situation in J&K is far different from that in the rest of the country, and thus, measures that may be necessary there may not be in the rest of the country. Further, such is likely to impede a good deal of legitimate usage, and is likely, even if done for a short period of time, to be unconstitutional. Second, access to websites is being blocked for Indian Internet Service Providers (I.S.P.s) under Section 69A I.T. Act in the case of pornographic websites or websites with links to content infringing intellectual property rights. These are purportedly in the interest of public order, but this is highly vulnerable to misuse. Further, such I.S.P. blocks can be quite easily circumvented by routing one's internet through a foreign proxy. Thus, legitimately illegal content must be taken down and not blocked. However, the public is unaware as to why a website has been blocked, and if websites continue to be blocked, reasons must be provided upon a Right to Information request.

A plethora of cases have been filed challenging the constitutionality of Section 66A, the Intermediaries Guidelines, and other provisions of the I.T. Act.²⁵⁴ One notable case involves Mouthshut.com,²⁵⁵ which has challenged the Intermediaries Guidelines in the Supreme Court. Mouthshut.com, a website hosting consumer reviews posted by users, received several

²⁵³ Press Release, MOUTSHUT.COM, *Update on Writ Petition filed by Mouthshut.com before the Hon'ble Supreme Court* (August 17, 2013) at http://www.mouthshut.com/pdf/petition_update.pdf (Last visited August 10, 2014).

²⁵⁴ Examples include *Mouthshut.com (India) Pvt. Ltd. & Anr. v. Union of India & Ors.*, W.P. (C) No. 217 of 2013 (S.C.) (Pending); *Shreya Singhal v. Union of India*, W.P. (Crl.) No. 167 of 2012 (S.C.) (Pending); *Rajeev Chandrashekhar v. Union of India*, W.P. (C) No. 23 of 2013 (S.C.) (Pending); *Common Cause v. Union of India*, W.P. (C) No. 21 of 2013 (S.C.) (Pending); *Kamlesh Vaswani v. Union of India*, W.P. (C) No. 177 of 2013 (S.C.) (Pending); *People's Union for Civil Liberties v. Union of India*, W.P. (C) No. 199 of 2013 (S.C.) (Pending); and *Taslima Nasrin v. State of U.P.*, W.P. (Crl.) No. 222 of 2013.

²⁵⁵ *Id.*, *Mouthshut.com v. Union of India*, *supra* note.

complaints from companies which had received unfavourable reviews. The Court has issued notice in this matter.²⁵⁶ The matter is linked with the case *Shreya Singhal v. Union of India*,²⁵⁷ in which the petitioner moved the SC in the wake of an incident where two girls were arrested, one for making an innocuous comment about the chaotic shut down of Mumbai following the death of a politician, and the other for 'liking' the post. It is listed for August 25. Thus, it is clear that the public is finding the Act and rules onerous.

RECOMMENDATIONS

1. Section 66A I.T. Act should be re-written to read as follows:

Any person who sends, transmits or publishes, by means of a computer resource or a communication device, any message containing a statement or rumour that is intended to, or likely to, cause fear, panic or alarm to the public, or to any section thereof, shall be punishable with imprisonment of either description up to three years and shall also be liable to fine.

2. Rule 3(3) of the Intermediaries Guidelines should be omitted. An appeal mechanism must be introduced under the Guidelines, under which the author of the content taken down can appeal to the intermediary, and require the complainant to produce documents in cases of complaints of unauthorised use or violation of intellectual property rights. The intermediary can thus make a better decision as to whether the content offends the provisions of Rule 3(2) of the Intermediaries Guidelines, and restore it if it is found not to. Subsequent to restoration, if another complainant feels that the content is in violation of the Guidelines, the intermediary must be entitled to the same protection as if it were receiving a complaint for the first time. This is to encourage intermediaries to restore content taken down upon frivolous or unsubstantiated complaints. This decision may be appealed in the Cyber Appellate Tribunal.

²⁵⁶ *Id.*, Order dated April 29, 2013.

²⁵⁷ W.P. (Crl.) No. 167 of 2012 (S.C.) (Pending).

