Directorate of Distance Education
NALSAR University of Law, Hyderabad

Reading Material

Post-Graduate Diploma in Media Laws

1.2 Media and the Law

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CHAPTER I

MEDIA AND CRIMINAL LAW

While the Constitution provides a guarantee to freedom of speech and expression, which is exercised by the media, the criminal law imposes certain restrictions on that freedom for protecting the social or group interests and public tranquility. Article 19(2) provides certain grounds, based on which the state can impose reasonable restrictions on this freedom. Media-persons are basically under the same obligation as the people in **general** to abide by general principles of penal law. Media in its exercise of free criticism may slip either intentionally or through its routine activity into any kind of criminal liability under different circumstances. The Indian Penal Code envisaged certain crimes which a media person may get entangled into and face the prosecution. Media persons' right to free speech cannot extend to cause sedition, by bringing disrepute of the state, or affect the reputation of individual leading to defamation or represent obscene or base material disturbing the moral and serene atmosphere of society. In case they do so, the criminal provisions of Indian Penal Code are attracted. Thus Defamation, Sedition and Obscenity are the three major areas where the media persons could be vulnerable to face the prosecution.

1.1. Media and Crime of Defamation:

Journalist who defames is liable both in Civil law and criminal Law.

Section 499 of Indian Penal Code defines defamation:

> *Whoever by words either spoken of intended to be read, or buy signs or by visible representation, makes or publishes any imputation concerning any person intending to harm or knowing or having reason to believe that such person, is said, except in cases herein after excepted, to defame that person.*

The expression ‘makes or publishes’ has been interpreted as supplementing each other. If a person merely writes out a defamatory matter but does not publish the same i.e., does not circulate to others; it will not be defamation. The word ’makes’ refers to originator of imputation.

In ***Lingam Gouda V. Basan Gouda Patil case*** [1] it was held "if one repeats, another writes a libel, and a third approved what is written they are all makers of it, as all who concur and assent to the doing of an unlawful act are guilty; and murdering a man’s person in which all who are present and encourage the act are guilty, though the sound was given by one only

[1] C.R. Criminal appeal No.173 of 1927 decided on Sept.22,1927 (Unrep.Bom)

Publication; legally means communication of defamatory matter, to the third person other than the defamed one. Direct communication to the defamed was held to be no publication under the Code by a majority of the Full Bench of the Allahabad High Court in ***Taki Hussain*** [2]the accused sent a suit notice to a policeman claiming a damages for unjustifiable search of his house made by the latter, attributing malice, and bribery to him. The notice was full of defamatory writings. The policeman sued him for defamation. The majority of the Full Bench held that there was no publication as contemplated under section as there was no communication to a third person other than the defamed.

But where the accused knows that his communication will be read by others or will be known to others in the usual course of business he will be liable. Thus in the case of ***Sukheo***[3] the accused has sent his reply to the President of Municipality with a defamatory imputation. In the course of business, the president kept it before councilor's. Accused was held guilty of publication of defamatory matter.

The publisher of a newspaper is responsible for defamatory matter published in such paper whether he knows the contents of such paper or not. The editor of a journal is in no better position than any other ordinary subject with regard to his liability for libel. He is bound to take due care and caution before he makes a libelous statement. It was held so in ***Balasubramania Mudaliar V. Rajagopalachariar.***[4] But it has been held in ***Ramaswamy V. Lokananda.***[5] that it would be sufficient answer to a charge of defamation against the editor of a newspaper if he proves that the libel was published in his absence.

The word 'imputation indicates something bad about another and implies the attribution or evil, the making or an accusation, allegation, insinuation of a charge against a person, words either spoken or intended to be read, or by signs or by visible representation. 'Visible representation' will be inclusive of every possible form of defamation which human ingenuity can devise. In the case ***Manson V. Tussaud***[6] the defendant exhibited a wax figure in Chamber of Horrors expressing that plaintiff has murdered another Lieutenant, such as allegation as not proved in the court. Defendant was held liable.

Intention to harm

According to section 499, the person who defames another must have done it intending to harm or knowing or having reason to believe that such imputation will harm the reputation.

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[2] 1884,7 Allo 205 (222) F.B.
[3] 1932 55 All 253
[4] 1944 46 Cr. L.J. 71
[5] 1886 9 Mad. 397
[6] 1894 1 Q.B. 671

It is not necessary to prove that the complained actually suffered directly or indirectly from the scandalous imputation alleged; it is sufficient to show that the accused intended to knew or had reason to believe, that the imputation made by him would harm the reputation of the complainant, irrespective of whether the harm is actually caused or not. It is not necessary that there should be an intention to harm the reputation. It is sufficient if there was reason to believe that the imputation made would harm the reputation. Section 499 of Indian Penal Code gives four explanations in this regard.

Defamation of the dead

Explanation 1: According to this the imputation must not only be defamatory of the deceased but it must also be hurtful to the feelings of his near relatives. The question depends upon the harm caused and not the harm intended, for in the case of deceased, the latter test is inapplicable.

Defamation of a company or a collection of persons

Explanation 2: A corporation or company could not be liable in respect of a charge of a murder, incest, or adultery because it could not commit those crimes. The words complained of must attack the corporation or company in the method of conducting its affairs; must accuse it of fraud or mismanagement or must attack its financial position.

The class defamed must not be too large to cease of be distinct from the memory of certain trade or profession. If a person calls the lawyers as thieves or medical men as a class of cut-throats in disguise or the police force as a hotbed of corruption, there would be not indictable libel-because the class is too large and the generalisation too sweeping to affect any of its composing members.

Defamation by innuendo

Explanation 3: When a particular passage is prima facie non-defamatory the complainant can show that it is really defamatory of him from the circumstances and nature of the publication. Such a passage is called ‘innuendo’. The language of irony or sarcasm very often will be better, forcible, and impressive than a bold statement. It is thus necessary for the prosecution to establish that the words though innocent are appearances were intended to be said in a libelous sense. So it may be libelous to say of an attorney that he is an honest lawyer meaning thereby he is the reverse of the honest.

Explanation 4:- What is harming the reputation? This explanation specifies various ways in which the reputation of a person may be harmed. It says that the imputation must

directly or indirectly lower the moral or intellectual character of person defamed. This language of explanation 4 is loss. It was held to include degradation in caste, community, at feasts and so on.

During a feast a Hindu declared that complainant had been excommunicated and was not fit to sit down, it was held that priest was guilty of defamation.[7]

Publication

Publication in its primary sense of communication by the defendant to a person other than the defamed is the basis of liability in English civil law of defamation i.e., in torts. This principle which is not accepted as the basic principle of English Penal Law of defamation is accepted as the basic principle of Indian Penal Code. (Section 499 Expln.4) Words which may have the effect to provoking other persons at whom they are uttered are made punishable under Sec. 504 of Indian Penal Code which deals with intentional insults with intent to provoke breach of peace. The gist of the offence in section 499 seems to lie in the tendency of the statements verbal or written to create that degree of pain which is felt by a person who is subjected to unfavourable criticism and comments.

There is another important difference between English law and Indian law in the matter relating to spoken defamation or slander. Slander cannot be subject matter of criminal prosecution in England except when it happens to be seditious or blasphemous and when they are against State or State religion. The Indian Penal Code recognises no such distinction classing both as punishable.

Exceptions

The ten exceptions to S 499 state cases in which an imputation prima facie defamatory may be excused. They are occasions when a man is allowed to speak out or write matters which would ordinarily defamatory. Those exceptions are;

1. Imputation of truth for public good,
2. Public conduct of public servants,
3. Public conduct of public men other than public servants,
4 Comment on cases and conduct of witnesses and others concerned,
5. Merits of cases, decisions and judicial proceedings,
6. Merits of a public performance, literary criticisms,
7. Censure in good faith by one in authority,
8. Complaint to authority,
9. Imputation for protection of interest,

[7] Mohanlal V. Ramchanran 1928 26 A.L.J.R. 361

10. Caution in good faith.

It is pointed out that the ninth exception states a general principle of which exceptions 7,8 and 10 are particular instances so that the last four exceptions really fall under, what is known as privilege i.e., communication made on privileged occasion that is in the discharge of a duty or protection of an interest in the person who makes it.

Justification: First Exception

> ***Imputation of truth which public good requires to be made or published****: It is not defamation to impure anything which is true concerning any person if it be for the public good that the imputation should be made or published. Whether or not it is for the public good is a question of fact.*

The main requirement of this exception and exception 4 is that the imputation should be true and be for public good. The remaining exceptions require that the imputation should be made in good faith.

It is sufficient if the accused can show that the statements are substantially true in regard to the material portion of the allegation or insinuation.

The truth of an allegation need not be literally proved; it is enough is it is substantially true. If X says L, B and C are a gang who live by card cheating and the accused justified libel giving several such specific instances which had been proved in substance, it is not necessary to prove the other instance.

Justification or truth operates as complete defence in an action for defamation. The people can defame others by telling truth about their deeds. Proof of truth of the allegation makes the publisher free from the liability. *Simi Garewal's case*[8] is an example of the same.

Truth is absolute justification to a civil action for defamation. The defendant will succeed if he knows that what he has spoken of the plaintiff is substantially true. The law has recognised this defence since defamation is essentially an injury to man's reputation and when it is shown that what is spoken of a person is true, it means only that his reputation has been brought down to its proper level and there is no reason for him to complain.

All defamatory words are presumed to be false, and the plaintiff is not required to give evidence show that they are false, but the defendant rebut his presumption by giving evidence in support of his plea that the words are substantially true.

[8] C.A. 397774 decided on 28th Feb.1974 (see the details of the case in next chapter, Media and Tort Law

The true of any defamatory words if pleaded is a complete defence in civil proceedings and for the reason even though the words were published spitefully and maliciously. The law takes the view that it should no allow a plaintiff to recover damages for an injury to his character or reputation which he either does not or ought not to possess.

In criminal law, truth is not an absolute justification. Truth is a justification only when it is given out for public good. The reason for the distinction lies in the fact that in civil action the benefit or detriment to the public is not in issue while it is paramount that the public should have a concern in criminal matters.

Public good:

The term 'public good' implies the good of the public and this word' public' has been defined to include any class of the public or any community. A class or community residing in a particular locality may come within the term 'public'.

Public good is the good of the general public contradistinguished from the individual. Truth of imputation shall amount to a defence if it was for the public benefit, that the imputation should be published but not otherwise. Truth by itself is no justification in the criminal law although it is sufficient justification in the civil law of torts.

The First Law Commissioner recommended that truth by itself ought to be recognised as a valid defence in all cases but the legislature refused to accept it. As it is, the law is now definite that truth is no justification unless it is for public good. The authors of the code observe:

> "there are undoubtedly many cases in which the spreading of true reports, prejudicial to the character of an individual, would hurt the feelings of that individual, without producing compensating advantage in any quarter. The proclaiming to the world that a man keeps a mistress, that he is too much addicted to wine, and raking up ridiculous and degrading stories about one's youthful days, who has obtained a respectable post, which requires sanctity of character can seldom or never produce any good to the public sufficient to compensate for the pain given to the person attacked and to those who are connected with him. A writer in such cases who publishes the truth renders no great service to the public and cannot, without a violation of every sound principle, be treated as a criminal.

The question whether the publication is or is not for the public good is a question of fact, and it can well depend upon the matter published, the nature, occasion, and extent of publicity and the actual good thereby accomplished.

Fair Comment 1: Second Exception

> ***Public conduct of public servants:*** *It is not defamation to express in good faith any opinion whatever respecting the conduct of a public servant in the discharge of his public function or respecting his character so far as his character appear in that conduct, and no further.*

The first exception deals with allegations of facts while the second exception deal with expressions of opinion.

In the second and the following exceptions what are protected are opinion and not the assertion. They are really fair comments upon public men on matters of public interest. Every subject has a right to comment on those of acts of public men, which concern him as a subject of the realm, if he does not make his commentary a cloak for malice and slander. A writer in a public paper has the same right as any other person. And where a person makes the public conduct of a public men the subject of comment and it is for the public good he is not liable to an action if the comments are made honestly, and he honestly believed the facts to be as he states them and there is no wilful misrepresentation of fact or any misstatement's which he must have known to be a misstatement if he had exercised ordinary care.

Men in public positions even though official, can claim no immunity from fair criticism. This is the essential nature of the rule of law in all democratic countries. Similarly, the press, authors and publishers of books have no special privilege and are in no better position than any other man.

If a person undertakes to criticise the acts of public man, he must take care not to assert that which is not true as the basis of his criticism and he is bound not to concede wilfully anything which would show that the criticism is not well-founded. The opinion should not contain only half truth.

The term "good faith" appears in most of the Exceptions. Under the Penal Code by S.52, "Nothing is said to be done or believed in good faith which is done or believed without care and attention. " The code regards honesty as immaterial and the presence of a care and intention is all in all. Absence of good faith means simply carelessness or negligence and want of due care and caution does not imply any idea of dishonesty.

The mere absence of ill-will does not itself prove that the imputation was made in good faith. In determining the question of good faith the Court should have to take into account the intellectual capacity of the person, his predilections and the surrounding facts.

A newspaper has a public duty to ventilate abuses and if an official fails in his duty a newspaper is absolutely within its rights in publishing facts derogatory to such official and making fair comment on them, but it must get hold of private facts.[9]

Unless there are strong and cogent grounds for believing the information to be true, the editor should not make defamatory attacks. No opinion can be considered as fair unless it contained some subtraction of the truth.

Fair Comment 2: Third Exception

> ***Fair comment on public conduct of public men other than the public servant:*** *It is not defamation to express in good faith any opinion whatever respecting the conduct of any person touching any public question and respecting his character, so far as his character appears in that conduct, and no further.*

This amounts to criticism on public conduct of public persons. With a march of progress in every democratic state, citizens take an ever increasing interest in public affairs and these publicists form vigilant guardians of the right of the people.

The Draftsmen of the Code wrote about this exception that "there are public men who are not public functionaries; persons who had no office may yet take very active part in urging or opposing the adoption of measures in which the community is deeply interested. So every person ought to be allowed to comment in good faith on the proceedings of these volunteer servants of the public".

Accused should prove that his expression was fair and honest and the alleged act, on which the opinion was based, was true.

The public career of Member of Parliament, Legislative Assembly, of a corporation, or Municipal Council, may no doubt be the subject of comment, however harsh or severe it may be, but none has a right to peep into his private life history. One can expose bad character, of the person, who seeks election to a place where he will have further opportunities to receive bribes or commit fraud. Intermediate habits of a clearly man, priest or immoral habits of a physician, or the dishonest habits of an attorney too can be exposed, because of their public duty.

[9] Jhabbarmal (1927) 26 A.L.J.R.196, 30

In ***Campbell V. Spottiswood***[10] the newspaper ' Saturday Review' in criticising certain letters published by the proprietor of a regions newspaper, in which he had sought subscriptions as a means of converting the Chinese; It was imputed to him that he had published a false subscription list. The jury found this statement untrue, although the writer of the article believed the imputation to be true. This was held to be no justification. If you impute wickedness to public person, then you must prove that imputations are true.

The law is that, where a matter is of public interest, the Court ought not to weigh any comment on it in golden scales, and that some allowance must be made for heated passion and what the writer might consider righteous indignation.

Where in a newspaper report, the main aspersion of the accused against the complainant is true, the fact that there is some exaggeration or departure from strict truth does not deprive the accused of the protection provided in this exception. Mere exaggeration or gross exaggeration does not make a comment unfair. ***Subroya V. Abdul Khader***[11] Where the accused published his view concerning a Municipality that the members knew that there was not one among them fit to be a Chairman and that the Government should ordered that the Chairman should be a Revenue Divisional Officer, which was a fact. The Court acquitted the accused holding that his statement did not exceed the limit of fair comment.

In ***Durga Prasad Choudhuri V. State of Rajasthan***[12] It is held "Fair comment cannot justify adefamatory statement which is untrue in fact. A comment cannot be fair which is built upon facts which are not truly stated."

In ***G.Chandrasekhara Pillai V. G.Raman Pillay*** [13] the Kerala High Court has pointed out that plea of good faith implies the making of a genuine effort to reach the truth, and a mere belief in the truth, without being reasonable grounds for such a plea, is not synonymous with good faith.

Court Reporting: Fourth Exception

> ***Publications of reports of proceedings of Court:*** *It is not defamation to publish a substantially true report of the proceedings of a court of Justice, or of the result of any such proceedings.*

[10] 053. .0 L.J.Q.B. 185
[11] 0601 M.W.N. 351, Gour, P.3584
[12] 1969 Raj. L.W. 20
[13] 1964 Ker. L.J. 317

Explanation: A justice of the Peace or other officer holding an enquiry in open Court preliminary to a trial in a Court of Justice, it a Court within the meaning of the above section.

Where there are judicial proceedings before a properly constituted judicial tribunal exercising its jurisdiction in open Court, then the, publications without malice, of a fair and accurate report of what takes place before that tribunal is privileged.

Though the publication of such proceedings may be to the disadvantage of the particular individual concerned, yet it is of vast importance to the public that the proceedings of Court of Justice should be universally known. It is immaterial whether the proceedings were experts or not, or whether the Court had jurisdiction or not. But a report of judicial proceedings cannot be published if a Court has prohibited, or where the subject matter of the trial is obscene blasphemous. In England there is an Act to regulate those publications, to prevent injury to public morals. This privilege is not confined to newspaper only. Anyone can publish such proceedings through a pamphlet also. The reporter should not mix up the matter with comments of his own; and if comments are made, they should not be made as a part of the report. The report must not be one-sided or highly coloured.

In ***Clement V. Lewis***[14] paper 'Observer' gave a true and correct account of some proceedings in the insolvency Court, but inserted a sensational heading "Shameful conduct of an Attorney". It was held to be not justified.

In the Exception 4, nothing is said as to good faith, the only requisite being that the report should be substantially true. Such a report may, however, be punishable under Sections 292 Indian Penal Code if it contains obscene matter.

Fair Comment on Court Proceedings: Fifth Exception

Merits of case decided in Courts or conduct of Witnesses and other concerned: It is not defamation to express in good faith any opinion whatever respecting the merits of any case, civil or criminal, or which has been decided by a Court of Justice or respecting the conduct of any person as a party, witness or agent in any such case or respecting the character of such person, as far as his character appears in that conduct and no farther.

Illustration

[14] 3 B & All 732

a. A says “I think Z’ evidence in that trial is so contradictory that he must be stupid or dishonest” A is within this exception if he says this in good faith in as much as the opinion which he expresses respects Z’s conduct as a witness and no farther.

b. But if A says “I do not believe what Z asserted at that trail because I know him to be a man without veracity; A is not within this exception in as much as the opinion not founded on Z’s conduct as a witness.

This exception protects benefice comment on cases adjudicated, but not when they are still *sub judice*, Authors of the Code say “We have allowed all persons free to discuss in good faith the proceeding of Courts of Law, on characters of parties, agents and witnesses as connected as connected with those proceedings. It is almost universally acknowledged that the Courts of law ought to be thrown open to the public. The administration of justice is matter of universal interest to the whole public.”

In commenting on such matters, a public writer, is bound to attend to the truth and put forward the truth honestly and in good faith and to the best of his knowledge and ability. It should not merely be declamation and invective, written not with a view to advance public good, but solely to bring into contempt and hatred the administration of justice or injure the character of individuals. It is not fair to comment to say that the prisoner was acquitted, when he was really guilty. It would be fair to give reasons showing on what points the judge had erred and why there had been a failure of justice. The State of the law, the administration of which leads to such startling result but he cannot direct his shafts personally against the judge calling him a have or a food or implying as such. It can be said that the judges had misunderstood or misapplied the law or omitted to consider or apply it correctly. Such criticisms are daily made in the public press, and though they have a remote tendency to bring the administration of justice into contempt. They are not defamatory, because they are equally protected by this exception and exception 2.

Fair Comment on Performance: Sixth Exception

Merits of Public performance: *It is not defamation to express in good faith any opinion respecting the merits of any performance which its author has submitted to the judgement of the public, or respecting the character appear in such performance, and no farther.*

Explanation: A performance may be submitted to the judgement of the public expressly or by acts on the part of the author which imply such submission to the judgement of the public.

Publishing a book, making a public speech, performance of an actor, singer-all are submitted for the judgement of the public.

If A says of a book published by Z-"Z's book is foolish; he must be a weak man, Z's book is indecent Z must be a man of impure mind, A is with in this exception. But if A says I am not surprised that Z's book is foolish and decent, for he is a weak man and a libertine." A is not within this exception, as the opinion is not founded on Z's book.

The object of this exception is that public should have the benefit of free criticism of all public performances submitted to its judgement.

Lore Ellengborough said:

> "Liberty of criticism must be allowed, or we should neither have purity of taste nor of morals. Fair discussion is essentially necessary to the truth of history and the advancement of science. That publication therefore, I shall never consider as a libel: it is not to injure the reputation of any individual, but to correct misrepresentations of fact, to refute sophistical reasoning, to expose a vicious taste in literature, to censure what is hostile to morality."

In ***Merivale v. Carison*** [15] the critic wrongfully described Murivales play as immoral, though there was nothing immoral in it, the court held defendant liable on the ground that he had overstepped the bounds of fair criticism. In ***Dupiani V. Davis***[16] the Court held defendant liable, wherein he wrote an article in a newspaper that advising an actor to return to his old profession, that of a waiter, when in fact, the actor was never a waiter in his life, the defendant was held liable.

Good faith under this exception required not 'logical infallibility' but due care and attention.

Privileged Communication-1: Seventh Exception

> ***Censure by one in authority:*** *It is not defamation in a person over another and authority, either conferred by law or arising but of a lawful contract made with that other, to pass in good faith any censure on the conduct of that other in matters to which such lawful authority relates."*

[15] 20 Q.B.D.275 at p 281
[16] 1886-3 T.L.R.184

Judge censuring in good faith the conduct of a with ness or parent censuring child, teacher censuring pulls a master to a servant, a banker to cashier-are within this exception.

The two essential conditions for the application of this exception are I) that the censure must be on the conduct of the person within the scope of the critics' authority: and ii) the censure must be passed in good faith.

Privileged Communication-2: Eight Exception

> ***Accusation preferred in good faith to authorised person****: It is not defamation to prefer in good faith an accusation against any person to any of those who have lawful authority over that person with respect to subject matter of accusation.*

If A accused Z before a magistrate; or complains of servant to master, a child to father, it is no defamation.

To conditions for the protection under this exception are I) the accusation must be made to a person in authority over the party accused and ii) that the accusation must be preferred in good faith.

Persons in authority would include the King, President, Ministers, members of the houses of Parliament and other officials of State, Civil or Military. Besides these are Magistrates and the judges and the police to whom all persons are entitled to represent their grievance falls within the scope of their authority. Besides above, persons in domestic circles such as a husband, guardian or a father-would also come under this category of persons in authority.

Privileged Communication-3: Ninth Exception

> ***Imputation for protection of interests:*** *It is not defamation to make an imputation on the character of another, provided that the imputation be made in good faith for the protection of the interest of the person making it, or of any other person or for the public good.*

This exception rests on the ground that honest communications made in course of business and of social intercourse should be duly protected so long as the parties act in good faith.

Exceptions 7 of 10 fall under the same head of communication made on privileged occasion i.e., one made in the discharge of a duty of protection of an interest in the person

who makes it. Exceptions 7,8,10 are particular instances, whereas exception 9 states a general principle.

Landmark Cases

In the Supreme Court decision in ***Harbhajan Singh v. State of Punjab***[17] Accused was secretary of Punjab Praja Socialist Party. He wrote a defamatory article in Blitz about Surinder Singh, son of the Chief Minister of Punjab S. Pratap Singh Kairon. The two defamatory statements states that he is the leader of smugglers and is responsible for a large number of crimes being committed in Punjab State. The statement added that because the culprit happens to be the Chief Minister's son, the cases are always shelved up. 'There was evidence that certain pending cases against some smugglers were withdrawn by the State at the instance of the Chief Minister. The truths of these allegations were not proved beyond the shadow of doubt in the trial of the defamation case.

The accused pleaded that imputation made in good faith and for public good falling under Exception 9 though he has stated in the original trial court that he relied on the truth of his statements falling under the First exception to S.499. Trial Court and High Court found against the accused even on the plea of 'good faith' under ninth exception namely on the ground that heehaw not conclusively established the truth of the allegation. High Court sentenced him to undergo three months simple imprisonment and to pay a fine of Rs.2,000/- . The Supreme Court allowed the appeal of the accused and set aside the order of conviction by holding that in the circumstances of the case that the appellant was entitled to the protection of the Ninth Exception.

Sewakram v. R.K. Karanjia[18]: During the period of Emergency Sewakram who is a senior lawyer practicing at Bhopal, was placed under detention under Section 3 (1) (a) (ii) of the Maintenance of Internal Security Act, 1971 and was lodged at the central Jail Bhopal. There were among other detenues three lady detainees, including Smt. Uma Shukla. She was found to have conceived. She goes the pregnancy terminated. In an exparte confidential inquiry by a Deputy Secretary to the Government)Homes) it was found that the pregnancy was due to illicit relations between Sewakram and Smt. Shukla, the Blitz in its three editions in English, Hindi and Urdu flashed a summary of the report. The story as given but was that. (i)there was a mixing of male and female detainees in the central Jail, (ii) Sewakram had the opportunity and access to mix with Smt. Shukla freely and (iii) Smt. Shukla became pregnant by Sewakram. The news item was per se defamatory. After revocation of Emergency, Mr. Sewakram lodged a criminal complaint for defamation. Mr. Karanjia prayed the Court to

[17] A.I.R.1966 s.C.97
[18] A.I.R. 1981 S.C.1514

order the production of inquiry report, which was rejected by the Magistrate. Karanjia filed a revision before the High Court, wherein the inquiry report was produced and the High Court quashed the proceedings on the ground that the respondent's case clearly falls within the ambit of exception 9 of S.499. In reaching that conclusion the Court observed that 'it would be abuse of the process of the court if the trial is allowed to proceed with ultimately would turn out to be vexatious proceeding. It was held that the publication of report was for the welfare of the society. A Public institution like prison had to be maintained in rigid discipline; the rules did not permit mixing of male prisoners with female prisoners and yet the report said the prison authorities connived at such a things. The balance of public benefit lay in tits publicity rather than in hushing up the whole episode. The report further shown that the publication had been honestly made in the belief of the truth of the report and also upon the reasonable ground for such a belief, after the exercise of such means to verify its truth as would be taken by a man of ordinary prudence under similar circumstances.

The case went to Supreme Court on a technical ground whether an appellate court like High Court can quash the original trial of the case where it was not prayed for, and in a miscellaneous application. The majority of Supreme Court bench allowed the appeal. Behraul Islam J. dissented and said that the quashing of original proceeding is correct. The Supreme Court also agreed that the publication of the defamatory statement by Blitz is for public good and thus falls under the exception 9 to S.199

Preponderance of probabilities

The nature of the burden of proof that falls upon an accused person who had raised the plea of any of these exceptions is not to prove the truth of the allegations beyond reasonable doubt as a prosecutor should do to establish the guilt of the accused, but only to show the mere preponderance of probabilities in his favour as in civil proceedings.

1. If it is shown that accused has acted in good faith this exception protects him.
2. Under this exception strict proof of fact is not necessary and indeed it is immaterial to consider whether the accused has strictly proved the truth of allegations made by him.
3. Simple belief or actual belief by itself not enough, it must be shown that the belief in the impugned statement had a notional basis, and was not just a belief. If before making the statement the accused did not show due care and attention that would defeat his plea of good faith.
4. No rigid rule of test, for deciding the good faith can be framed. The question has to be considered on the facts of each case and their circumstances.
5. Absence of personal malice may be relevant fact in dealing with plea of good faith.

Supreme Court held that High Court has committed an error in holding that the accused had failed to show that he acted in good faith when he published the defamatory statement. It was further held the publication was made for public good and that the accused was entitled to claim protection under this exception.

There is no special privilege attached in India for official report submitted by an officer to his superior. It is contains reckless unjustifiable allegation no absolute privilege is there to protect the officer.

In ***Adbul Razk v. Gourinath***[19] It was held that a police officer who was asked in a court whether a person is the leader of a gang of dacoits, added at the end of his report. 'I learn from private inquiries that there is scarcely a woman in the houses of Banias who has not passed a night or two with defendant", is not entitled to any benefit under the defence of absolute privilege.

Privileges or judges, counsels, witnesses and parties:

The privileges of judges, parties, counsels, attorneys, pleaders and witnesses come under this exception. Under English law these persons enjoy absolute privilege both in the law of torts is concerned the English rule of absolute defence of privilege is followed. But their position is not so in Criminal law, where they are subject to the conditions laid down by the Section 499. This exception says that their imputations are protected only if made in good faith. In short, Indian Penal Code confers on them only qualified privilege, limited by good faith.

There are number of conflicting rulings between various High Courts in India and the law is in an unsettled condition. Section 177 Indian Penal Code protects judges for acts done when acting judicially. Illustration 7 of this section protects a judge censuring in good faith the conduct of the witnesses. But the above provisions will not cover the cases of remarks made by a judge or magistrate in under this exception.

The privilege of Counsel, witness and party is only qualified and not absolute. It is for the prosecution to prove the absence of good faith. It is only where the questions are asked by a counsel with utter recklessness, and without regard to seeking whether there was any truth is them, and with absolute disregard of whether he has entitled to ask them or not and with no other view them publicly to injure the reputation of the other person. That he can be held liable.

[19] 1893 17 Mad.87

Advocate who makes defamatory statements in the conduct of a case has wider protection than a lay man, he has to bring his case within the terrace of this exception and under section 105 of Indian Evidence Act, and the burden of proof is normally upon him. In practice an advocate is entitled to special protection, good faith will be presumed in his favour.

Parties also do not enjoy absolute privilege. Only relevant statement of parties will be protected.

The Patna High Court followed the view that the right of party is not absolutely privileged. In Karu Singh (1926) where in a plaint the accused described the complainant / Defendant 3 as the 'kept woman 'of Defendant No.1 without any foundation, it was held that he was guilty of defamation.

Privileged Communication-4: Tenth Exception

> ***Caution in good faith:*** *It is not defamation to convey a caution in good faith to one person against another provided that such caution be intended for the good of the person to whom it is conveyed, or of some person in whom the person is interested, or for the public good.*

This covers cases of imputation in the discharge of a social duty such as when A says to his friend B that his dismissed servant is a dishonest man, and ought not to be trusted. So also a relation can advise a lady not to marry A without giving reason. These statements are privileged.

A person cannot claim privilege by merely writing on his letter 'private and confidential'. But two persons may really make communication confidentially. Relation between counsel and client, Husband and wife, father and son, teacher and pupil, and intimate friends is confidential relation.

> S. 500: Whoever defames another shall be published with simple imprisonment for a term which may extend to two years or with fine, or with both.
>
> S.501: Printing or engraving of defamatory matter is made publishable with simple imprisonment for 2 years or with fine or with both.
>
> S.502: Whoever sells or offers for sale any printed or engraved substance containing defamat00ory matter, knowing that it contains such matter, shall be punished with

simple imprisonment for a term which may extend to two years or with fine or with both.

Sections 500,501 and 502 prescribe punishments for various defamatory statements

1.2. Media and Crime of Sedition:

Criticism of government is not sedition. The expression 'sedition' generally means defamation of state. But the legal meaning of 'sedition' is different.

Definition: Section 124A of Indian Penal Codes defines and punishes sedition as follows:

Whoever by words, either spoken or written, or by signs, or by visible representations, or otherwise, brings or attempts to bring into hatred or contempt, or excites or attempts to excite disaffection towards, the Government established by law in India, shall be punished with imprisonment for life to which fine may be added, or with imprisonment which may extend to three years, to which fine may be added, or with fine.

Explanation 1: The expression 'disaffection includes disloyalty and all feelings of enmity.

Explanation 2: Comments expressing disapprobation of the measures of the Government with a view to obtain their alteration by lawful means, without exciting or attempting to excite hatred, contempt or disaffection, do not constitute an offence under this section.

Explanation 3: Comments expressing disapprobation of the administrative or other action of the Government without exciting or attempting to excite hatred, contempt or disaffection, do not constitute an offence under this section.

Meaning: Sedition is a crime against the state. The word 'seditio' in a latin means 'going aside' The State intends to bring in all kinds of separatist tendencies into this word and curb the writings or campaign causing disaffection. According to Sir J Fitzjames Stephen[20] are not connected with open violence but they presuppose disaffection with the existing government in various ways. This offence in English law is a crime against the

[20] Criminal Law of England, Ch 24

Crown and government, but not as serious as treason.[21] Sedition according to English law is the misdemeanour of publishing verbally or otherwise any words or documents with the intention of exciting disaffection, hatred or contempt, against the sovereign or the government and constitution of the Kingdom or either House of Parliament, the administration of justice, or exciting the subject to change by unlawful means the Church, the State or Exciting ill-will, hostility, or ill feelings between different classes.[22]

According to decision in ***Indramani Singh***[23] case, sedition is a comprehensive term, and it embraces all those practices, whether by word, deed, or writing, which are calculated to disturb the tranquility of the State and lead ignorant persons to endeavour to subvert the Government and laws of the country.

Object: The object of sedition is to induce insurrection-(rising in the first stage or incipient rising) and rebellion. It has been described as a disloyalty in action and it leads to civil war, bringing into contempt the sovereign or the government or the Constitution. This offence, therefore, is the offence of defamation of Government.[24]

English Law and Indian Law: The Indian Law of Sedition is almost same as the English Law. The substance of Indian Law of sedition is contained in Sections 124A, 153A, 295. While the Section 124-A deals with political offence of sedition, Section 153-A deals with sedition by class hatred and Section 295-a deals with sedition by promoting religious insult. Sedition can also be committed by questioning the territorial integrity of frontiers, according to Criminal Law Amendment Act, 1961, Section 2.

Citizen's Criticism and Sedition: Sedition is not an offence against public order, the gist of the offence is 'incitement to disorder or tendency or likelihood of public disorder or the reasonable apprehension thereof', as per the Supreme Court in ***Kedar Nath*** case.[25] Moreover a citizen has a right to say or write whatever he likes about the government; or its measures, by way of criticism, or comment so long as he does not incite people to violence;. When he does so and incites people to violence, he loses the constitutional protection of freedom of speech and freedom is different from licence. It further observed that the restrictions imposed by these provisions cannot but be said to be in the interest of public order and within the ambit of permissible legislative interference. The explanations appended to the main body of section make it clear. It is only when the words used have the pernicious tendency or intention of creating public disorder or disturbance of law and order that the law steps in to prevent such activity in the interest of public order. Section 124-A is a proof of

[21] Walker: Oxford Companion to English Law,Vol 3 pp 317 318
[22] ibid
[23] 1965) 1 Cr L J 184
[24] Niharendu Dutt, 1942 FCR 38, 43 CrLJ 504
[25] (1962) 2 Cr L J 103, AIR 1962 SC 955

this that the Government can be criticised by all legitimate means and the State cannot do anything.[26]

A Reasonable Restriction: No state can be expected to concede freedom to those who profess to put an end to it by availing of that freedom. And in such cases there is no point in waiting till an overt act is done towards the commission of the crime when their cherished aim is to destroy that freedom itself. Thus it was held in different cases that Sedition is a reasonable restriction over the freedom of speech and expression.

The Person: The writer, printer, publisher, editor and the composer can be a person under this section. A person who has used the article or writing for such purpose is also included. A person is liable for everything that appears in his paper and the question of punishment is a different thing. Because a person is printer he is not considered to be less liable. This is however a rebuttable presumption. The essence of this crime is the intention of the writer, speaker or publisher with which the language is used. The intention of the writer is to be gathered from the articles written or published. A speech suggesting generally that the government established by law in British India was thoroughly dishonest and unfair and that steps should be taken either by violence or by threat of violence to abolish I, comes within the provisions of Section 124-A.[27] The British Indian Government used this section to suppress the nationalist movement and jail the leaders like Mahatma Gandhi, Balgangadhar Tilak and Nehru.

Balagangadhar Tilak's Case: In ***Balagangadhar Tilak Case***,[28] the proprietor, editor, manager and printer of Bangbasi, a Bengali weekly newspaper, published a certain article, for which charged under Section 124-A and 500 Indian Penal Code. In his speech, he suggested that the government established by law in British India was thoroughly dishonest and unfair and that steps should be taken either by violence or by threat of violence to abolish it, comes within the provisions of this section. Anyone is entitled to hold what political views he chooses provided he expresses them with proper restraint and with due regard to law. The right of free speech exists, subject only to the qualification that the freedom is not permitted to degenerate into a licence to provoke breaches of peace, to stir up disaffection towards the King Emperor or the Government established by law in British India, or to bring the Government established by law into hatred or contempt.

Sedition trial of M. K. Gandhi: Section 124A was invoked in March 1922 and this was a historical case in the context of Sedition. The accused this time was M.K.Gandhi and Shankarlal Banker was co-accused. The trial, held at the Government Circuit House at

[26] (1962) 2 CrLJ 103 (Sc) AIR 1962 SC 955
[27] AIR 1941 All 156
[28] (1897) 22 Bom 112.

Ahmedabad heavily guarded for that purpose, on March 18, 1922, ended in the Judge, Mr. Justice Robert Broomfield, sentencing Gandhi to six years' imprisonment. Co-accused in the case, Mr. Banker, was sentenced for one years's imprisonment and a fine. The case was based on a series of articles that Gandhi wrote in Young India between March 1921 and February 1922 that were held as seditious by the authorities; Banker was tried because he published Young India.

Gandhi did not plead innocent. His written statement contained the following sentence: ``I hold it to be a virtue to be disaffected towards a Government which in its totality has done more harm to India than any previous system''. And he concluded his arguments by seeking the judge to inflict the ``severest penalty''. Judge Broomfield, relied on the earlier judgments in the trial of Tilak, in this case who was also booked under the same case earlier on two counts. Soon after he pronounced the sentence, Gandhi stood up to say that he regarded it as the ``proudest privilege and honour'' to be associated with the well revered name of Tilak.

That was the last occasion when the British authorities ever put the Mahatma on trial. On all subsequent occasions, Gandhi was put in jail without trial! [29]

Sedition and Political Philosophy: In ***Manubhai Tribhovandas v State,***[30] the question was whether the passages from the book 'extracts from Mao-Tse-Tung' expound the philosophy of Mao with a view to its academic study or not. The book was forfeited by the Government. The Gujarat High Court observed that to condemn them as seditious would be to close the doors of knowledge, to ostracize a work of philosophy because it challenges values cherished and held dear by our present day society and holds up for acceptance a new way of life vastly different from that to which our people are presently accustomed. It is not for the court to decide which doctrine is good for our people. It is for the people to choose what is best for them. If any word or writing incites violence or disturbs law and order or creates public disorder with a view to overthrowing Government established by law, the State would have power to forfeit the book in order to prevent disturbance of public tranquility. However, here the objected passages which constitute but only six out of 184 passages do not constitute seditious matter punishable under Section 124 A Indian Penal Code. The order of forfeiture was therefore quashed.

Sedition by visible Representation: In Devising Mohan Singh Cr. App No 334/1910 decided on 3.11.1910 and Shridhar Waman Nagarkar, Cr App No 395/1910 decided on 1.12.1910 are important cases on sedition. Both of these are unreported.[31] in these cases the accused published a photographic print called 'the Nation personified". The photo portrayed a

[29] http://krishnananth.blogspot.com/2008/10/on-section-124a-of-ipc-and-sedition.html

[30] (1970) CrLJ 373 (Guj)

[31] Unreported cases of Bombay High Court, quoted by Ratanlal & Dhirajlal's Law of Crimes, 23rd Edition 1987, reprint 1990 p 425

muscular person styled India personified (Rashtra Purusha) standing on the lotus of self-reliance (Swavalamban) wearing bracelets labeled self rule (Swarajya) and hail motherland (vandematharam) and holding in his right hand a sword called boycott (bahishkar) and in his left a map of India covered with portraits of Dadabha Naoroji, Tilak, Paranjpe, Bijapurkar and Khare, who were designated as friends of India (Yar-e-hind) and national luminaries (rashtra deepika). On the left hand corner at the bottom of the photo there were two dogs barking at the rashtra purusha labelled as "Dependents of others" (paravalambee) and near them stood two persons called 'Effeminate' (janani). On the left hand corner at the top there were portraits of Shivaji, Ramdas, Goddess of India's Independence (Shri Bharatha Swatantrata) and Swami Vivekananda. Beneath these portraits there were two texts; "(1) He who depended upon others lost his cause, and (2) will the force of injustice (immorality) or physical force prevail'? On the top right hand corner there were portraits of Chapekar brothers, Ranade, Chiplunkar, Phadke, Khudiram Bose, Profulla Chaka, Tatya Tope, Rani of Jhansi and Nana Saheb, some of whom had rebelled against the British Government or had been executed for murder or convicted of sedition. These persons were styled 'Reliable Hindu Patriots". The Sessions Judge in convicting the accused of sedition observed, 'From the above description of the picture and its meaning it is clear that it is of a seditious nature and would be likely to excite hatred and disaffection towards government in the minds of persons who look at it", The High Court confirmed the conviction and said 'the main evidence is really the photograph itself, and although some of the photographs therein contained are photographs of gentlemen against who there is nothing whatever to be said, yet, we think, we must take the photograph as a whole. And so considering it we are clear that its symbolism plainly exhorts hatred of the established government. That is made plain throughout the picture and particularly by the selection as models for imitation of persons who have rebelled against the existing Government or have been executed for murder or convicted for sedition.

A threat to Media's Freedom

This case is an example for slapping a case of sedition against the visible representation and its symbolic communication of seditious message. Sedition is a weapon generally a state uses against the persons having opposite political thought or those who are propagating against the foreign rulers and championing the cause of self-rule like that of Indian Independence struggle.

Section 124A defined as an offence, exciting disaffection against the state; it was replaced with ‘sedition' in 1898. The English law meaning of sedition is basically libel of government, but its ordinary English meaning is “stirring up rebellion against the

government"[32], the Federal Court gave a liberal meaning to 'sedition': "The acts or words complained of must either incite to disorder or must be such as to satisfy reasonable men that is their intention or tendency." After Independence, it was argued before the Supreme Court that Section 124A was *ultra vires* of the Constitution insofar as it sought to punish merely bad feelings against a government, and that it was an unreasonable restriction.

The First Amendment to the Constitution in 1951 incorporated 'public order' in Article 19(2) as a ground on which the state could impose reasonable restrictions by law. Thus, the inclusion of 'sedition' was held constitutional by the Supreme Court in *Kedarnath*. But the Constitution-makers did not specifically state that 'sedition' should be a ground to restrict free speech. Though the additional ground of 'public order' is held to be valid for restricting freedom of expression, sedition cannot be read into the wide expression 'public order.'

When two officers of the Punjab Education Department raised the slogan "Khalistan Zindabad, Raj Karega Khalsa," they were convicted of 'sedition'. But the Supreme Court set it aside[33] saying the court should look at whether it had led to a consequence detrimental to the nation's unity and integrity. It pointed out that Section 124A should not be used to violate freedom of expression. Free speech can be reasonably restricted if that would result in violence or public disorder. Such an event linked to the relevant communication needed to be proved before pronouncing a person guilty of sedition, going by this interpretation by the Supreme Court based on its own judgment in *Kedarnath v State of Bihar*.

Conviction of Dr.Binayak Sen:

Charging a practicing doctor and social worker, Dr. Binayak Sen of Chattisgarh in 2010 of 'sedition' under Section 124A was criticized to be uncalled for. If the interpretation of the section by the Supreme Court has to be followed as the law, along with the penal provisions of the IPC, he cannot be convicted.

When the investigating police officers were the only crucial witnesses, their evidence has to be corroborated as they are not independent witnesses. Sentencing Dr. Sen solely based on their evidence is unreasonable and unjustified. The judgment should at least appear to be an independent opinion and be supported by a convincing articulation of available evidence. There are several such bad aspects of evidence, reasonable doubts and unreasonable contradictions involved in this conviction.

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[32] *Kedarnath v State of Bihar,* AIR 1962 SC 955). But in *Niharendu Majumdar* (AIR 1942 FC 22 (26)

[33] (1995(3) SCC 214),

The constitutional validity of the charges of sedition and conspiracy that were used to implicate rights activists such as Binayak Sen merely for their anti-establishment political thoughts is now under challenge. Such a conviction ridicules the constitutional guarantee of freedom of expression.

The role of media in communicating the political thoughts adverse to ruling sections should not be viewed as seditious. Thus the law of sedition is a threat to freedom of airing the views on political thought and making a very bitter criticism of functioning of the rulers.

1.3. Media and Crime of Mischievous Statements

Section 505: Statements conducing to public mischief: (1) whoever makes, publishes or circulates any statement, rumour or report:

a. with an intent to cause, or which is likely to cause, any officer, soldier, sailor or airman in the Army, Navy, Air Force of India to mutiny or otherwise disregard or fail in his duty as such: or
b. 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 the public tranquility; or
c. with intent to cause, or which is likely to incite, any class or community of persons to commit any offence against any other class or community, shall be punished with imprisonment which may extend to three years, or with fine, or with both.

Promoting Enmity between groups, 153A

(1) Statements creating or promoting enmity, hatred or ill will between classes- whoever makes, publishes or circulates any statement or report containing rumour or alarming news with intent to create or promote, or which is likely to create or promote, on grounds of religion, race, place of birth, residence, language, caste or community or any other ground whatsoever, feelings of enmity, hatred or ill will between different religious, racial, language or regional groups or castes or communities, shall be punished with imprisonment which may extend to three years, or with fine, or with both.
(2) Offence under sub-section (2) committed in place of worship etc.- Whoever commits an offence specified in sub-section (2) in any place of worship or in any assembly engaged in the performance of religious worship or religious ceremonies, shall be punished with imprisonment which may extend to five years and shall also be liable to fine.

Exception: It does not amount to an offence within the meaning of this section, when the person making, publishing or circulating any such statement, rumour or report, has

reasonable grounds for believing that such statement, rumour or report is true and makes, publishes or circulates it in good faith and without any such intent as aforesaid.

In ***Kedarnath Singh*** case the constitutional validity of Section 124-A and S 505 was upheld. They are held to not violate of Article 19(1) (a).

1.4. Media and Crime of Obscenity

The society is now reeling under the impact of unending flow of cinema, story, dance and drama through small screen of television and of pornography in its vulgar form in personal computer with World Wide Web. The television with powerful, multi-channel visual splendors is totally occupying the young minds. Its utility in educating, informing and news-giving is camouflaged by its misuse in dishing out obscene and indecent stuff in the name of entertainment. Images of women in electronic media, either by way of commercial advertisements or themes of serials or repeated show of films, can straight away influence the young minds.

It is the need of civilized world to protect the human dignity and medium of any kind has to project the image of humanity in decent form. The commodification of women as the object of sex and obscene writing or visual or sensational theme of a serial or film represents the moral and cultural levels of a society.

While all other media have their own limitations of reach, the TV and Internet have no technological, territorial or literacy limitations. The writing is for those who know to read and write, and the film as such is meant for which they have to pay. TV at present is playing a role of "medium of the medium" by becoming a vehicle for films based on stories and novels. Seeing a cinema in theatre requires preparedness, whereas the TV which has become an inevitable ingredient of either drawing room or bed room, repeats a film either in totally or in part for umpteen number of times without requiring any preparedness on the on the part of audience except to switch on the set. A song and dance part or a fight sequence is having a tremendous impact because of its repetition in TV, the most powerful and effective vehicle of thoughts at present.

The internet as an information infrastructure, a communicative device, is viewed as a tool for democratising speech on a global basis. Some say that no national law can regulate the net users and TV viewers. Before understanding the effectiveness of any control over distorting image of the women, it is necessary to know the existing legal controls over the media.

Restriction on Freedom of Expression: Constitution of India

The constitution Art.19(1)(a) recognizes the right to freedom of speech and expression, which can be restricted under Art.19(2) where in several grounds were prescribed including "decency or morality and public order", through which the image of humanity and dignity of women can be sought to be protected in the media projections.

The society is bound to decay if high standards of decency and morality are not maintained. It is imperative for its preservations for the base, carnal and low instincts of its members must be curbed. Hence the need arose to include the ground" decency or morality" in Article 19(2) to justify the restrictions on the freedom of speech and expressions which may otherwise be conveniently abused for deliberately lowering the public morals.

Obscenity and Indecency:

'Obscene means offensive to chastity or modesty; expressing or representing to the mind or view something that delicacy, purity and decency forbid to be expressed; impure, as obscene language obscene pictures'. Decency connotes conformity to standards of propriety' good taste or morality, conformity to ideals or right human conduct[34] . According to Oxford dictionary, obscene means 'offensive to modesty or decency expressing or suggesting unchaste and lustful ideas; impure, indecent. Indecency includes anything which an ordinary decent man or woman would find to be shocking disgusting and revolting. Indecency is a wider concept than obscenity. Anything obscene has to be indecent, but indecency may be something which may not be obscene always, in the sense of tendency to disgrace and corrupt the reader. For example glorification of violence and a criminal may not be offensive and obscene under Section 292 IPC but is still punishable under the Young Persons Harmful Publications Act, 1956, for not being decent for them. Decency is the ground available under Article 19(2) on which restrictions can be placed on the freedom of speech and expression.

Offences affecting public decency and morals, IPC:

Indian Penal Code incorporates offences affecting public decency and morals. S. 292 punishes selling or letting or distributing the objects (book or pamphlet etc.) which are lascivious or appeals to the prurient interest or its effect tends to deprave and corrupt persons who are likely to read, see or hear. Section 292 punishes selling of such objects to a person under the age of 20 years. Section 294 punishes public exhibition, selling or singing of obscene object.

Section 292 IPC says:

[34] Webster's New Collegiate Dictionary (Indian Ed.) 1981

Whoever (a) sells, lets to hire, distributes, publicly exhibits or in any manner puts into circulation, or for purposes of sale, hire, distribution, public exhibition or circulation, makes produces or has in his possession any obscene book, pamphlet, paper, drawing, representation or figure or any other obscene object whatsoever, or….(d) advertises or makes known by any means whatsoever that any person engaged is ready in any act which is an offence under this section, or that any such obscene object can be procured from or through any person, or…shall be punished on first conviction with imprisonment of either description for a term which may extend to two years, and with fine which may extend to Rs 2000 and in the event of a second or subsequent conviction, with imprisonment of either description for a term which may extend to five years, and also with fine which may extend to Rs. 5000.

The Indian Penal Code exempts certain publications from guilt of obscenity, as follows:

a) Any book, pamphlet, paper, writing, drawing, painting, representation or figure

i) the publication of which is proved to be justified as being for the public good on the ground that such book, pamphlet, paper, writing, drawing, etc. is in the interest of science, literature, art or learning or other objects of general concern, or
ii) which is kept or used bona fide for religious purposes;

b) any representation sculptured, engraved, painted, or otherwise represented on or in

i) any ancient monument within the meaning of the Ancient Monuments and Archaeological sites and Remains Act, 1958, or
ii) any temple, or in any car used for the conveyance of idols or kept or used for any religious purpose.

There is no precise definition of word obscenity. Section 292 cl. (1) as amended in 1969 attempts to define as to what obscenity means. It says, 'for the purposes of subsection 2, a book, pamphlet, paper, writing, drawing, painting, representation, figure or any other object, shall be deemed to be obscene if it is lascivious or appeals to the prurient interest or if its effect, or the effect of any one of its items, is if taken as a whole, such as to tend to deprave and corrupt persons who are likely, having regard to all relevant circumstances to read, see or hear the matter contained or embodied in it". This amendment was made after the Supreme Court judged Ranjit D. Udeshi case in 1965.

Hicklin Test: Validity

It has to be decided on the facts and circumstances of each case whether in the context of its surroundings, the questioned act is obscene or not. As stated in ***Ranjit D. Udeshi v. State***[35] none has so far attempted to define 'obscenity'. In this case, the Supreme Court upheld constitutionality of Section 292 and applied what is known as the Hicklin test as the right test to determine obscenity. The test laid down by the Chief Justice Cockburn in ***Queen v. Hicklin***, was referred:

> Whether the tendency of the matter charged as obscenity is to deprave and corrupt those whose minds are open to such immoral influences, and into whose hand a publication of this sort may fall… it is quite certain that it would suggest to the minds of the young of either sex, or even to persons of more advanced years, thoughts of a most impure and libidinous character"[36]

The Supreme Court recently allowed some scenes of female frontal nudity and ghastly rape in the feature film "Bandit Queen" saying that they were essential to explain why Phoolan became a bandit Queen. The Court refused to cancel the censor certification to the film, saying that the scenes were not obscene.[37]

The standards of contemporary society in India are fast changing like anywhere in the world. The concept of obscenity however would differ from country to country depending on the standards of morals of contemporary society. What is considered as a piece of literature in France may be obscene in England and what is considered in both countries as not harmful to public order and morals may be obscene in our country, but to insist that the standard should always be for the writer to see that the adolescent ought not to be brought into contact with sex or that if they read and references to sex in what is written whether that is the dominant theme or not they would be affected, would be to require authors to write books only for the adolescents and for the adults. In early English writings authors wrote only with unmarried girls in view but society has changes since then to allow literatures and artists to give expression to their ideals, emotions and objectives with full freedom except that it should not fall within the definition of 'obscene' having regard to the standards of the contemporary society in which it is read. The standards of contemporary society in India are fast changing. The adults and adolescents make use of a large number of classics, novels, stories and pieces of literature which have a content of sex, love and romance. In the field of art and cinema also the adolescent is shown situations which even a quarter of a century ago would be considered derogatory to public morality, but having regard to changed conditions are more taken for granted without in any way tending to debase or debauch the mind. What

[35] AIR 1965 SC 881
[36] As quoted in Ranjit D. Udeshi Case
[37] 1996(4) SCC 1

has to be seen is whether a class, not an isolated case, into whose hands the book, article or story falls, suffers in their moral outlook or become depraved by reading it or might have impure and lecherous thoughts aroused in their minds.[38]

In the Victorian age, it used to be bad manners for the women to expose her ankles, but in the 20th century it became a fashion to expose even to the knees and with the advent of the 21st century that the dress are going above the knees and below the waist-line. The hidden parts are only to arouse curiosity. This is becoming the moral code of the day, making it sure that moral codes differ from age to age, because they adjust themselves to historical, social and environmental conditions and that man's sins may be the relics of his rise rather than the stigma of the fall. So is the look of decency. It differs from age to age, man to man and eye to eye. What is decent for one may not be for other. What is termed as decent today, perhaps was not so a decade before. Hence there is varying the meaning of decency, the meaning of moral and so also the degree thereof. There does not appear to be one universal scale to weigh decency or moral values nor there immutable standard thereof."[39]

Hicklin Test in UK

The Hicklin test was retained in England till 1954, after the English courts delivered several contradictory judgments. In Regina v. Martin Secker and Warburg Limited, 1954, Stable J., it was observed that present day context and prevailing attitude to sex should also be considered while applying Hicklin test. He said: 'a mass of literature, great literature from many angles is wholly unsuitable for reading by the adolescent but that does not mean that a publisher is guilty of a criminal offence for making these works available to the general public'.

As the public opinion and judicial observations went against the Hicklin Test, a new Act, Obscene Publications Act was made in 1959, which defined the obscene publication as 'for the purpose of this Act, an article shall be deemed to be obscene if its effect is, if taken as a whole, such as to tend to deprave and corrupt persons, who are likely having regard to all relevant circumstances, to read, see or hear the matter contained in it"

Hicklin Test: USA

In USA, Hicklin Test was used for some time till 1933, in which year James Joyce's Ulysses case, ***this test was rejected. According to the Supreme Court, the test is whether, to the average person applying contemporary community standards, the dominant theme of the material taken as a whole appeal to prurient interest.***[40]

[38] As stated in Chandrakant v. State, AIR 1970 SC 1390
[39] V.K. Dewan, Law Relating to Offences Against Women, 1996, 393
[40] Dholakia H.C, Right to Freedom of Speech and Expression in India, 167

Hicklin Test: India:

Though the Hicklin test was rejected in its own country of origin, the Indian judiciary is still applying it.

According to Section 292 Clause (1) there are three tests to determine obscenity. A book, pamphlet, paper, writing etc., shall be deemed to be obscene if it is:

a) lascivious; or
b) appeals to the prurient interest; or
c) if its effect, or (where it comprises two or more distinct items) the effect of any one of its items, if taken as a whole, such as to tend to deprave and corrupt persons who are likely having regard to all relevant circumstance to read, see or hear the matter contained or embodied in it.

This clause is added by amendment in 1969. In practice only the test of deprave and corrupt is being resorted to for deciding the obscenity. This test is largely based on the Hicklin test. The Amendment in 1969 was the result of the two decisions of Supreme Court in Ranjit Udeshi and Chandrakant Kakodkar cases. Even after the amendment the courts are interpreting the word obscenity according to earlier standards. The Court viewed the amendment as a clarification to 'obscenity' based on earlier interpretations. Thus it is for the courts to decide what is obscene or not within the frame work of the section. Therefore, what is obscene for one judge may not be so for the other. This inherent weakness serves as a potential danger to the freedom of speech and expression. There is a too much emphasis on word 'tendency of the matter to deprave and corrupt those minds. The section must be amended to add some qualifying prefixes to the 'word tend to'. The words must be 'grossly' or 'sufficiently' or 'substantially' tend to deprave. Garg, the counsel for Ranjit Udeshi argued the case taking the American obscenity test as one of the bases. He cited the case of Samuel Roth v. USA 1957 in which Justice Brennan delivered that if obscenity is to be judged by the effect of an isolated passage or two upon particularly susceptible persons, it might well encompass material legitimately treating sex and might become unduly restrictive and so the offending book must be considered in its entirety. Chief Justice Warren made "substantial tendency to corrupt by arousing lustful desires" as the test[41] .

Knowledge of the Seller:

In Ranjit D Udeshi case the seller of the books "Lady Chatterley's Lover", Ranjit Udeshi took the plea that the prosecution must prove that the person who sells or keeps for sale any obscene object knows that it is obscene before he is adjudged guilty. The Supreme

[41] Ranjit D Udeshi Case, AIR 1965 SC 881

Court rejected this argument saying that the knowledge was not an ingredient of this offence under Section 292.

Section gives more importance to the effect on the readers but the intention of the author was totally ignored. It shows that the writer has to keep in mind the effect on the people as a condition. This amounts to a kind of pre-censorship or restraint on the writer. There is a need to balance the writers' freedom and the effect on the readers.

Intention of the Writer:

Media writings attracted attention of judiciary when the books were challenged as obscene. In ***Samaresh Bose v. Amal Mitra***[42] , the Supreme Court was liberal and took an objective stand. In this case, the Supreme Court was concerned with a novel entitled 'Prajapati'; it was published in Sarodiya Desh, which was read by Bengalis of both sexes and almost of all ages all over India. A complaint was lodged that the novel was obscene and had the tendency to corrupt the morals of its readers. The Supreme Court said[43] :

> ….the judge should in the first place try to place himself in the position of the author and should try to understand what is it that the author seeks to convey and if what the author, conveys has artistic value. The judge should thereafter place himself in the position of a reader of every age group…and should try to appreciate what kind of possible influence the book is likely to have on the minds. The judge should thereafter apply his judicial mind dispassionately to decide.

The Court took into consideration the intention of the novel writer Samaresh Bose and S. Kumar Das Gupta, the printer and publisher of Desh, a magazine. It held:

> ….a vulgar writing is not necessarily obscene, vulgarity arouses a feeling of disgust and revulsion and also boredom but does not have the effect of depraving, debasing and corrupting the morals of any reader of the novel, whereas obscenity has the tendency to deprave and corrupt those whose minds are open to such immoral influences. If a reference to sex by itself in any novel is considered to be obscene and not fit to be read by adolescents, adolescents will not be in a position to read any novel and 'will have to read books which are purely religious.
>
> We may observe that characters like Sukhen, Shikha, the father and the brothers of Sukhen, the business executives and others portrayed in the book are not just figments of the author's imagination. Such characters are often to be seen in real life in the

[42] AIR 1986 SC 967
[43] ibid.

society. The author who is a powerful writer has used his skill in focusing the attention of the readers on such characters in society and to describe the situation more eloquently has had used unconventional and slang words so that in the light of the author's understanding, the appropriate emphasis is there on the problems. If we place ourselves in the position of the author and judge the novel from his point of view, we find that the author intends to expose various evils and ills pervading the society and to pose with particular emphasis the problems which ail and afflict the society in various spheres. He has used his own technique, skill and choice of words which may in his opinion, serve properly the purpose of the novel. If we place ourselves in the position of readers, who are likely to read this book, - and we must not forget that in this class of readers there will probably be readers of both sexes and of all ages between teenagers and the aged, - we feel that the readers as a class will read the book with a sense of shock, and disgust and we do not think that any reader on reading this book would become depraved, debased and encouraged to lasciviousness. It is quite possible that they come across such characters and such situations in life and have faced them or may have to face them in life. On a very anxious consideration and after carefully applying our judicial mind in making an objective assessment of the novel we do not think that it can be said with any assurance that the novel is obscene merely because slang and unconventional words have been used in the book in which there have been emphasis on sex and description of female bodies and there are the narrations of feelings, thoughts and actions in vulgar language. Some portions of the book may appear to be vulgar and readers of cultured and refined taste may feel shocked and disgusted. Equally in some portions, the words used and description given may not appear to be in proper taste. In some places there may have been an exhibition of bad taste leaving it to the readers of experience and maturity to draw the necessary inference but certainly not sufficient to bring home to the adolescents any suggestion which is depraving or lascivious. We have to bear in mind that the author has written this novel which came to be published in the Sarodiya Desh for all classes of readers and it cannot be right to insist that the standard should always be for the writer to see that the adolescent may not be brought into contact with sex. If a reference to sex by itself in any novel is considered to be obscene and not fit to be read by adolescents, adolescents will not be in a position to read any novel and 'will have to read books which are purely religious'.

Finally Supreme Court concluded that 'the Bengali novel Prajapati is not obscene merely because slang and unconventional words have been used in the book in which there have been emphasis on sex and description of female bodies and there are the narration of feelings, thoughts and actions in vulgar language and that the Courts below went wrong in considering this novel to be obscene’.

The court has to look into intention, though in earlier cases the courts did not consider the intention of the author. In ***Queen Empress v Parashram Yeshwant***[44] , ***Emperor v. Hari Singh***[45], ***Public Prosecutor v. Markondayulu***[46] , ***Kailashchandra Acharjya v. Emperor***[47], they have regarded the intention of the author as immaterial. Taking a realistic and progressive stand, the courts have considered the intention of the author in several recent decisions. When obscenity is made a criminal offence, the intention and motive of the writer must be considered as an essential element.

Within Reach of all:

If the publication describing illicit love for another's wife or any other obscene matter and selling at a low price which places it within easy reach of all, it is an obscene publication in spite of the literary eminence of the writer. This was decided in Public Prosecutor v. Markandeyulu[48].

Out of context:

Any passage out of context and divorced from content may be obscene. Though bona fide publication for religious purposes is excluded by the exception under the section, a passage from religious book may become obscene if it finds place in a journal intended for the general public as decided in Ghulam Hussain case. The statement of a religious matter is perverted so as to transgress the bounds of a bona fide controversy as decided in the case of Hari Singh[49].

Slurry Words:

A novel, written by well-known writer of novels and stories, by which the author intended to expose various evils and ills pervading the society cannot be said to be obscene merely because slurry and unconventional words have been used in the book. This was so held by Supreme Court in Samaresh Bose Case.

Pornography, aggravated form of obscenity

Any material which is offensive to modesty or decency or lewd is undoubtedly an obscene material. Pornography is intended to directly arouse sexual desire. Obscene material could include something not intended to do so but has that tendency. Both offend against public decency and morals but pornography is an aggravated form of obscenity. Filthy and repulsive writings also belong to category of grave form of obscene writings.

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[44] 1895, (ILR 20 Bom 193)
[45] 1905 ILR 28 All.100,101
[46] AIR 1918, Madras, p 1195
[47] 1932 (Calcutta Series, ILR p 201)
[48] AIR 1918 Mad 1195
[49] 1905, 28 All. 100

Evidence:

Under Section 292 in the determination of obscenity importance is not given to evidence. It all depends on interpretation of section 292 and not on oral or expert evidence, according to Supreme Court in Ranjit Udeshi Case. The apex court reiterated it in Chandrakant Kakodkar case, saying "the question whether a particular book is obscene or not, does not altogether depend on oral evidence because it is the duty of the Court to ascertain whether the book offends the provisions of s. 292 IPC" but "it may be necessary if it is at all required, to rely to a certain extent on the evidence and views of leading literatures on that aspect particularly when the book is in a language with which the Court is not conversant". Thus the question of obscenity totally depends on the interpretation and judicial discretion. If the Courts deal the literary and news writings with an open mind and proper spirit, then alone the freedom of writing will be secured, If not, it will obstruct the freedom.

Krishna Iyer's Judgment:

Film has overtaken as the most impressive and powerful medium, and thus became subject matter of dispute when obscenity has flown through the celluloid. The much acclaimed showman of the millennium, Raj Kapoor was in court for his controversial film Satyam Shivam Sundaram.

Man needs beautiful surroundings and tempted by biological needs, says the Supreme Court in ***Rajkapoor v. State***[50] . It says "social scientists and spiritual scientists will broadly agree that man lives not alone with mystic squints, ascetic chants and austere abnegation but by luscious love of Beauty, sensuous joy of companionship and moderate non-denial of normal demands of flesh. Extreme and excesses boomerang although some crazy artists and film directors do practice Oscar Wilde's observation; "Moderation is a fatal thing, nothing succeeds like excess"

The Supreme Court was dealing with a pro bono public prosecution against the producer, actors and others connected with a film called "Satyam, Shivam, Sundaram" on the ground of prurience, moral depravity and shocking erosion of public decency. One of the questions considered was: when can a film to be publicly exhibited be castigated as prurient, obscene and violating the norms against venereal depravity? Krishna Iyer, J., speaking for the Court, said[51] :

> Art, morals and law's manacles on aesthetics are a sensitive subject where jurisprudence meets other social sciences and never goes alone to bark and bite because State-made strait-jacket is an inhibitive prescription for a free country unless enlightened society actively participates in the administration of justice to aesthetics.

[50] 1980(1) SCC 43

[51] SCC pp. 47-50, paras 8-15

> …The world's greatest paintings, sculptures, songs and dances, India's lustrous heritage, the Konaraks and Khajurahos, lofty epics, luscious in patches, may be asphyxiated by law, if prudes and prigs and State moralists prescribe paradigms and prescribe heterodoxies.

It was Krishna Iyer, J., who again came to rescue of freedom of criticism, in ***Rajkapoor v. Laxman***[52], he said:

> ….Sublime titles of cinematograph films may enchant or entice and only after entry into the theatre the intrinsic worth of the picture dawns on the viewer. The experience may transform because the picture is great or the audience may lose lucre and culture in the bargain. More titles may not, therefore, attest the noxious or noble content of the film. Sometimes the same film may produce contrary impacts and what one regards as lecherous, another man may consider elevating.

Justice Krishna Iyer referred to probono prosecution case of Satyam Shivam Sundaram where it was complained that the fascinating title was misleadingly foul and beguiled the guileless into degeneracy. If the gravamen of this accusation was true, obscenity, indecency and vice are writ large on the picture, constituting an offence under Section 292, IPC. The Magistrate, after examining some witnesses, took cognizance of the offence and issued notice to the accused. The producer wanted quashing the criminal case. As the High Court dismissed the petition, aggrieved film producer has approached Supreme Court and pressed one principal objection founded on Section 79, IPC to neutralize Section 292, IPC. The Supreme Court said that "once a certificate sanctioning public exhibition of a film has been granted by the competent authority under the Cinematograph Act, 1952 there is a justification for its display thereafter, and by virtue of the antidotal provisions in Section 79 of the Penal Code, the public exhibition, circulation or distribution or the production of the film, even if it be obscene, lascivious or tending to deprave or corrupt public morals, cannot be an offence, Section 292, IPC notwithstanding. The absolution is based upon the combined operation of Section 5-A of the Act and Section 79 of the Penal Code".

Lethargy of censorship

Referring to lethargy of censorship, the Supreme Court judge observed that

> …..the Prosecutions like this one may well be symptomatic of public dissatisfaction with the Board of Censors not screening vicious films. The ultimate censorious power over the censor belongs to the people and by indifference, laxity or abetment, pictures which pollute public morals are liberally certificated; the legislation, meant by Parliament to protect people's good morals, may be sabotaged by statutory enemies

[52] 1980 AIR (SC) 605

within. Corruption at that level must be stamped out. And the Board, alive to its public duty, shall not play to the gallery; nor shall it restrain aesthetic expression and progressive art through obsolete norms and grandma inhibitions when the world is wheeling forward to glimpse the beauty of Creation in its myriad manifestations and liberal horizons. A happy balance is to ... consider, on the one hand, the number of readers they believe would tend to be depraved an corrupted by the book, the strength of tendency to deprave and corrupt, and the nature of the depravity or corruption; on the other hand, they should assess the strength of the literary, sociological and ethical merit which they consider the book to possess'. They should the weigh up all these factors and decide whether on balance the publication is proved to be justified as being for the public good [53]".

'Bandit Queen' compared with 'Schindler's List':

If certain scenes are essential components of the movie, it cannot be condemned as obscene. The Supreme Court upheld the certification of the film Bandit Queen for public exhibition on the ground that the frontal nudity of woman and depiction of rape were necessary parts of the theme of the film justifying the criminalisation of a young girl who was brutally hurt by the cruel society. It is essential to know how the critical expressions have to be considered before criminalizing them. Explaining the plot and story of Bandit Queen the Supreme Court said:

> It is not a pretty story. There are no syrupy songs or pirouetting round trees. It is the serious and sad story of a worm turning: a village-born female child becoming a dreaded dacoit. An innocent girl who turns into a vicious criminal because lust and brutality have affected her psyche so, the film levels an accusing finger at members of society who had tormented Phoolan Devi and driven her to become a dreaded dacoit filled with the desire to revenge. It is in this light that the individual scenes have to be viewed. First, the scene where she is humiliated, stripped naked, paraded, made to draw water from the well, within the circle of a hundred men. The exposure of her breasts and genitalia to those men is intended by those who strip her to demean her. The effect of so doing upon her could hardly have been better conveyed than by explicitly showing the scene. The object of doing so was not to titillate the cinemagoer's lust but to arouse in him sympathy for the victim and disgust for the perpetrators. The revulsion that the Tribunal referred to was not at Phoolan Devi's nudity but at the sadism and heartlessness of those who had stripped her naked to rob her of every shred of dignity. Nakedness does not always arouse the baser instinct. The reference by the Tribunal to the film "Schindler's List" was apt. There is a scene in it of rows of naked men and women, shown frontally, being led into the gas chambers of a Nazi concentration camp. Not only are they about to die but they have

[53] *R. v. Calder and Boyars Ltd* 1969) 1 QB 151, 172 : (1968) 3 All ER 644, 650 (CA)

been stripped in their last moments of the basic dignity of human beings. Tears are a likely reaction; pity, horror and a fellow-feeling of shame are certain, except in the pervert who might be aroused. We do not censor to protect the pervert or to assuage the susceptibilities of the oversensitive. "Bandit Queen" tells a powerful human story and to that story the scene of Phoolan Devi's enforced naked parade is central. It helps to explain why Phoolan Devi became what she did: her rage and vendetta against the society that had heaped indignities upon her.

The rape scene also helps to explain why Phoolan Devi became what she did. Rape is crude and its crudity is what the rapist's bouncing bare posterior is meant to illustrate. Rape and sex are not being glorified in the film. Quite the contrary, it shows what a terrible and terrifying effect rape and lust can have upon the victim. It focuses on the trauma and emotional turmoil of the victim to evoke sympathy for her and disgust for the rapist. Too much need not, we think, be made of a few swear words the like of which can be heard every day in every city, town and village street. No adult would be tempted to use them because they are used in this film.

The Supreme Court suggested recognizing the message of a serious film and applying this test to the individual scenes thereof: do they advance the message? If they do they should be left alone, with only the caution of an 'A' certificate. Adult Indian citizens as a whole may be relied upon to comprehend intelligently the message and react to it, not to the possible titillation of some particular scene'[54] .

Cinematography Act:

Cinematography Act provides some guidelines to censor the films before they are permitted for public exhibition. The certification from authority is made necessary, with a view to control the obscenity and criminality.

"1. The objectives of film certification will be to ensure that -

a. the medium of film remains responsible and sensitive to the values and standards of society;
b. artistic expression and creative freedom are not unduly curbed;
c. certification is responsive to social change;
d. the medium of film provides clean and healthy entertainment; and
e. as far as possible, the film is of aesthetic value and cinematically of a good standard."

Clause (2) states that the Board of Film Censors shall ensure that -

[54] Bandit Queen Case, 1996(4) SCC 1, Paras 25-30

i) human sensibilities are not offended by vulgarity, obscenity or depravity;
ii) scenes degrading or denigrating women in any manner are not presented;
iii) scenes involving sexual violence against women like attempt to rape, rape or any form of molestation or scenes of a similar nature are avoided, and if any such incident is germane to the theme, they shall be reduced to the minimum and no details are shown;

Clause (3) reads thus: The Board of Film Certification shall also ensure that the film-

i) is judged in its entirety from the point of view of the overall impact; and
ii) is examined in the light of the period depicted in the film and the contemporary standards of the country and the people to which the film relates, provided that the film does not deprave the morality of the audience."

The guidelines for censorship are broad standards. They cannot be read as one would read a statute. Within the breadth of their parameters the certification authorities have discretion. The specific sub-clauses of clause 2 of the guidelines cannot overweigh the sweep of clauses 1 and 3 and, indeed, of sub-clause (ix) of clause (2). Where the theme is of social relevance, it must be allowed to prevail. Such a theme does not offend human sensibilities nor extol the degradation or denigration of women.

The Supreme Court referred these rules in Bandit Queen case, and said: "It is to this end that sub-clause (ix) of clause 2 permits scenes of sexual violence against women, reduced to a minimum and without details, if relevant to the theme. What that minimum and lack of details should be is left to the good sense of the certification authorities, to be determined in the light of the relevance of the social theme of the film. The Film Censor Board, acting under Section 5-A, is specially entrusted to screen off the silver screen pictures which offensively invade or deprave public morals through over-sex, the Supreme Court added.

Indecent Representation of Women Act 1986:

As per this Act the indecent representation of women means- the depiction in any manner of the figure of a woman, her form or body or any part thereof in such a way as to have the effect of being indecent, or derogatory to or denigrating women or is likely to deprave corrupt or injure the public morality or morals[55]. Section 3 prohibits exhibition, publication or advertisement of indecent representation of women in any form. Section 4 punishes sending such things by post or circulating, unless it is for public good or used bona fide for religious purposes in the shape of sculptures, paintings, ancient monuments or in

[55] Section 2C of the Indecent Representation of Women Act 1986

temples, etc. Section 4-C exempts films from this provision as the provisions of Part II of Cinematograph Act, 1952 applies to the films. If a company resorts to such indecent representation of women, company shall be deemed to be guilty of this offence.

Section 5B of the Cinematography Act states that a film shall not be certified for public exhibition if, in the opinion of the authority competent to grant the certificate, the film or any part of it is against the interest of, inter alia, decency. Some guidelines are prescribed under this Act by the authority now and then to protect the values, and standards of society. The guidelines say that the human sensibilities should not be offended by vulgarity, obscenity or depravity. Scenes degrading or denigrating women in any manner are not presented. Scenes involving sexual violence against women, and if any such incident is germane to the theme, they shall be reduced to the minimum and no details are shown. There is another clause saying that the film should be judged in its entirety from the point of view of the overall impact. Wider interpretation of this provision by the Supreme Court helped the film 'Bandit Queen' to retain its Censor Certificate for public Exhibition.

Effect of Electronic media on young children:

In the last decade mass media has grown worldwide to be larger, more influential and more powerful. Quite a few films are shown on TV. The constraints that are applicable to film media equally apply to TV media also and the authorities concerned must exercise proper discretion in selecting the films to be telecasted. Therefore among the available sources, movie and TV have key roles in modifying human behaviour and one can easily observe the effect of movie and TV that affects all children, adolescents and youths in dress, action and expression etc. day-to-day and even the modus operandi adopted by some criminals to commit the crime has been found to be akin to be that of the hero or villain in a particular movie. This subject because of its importance has been attracting the attention of the eminent people including psychologists, doctors and professors who have written several books after intensive study. The Supreme Court wanted them to act to set right this scenario. It should not be understood to mean that all films are of that nature but in the context some of them are enough to cause the damage and the Censor Board is dutifully expected to stop such films from being released in an earnest manner[56] .

In US

The Communication Decency Act CDA of Untied States by amending the 1996 Telecommunication Bill, has outlawed the electronic circulation to minors of indecent material. It also ordained big fines. Opponents opposed it as violating the First Amendment, which provides for freedom of speech. It may be wrong to send smut to minors. What about practical difficulties in controlling flow of such information or movies reaching the young

[56] Section 2C of the Indecent Representation of Women Act 1986

through the world wide web or internet, or e-mail, chat-rooms, or mail exploders? The Supreme Court of US officially deleted the CD Act as violating the Constitution, concluding that the Act endangers free speech and 'threatens to torch a large segment of the internet community"[57].

Child Pornography: New Cyber Crime

The new cyber law recognized some new cybercrimes. Among the crimes of pornography, cyber pornography is an aggravated form of offence while the child pornography is much more serious crime. The Information Technology Amendment Bill 2006 did not propose this to make a specific crime until the Nikhil Kumar Committee took it seriously. Clause 31 proposed to insert Section 67A whereby punishment has been provided for publishing or transmitting of material containing sexually explicit act in electronic form.

A representative of CBI wanted some specific provisions to criminalize child pornography in IT Act in tune with the laws prevailing in advanced democracies of the world as well as Article 9 of the Council of Europe Convention on Cyber Crimes which states as under:

> 1. Each Party shall adopt such legislative and other measures as may be necessary to establish as criminal offences under its domestic law, when committed intentionally and without right, the following conduct:
>
> (a) producing child pornography for the purpose of its distribution through a computer system;
>
> (b) offering or making available child pornography through a computer system;
>
> (c) distributing or transmitting child pornography through a computer system;
>
> (d) procuring child pornography through a computer system for oneself or for another person;
>
> (e) possessing child pornography in a computer system or on a computer-data storage medium.
>
> 2. For the purpose of paragraph 1 above, the term "child pornography" shall include pornographic material that visually depicts:
>
> (a) a minor engaged in sexually explicit conduct;
>
> (b) a person appearing to be a minor engaged in sexually explicit conduct;
>
> (c) realistic images representing a minor engaged in sexually explicit conduct.

[57] "On the net anything goes", News Week, July 7, 1997 pp46-49

3. For the purpose of paragraph 2 above, the term "minor" shall include all persons under 18 years of age. A Party may, however, require a lower age-limit, which shall be not less than 16 years.

4. Each Party may reserve the right not to apply, in whole or in part, paragraphs 1, sub-paragraphs d. and e, and 2, sub-paragraphs b. and c.

Provisions on Pornography

Section 67 of the IT Act 2000, after amendment in 2008 states:
Whoever publishes or transmits or causes to be published in the electronic form, any material which is lascivious or appeals to the prurient interest or if its effect is such as to tend to deprave and corrupt persons who are likely, having regard to all relevant circumstances, to read, see or hear the matter contained or embodied in it, shall be punished on first conviction with imprisonment of either description for a term which may extend to three years and with fine which may extend to five lakh rupees and in the event of a second or subsequent conviction with imprisonment of either description for a term which may extend to five years and also with fine which may extend to ten lakh rupees.

Cyber obscenity is retained as a crime but with reduced punishment.

Transmission of image of private area of person

Under Section 66E, the new law made out a new offence within the classification of violation of privacy, intentionally capturing or transmitting image of private area of any person.

66E. Punishment for violation of privacy (Inserted Vide ITA 2008) Whoever, intentionally or knowingly captures, publishes or transmits the image of a private area of any person without his or her consent, under circumstances violating the privacy of that person, shall be punished with imprisonment which may extend to three years or with fine not exceeding two lakh rupees, or with both.
Explanation - For the purposes of this section--

a. "transmit" means to electronically send a visual image with the intent that it be viewed by a person or persons;
b. "capture", with respect to an image, means to videotape, photograph, film or record by any means;
c. "private area" means the naked or undergarment clad genitals, pubic area, buttocks or female breast;

d. “publishes” means reproduction in the printed or electronic form and making it available for public;
e. “under circumstances violating privacy” means circumstances in which a person can have a reasonable expectation that--

i) he or she could disrobe in privacy, without being concerned that an image of his private area was being captured; or
ii) any part of his or her private area would not be visible to the public, regardless of whether that person is in a public or private place.

The new IT Act presented a set of new crimes such as cyber obscenity, child pornography, violation of privacy, intentional exposure of private parts of a person as specific offences and provided penalties.

Aggravated form of obscenity

However, one good feature is that in Section 67A, an aggravated form of obscenity in electronic form is stipulated with higher punishment (five to ten years of imprisonment and or with the fine from five to ten lakh rupees).

67A. Punishment for publishing or transmitting of material containing sexually explicit act, etc. in electronic form: whoever publishes or transmits or causes to be published or transmitted in the electronic form any material which contains sexually explicit act or conduct shall be punished on first conviction with imprisonment of either description for a term which may extend to five years and with fine which may extend to ten lakh rupees and in the event of second or subsequent conviction with imprisonment of either description for a term which may extend to seven years and also with fine which may extend to ten lakh rupees.

Exception: This section and section 67 does not extend to any book, pamphlet, paper, writing, drawing, painting, representation or figure in electronic form-

i) the publication of which is proved to be justified as being for the public good on the ground that such book, pamphlet, paper, writing, drawing, painting, representation or figure is in the interest of science, literature, art, or learning or other objects of general concern; or
ii) which is kept or used bona fide for religious purposes.

67B. Punishment for publishing or transmitting of material depicting children in sexually explicit act, etc. in electronic form whoever,-

a. publishes or transmits or causes to be published or transmitted material in any electronic form which depicts children engaged in sexually explicit act or conduct or
b. creates text or digital images, collects, seeks, browses, downloads, advertises, promotes, exchanges or distributes material in any electronic form depicting children in obscene or indecent or sexually explicit manner or
c. cultivates, entices or induces children to online relationship with one or more children for and on sexually explicit act or in a manner that may offend a reasonable adult on the computer resource or
d. facilitates abusing children online or
e. records in any electronic form own abuse or that of others pertaining to sexually explicit act with children,

shall be punished on first conviction with imprisonment of either description for a term which may extend to five years and with a fine which may extend to ten lakh rupees and in the event of second or subsequent conviction with imprisonment of either description for a term which may extend to seven years and also with fine which may extend to ten lakh rupees:

Provided that the provisions of section 67, section 67A and this section does not extend to any book, pamphlet, paper, writing, drawing, painting, representation or figure in electronic form-

i) The publication of which is proved to be justified as being for the public good on the ground that such book, pamphlet, paper writing, drawing, painting, representation or figure is in the interest of science, literature, art or learning or other objects of general concern; or
ii) which is kept or used for bonafide heritage or religious purposes

Explanation: For the purposes of this section, "children" means a person who has not completed the age of 18 years.

New Section 67B introduced to cover Child Pornography with stringent punishment, imprisonment 5 or 7 years and fine Rs. 5 or 10 lakhs for first and subsequent instances respectively, it also covers "grooming" and self-abuse. It increased imprisonment and fine compared to Section 67. **Section 67C** is a new section introduced requiring Intermediaries to preserve and retain certain records for a stated period. However the period is not specified by law. It is a good provision.

CHAPTER II
MEDIA AND CIVIL WRONGS (TORTS)

2.1. DEFAMATION

The media's most dreaded professional hazard is the defamation litigation. In fact a journalist who reports in hurry to meet the deadlines amidst competition, is more vulnerable for both civil suit demanding compensation for defamation and also a criminal charge which if successful might land him in jail. Because the defamation is a two-in-one choice available to every citizen to protect his reputation against defamatory publication made by newspapers. One can either sue for damages and/or also prosecute defamer.

Defamation is a ground on which a constitutional limitation on the right to freedom of the expression, as mentioned Article 19(2) could be legally imposed. Thus the expression "Defamation" has been given constitutional status. This word includes expressions like libel and slander covering many other species of libel, such as obscene libels, seditious libels, blasphemous libels and so on. The law of defamation does not infringe the right of freedom of speech guaranteed by article 19(1) (a). It is saved by Article 19(2) as it was included as one of the specific purposes for which a reasonable restriction can be imposed.

The law relating to the tort of defamation, from the point of view of distribution of legislative power, would fall under "actionable wrongs" mentioned in Entry 8 of the Concurrent List in the Eleventh Schedule to the Constitution. Criminal law also falls under the Concurrent List. This would cover the offence of defamation. Questions of defamation frequently arise in regard to newspapers. The particular topic of "newspapers, books and reprinting presses" is also covered by entry 39 of the Concurrent List. Special forms of communication such as wireless, broad casting and the like find a mention in entry 31 of the Union List. The field of legislation relating to defamation is thus within parliament competence[58].

Defamation is both a crime as well as civil wrong. The criminal law of defamation is codified in India. If state wants to prohibit a particular conduct, it has to specifically define it and pass a law to prospectively punish such conduct. This is a constitutional right under Article 20(1). However the civil wrong of defamation is not a codified law in India and the rules and principles of liability that are applied by our courts are mostly those borrowed from the common law as explained in UK. Because of this historical background, extensive reference to English law becomes necessary to understand the civil liability for defamation.

[58] There is no enactment on civil wrong of defamation in India.

A journalist working for any media is supposed to know that he has a duty not to injure the reputation of another person by false publications, with or without intention, because every citizen has a right to reputation. Right to reputation is a facet of the right to life guaranteed under Article 21 of the Constitution. Where any authority in discharge of its duties traverses into the realm of personal reputation, it must provide a chance to the person concerned to have a say in the matter, as decided by the Supreme Court in ***State of Bihar v Lal Krishna Advani.***[59] It can be stated that the right of reputation is one of the most important things in a man's life. The right of reputation is a *jus in rem*, which can be defined as a right, good against the whole world.

Noted writer Weir[60] mentioned that there was an increasing feeling that the present law of defamation gives too much protection to reputation and imposes greater restrictions on the freedom of speech and expression.

Definition of Defamation

A statement is considered defamatory when it impugns another person's reputation or adversely affects his/her standing in the community. It is actionable without proof of its falsity. Typically, the elements of a cause of action for defamation include:

1. A false and defamatory statement concerning another;
2. The publication of the statement to a third party (that is, somebody other than the person defamed by the statement);
3. If the defamatory matter is of public concern, fault amounting at least to negligence on the part of the publisher; and
4. Damage to the plaintiff.
5. In the context of defamation law, a statement is "published" when it is made to the third party. That term does not mean that the statement has to be in print.

As per Salmond the wrong of defamation lies in the publication of a false and defamatory statement about another person without lawful justification[61]. According to another thinker, Underhills, such a statement becomes defamation if it is made about another without just cause or excuse, whereby he suffers injury to his reputation (not to his self-esteem)[62]. He considers defamatory statement as one which imputes conduct or qualifies tending to disparage or degrade any person, or to expose him to contempt, ridicule or public hatred or to prejudice him in the way of his office, profession or trade. Famous authors Blackburn and George[63] define defamation as the tort of publishing a statement which tends

[59] [(2003) 8 SCC 361]
[60] Weir, Case Book on Tort, 5th Edition p 435
[61] Salmond on Torts, 13th 1961 edition. P361
[62] Law Torts, Underhills, 18th 1946 edition p 23
[63] Elements of the law of Torts by Blackstone and George, 2nd 1949 edition p. 167

to bring a person into hatred, contempt or ridicule or to lower his reputation in the eyes of right thinking members of society generally". The words "to lower his reputation in the eyes of right thinking members of society generally" are taken from the test suggested by Lord Atkin. He said in the case of ***Sim. v. Stretch***[64] that a statement would be considered to be defamatory, if "the words tend to lower the complaint in the estimation of the right thinking members of society generally". Slander is the making of defamatory statements by a transitory (non-fixed) representation, usually an oral (spoken) representation. Libel is the making of defamatory statements in a printed or fixed medium, such as a magazine or newspaper. A classical definition of the term defamation has been given by Mr. Justice Cave in the case of ***Scott v Sampson***[65], as a "false statement about a man to his discredit".

Fraser thinks that a statement becomes defamatory if it exposes on to hatred, ridicule or contempt or which causes him to be shunned or avoided, or which has a tendency to injure him in his office, profession or trade[66].

But Winfield does not agree with this definition. According to him defamation is the publication of a statement which tends to lower a person in the estimation of the right thinking members of society generally or which tends to made them shun or avoid that person. He thinks that a statement may possibly be defamatory even if it does not excite in reasonable people feelings quite so strong as hatred contempt or ridicule".[67] The phrase "right thinking members of society" excludes lay or morally blunt men or hypersensitive and conscious persons.

Slander and Libel:

A slander is a false and defamatory statement by spoken words or gestures tending to injure the reputation of another. Slander is a civil wrong only. Where a document containing defamatory statements is published by being read out to a third person, or where the publication of the defamatory statement is to a clerk to whom it is dictated, the communication in either case amounts to slander and not to libel[68].

Differences: Apart from differences in form, the libel differs from slander in its procedure, remedy and seriousness. In common law, a libel is a criminal offence as well as a civil wrong, but slander is a civil wrong only; though the words may happen to come within the criminal law as being blasphemous, seditious, or obscene or as being a solicitation to

64 (1936) 52 TLR 669
65 (1882) 8QBD 491
66 Scott V. Samson 1882 e.Q.B.D. 491
67 Winfield, Tort, 7th edition 1963, P.574
68 Osborn v. Thomas Boulter & Sons (1930) 2 KB 226

commit a crime or being a contempt of court[69]. Under Indian Penal Code both libel and slander are criminal offences.

A libel is in itself an infringement of a right and no actual damage need be proved in order to sustain an action. At common law, a slander is actionable only when special damage can be proved to have been its natural consequence, or when it conveys certain imputations. Libel is actionable per se but generally, slander is not.

The Form:

In the earlier days, the form in which a defamatory imputation is conveyed determines whether the resulting wrong is a libel or slander. If the form is permanent and so capable of conveying repetition of the imputation it is a libel; if it is only transitory it is a slander. The very first distinction between libel and slander is in form only.

English Judge, Lopes, J., in *Monson v. Tussauds* [70] points out that libel need not always be in writing or printing. The defamatory matter may be conveyed in some other permanent form as a statue, a caricature, an effigy, chalk mark on a wall, sign or pictures. Conversely, the spoken work is the most obvious example of a form of expression which is slander; other examples are gestures, and perhaps, inarticulate expressions of disapproval such as hissing or booing, or cat calls and significant gestures, such as winking etc.

In *Manson v. Tussauds* case the defendants, who kept a wax works exhibition, had exhibited a wax model of the plaintiff with a gun, in a room adjoining the 'Chamber of Horrors' (a room in the basement, in which the wax models of notorious criminals were kept). The plaintiff has been tried for murder in Scotland and released on a verdict of 'Not proven' and a representation of the scene of the alleged murder was displayed in the chamber of horrors. The Court of Appeal held that the exhibition was libel, because that was in permanent form.

Libel is a written defamation while slander is a spoken defamation. It is said that while libel is addressed to the 'eye stander is addressed to 'ear'. Salmond questioned this and suggests that the libel is defamation crystallized into some permanent form, while slander is conveyed by some transient method of expression. The Court of Appeal in ***Yourssoiupoff V. Metro-Goldwyn-Mayer Picture***'[71] held that defamation in a "talking" film was libel. But there is no authority as to whether defamatory matter recorded in a gramophone disc unaccompanied by any pictorial or other matter is libel or slander. It is addressed to the ear, not to the eye, but it is in permanent, not in transient form. The correct answer is that to utter

[69] The Queen v. Holbrook, (1878) 3 Camp. 214n
[70] 1895 1 Q..B. 671)
[71] 1934 50 T.L.R. 581

defamatory words with the intention that they shall be recorded is slander only, but that when the record has been made, if it is published, the manufacturer is responsible for libel.

In UK the Defamation Act 1952 provided that the broadcasting of words, by means of wireless telegraphy shall be treated as publication in permanent form. Section 4 of the Theaters Act, 1968 makes a similar provision for words published during the public performance of a play. A talking cinematography film must now be added to the List. Defamatory gramophone records are libels because of their permanency in form. On the other hand, broadcasting is held to be slander for there is want of permanency about them. The case might be different if the defamatory statements were broadcast from a record, in which case the defamation becomes a libel. Defamatory statements in websites and blogs could be libels because their publication could be multiple and be referred repeatedly.

Action

Another important factor of differentiation is the actionability of the wrong. While libel is actionable per se without proof of special damage, the slander is actionable only on proof of special damage.

Special damage signifies that no damages are recoverable merely for loss of reputation by reason of the slander, and that the plaintiff must prove loss of money or of some temporal or material advantage estimable in money. If there is only loss of the society or consortium of one's friends, that is not enough.

Where there is no need to prove special damage in defamation, the plaintiff can recover general damages for the injury to his reputation without adducing any evidence that it has in fact been harmed, for the English law presumes that some damage will arise in the ordinary course of things. It is enough that the immediate tendency of the words is to impair his reputation. If the plaintiff contends that special damage has been suffered in addition to general damages, he must allege it in his pleadings and prove it at the trial but even if he breaks down on this point, he can still recover general damages.

In India the between libel and slander on the point whether it is actionable without proof of special damage has not been recognized. In this country, both libel and slander are criminal offences under the Penal Code and both of them are actionable in civil without proof of special damage *Ms. Ramdhara v. Phulwatibai*[72] slander may be the result of a sudden provocation uttered in the heat of the moment, while the libel implies grater deliberation and raises a suggestion of malice. Libel is likely to cause more harm to the person defamed than slander because there is a strong tendency everywhere on the part of most people to believe anything they see in print.

[72] 1969 Jab.L.J.582

Slander, actionable per se:

Generally the plaintiff, to claim damages, has to prove that he suffered special damage. The rule is slander is not actionable per se. But under exceptional circumstances it is actionable without proof of special damage. These exceptional circumstances are as follows:

a) When the slander contains imputation of crime: When the slander imputes that the plaintiff has committed a crime punishable with imprisonment, there must be direct imputation of the offence, not merely suspicion of it and it is not enough if the offence imputed is punishable with fine. The words imputing a suspicion of a crime, even though the offence be punishable corporal, are not actionable without proof of special damage. But the words "you are a rogue and I will prove you are rouge, for you forged my name" are not mere imputation of a suspicion and are actionable per se. Again the words "you are guilty (innuendo) of the murder of D" have been held to amount to a charge of murder and are actionable without proof of actual damage. The crime imputed need not be indictable; it is sufficient if it is punishable corporal. Nor it is necessary that the words should specify any particular offence. The crime or misdemeanor must be one for which corporal punishment may be inflicted, e.g., murder, robbery, perjury, adultery, theft, tampering with the loyalty of sepoys etc.

Where the imputation of crime is accompanied by an express reference to a transaction which merely amounts to a civil wrong, slander is not actionable per se. Where the crime imputed is impossible and has not been committed with the knowledge of all parties etc., where the defendant said to the plaintiff" thou has killed my wife and she was then alive within the knowledge of all, there is no such imputation as can be made the basis of a suit without proof of special damage.

b) When the slander contains allegation that plaintiff has a contagious disease: If the allegation is that plaintiff is suffering from a contagious or infectious disease likely to prevent other persons from associating with the plaintiff, it is actionable without specific proof of damage. The effect of such accusation is naturally to exclude the plaintiff from society. Whereas, an assertion that the plaintiff has had some disease which is not contagious or infectious, it is not a slander which is actionable, because it is no reason for others to avoid him.

c) When the unchastity or adultery is attributed to any woman: In common law words, imputing unchastity to a woman was not actionable without proof of damage. But the Slander of Women Act, 1891 abolished the need of showing special damage in the case of words which impute unchastity or adultery to any woman or girl. It has been held that imputation of unchastity includes that of lesbianism or homosexual vice. In *Parvathi v.*

Manner[73], the defendant abused the plaintiff and said that she was not the legally married wife of her husband, but a woman who had been ejected from several places for unchastity. It was held that the defendant was liable. It was held that refusal of the bridegroom and his father to take the bride to their home after marriage in full gaze of guests was defamation and the bride was entitled to receive damages for the loss of reputation[74].

***d) When the unfitness or incompetence is alleged*:** An imputation of unfitness, dishonesty or incompetence in any office, profession, calling, trade or business held or carried on by the plaintiff at the time when slander is published is actionable per se. On the other hand an imputation of want or skill or knowledge necessary to carry on a profession is actionable per se. Thus to impute to a barrister or a solicitor that he knows no law, or to a doctor want of skill is actionable per se.

Where words affect a plaintiff in his office, profession, or trade, and directly tend to prejudice him therein, no further proof of damage is necessary. It must be shown that he held such office, or was actively engaged in such profession or trade at the time the words were spoken. It is not necessary that the words should hold him up to hatred, contempt, or ridicule. An imputation of immorality against the head master of a school, made without any relation to his position, as a schoolmaster is not actionable per se[75]. Words, which merely charge him with, some misconduct outside his office, or not connected, with his special profession or trade will not be actionable, as held in, Lumby v. Allday[76]. In this case the plaintiff was a clerk of a gas company, and the defendant spoke of him, "you are a fellow, a disgrace to the town, unfit to hold your situation, for your conduct with whores". It was held that the words were not actionable.

In other ordinary slanders, the proof of special damage is necessary to claim damages. The special damage must appear to be natural consequence of the words spoken. Following are the examples:

1. the loss of a customer, or
2. the loss, or
3. refusal, of some appointment or employment or
4. the loss of a gift, or
5. of hospitality of friends or
6. the loss of the consortium of one's husband.

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[73] 1926 I.L.R. 8
[74] Noor Mohd. v. Mohd. Jiauddin, AIR 1992 MP 244
[75] Jones v. Jones (1916) 2 AC 481
[76] (1831) 1 C R

The mental anguish or impairment of physical health is not special damage. To call a man a swindler or a cheat or a blackleg is not actionable without special damage.

Proof of special damage is in fact, a practical impediment in an action for slander. Faulks Committee in its Report in 1975 recommended abolition of the distinction. Generally the slander also should be actionable per se. In India, both libel and slander is actionable per se. The reason for making slander not actionable per se was that it was in transient form and might have been uttered in heat of the moment or under a sudden provocation. Whereas the libel being in a permanent form show a greater deliberation or and raise a suggestion of malice. A libel also conduces the breach of the peace, while a slander does not. Such a distinction was not practical and most of the times not real.

The Common Law rule that slander is not actionable per se has not been followed in India. The reason given is that the rule is not founded in any obvious reason or principle and that it is not in consonance with "Justice, equity and good conscience". English law itself underwent a change by the Slander of Women Act.

Nature of Wrong:

Libel, if it tends to provoke the breach of the peace is a crime as well as tort; Slander as such is never criminal although spoken words may be punishable as being reasonable, seditious, and blasphemous or the like. This distinction between libel and slander is not recognized in India. In England while libel is both a crime and civil wrong, slander is only a civil wrong. In India, However both are criminal offences. Indian decisions relating to slander may be classified under three heads; (a) Vulgar abuse**:** The words '*sala,' 'haramjada,' 'soor and 'bapar beta'* were held to be mere abuse. Where however, abusive language is not only insulting but amounts to defamation as well as action will lie even without proof of special damage. (b) Imputing unchastity to a woman (explained above) (c) Aspersion on caste: It has been held by the Oudh Chief Court that to say of a high caste woman that she belongs to a low caste is a slander which is actionable per se not only at the instance of the woman herself, but also at the instance of her husband[77].

Essentials of Defamation

There are three essentials to be established in a civil action for defamation. Plaintiff has to prove that the words are defamatory; they refer to plaintiff and were published.

1. Defamatory Statements

Defamation is of two kinds that which is prima facie defamatory i.e., openly and in terms makes an allegation defamatory to the plaintiff and that which is not openly and in terms makes an allegation defamatory to the plaintiff and that which is not openly

[77] Gaya Din Singh v Mahabir Singh, 1. Luck 386

defamatory but contains some latent, hidden or secondary meaning which would lower the plaintiff's reputation in the eyes of those who know the facts. This secondary meaning is known as an 'innuendo.' If the words communicate defamatory meaning on the face of it, they fall under this category. The obvious defamatory expressions are called prima facie defamatory. The words used must be capable of bearing a defamatory meaning.

Where there is no legal innuendo the court should consider the natural and ordinary meaning that the words would have to the 'ordinary, reasonable and fair minded reader" Such a reader is not unduly suspicious but nor is he unduly naive. He can read between the lines. He can read an implication more readily than a lawyer, and may indulge in certain amount of loose thinking. But he must be treated as a man who is not avid for scandal and someone who does not, and should not, select one bad meaning where non-defamatory meanings are available[78].

The standard of reasonable reader may change from time to time. For example, it was at one time defamatory to call someone a 'German", i.e., during World War II and the tendency at that time was to denigrate Germans.

A classic case of Innuendo: Tolley v. J.S. Fry

This case is the example of innuendo. In this case[79] Mr. Tolley is a champion amateur golfer and member of a sports club. The rules of the club prohibit members from associating themselves with any advertisement media. A caricature of the plaintiff was quite innocent but the plaintiff alleged the latent or hidden meaning which constituted an innuendo.

It is alleged that it conveys an indirect defamatory statement to viewers as if the defendant has committed a wrong knowingly. The innuendo may be derived from the circumstance of the case as a whole. It may not depend on the words used; In this case the plaintiff brought an action for libel and alleged as an innuendo that the plaintiff had agreed or permitted his portrait to be exhibited for the purpose of the advertisement of the defendant's chocolate, that he did so far gain and reward, that he had prostituted his reputation as an amateur golf player for advertising purposes. It was held by the House of Lords that the innuendo was proved in view of the circumstances and therefore, the defendants were liable.

The plea of innuendo failed in ***Capital and County Bank Ltd., V. Henry and Sons.***[80] Henry and Sons, a firm of breweries was in the habit of receiving in payment from their customers in the form of cheques on various branches of the Capital and Counties Bank, which the bank cashed for the convenience of Henrys at a particular branch of which he was

[78] Neill, L.J., in Hartt v. Newspaper Publishing plc, unreported, October 26, 1989, as reported in Media Law, Peter Carey, p 42

[79] 1931 – A.C.331

[80] 1882, 7Th April.741

the manager. In consequences of a squabble with new manager he refused to continue this practice. "Henry and Sons hereby give notice that it will not receive in payment cheques drawn on any of the branches of the ***Capital & Counties Bank***". The circular became known to other persons and there was a run on the bank i.e. people started withdrawing their money from the Bank. The bank sued Henrys for libel on the ground that the circular imported insolvency. It was held that 1. The words were not libelous in their natural meaning and 2. There were no facts proved which made them capable of bearing the meaning alleged in the innuendo to the effect that the plaintiffs were insolvent. Accordingly the circular was not actionable although its affect had been to cause run on the bank and loss to the plaintiffs.

The words used must be construed in the sense in which they would be understood by ordinary person. If they are not capable of a defamatory meaning in that sense they may nevertheless be actionable if it is proved that would be understood as defamatory by the persons to whom they were published.

What is Innuendo?

Thus innuendo means the words which are not defamatory in their ordinary sense, but may nevertheless convey a defamatory meaning owing to the circumstances in which they are spoken. If I say of a man 'he is no better than his father 'these words are not in their ordinary sense capable of a defamatory meaning. But if the father is known by the person to whom the words are used, to have been a scoundrel, the words used would convey to them the meaning that the son also is a scoundrel. The words when would be defamatory in the sense in which they were understood by the persons to whom they were addressed.

Where the words are not prima facie defamatory but innocent; the plaintiff must expressly and explicitly set forth in his pleadings the defamatory sense which he attributes to it. Such an explanatory statement is called an 'innuendo'. A man may ironically say of another that the latter is a 'Harischandra' or 'Gandhiji' meaning exactly the reverse of what there saintly persons were. Another example is the case of ***Bishop V. Latimer*** [81] where the heading line "How lawyer B treats his clients" which appeared over a paragraph containing perfectly accurate report of certain judicial proceedings in which the lawyer B had apparently not treated one particular client well. In an action for libel against the newspaper it was held that the head line was capable of meaning that B habitually treated his clients badly and as this inference was not justified by the single instance reported, the newspaper proprietor had to apologize for his error.

An innuendo must be pleaded and proved. The statement of claims must set out the facts and circumstances which would have induced reasonable persons. The plaintiff cannot

[81] 1861, 4 L.T.N.S. 775

at the trial allege some other hidden meaning which he has not pleaded in his statement of claim.

Cassidy v Daily Mirror Newspapers Ltd*[82]*.,

In this case a married man living apart from his wife, posed with a young woman to a photographer in the employment of the defendants, telling him that he was engaged to her. The photographer sent the photograph to his employers who published it in their newspaper with words Mr. C, the race horse owner, and Miss. X, whose engagement has been announced; Mrs. C. was known among her acquaintances as the lawful wife of C, although she and C were not living together. The information which the defendants based their statement was derived from C alone, and they had made no efforts to verify it from any other source. Mrs. C sued them for libel. The innuendo bearing that C was not her husband, but lived with here in immoral cohabitation. A majority of the court of Appeal held the innuendo was established and the Jury entitled her to damages as they held that the publication conveyed to reasonable person an aspersion on the plaintiff's moral character.

2. Reference to plaintiff: Classic Example of Hulton V. Jones[83]:

This case deals with the importance of the second essential ingredient, that is: the statement must refer to the plaintiff. The statement must have been reasonably understood by at least one person to refer to the plaintiff. If it is, of course, not necessary that the plaintiff's name should be contained in the statement, it is sufficient if the statement is such that at least one person to whom it was communicated had good and reasonable grounds for believing it to refer to the plaintiff.

"If the cap fits" Principle:

It is not necessary that the defendant should have intended to refer to the plaintiff or even have known of his existence. This is the strict rule of liability known as '*If the cap fits'* liability. If the defamatory statement fits into the cap of the plaintiff, it will make the plaintiff entitled to have cause of action against the defendant in spite of the absence of international or deliberate reference.

In this case, the defendant had invented the name, 'Artemus Jones' and did not know the existence of a person of that name. Yet the House of Lords held that the newspaper was responsible for the libel. The decision in this case shows that a man publishes a defamatory statement at his peril. Intention or knowledge of defendant is immaterial. Hulton and Co. were newspaper proprietors who published in their Sunday Chronicle a humorous account of a motor festival at Diepp (resort in the north of French) in which imputations were cast on the morals of one Artemus Jones, a church warden at Peckham.

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[82] 1929, 2 K.B. 331

[83] 1910 A.C.20

Paper Wrote: "There is Artemus Jones with a woman who is not his wife, who must be, you know the other thing, here he is the life and should of a gay little band betraying a most unholy delight in the society of female butterflies." The name 'Artemus Jones' was purely fictions and was invented by the authors of the article. Neither the author, nor the proprietor, the printer or publisher of the newspaper was aware of any person living or dead bearing such name. But it so happened, that there was person living in England bearing that name, with the only difference that he was not a Churchwarden, but a barrister, and he was not living at Peckham and did not take part in the Dieppe festival. He sued Hulton & Co. for libel, and friends of his swore that they believed that the article referred to him. The defendants pleaded that the article was a mere fancy sketch of life abroad, the name was imaginary.

It was held by the House of Lords that a man publishes a defamatory statement at his peril, whether there was any intention to defame or not is immaterial. Newspaper was therefore liable. 'The cap has fitted' and so 'if the cap fits' liability applies. If the cap fits the plaintiff either by words prima facie defamatory or by innuendo the defendant is liable whether or not be known or ought to have known of the plaintiff's existence. Though the defendants were unaware that Mr. C was married man they were held liable as all those who know the plaintiff reasonably thought that she was not the lawfully wedded wife or Mr. C but was living with him in immoral cohabitation.

Lord Advestone, C.J., says:

> … I think beyond dispute that the intention or motive of the words which are employed is immaterial, and that if in fact the article does refer or would be deemed by reasonable people to refer to the plaintiff, the action can be maintained, and proof of express malice is wholly unnecessary.

He refers to the judgment of Lord Bramwell in ***Abrath v. North Eastern Railway Co.***[84], in which, it was observed:

> That unfortunate word 'malice' has got into cases of action for libel. We all know that a man may be the publisher of a libel without a particle of malice or improper motive. Therefore the case is not the same as where actual and real malice is necessary.

Newstead v. London Express Newspapers Ltd.[85]

In this Newspaper the conviction for bigamy of Harold Newstead, a 30 year old Camberwell man was reported. The report was correct and the description was also correct. But there was another Harold Newstead in Camberwell, a hair dresser assistant, who was of

[84] 1886, 11 App. Cas.247
[85] 1940 1 K.B.377

course innocent of bigamy. Reasonable persons who knew him thought that the report related to him. It was held by the Court of Appeal that innocent Harold Newstead could recover damages for defamation, although the words were true of, and a reasonable description of, the guilty Harold Newstead.

These decisions undoubtedly stiffen the responsibility of the producers of printed matter. The rule that 'Liability for libel' does not depend upon the intention of the defendant, but upon the fact that defamation creates much hue and cry among the journalists, publishers and authors. Depicting the initials, designation, fathers name and other details will help journalist to secure protection for honest reporting.

Winfield commented, "… they (Journalists) are at the mercy of coincidence in the sense that any unscrupulous person whose name happens to be identical with that of fictitious character can threaten them with an action for libel, although he has not suffered a little of damage." Salmond says "the present state of law undoubtedly provides a temptation to a speculative and 'gold digging legislation'." And this is more so because of the heavy damages often awarded by juries in libel actions.

Disclaimers will not save the writers and publishers. Even when they wrote, "if the facts tally with any other we are not responsible", they were held liable.

Innocent Publishers

Realizing the hardship of these judgments punishing writers who never intended to defame, the English Parliament passed, the Defamation Act, 1952. Section 4(1) of the act says that a person who has published words alleged to be defamatory of another persons may, if he claims that the words were published by him innocently in relation to that other person, make an offer of amends under this section, and

a) If the offer is accepted by the party aggrieved and duly performed, no proceedings for libel or slander shall be taken against the publishers.

b) If the offer is not accepted, it shall be defence.

The publisher has to publish a suitable correction of the words complained of, and a sufficient apology to the party aggrieved in respect of those words. Still it is harsh.

Indian example

Dissenting opinion of Fletcher Moulan L.J., in Hulton and Jones and section 4 of English Defamation Act 1952 was accepted in ***T.V. Ramasubba Iyer and another v. A.M.***

***Ahmed Mohideen*[86].** There was a news item published in Dinamalar dated 18-2-1981 stating that a person who is called King of Agarbathis had smuggled opium into Ceylone and that he was arrested by Madras Police. The respondent alleging that he said publication constituted a defamation of him since the news item was understood to refer to him, instituted suit for damages in a sum of Rs.5000. The subordinate judge found the newspaper guilty of defamation though he did not intend to defame him and published a correction stating that the news that appeared was not referred to the plaintiff. Following the decision of the House of Lords in Hulton and Co. v. Jones, the judge came to the conclusion that the intention was not the test of liability. First appeal was dismissed by the District Judge, and second appeal was preferred. Appellate court followed the dissenting opinion of Lord Justice Fletcher Moulton in the Hulton case. Fletcher said that a defendant is not guilty of libel unless he wrote and published the defamatory words of and concerning the plaintiffs in other words unless he intends them to refer to the plaintiff. The appellate court observed that the law of defamation as part of the law of torts as applied and enforced under the common law of England is applied to this country only on the basis of justice equity and good conscience. Lord Fletcher's opinion was much more in consonance with justice equity than the law in England, said the appellate court.

Group defamation in Knuffer V. London [87]

This case deals with group defamation. Defamation of a class is not generally actionable; when the words complained of reflection on a body of class of persons generally, such as lawyers, clergy men etc., no particular number of the body or class can maintain an action. Willer J. said in ***East Wood V. Holmes***[88] that "If a man wrote that all lawyers were thieves, no particular lawyer could sue him unless there was something to point to the particular individual". Thus, in *Knuffer v. The London Express Newspaper Ltd.,* the plaintiff was not able to get damages for alleged defamatory passage about him. The defendant published an article in a newspaper adversely commenting on the activities of an accusation of certain Russian political refugees called Mlado Ruse or young Russia in terms which it was admitted would have been defamatory if written of a named individual. The association had a very large membership in other countries but that of the branch of the United Kingdom was only about 24 members. The plaintiff who resided in London was the active head of the Association of the United Kingdom branch and it was contended that the article reflected on him personally. The defendants contended that the article was an attack on the general character and activities of the association and do not on the plaintiff. It was held by the House of Lords that when the defamatory words are written or spoken of a class of persons it is not open to a member of that class to any that the words were spoken of him unless there

[86] AIR 1972 Mad 398
[87] 1944 A.C/116
[88] 1858 I.F. and F 347

was something to shown that the words referred to the plaintiff an individual and therefore the defendants were not liable.

When the words reflex impartially on either of two persons e.g., if the defendant said "Either a or B has stolen my watch" then if there was something in the defendant's tone or manner, or in the expression added, or in the surrounding circumstances which would lend these who heard the words to understand them as solely applicable to A or to B, an action clearly lies to the suit of A or B according to circumstances.

Arthur Lee V. Wilson:[89]

This interesting case also upholds the rule in *Hulton v. Jones* case. Here the statement referred to 3 persons. In fact it was intended to refer to a fourth man. Yet the publisher was held liable to all of them.

During the course of a public inquiry as to the charges of bribery against certain police officials at Melbourne, Victoria, A gave evidence that "first constable Lee on the Motor Registration Branch' had accepted a bribe. The defendant newspaper reported A as having said that 'Detective Lee' had accepted a briber. There were in the Melbourne police three officers named Lee, one in the Motor Registration branch, and two in the Detective branch. Each of the two detectives brought an action of libel against the newspaper and each called evidence of persons who understood the published matter to refer to him. The defendants tendered evidence to show that the words did not in fact refer to either of the plaintiffs but to another member of the police force named Lee. This evidence was objected to and was rejected; and judgment was given for each of the plaintiffs. The Full Court of Victoria held that the evidence was wrongly rejected and ordered a new trial. On appeal, it was held by the High Court of Australia that if words capable of referring to more than one person, are found to defame each of them, each may recover, although the word may have been intended to refer to quite a different person.

3. Publication

Unless the defamatory reference to plaintiff is published, there is no action at all. Thus the other ingredients of defamation are 1) publication 2) falsity of statement, and 3) specialty of damage. No civil action can be maintained in England in respect of a defamatory statement unless the plaintiff can establish that it has been published to a third person, that is to say, to some person other than the plaintiff himself.

Communication of defamatory words to a third party is termed a publication. Publication is defined as making known the defamatory matter after it has been written to some person other than the person of whom it is written. If nobody else sees the libel or hears

[89] 1934-51 C.L.R. 276

the slander, except the person defamed, the law gives him no cause of action because there cannot be publication of a defamatory matter to on self.

In ***Nemichand v. Khemraj***,[90] defendants made some wild imputations in their speeches against the plaintiff for molesting women, extracting money by unlawful means and remaining absent from duty from the railway workshop. The extract of these speeches was published by Nemichand in a leaflet. Plaintiff suffered loss of reputation and was suspended from the service as a result of the leaflet. The district judge concluded that there was no absolute evidence to show that Nemichand published the pamphlet and that he was not liable for payment of damages. Mere printing is not enough; it must reach some more people through his publication only then there can be publication, which is an essential ingredient making defamation an actionable wrong. Nemichand was not held liable in appeal.

The question was discussed in a Kerala case in ***T.J. Ponnen v. M.C. Verghes***[91] where the court, under the circumstance of the case, held that there could be no publication between husband and wife. The privilege however, does not extend to cases where they are living apart, either divorced, or judicially separated, or under a separation order. Again, this rule of publication between husband and wife is confined to communication made by one spouse to another. No third party will be protected if he makes the communication to one spouse about the other.

In case of ***Huth V. Huth***[92] the alleged libel was contained in a document sent through the post by the defendant in an un-gummed envelope under a half-penny stamp addressed to his wife, which on arrival at the addressee, was opened and read by the butler out of curiosity. The court or appeal held that there was no publication.

Every repetition of defamatory words is a fresh publication and creates a fresh cause of action. It is no defence to an action for such republication that the defendant received the libelous statement from another whole name he disclosed at the time of the publication.

In ***Dingle V. Associated News Papers Ltd.*** **and Others,** [93] the Court of Appeal, besides reaffirming the principles laid down in Scott V. Sampson, held that even if a part of the defamatory publication is protected as absolute privilege under the parliamentary proceedings Act, it will not save the defendants (News Papers) from liability for publishing the privileged matters along with other unprivileged defamatory statements.

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90 AIR 1973 Rajasthan 240
91 AIR 1967 Ker.228 1965 Ker L.T.1010
92 1915, 3.K.B.C.A
93 1961 1 All Eng. R.897

Where the statement is in a language which the recipient does not understand, or if the recipient is too blind to read, or too deaf to hear it or if he does not realise that it refers to the plaintiff, there is no publication.

Repeater: An action will lie for libel or slander against a defendant who is merely a repeater, printer, or publisher of it, unless the defendant can show (I) that he did not know that he was publishing a libel or slander, (ii) that his ignorance was not due to negligence on his part, (iii) that in the case or libel he did not know and had not grounds to think that the document was likely to contain libelous matter.

But in slander, if the special damage arises simply from the repetition, the originator will not be liable except, a) when the originator has authorised the repetition or b) when the words are originally spoken to a person who is under a duty legal, moral., or social to communicate them to a third person.

Innocent dissemination: All those who authorize, control, or assist in the actual printing or production of printed matter are clearly liable as having published it; and ignorance of the defamatory nature of the contents is no defence, even though they behaved in a reasonable and careful manner. But those who merely disseminate or distribute the printed matter are not regarded as responsible for publication if he can prove that he did not know the contents.

Emmens v. Pottle*[94]*:

In this case the news-vendors, in the ordinary course of their business, sold several copies of a newspaper which contained a libel on the plaintiff. The jury found (1) that the defendants did not know that the newspaper at the time they sold them contained a libel on the plaintiff, (2) that it was not by negligence on the defendant's part that he did not know that the newspaper was of such a character that it was likely to contain libelous matter. On these findings both the trial Court of Appeal held the defendants not liable.

False Statement:

To be actionable the defamatory statement must be false. No doubt civil action lies for the publication of a defamatory statement which is true. It is customary to allege, therefore, that the statement is false. But the plaintiff need not prove that it is false; falsity of a defamatory statement is presumed in favour of the plaintiff, and the burden is cast on the defendant to prove that it is true. Truth is the best defence, whereas in Criminal Law, mere truth is no defence; truth must be spoken in public interest.

[94] (1885) 16 Q.B. D.354

Special Damage: Libel, is actionable per se, i.e., plaintiff need not prove the special damage. But the slander is not so. Special damage must be proved. However slander is actionable per se in four cases.

1. Imputation of a criminal offence,
2. of a disease,
3. of unfitness or incompetence,
4. of unchastity on women.

Defenses: In a civil action for defamation, a media person can plead the defenses of truth as complete justification of making the defamous comment, or that he made a fair comment, or that he was protected by privilege to make such comment.

First Defence: Truth

Truth brings back the level of fame of the defendant in a defamation case. The extent of the liability and the role of truth in expiating that liability is discussed in the following case.

Miss Simi Garewal V. T.N. Ramachandran & Another[95]

In Miss Simi case the Bombay High Court dismissed the suit for injunction filed by from publishing her nude photograph in a film magazine on the ground of justification by truth. The plaintiff, Miss Simi a reputed film artiste, played the female role in a picture entitled *'Siddartha'* which was shot in India but not released here, though shown in United States. One of the scenes consisted of the plaintiff playing the role of a courtesan standing nude wearing only certain jewellery before the principal male actor Shashi Kapoor, who was kneeling in front of her with folded hands and bowing. A colour photograph of this scene was announced to be published by the defendant, in a film magazine he owned. The plaintiff sought an injunction restraining the defendant from publishing that photograph. Her contention was that although she had to stand nude in taking the film in the context of the original German novel out of which the story of the picture was taken, still there was an agreement between her and producer that the particular nude scene would not be exhibited or screened in India without her permission as it would not be found acceptable to the Indian Society. She alleged in the plaint that with a view to defame her in Indian Society, film goers, producers, distributors, and exhibitors of Indian pictures, the defendant was publishing the above scene in his magazine in India. The defendant in his written statement explained the circumstances in which the photographs were taken with her consent which had already been published in the American Magazines as also in an Indian weekly magazine. He contended that this photograph was a true photograph of a scene in the film depicting the plaintiff and her male lead and it was in no way defamatory.

[95] C.A. 397774 decided on 28th Feb.1974

The Bombay High Court held, once it was proved that a representation or statement in question was true in substance and in fact, it was utterly irrelevant to consider whether it was defamatory or not. Further the Court said that a person has no right to the protection of reputation to which that person is not entitled. As the photograph was a correct one and in no way showed the plaintiff less attractive or beautiful, or unfair, she has no reason to complain. The picture was also not torn out of context so as to make it misleading or to amount any misrepresentation.

In ***Jawaharlal Darda v. Manoharrao Ganpatrao Kapiskar***[96]**,** Manoharrao filed a complaint in the court alleging that by publishing a news item in its newspaper "Daily Lokmath" J.L Darda and others have committed offences under Section 499, 500, 501, 502 read with section 34 IPC. The news item disclosed the details of debate in Assembly. It stated that when a question regarding misappropriation of government funds was posed, the minister concerned had replied that a preliminary enquiry was made and it was found to be true. The minister also stated five names including the complainant as responsible for misappropriation. It was a report about the public conduct of public servants who were entrusted with public funds intended to be used for public good. The facts and circumstances of the case disclose that the news item was published for public good.

Truth is absolute justification to a civil action for defamation. The defendant will succeed if he knows that what he has spoken of the plaintiff is substantially true. The law has recognised this defence since defamation is essentially an injury to man's reputation and when it is shown that what is spoken of a person is true, it means only that his reputation has been brought down to its proper level and there is no reason for him to complain.

All defamatory words are presumed to be false, and the plaintiff is not required to give evidence show that they are false, but the defendant rebut his presumption by giving evidence in support of his plea that the words are substantially true.

In criminal law, truth is not an absolute justification. Truth is a justification only when it is given out for public good. The reason for the distinction lies in the fact that in civil action the benefit or detriment to the public is not in issue while it is paramount that the public should have a concern in criminal matters.

To succeed in a plea of justification, the defendant must prove that the defamatory imputation is true. It is not enough for him to prove that he believed that the imputation is true, even though it was published as belief only. "If I say of a man that I believe he committed murder, I cannot justify by saying and proving that I did believe it. I can only justify by proving the fact of murder". So also if the defendant has written, "A said that B

[96] AIR 1998 SC 2117

the plaintiff had been convicted of theft." It will be no defence for the defendant to prove that A did tell him so, that he honestly believed that A said and he only repeated it. He must prove as a fact that B was convicted of theft. If you repeat a rumour you cannot say it is true by proving that the rumour existed; you have to prove that the subject matter of the rumour is true. A person, who has a libelous statement about another, is at least bound to take the ordinary precaution of keeping it to himself till he is convinced of its truth. He has no right to take it for granted that if it true and thus give a wider publicity to a calumny which, but for his publication, might have died with its originator.

Substantial justification sufficient:

In ***Sutherland V. Stopes***[97] Lord Shaw indicated the nature of this defence thus.

> The plea must not be considered in a meticulous sense. It is that the words were true in substance and in fact….. There may be mistake here and there….. which would make no substantial difference to the quality of the alleged libel or in the justification pleaded for it.. and sold in the next day and pocketed the money, all without notice to me and that in my opinion he stole the saddle and if the facts truly are found to be that the defendant did not take the saddle from the stable, but from the harness room and that he did not sell in the next day but a week afterwards, but nevertheless he did, without my knowledge or consent, sell my saddle so taken and pocketed the proceeds, then whole sting of the libel may be justifiably affirmed by a jury notwithstanding these errors in detail.

Justification as defence in India:

In India also truth is a complete defence to a civil action for libel. The Burden of proof of the defence of justification lies on the defendant. Some eminent jurists feel the need to change this concept of making the truth the whole defence in civil cases. They say that the law should require that publication of the statement must be proved to be for the public to good if it is to be immune from liability. In four Australian states, truth, in itself, is not a complete defence in a civil action, and the defendant must establish public good also. P.M. Bakshi says:

> ….If the law seriously wants to protect reputation, truth in itself should not be a defence to a civil action for defamation. The fact that A, a woman, is unchaste does not for example; morally justify B in publicizing unchastity. No social interest is served by allowing B to circulate such statements.[98]

In the absence of any social interest (Public good), as legal interest in her own reputation she ought to continue to receive legal protection. As between A's right to reputation and B's

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[97] 1925 A.C. 79

[98] P.M. Bakshi, Law of Defamation, Some Aspects: 1986,p 38

supposed "liberty" of expression the balance ought to tilt in A's favour in the absence of any element of public good. A has everything to gain by getting legal protection for her reputation. B has nothing to lose if A receives such legal protection. He gets nothing except a malicious self-satisfaction in making others unhappy. Society also gains nothing by such statements.

The Second Press Commission in India expressed itself on the point:

> The Australian Law Reform Commission was of the view that truth, by itself should be the complete defence in civil actions, as "Public benefit" is a vague term and publishers are entitled to a clear guidance as to the rules bending them. The requirement of public benefit would be adding too much of a burden on journalists. We see no reason for any departure from the present position. Truth alone should continue to be a complete to defence[99].

At Common Law the defence of justification suffered from one drawback, in that, person taking this defence had to prove the truth of the whole libel tie of every defamatory statement contained in the words complained of. Where the words complained of contained more than one change or are otherwise severable the defendant may justify only part of the words (partial justification). He remains liable to pay damages in respect of the part not justified if it is defamatory and materially injures the plaintiff's reputation if no other defence is established.

The porter committee recommended that the defendant should be entitled to succeed in a defence of justification, if he proved that so substantial a position of the defamatory allegations was true as to lead the court to the views that any remaining allegations which had not been proved to be true did not add appreciably to the injury to the plaintiff's reputation.

After the Porter Committee report in the United Kingdom the defence of partial justification has been extended by statute. In certain circumstances, a partial justification now provides a complete defence. Section 5 of the UK Defamation Act provides the same.

Honest belief in truth:

The defence of justification (truth) is not satisfied by merely proving that the defendant honestly believed the statement to be true. He must prove objectively that the statement was in fact true. This suggestion has been particularly pressed in the United Kingdom so as to make the position of newspapers more favourable. A report published by Justice (Joint

[99] Second Press Commission Report vol 1 PP 46-47 1982

working party of Justice and British committee of International Press Institute)[100] proposed that the press should be given a new qualified privilege for statements based upon information which might reasonably believed to be true, provided that the defendant published a reasonable statement from the plaintiff by way of explanation if so requested and, if necessary, an apology. This suggestion was opposed in parliament, academic writings and by the Faulks Committee. They said that it would create another form of qualified privilege and that it would mean that the press would now be entitled to put out untrue statements about matters of public concern or half-truths which could be justified in subsequent legal proceedings merely on the footing that they were based upon evidence which might reasonably be believed to be true.

Subash Chandra Bose V. Knight & Sons [101]

In this case the Statesman published in its issue of 26th November,1924, passage commenting on the speech of Lord Lytton, the then Governor of Bengal, where-in it was stated that the Governor said Mr. Subash Chandra Bose was arrested under Regulation 3 and alleged that he was the brain behind the terrorist conspiracy. The plaintiff's complaint was that the writer stated a fact that he was a member and a directing brain of a terrorist movement. The Court held that although the defendants were entitled to refer to the fact that the viceroy and the Governor, had caused the arrest of the plaintiff because they were satisfied that he was a terrorist, but in a matter of such great importance to the plaintiff it was very necessary that they should refrain from conveying to the ordinary reader an opinion of their own which was in effect the reiteration of a charge of criminal conspiracy. In such a matter a journalist who does not excise a reasonable degree of care and skill to make plain the limits of his intention may quickly drift into a repetition of this accusation – into a suggestion that it must be true— into an opinion to that effect. If he has done so and if the fair meaning to the ordinary reader, as put by a jury upon his words, is to present the reader with or command to him a conclusion that the plaintiff has been guilty of a crime, it would be erroneous to say that he has been merely commenting upon the statement of another. It will be a defamatory comment only.

Second Defence: Fair Comment:

A fair comment or bona fide comment is a statement of opinion based on facts of public matters which concern them. To say that 'the soldier is a deserter'' is a statement of a fact while to say 'he is a deserter and hence a coward soldier' is an expression of opinion. Every citizen is having a right to make a legitimate and fair comment on public affairs like-

a. affairs of state; Public acts of Ministers and officers of state.
b. administration of justice
c. public institutions and authorities including local authorities,

[100] Justice, The Law and the Press 1965
[101] 1929 Cal.69 113 I.C.34

d. religious matters
e. Books, pictures and works of art.
f. Theaters, concerts and other public entertainments (not on private life of public figures)
g. other affairs which appeal to the general public e.g., a medical man bringing some new methods of treatment and advertisement.

Facts comments should be easily distinguishable to the reader so that clear inference and judgment is possible. Comment should not be mixed with facts, which land the readers in confusion. In such a case, the defence of fair comment is not available. Incorrect attribution of a disgraceful act cannot be passed. It must be clear expression of opinion and not assertion of a fact. There are three parts in fair comment. They are:

1. An expression of opinion and not statement of fact,
2. which is a fair comment
3. and about some matters of public interest.

The comment must be made on the basis of true facts. No comment can be fair if not based on facts. There should be no malicious intentions in making a fair comment. There must be a belief in the truth of the comment being made. Imputation of wrongful or criminal motives will make the comment unfair. One cannot attack the moral character or personal life of a person, even though the person occupies some public position which makes his character a matter of public interest.

A comment is a statement of opinion on facts[102] and the defendant in an action for defamation may raise the defence that the matter alleged to be defamatory is nothing but a fair comment on a matter of public interest, and this plea if made out is a complete defence to an action for defamation.

Any person whether he is a private individual or a public journalist has a right to hold any views he pleases on a matter of public concern and to express the same. But that expression of opinion should be fair. Thus the rule is that if a statement is a fair comment on a matter of public interest, it is not actionable. Right of criticism and free expression of opinion are considered essential for the progress society and for inducing efficiency in the services of private and governmental establishments in the land.

It is immaterial whether the opinion of comment is correct or not whether it is just or unjust, or whether it is couched in a language which may not error the side of moderation; what is material and important is that the comment must not be beyond the limits which the law calls 'fair'.[103] The doctrine of fair comment is based on the hypothesis that the

[102] *Christle V. Robertson* (1889) 10 New South Wales L.R. 161
[103] Mitha Rusthomji V. Nusserwanji) Nowroji 66 1941 Bom. 278

publication in question is one which, broadly speaking is true in fact, and is not made to satisfy the personal vendetta and further that the facts stated therein are such as would go to serve the public interest.[104] It is said that nothing is libel which is a fair comment on a subject fairly open to public discussion [105] Fair comment on matters of public interest is a right and it is the duty of the Courts carefully to guide and liberally to interpret[106].

The onus is upon the defendant to show that the subject commented upon is a matter of public interest, that the statements of fact relating thereto are true and that the comment based upon the facts is a fair and bona fide comment. It is the expression of criticism that has to be fair. It is not necessary to prove malice on the part of the defendant, though malice may sometimes be proved to show that the comment is not fair. Nor is it statements were true[107]. To be a defence the comment must be an expression of opinion of the writer and must not be assertions of facts; must be fair, must be on a matter which is of public interest and must not be malicious.

Defendant can plead that the matter complained of if not defamatory and the other plea in the alternative that if the matter be considered defamatory, it was an honest expression of opinion me in good faith and for the good of the public[108].

As a matter of fact, all kinds of inconsistent pleas can generally be taken up by the defendant and it is laid down by Codgers that the usual form in which defence of fair comment is pleaded is:

> In so far as the words complained of consist of allegations of fact, they are true in substance and in fact, and in so far as they consists of expressions of opinion, they are fair comments made in good faith and without malice upon the said facts, which are matters of public interest[109].

The statement must be an expression of opinion and not assertion of facts. To write of a man that he is "a disgrace to human nature" is a defamatory allegation of fact. Comment based on admitted facts is altogether a different thing from assertions of facts.

It happens sometimes that comment is mixed up with assertion of facts and the reader or listener or viewer or browser is unable to distinguish between one and the other. But that is always a pitfall for the writer. Comment should always appear as comment if it is to be called fair. Comment is a criticism or a statement of an opinion; it is an inference that the

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[104] Vishan Sarup V. Nardeo Shastri, 1965, All .439
[105] W.S. Iwin V. D.F. Reid, 1921 Cal. 282
[106] Subramania V. Ritchoock. 1925, Mad.950
[107] Mitha rusthomji V. Nasserwanji Nowroji.)21 I.C. 625: 25 M.L.J. 476.
[108] Balasubramania V. Rajagopala Chariear, 1944, Mad, 484
[109] Odgrers: Libel and Slander, p.169

writer draws from a certain set of facts. If the facts are wrapped up with comment, that is the fault of the writer, thereby he does not place before his renders facts from which he has drawn his inference; so that the reader cannot judge for himself whether the inference drawn is well-founded or not. If the writer has made it fairly plain the facts and his comment, however strong the opinion expressed that would not be liable to create any harm because the readers would be able to form their own opinion on it.

The defence of fair comment is of more use to journalists. Expressions of opinion contained in editorials, critical articles, letters to the editor and news items of an analytical nature are covered chiefly by the defence of the right of fair comment is applied to a defamatory publication[110]. The defence is based on public policy – the right of all persons and publications to comment and criticise without malicious intent the work of those who draw public attention. Here, newspapers do not stand in any special position. Where the facts supporting the comments are not stated at least with substantial correctness, the defence is not available.

The law on this point is too technical and it envisages a strict compartmentalization between "facts" and "opinions". Normally defamatory matter would not consist solely of expressions of opinion. Facts and expressions of opinions would cause injustice. The Porter Committee noted this defect and recommended that the basis of the defence of fair comment should be broadened in a manner similar to that recommended by that committee in relation to the defence of justification. This recommendation of the porter Committee has been substantially carried out in the Defamation law of UK. This changed principle has to be adopted in Indian cases also.

In ***Dainik Bhaskar v. Madhusudan Bhasker***, AIR 1991 MP 162 it was held that the Court must analyze the alleged defamatory news and views with due care, caution and circumspection and eschew hypersensitivity in doing so for the role of the press as crusader against social evil is progressively acquiring greater importance and newer dimensions with the niche found by investigative journalism.

Rolled – Up Plea

This is a highly technical plea of the English law of defamation which the defendants can usefully resort to when the fact and comments are so inextricably bound together that it is impossible to separate them. Hence in this plea the defendant alleges that they are true in substance and in fact; and in so far as they consist of expressions of opinion they are fair comments made in good faith and without malice upon the said facts which are matters of public interest.

[110] Hohenberg, Professional Journalist, 1980, Indian Reprint, 376

Subba Ramier v. Hitchock [111]

In this case the defendants published in the newspaper 'Hindu' a report under the heading 'Police Crimes in Ottapalem' on the events which occurred at a student's conference there. The report charged the plaintiff, Superintendent of Police with having deliberately conspired with subordinate police officers to assault innocent people, when as a matter of fact he was not proved to have been aware of them. The Madras High Court held the defendants liable on the ground that the facts in the case did not justify the report which was deemed unfair and the defendant's belief of its truth was held to be bad plea. The true test to decide whether a particular criticism is unfair or not is not the correctness of the inference drawn by the critic but the following: "is the inference, the honest expression of the opinion which the defendant held upon the facts truly stated, and warranted by the facts in the sense that a fair minded man might reasonably draw from them - that inference"[112].

Fair comment must be on a matter of public interest. Matters of public interest cover a wide range of subjects and individuals. In modern times it includes everything relating to national or local government, the administration of public institutions whether of State or Private aided, or charitable or educational institutions; the public conduct not only of all public officials but of all persons as priests, clergymen, judges, barristers, political candidates, and agitation's who take part in public affairs, in short it includes the conduct of every man and institution of public concern. The private life of such persons is however only of legitimate public interest in so far as it affects their public activities and functions. The conduct of all civil and criminal actions in Courts, the decision of judges, and the evidence of witnesses can properly be commented upon when the trial is over.

A newspaper is not entitled to invade the private life of an individual in order to discuss questions of character with which the public is not concerned. The private life and character of an author or artiste unconnected with the work he has given to the public is not a matter of public interest.

It may be well to state here that newspapers, since they have generally to defend themselves on the plea of fair comment, are subject to the same rules as other critics, and have no special right or privilege[113]. The range of their criticism or comments is as wide as and no wider than that of any other subject, and therefore, in spite of the latitude allowed to them, it does not mean that they have any special right to take unfair comments, or to make imputations upon the character of a person, or imputations upon or in respect of person's profession or calling[***114***], as a matter of fact they have greater responsibilities and should be more cautious in making scandalous imputations.

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[111] 1924 I.L.W. 26

[112] Peter Walker Ltd. V. Hodgson 1909 1 K.B. P. 253

[113] Mitha Rushomji Case

[114] Arnold v. Emperor 1914 P.C.116

Malice would make the comment unfair. This is an exception to the general principle that the motive of the defendant is irrelevant in the law of tort. Lord Easher's remark in ***Marivals v. Carson,*** where the critic is actuated by malice, the comment could not then be a criticism of the work. The mind of the writer would not be that of a critic, but he would be actuated by an intention to injure the author.

Third Defence Privilege: *R.K. Karanjoia V. K.M.D. Thackersey*[115]

It is not sufficient to attract the protection of qualified privilege that the subject matter is one of general public interest. The person or the newspaper who wants to communicate the news to the general public must also have a duty to communicate and the person to whom the communication is made must a have a corresponding duty or interest to receive it. The privilege is based on the principle that such communications are protected for the common convenience and welfare of the society.

Malice in law, which is presumed in every false and defamatory statement, stands rebutted by a privileged occasion, in such case, in order to make a libel actionable, the burden of proving actual or express malice is always on the plaintiff. Malice in that sense means making use of a privileged occasion for an indirect or improper motive.

In the issue of 24th September 1960 of Blitz English weekly an article was published. It was an attack directed against the 'House of Thackersey', a business organisation, which constituted of the plaintiff's close friends and relations. The aim of the article was to suggest as to how the plaintiff, who was also the Chairman of the Textile Control Board, had exploited his position in amassing enormous wealth having recourse to unlawful and questionable means, involving tax-evasion on a colossal scale, financial jugglery, import, export rackets by resorting to foreign exchange violations. Reference was also made in the article to the inaction of the Government in tax evasion and that investigations into the operations of the' house' and been bogged down for years enabling it to amass great wealth.

The plaintiff brought an action against R.K. Karanjia, the editor, and the owners of the newspaper, its printers and the person who furnished the material for the said article. The printer tendered an apology and the plaintiff withdraws the suit against him. At the trial Court the defence of justification, fair comment on a matter of public interest and qualified privilege were pleaded. All those defences were rejected. Holding that the plaintiff had been grossly defamed, it passed a decree for the full claim of Rs. 3,00,000/- with costs and also

[115] A.I.R. 1970 Bom. 424

issued an injunction forbidding the publication of series of similar articles intended to be published.

Against this decision the defendants preferred an appeal to the High Court. The only defence pleaded before the High Court was 'qualified privilege'. The Council for 'Blitz' argues that the subject matter of article was of great public interest. The public are vitally interested in being assured that great concentration of wealth which is discouraged by clauses (b) and (c) of Art.39 of the Constitution does not take place, and if it does, either because of Government's inaction or because of deliberate violation of the law on the part of any business organization. The public have a legitimate interest to know about it. If again, owing to corruption, inefficiency or neglect on the part of the State investigating machinery, offenders were not speedily brought to book, that would also be a matter of vital public interest. The council for appellants (Blitz) contends that this particular situation gave the newspaper privileged occasion, that is to say, an occasion giving rise to a duty on the part of the newspaper to address a communication to its readers, the citizens of India, who were interested in receiving the communication. Therefore, any defamatory matter incidental to the subject matter of the communication was protected by law unless express malice was proved by the plaintiff.

The plaintiff's counsel argued that a privileged occasion cannot be created by a person for himself to enable him to publish a defamatory statement which he cannot sustain or justify. The plea of qualified privilege was rejected for two reasons. Firstly, the element of duty "duty" in communicating the statement was missing. It was held that the mere fact that the matter is of general public interest is not enough, as Lord Buddy[116] in ***Uadam v. Ward*** held, the person or the newspaper who wants to communicate to the general public must also have duty to communicate, and if no such duty, apart from the fact that the matter is one of public interest, can be spelt out in the particular circumstances of the case, the publication could not be said to be upon a privileged occasion. Another reason for rejecting the defence of qualified privilege was that the article was published maliciously, not with an idea to serve public interest but with a view to expose the plaintiff because on an earlier occasion plaintiff had made the defamatory article. The High Court, however, allowed the appeal in part as it reduced the amount of compensation payable from Rs.3,00,000 to Rs. 1,50,000.

In particular circumstances, a person is allowed to make defamatory statements so to not incur liability even if the statement be untrue. A defence founded on such a right is called the defence of 'privilege, and the occasions on which the immunity is conferred by law are called 'privilege and the occasions'. These constitute further exceptions to the rule that a man attacks the reputation of another at his risk, the exigencies of the occasion, the

[116] 1915T.L.R. 299

protection of public interest, or of the rights of lawful interests of individuals' amount to a lawful excuse for the defamatory statement. Privilege is of two kinds- A) absolute and B) qualified.

a) Absolute privilege: Absolute privilege arises when on grounds of public policy; a man should speak out his mind freely and without fear of consequences. Hence no action lies however, false the statement may be. The existence of malice is entirely irrelevant in these cases. Absolute privilege is recognized in the following cases:

i) *Parliamentary proceedings*: Article 105(2) of our Constitution provides that (a) statements made by a member of either House in Parliament, or (b) the publication by or under the authority of either House of Parliament of any report, paper, votes or proceedings, cannot be questioned in a Court of law. A similar privilege exists in respect of State Legislatures, according to Art.194(2).

ii) *Judicial Proceedings*: No action for libel or slander lies whether against Judges, Counsels, Witnesses, or Parties, for words written or spoken in the course of any proceedings before any court recognized by law, even though the words written or spoken were written or spoken maliciously, without any justification of excuse, and from personal ill-will, and anger against the person defamed. Such a privilege also extends to proceedings of the tribunals possessing similar attributes[117]. Protection to the judicial officers in India has been granted by the Judicial Officer's protection Act, 1850. The counsel has also been granted absolute privilege in respect of any words spoken by him in the course of pleading the case of his client. If, however the words spoken by the counsel are not having any relevance to the matter before the Court, such a defence cannot be pleaded. (***Rahim Bakshav v. Bacchalal[118]).*** The privilege claimed by a witness is also subject to a similar limit.

iii) *State Communications*: A statement made by one officer of the State to another in the course of official duty is absolutely privileged for reasons of public policy. Such privilege also extends to reports made in the course of military and naval duties in the publication.

The common law has recognized only a qualified privilege for fair and accurate reports of judicial proceedings. The privilege extends to reports other than those in newspapers for example, to reports in letters or in conversation. At the present day, the defence has to be considered in the light of the fact that most reports which are published in the media of proceedings in Parliament, or in the courts or elsewhere do not purport to a full

[117] Dawkins V. Lord Rockely 1875 L.R.-7 H.B.744
[118] A.I.R. 1929 All 214

account, or even a precise of the proceedings, but are selective and concentrate on those aspects of the proceedings which are thought to be of particular interest to the public.

b) **Qualified Privilege:** In certain cases the defence of qualified privilege, in this case it is necessary that the statement must have been made without malice. For such a defence to be available it is further necessary that there must be an occasion for making the statement.

Statement made in discharge of a duty

Generally such a privilege is available either when the statement is made in discharge of a duty or protection of an interest or the publication is in the form of report of parliamentary, judicial or other public proceedings. Thus, to avail this defence the defendant has to prove following two points:

The statement was made on a privileged occasion, i.e., it was in discharge of a duty or protection of an interest; or it is a fair report of parliamentary, judicial or other public proceedings. And secondly, it must have been made without notice.

Statement was made without any malice

The occasions when there is a qualified privilege to make defamatory statement without malice are either when there is existence of a legal or social duty, or existence of some interest for the protection of which the statement is made. A privileged occasion is in reference to qualified privilege, an occasion where the person who makes a communication has an interest or a duty legal, social, or moral, to make it to the person to whom it is made, and the person to whom it is made has a corresponding interest or duty to receive it. This reciprocity is essential. The Indian Penal Code contains such a privilege in its ninth exception to Section 499.

In the case of publication of libelous matter in a newspaper duty to the public has got to be proved. If such a duty is not proved the plea of qualified privilege will fail. The plea will also fail if the plaintiff proves the presence of malice or an evil motive in the publication of the defamatory matter.

c) Publication of Parliamentary Proceedings: In India, the Parliamentary Proceedings (Protection of Publication) Act, 1977 grants qualified privilege to the publication of reports of proceedings of parliament. According to Sec. 3 (1) "no person shall be liable to any proceedings, civil or criminal, if any court in respect of the publication in a newspaper, of a substantially true report of any proceedings, of either House of Parliament unless the publication is proved to have been made with malice." Article 361A which was inserted by Amendment in 1978 provides protection of publication of proceedings of Parliament and State Legislatures. The above stated protection is not available unless the publication has been made for public good.

Thus, to claim qualified privilege in respect of parliamentary proceedings the publication should be without malice and for public good.

The New York Times Rule: (*The New York Times Co. V. Sullivan.)*

This rule in 1964 has expanded the scope of freedom of press to critically comment upon the conduct of the public official. Even if the utterance is defamatory falsehood about the public official, it was not held to be actionable provided that it was published in good faith and without actual malice. The New York Times Rule that emerged in an interesting case extended to all, the individual as well as the journalist, the privilege of uttering of printing in good faith defamatory falsehoods about a public official as long as a few simple rules are met.

On March 29, 1960, The New York Times published an advertisement worth $4,800. Two years later, as a result of libel suits that advertisement looked as if it might cost the Times three million dollars in damages. But on March 9, 1964, despair turned into joy when the United States Supreme Court issued a ruling that not only removed all dangers of libel damages as a result of the Advertisement but also erected new safeguards for freedom of expression.

The advertisement titled "Head their Rising Voices" contained these paragraphs:

As the whole world knows by now, thousands of southern Negro Students are engaged in widespread non-violent demonstrations in positive affirmation of the right to live in human dignity as guaranteed by the US Constitution and the Bill of Rights. In their efforts to uphold these guarantees, they are being met by unprecedented wave of terror by those who would deny and negate that document which the whole world looks upon as setting the pattern for modern freedom…

In Montgomery, Alabama, after a student's sang 'My Country' Tis of Thee' on the State Capitals steps, their leaders were expelled from school, and truckloads of police armed with shotguns and teargas ringed the Alabama state college campus.

When the entire student body protested to state authorities by refusing to re-register, their dining hall was padlocked in an attempt to starve them into submission

Again and again the Southern violators have answered Dr. King's peaceful protests with intimidation and violence; they have bombed his home, almost killed his wife and child. They have assaulted his person. They have arrested him several times for

'speeding' loitering' and similar 'offences'. And now they have charged him with 'perjury' – a felony under which they would impression him for ten years…

Although he was not mentioned by name in the Advertisement Commissioner Sullivan contended that the word 'police' in the paragraph on Montgomery referred to him and everyone knew it did because the public knew that he was in-charge of the police. Thus he said, was being accused of 'ringing' the campus with his men and of padlocking, the dining hall to starve the students into submission. Furthermore he contended that since arrests are ordinarily made by the police, the 'they' in "They have arrested" Dr. King would be read as referring to him. The reader, he said would also identify him as among the Southern violators who committed the other acts mentioned in the same paragraph.

Facts of the case

Detailed facts of the case are: On February 1, 1960 four black college freshmen in Greensboro, North Carolina, went to the downtown Woolworth's, sat down at the whites-only lunch counter, and after being refused service, stayed all day. Sit-ins began. Seven weeks later, the New York Times editorialized: "The growing movement of peaceful mass demonstrations by Negroes is something new in the South, something understandable". The Times urged Congress to "heed their rising voices". Two weeks later Bayard Rustin and Harry Belafonte decided to use the latter phrase as a lead to a fund-raising appeal in the form of full page advertisement, to assist with Martin Luther King, Jr., rising legal fees. The Advertisement was released with the names of 64 prominent citizens in the New York Times. The ad began with an appeal: "three needs - the defense of Martin Luther King- the support of the embattled students - and the struggle for the right to vote"; it then moved on to describe the situation in South. The first paragraph alluded generally to the 'non-violent demonstrations' as a positive affirmation of the right to live in human dignity as guaranteed by the US Constitution and the Bill of Rights". It charged that in efforts to uphold these guarantees the demonstrates had been "met by an unprecedented wave of terror by those who would deny and negate that document which the whole world looks upon as setting the pattern of modern freedom". After mentioning the tear-gassing of demonstrators in Orangeburg, South Carolina, the ad turned in paragraph three, to Montgomery. It began by complaining of mistreatment of demonstrators who sang in the state capital. It charged the leaders of the demonstration were expelled from Alabama State College, that truckloads of police "armed with shotguns and tear-gas" had ringed the Alabama State campus, and that when 'the entire student body' protested by refusing to register, the college dining hall was padlocked in an effort to starve the protesters into submission. The fourth paragraph made references to other Southern cities where 'young American Teenagers' were facing the 'entire weight' of the state and police". The fifth paragraph also mentioned about the atrocities of

Southern violators, bombing of Luther King's home assault on his person, his seven arrests and the pending perjury charge.

Alabama attorney general announced that Governor James Patterson had instructed him to consider suing the Times and the signatories of the ad for libeling Alabama officials even though none were specifically named. On April 8, Montgomery Police Commissioner L. B. Sullivan wrote to four Alabama ministers who were listed in the ad's endorsement section, demanding a 'full and fair retraction of the entire false and defamatory matter". All these four ministers did not know about the existence of the ad and their names in it. A similar letter was addressed to New York Times by Sullivan, demanding an apology. The Times wrote back that it was 'puzzled as to how you think the statements in any way reflect on you" Like everyone else, Sullivan was also not mentioned by name, nor was any mention of his job. Four Alabama ministers demanded $500,000 in damages. Officers also filed similar suits. Replying to the letter from the Governor James Patterson, the Times printed a retraction: To the extent that anyone can fairly conclude from the statements in the advertisement that any such charge {of wrong doing by Patterson} was made, the New York Times hereby apologizes". It wasn't enough. Patterson filed suit for one million dollars naming King as a defendant as well. Finally the distinguished Times correspondent Harrison Salisbury, who had written two stories on conditions in Birmingham and Bessemer, was hit with a forty-two count indictment for criminal libel.

On the basis of advertisement titled "Heed their Rising Voices" published in New York Times, five libel suits were filed. Sullivan, a police Commissioner in his suit against the newspaper alleged that he was defamed with all false statements made in such advertisement, saying that he conducted illegal raids into the student’s hostel violating their privacy and disturbing their property.

Both Sullivan and the Times had problems at the trial. Sullivan had to convince a jury that an advertisement mentioning neither him nor his position libeled him. The Times' problem was that there were indeed several technical and one more substantial, factual error in the advertisement. According to Alabama law of defamation, which was similar to those of majority of American States, these errors would strip the Times of the Common Law defense of truth, because that defense existed solely for perfectly true statements. The errors also negated the common law defense of fair comment. A more serious error was the charge that the dining room had been padlocked to starve the protesting students into submission. That simply was not so, and the only students who were barred from eating were a relatively small number who lacked the necessary documentation.

At the trial Sullivan made a number of effective points to prove malice. He showed that the Times had in its newsroom files only one floor above the advertising department

clips of previously published articles demonstrating the falsity of the allegations made in the advertisement, but nobody had checked the advertisement against the clips. He cited the fact that the Times had not published a retraction when had requested once, but had done so for Governor Patterson. And he said that the newspaper had proved its malice right in the court by insisting that, apart from the statement that dining hall was padlocked, the advertisement was substantially correct.

The Times could not deny that some of the statements were inaccurate. Although students staged a demonstration on the State Capital steps, they sang a National Anthem, not "My country: It is of thee". Nine students were expelled by the State Board of Education, not for leading demonstration at the Capital but for demanding service at a lunch counter in the Montgomery Country Court house on another day. Most, but not all, of the students body had protested the expulsion- not by refusing to re-register but by boycotting classes on a single day; actually all the students had re-registered. The campus dining hall was not padlocked on any occasion, and the only students barred from eating there were the few who had neither signed a pre-registration application nor requested temporary meal tickets. Although the police were deployed near the campus in large numbers on three occasions, they did not at any time 'ring the campus and they had not been called to the campus in connection with the demonstration on the State Capital's steps, as the advertisement imputed. In addition Dr. King had been arrested four times but not seven. There was conflicting evidence as to whether Dr. King had been assaulted.

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The jury awarded Commissioner Sullivan every dollar he asked of them, a stiff price for the Times to pay for the 394 copies of the issue that went to Alabama. The Times appealed, but the Alabama Supreme Court upheld the judgment. The Times went to the United States Supreme Court and won the reversal. In its decision, which for the first time found libelous utterances protected under the First Amendment, the Court said[119]:

1. The Constitutional guarantee requires, we think, a Federal rule that prohibits a public official from recovering damages for a defamatory falsehood relating to his official

[119] The New York Times v. Sullivan, 376 US 254

conduct unless he proves that the statement was made with 'actual malice', that is with knowledge that it was false or with reckless disregard of whether it was false or not.
2. Actual malice must be proved with 'convincing clarity'
3. A juryman does not infer that criticism of the conduct of underlings is criticism of the supervising official.
4. Judges - both the trial judge and those exercising appellate review - must engage in independent review to satisfy themselves that the evidence in the case is constitutionally sufficient.

The Court set only two conditions as necessary to invoke the privilege: the libel must concern the official in public, not solely his private conduct, and the remarks must be a knowing lie reckless disregard of the truth.

What the Supreme Court did in the Times case was to amplify and extend to the press in the entire country, a protection that existed only in sixteen states, known as the Kansas Rule. It had stemmed from the classic exposition of the principle by the Kansas Supreme court in 1908 in a suit brought by State Attorney General, C.C. Coleman against the publisher of the *Topeka State Journal*. Coleman said that he had been libeled by an article regarding a school fund transaction. In upholding the State Journal's privilege of publishing false statements of facts about a public official the Kansas Supreme Court noted that there was a popular demand that the press exposed them and suspected fraud, graft, greed, malfeasance, and corruption in public affairs. It is said that its decision should encourage the press to fulfill its duty and noted:

It is of the utmost consequence that the people should discuss the character and qualifications of conditions for their suffrages. The importance to the state and to society of such discussions is so vest, and the advantages derived are so great that they more than counter balance the inconvenience of private persons whose conduct may be involved and occasional injury to the reputations of individuals must yield to the public welfare, although at times such injury may be great. The public benefit from publicity is so great, and the chance of injury to private character so small, that such discussion must be privileged. (***Coleman V. Mc.Lennan***)[120]

Garrison was tried by a judge of another Parish and convicted of criminal libel. The Louisiana Supreme Court upheld the verdict. In throwing out the convictions the United States Supreme Court said:

"At the outset, we must decide, whether, in view of the differing history and purposes of criminal libel, the New York Times rule also limit state power to impose criminal sanctions

[120] 78 Kan 711

for criticism of the official conduct of public officials. We hold that it does." (***Garrison V. Lousiana***[121]***)***

The Court had thus entered a brand-new area of law and dramatically constitutionalised it. Furthermore it had reached back to settle a long-dead controversy over the Sedition Act.

Derbyshire County Counsel v, Times Newspapers Ltd[122]

This landmark judgment of the House of Lords in England deals with the cases initiated by either the government or other local bodies against the press for charging authorities with irregularities. In case of Derbyshire County, legal actions were brought by the council against the newspaper, its editor and the two journalists who wrote theatricals on the ground that the publication injured the reputation and the credit of the Council and had caused it loss and damage. A preliminary point of law was raised whether the Council being a local authority could at all sue for libel. The trial judge held in favour of council but was reversed by the Court of Appeal, which ruled against the Council and dismissed the suit. The House of Lords affirmed and unanimously ruled that under the Common Law in England a local authority does not have the right to maintain an action for defamation. The major concern of the Law Lords in reaching that conclusion is the necessity of ensuring that Press freedom is not curtailed by the chilling effect of threats of criminal and civil action against it for defamatory statements concerning the functioning of local authorities and government departments.

The House of Lords accepted the position that individual councilors or officers of the local authority were entitled to sue for libel if they were defamed. The House also clarified that a local authority could also sue for malicious falsehood if false statements in the efficient carrying out of its functions adversely affected it. But a local body cannot sue for libel because in the view of their Lordships, one fundamental feature which distinguishes it from other trading and non-trading corporations is that it is a governmental body.

Further it is a democratically elected body. It is of the highest public importance that a democratically elected governmental body or indeed any other governmental body should be open to uninhibited public criticism. A threat of a civil action for defamation must inevitably have an inhibiting effect on freedom of speech.

The Law Lords relied heavily on judgments of US courts that approved the following observations of Thompson CJ of the Supreme Court of Illinois:

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[121] 379 U.S. 64

[122] (1992) 1. Q.B. 770

> Every Citizen has right to criticize an inefficient or corrupt government without fear of civil as well as criminal prosecution....a despotic or corrupt government can more easily stifle opposition by a series of civil actions than by criminal prosecution. These prepositions were endorsed by the US Supreme Court in it celebrated judgment in New York Times v. Sullivan.

The House of Lords was conscious that these observations and judgments of the US were in the context of the wide ambit of the First Amendment in the US Constitution. But it emphasised that the "the public interest considerations which underlay them are no less valid in this country. What has been described as the Chilling effect induced by the threat of civil actions for libel is very important. If that be the position in the UK which has no Bill of Rights guaranteeing freedom of Expression, the relevance and importance of these observations in our country which has a written Constitution containing the guarantee of free speech is obviously greater. The chilling effect is the same in all regions and operates irrespective of geographic considerations, says Soli. J. Sorabjee[123].

Auto Shankar Case:

Supreme Court delivered a historic judgment in ***R.Rajagopal v. State of Tamil Nadu***,[124] stating that the Government has no authority impose a prior restraint on publishing an auto biography because that is going to be defamatory or violation of a right to privacy etc. It cannot be said beforehand that a publication is going to be defamatory of some public officials. If it is alleged to be defamatory after its publication, the authorities have a remedy under the ordinary law. This is a case, which emphatically opposed any imposition of a prior restraint on press freedom based on the apprehensions of possible victims. The Court also held that the press could not be prosecuted if publication was based on the "public records". A Tamil sensational weekly, "*Nakheeran*", proposed to publish the autobiography of a condemned prisoner by name Auto Shanker, with an advance announcement about sensational revelations, about nexus between criminals and the public officials like police and jail authorities. The editor of the newspaper asked the court to direct the Tamil Nadu government not to interfere with the publication of the autobiography written by the prisoner who was convicted in six cases of murder and sentenced with death penalty. The Autobiography was delivered through the advocate of the prisoner to the news weekly, for publication as a serial, with the knowledge of the jail authorities. As the autobiography contained a narration about the nexus between criminals and authorities, especially between the prisoner and several IAS, IPS and other officers, the newspaper decided to commence publication and announced that in advance. It was alleged that the police authorities extracted some letters from prisoner applying third degree methods, addressed to top

[123] Soli J. Sorabjee, Freedom of Press, a landmark judgment of the House of Lords, Indian Express, Hyderabad, April 8, 1993, p 6

[124] (1994) 6 SCC 632.

authorities in the government requesting stoppage of publication of the autobiography. The Inspector General of Prisons in a letter to the editor, asked to stop the publication as the prisoner denied that he had written any such autobiography. The IG termed it as a false autobiography. The Editor sought a direction from the Court to prevent the interference in the freedom of the editor to choose the contents of his newspaper as per his discretion. The Division Bench consisting of Justice B. P. Jeevan Reddy and Justice Subhas C. Sen agreed with the petitioners and held that the newspaper had every right to publish the autobiography of Auto Shankar. The Supreme Court said that the newspaper could publish the life story so far as it appears from the public records even without the consent or authority. But if they go beyond the public record and publish, they may be invading the privacy and causing defamation of the officials named in the publication. However, the Supreme Court said that even if the apprehensions of the officials were true about the defamatory contents, they could not impose any prior restraint on the publication, though they had right to take to legal proceedings for defamation after publication. The Supreme Court said:

> The remedy of public officials and public figures, if any, will arise only after publication and will be governed by the principles indicated therein….even if they are entitled to do so, there is no law under which they can prevent the publication of a material is likely to be defamatory of them", said the Supreme Court.

Apex Court observed that the right to privacy is implicit in the right to life and liberty guaranteed under Article 21. It is right to be let alone. A citizen has a right to safeguard the privacy of his own, his family, marriage, procreation, motherhood, child bearing and education amongst other matters and none can publish anything concerning his in the matter without his consent. But if such publication is based upon public record including court record, then the aforesaid rule shall not apply. The Court further held that in the case of public officials, it is obvious, right to privacy or for that matter, the remedy of action for damages is simply not available with respect to their acts and conduct relevant to the discharge of their official duties. So far as the Government, local authority and other organs and institutions exercising government power are concerned, they cannot maintain a suit for damages for defaming them. There is no law empowering the State or its officials to prohibit or to impose a prior restraint upon the press or media.

However, in the interest of decency an exception was carved out to this rule. The females who are the victim of sexual assault, kidnap, abduction or a like offence should not be further be subject to indignity of their name through the publication of the incident in the media or press.

Several broad principles or evolved in this case. They are:

1. **Freedom of the Press & Right of Privacy**: The right to privacy is implicit in the right to life and liberty guaranteed to the citizens of this country by Article 21. It is "a right to be let alone". A citizen has a right to safeguard the privacy of his own, his family marriage, procreation, motherhood, child bearing and education among other matters. None can publish anything concerning the above matters without his consent, whether truthful or otherwise and whether laudatory or critical. If he does so, he would be violating the right to privacy of the person concerned and would be liable in an action for damages. Position may, however, be different, if a person voluntarily thrusts himself into controversy or voluntarily invites or raises a controversy.

2. **New Exception under Article 19(2)**: The Supreme Court suggested an addition to the list of exceptions under Article 19(2) to restrict the press freedom.

3. **Matter of Public Record**: The rule aforesaid is subject to the exception, that any publication concerning the aforesaid aspects becomes unobjectionable if such publication is based upon the public records including court records. This is for the reason that once a matter becomes a matter of public record, the right to privacy no longer subsists and it becomes a legitimate subject for comment by press and media among others. We are, however, of the opinion that in the interests of decency [Article 19(2)] an exception must be carved out to this rule, viz, a female who is the victim of a sexual assault, kidnap, abduction or a like offence should not further be subjected to the indignity of her name and the indecent being publicised in press/media.

4. **No privacy for public authority:** There is yet another exception to the rule in (1) above-indeed, this is not an exception but an independent rule. In the case of public officials, it is obvious, right to privacy, or for that matter, the remedy of action for damages is simply not available with respect to their acts and conduct relevant to the discharge of their official duties. This is so even where the publication is based upon facts and statements which are not true, unless the official establishes that the publication was made by the defendant with reckless disregard for truth. In such a case, it would be enough for the defendant (member of the press or media) to prove that he acted after a reasonable verification of the facts; it is not necessary for him to prove that what he has written is true. Of course, where the publication is proved to be false and actuated by malice or personal animosity, the defendant would have no defence and would be liable for damages. It is equally obvious that in matters not relevant to the discharge of his duties, the public duties, the public official enjoys the same protection as any other citizen, as explained in (1) and (2) above. It needs no reiteration that judiciary, protected by the power to punish for contempt of court, Parliament and Legislature, protected through their privileges under Articles 105 and 194 respectively of the Constitution of India represent exceptions to this rule.

5. **State cannot Sue for Defamation:** So far as the Government, local authority and other organs and institutions exercising governmental power are concerned, they cannot maintain a suit for damages for defaming them.

6. Rules 3 and 4 do not, however, mean that Official Secrets Act, 1923, or any similar enactment or provision having the force of law does not bind the press or media.

7. **No prior restraints:** There is no law empowering the State or its officials to prohibit, or to impose prior restraint upon the press/media.

SC's note of Caution:

The Supreme Court gave a note of caution. It said: "The principles above mentioned are only the broad principles. They are neither exhaustive nor all-comprehending; indeed no such enunciation is possible or advisable." The Supreme Court wanted that such a law should evolve in a case-by-case development, as these concepts were still in the process of evolution.

State cannot sue for damages in defamation:

According to the Court, these issues were not exhaustively dealt. The concept of impossibility of state being defamed by a media has been a well established principle of law enunciated in an English decision of 1993, *Derbyshire County Council v. Times Newspapers Ltd.*[125] In this case it was emphatically declared that an individual occupying a position in the state government or local authority had only a private right to claim damages for defamation, if the publication involves adverse comments on his functioning with regard to discharge of public duties. But he cannot make the claim in the name of the office/authority and use the money of that authority for fighting the case.

Defamatory falsehood on official conduct:

Similarly, the rule in *New York Times v. Sullivan*[126] found acceptance by the Division Bench. It has a reference to the Defamation as a restriction on press freedom. The rule is: "The constitutional guarantees require, we think, a federal rule that prohibits a public official from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with 'actual malice'- that is, with knowledge that it was false or with reckless disregard of whether it was false or not." The Division Bench in this case opined that the Supreme Court had to wait for a proper case to make this a rule after

[125] (1993) 2 WLR 449, (1993) All ER 1011
[126] 376 US 254: 11 L Ed 686 (1964)

studying its impact on Article 19(1)(a) read with clause (2) thereof, and sections 499 and 500 of Indian Penal Code.

In this significant decision, the Supreme Court has prepared a ground for making new legal principles on the above concepts, which may enhance the scope of press freedom in relation to commenting on the official conduct and limiting that freedom with regard to the right of privacy of a citizen. The Supreme Court has set an agenda for development of law on the press freedom in Auto Shankar[127] case. It laid down certain foundations for making new principles of law on this subject at an appropriate time in future. It was in fact waiting for a right to case to arrive to study the impact of Article 19(1)(a) on the provisions of criminal defamation in Indian Penal Code, i.e., Sections 499 and 500. In principle the Supreme Court welcomed the wider interpretation of press freedom in *New York Times rule*[128] of US Supreme Court and *Derbyshire*[129] case in England. These judgments enhanced the scope of commenting on the public conduct of the public officials and reduced the scope of individuals occupying the public positions using the public office and public money for pursuing the actions for damages in defamation. While effectively providing for an individual civil remedy for defamation in favour of individuals, there is a need to review the continuance of the criminal defamation in present form.

The Division Bench in Autoshankar case opined that the Supreme Court had to wait for a proper case to make this a rule after studying its impact on Article 19(1)(a) read with clause (2) thereof, and sections 499 (Defamation) and 500 of Indian Penal Code. So far as the Government, local authority and other organs and institutions exercising governmental power are concerned, they cannot maintain a suit for damages for defaming them.

Costly Defamation: Rs. 100 Crore Damages against Times Now

If 2011 judgment of Pune Trial Court holding the Times Now TV guilty of defaming Justice P B Sawant and imposing damages of Rupees 100 Crore is going to be the law of the land, there cannot be a malady serious than this affecting the Constitutionally secured Freedom of Speech and Expression as well as the basic principles of libel law limiting that freedom. The Freedom of Press is undoubtedly not absolute; and reputation of Justice P B Sawant, former Judge of Supreme Court and former Chairman of Press Council cannot be doubted at all. But what is the basis of this 'chilling' judgment?

[127] (1994) 6 SCC 632.
[128] 376 US 254
[129] (1993) All ER 1011

The Times Now judgment revives the century-old English principle in Hulton and Co v Jones, even while the law of defamation over the years has substantially changed through judicial pronouncements.

The sixth Joint Civil Judge, Senior Division, Pune, Smt. V K Deshmukh wrote in the judgment delivered on 26th April, 2011 imposing Rupees 100 Crore damages on Times Now channel: "This scam became sensational as a number of judges were involved, comprising higher judiciary. The public at large and the legal fraternity across the world watched the scam. The defendant no. 1 i.e. Times Now Channel started reporting all the developments relating to PF scam. Amongst the judges, allegedly involved was Justice P.K. Samantha, (Retd.) Judge of the Calcutta High Court. On 10.9.2008, while the News relating to this scam was being telecasted, a photograph of Justice Sawant was shown even as the name of Justice P.K. Samantha was being mentioned".

There is no doubt that Times Now should have exercised more caution while reporting a scandal accusing constitutional office holders like Justice Samantha. Non-exercise of such caution has certainly resulted in some defamation but definitely not in aggravated form of crime as dreamt by the plaintiff and the court.

Remedies

(a) **Damages:**

In an action for defamation, the plaintiff can seek remedy by compensation. But reputation is a thing which is not capable of scientific measurement. The amount of damages depends upon the assessment made by the tribunal, subject only to certain principles which have been laid down by the case-law of the guidance of the tribunal and the pleadings of the parties. The amount of damages depends upon the rank and social position of the parties and seriousness of the imputation. If defendant is able to show that the plaintiff's reputation was of little weight, that the plaintiff has provoked the utterance of defamatory statement, and that the newspaper has poor circulation or has offered the apology, the amount of damages will be mitigated.

General or presumptive damage is a pecuniary solatium awarded to the plaintiff for the mental pain, or annoyance caused to plaintiff. Since defamation is actionable per se and the law presumes damage, the court would ordinarily award nominal damages, in the absence aggravating circumstances, where, the award of damages will be substantial or damages equivalent to actual damage. Punitive or exemplary or vindictive punishment is to punish the wrongdoer.

Decree against Joint Wrongdoers:

The liability of joint-tort-feasors being joint, there must be one judgment and one decree against all such defendants (e.g., author, editor, printer and publisher) for the total damages awarded. The plaintiff cannot recover two decrees for the same libel.

(b) **Injunction**

In a suit for defamation an interlocutory injunction would be issued in the following cases: i) Where there is a danger of the defendant's reputation of the libel where e.g., the offending article itself contemplates the publication of a series of similar articles and (ii) where the offending matter is so palpably defamatory that a Court of Appeal would set aside unreasonable any contrary finding. No interim injunction would be granted where the matter is not *ex facie* defamatory. After the trial an injunction would be more readily granted to a plaintiff who has succeeded in as much as damages would be no solatium to him if the defendant goes on repeating the libel.

CHAPTER III
MEDIA AND COPYRIGHT ISSUES

Media and Copyright Issues

The copyright regarding news media is a complex mix of rights and responsibilities for journalists. A news item printed by one newspaper cannot be copied by the other newspaper as if it was their original work of collecting and drafting the information as a news report. Such a violation of copyright will attract the copyright regulations and result in penal consequences. If an evening newspaper picks up news published by morning newspaper and reports further developments with follow-up without reporting the text of earlier news report, there is no copyright violation. Such copyright restrictions are prescribed against content of all the media forms – print, electronic and social media.

Basics of Copyright

There are some basic points about copyright law in relation to media, which are as follows:

a) **Copyright** is the right granted by law to an author to control use of the work he created.

b) **Purpose of the** law of copyright is to prevent people making unauthorised copies of another peoples' work. The Copyright Act 1962 was thoroughly revised in 1994. The Copyright Act 1994 considers the development of new technologies, such as satellite broadcasting, computer programmes and cable television. The new Act also has more stringent criminal penalties for breaches and tougher border control measures.

c) **Owners of copyright** are: Authors, other creators and publishers who purchased that copyright from the original authors.

d) **The law of copyright is incorporated in Copyright Act, 1952.** The state recognizes/codifies copyright by defining it and explaining through this legislation.

e) **What is protected?** Subject matter protected by copyright includes literary, dramatic, musical and artistic works, sound recordings, films, broadcasts, cable programmes and typographical arrangements of published editions. Generally, the author of a work is the first owner of any copyright in the work. Exceptions exist, however, where works are created in the course of employment (the employer will be the first

owner of copyright) and where certain works are commissioned (the commissioning party is the first owner of copyright).

Copyright owners have the exclusive right to:

f) Copy the work include Issue copies to the public by sale or otherwise, perform, play or show the work in public, Broadcast the work or include the work in a cable programme, Make an adaptation of the work, All of the above in relation to an adaptation, and Authorise another person to do any of the above. In other words they have right to reproduce all or part of the work; to distribute copies; to prepare new (derivative) versions based on the original work; and to perform and display the work publicly.Copyright owner himself can exercise all these rights or allow others to do each of the above acts regarding their books, cinemas or dramas as per the agreed terms of the contract.

g) The Copyright accrues the moment it is generated and communicated. If an author writes an article and shows it to a friend, it amounts to communication of article, which act itself creates copyright. Thus, copyright protection covers both published and unpublished works. Publication is not limited to printing of book and its distribution. Showing it to second or third person, or making it known to other will amount to 'publication'. The fact that a previously published work is out of print will not give any other person any right to publish it again. Owner of copyright will not lose it because it is out of print.

h) Copyright arises AUTOMATICALLY. It does not require registration or any other formality. Copyright is not international. Conventions or agreements with other countries mean, however, for example, that a New Zealand copyright may be recognised and protected overseas and a foreign copyright may be recognised and protected in New Zealand.

i) Existence of Copyright: Copyright is a statutory property right and exists in original literary, dramatic, musical or artistic works. The requirement for originality does not mean that the idea behind the work has to be original, only that the idea is expressed in the work in an original form. Originality is a question of fact and will depend on whether sufficient independent skill and labour has been involved in the creation of the work.

j) Offence of copying: The offence of copying as per law includes the act of copying, reproducing, recording, storing (in any medium and by any means), re-transmitting,

emailing, faxing, printing, posting on the internet or an intranet site, selling, publishing, distributing or sharing, whether for internal purposes or otherwise.

k) **No copyright in some works:** Copying from non-copyrighted works is not copying. Anybody is free from using content available from the public domain. The Copyright Act states that no copyright exists in any of the following works: Any Bill before Parliament, An Act of Parliament, A Regulation, Reports of Select Committees, Judgments of any Court or Tribunal, Reports of Commissions of inquiry, etc.

l) **The duration:** Duration of copyright is prescribed by law. It is subject to certain exceptions. The copyright in literary, dramatic, musical or artistic work expires at the end of the period of 70 years from the end of the calendar year in which the author dies. If the work is of unknown authorship, copyright expires at the end of the period of 50 years from the end of the calendar year in which it is first made available to the public.

m) **Infringement:** The Copyright in a work is infringed by a person who does not own the copyright and who has not been authorised by the copyright owner, if they copy, publish, perform, broadcast or adapt the work or a substantial part of it.

n) **Moral Right:** Author can sell his copyright completely to another. It does not mean that the purchaser of copyright can distort the book of original author. The Copyright Act has given certain moral rights in relation to copyright. This is to prevent any distortion, mutilation or other derogatory treatment of the work that would be prejudicial to the honour or reputation of the author. A moral right is independent of the author's economic rights and cannot be sold or transferred. Even after selling all his rights on his work, author can still question the distortion of his writing. The writers should know this right and question the publishers or others who damaged the contents and theme of the work.

o) **Doctrine of Fair Use:** The only balancing factor in this regulation is doctrine of fair use. It is the most important of the rights of the users. Unfortunately, the fair use is the least specifically defined and least understood of user's rights. Certain specific fair uses of copyrighted works are not infringements even if they involve in copying, adapting, performing, or displaying the copyrighted work. The Act lists four non-exclusive factors for courts to consider in determining whether any particular use is a fair use and thus not an infringement of copyright. The four factors are: 1. the purpose and character of the use, including whether such use is of a commercial nature or is for non profit educational purposes; 2. the nature of the copyrighted work; 3. the amount and substantiality of the portion used in relation to the copyrighted work as a

whole; and 4. the effect of the use upon the potential market for or value of the copyrighted work. A court is required to examine these factors in adjudicating an assertion of infringement by the copyright owner on the one hand and the assertion of fair use by the alleged infringer on the other.

p) Public Interest & Fair Use: Doctrine if fair use defence will be judged again on the basis of the public interest. The Courts can refuse to enforce copyright on the basis of public interest defense which include those where the work is:

a) immoral, scandalous or contrary to family life;
b) injurious to public life, public health and safety or the administration of justice
c) incites or encourages others to act in a way referred to in (b)[4]

If the copied material was intended to be used for non-profit, personal, educational or informational purpose, it could be a fair use. Its commercial use or profitable exploitation might not be a fair use and thus be treated as an infringement.

Newspapers while reporting certain literary events can fairly use the copyrighted content without getting into legal trouble. The Copyright Act allows others to use the copyrighted material in a fair manner. It will be called fair dealing with literary, dramatic, or musical works does not constitute an infringement of copyright if:

- It is for the purpose of criticism or review of the work; or
- It is for the purpose of reporting current events in a newspaper, magazine or similar periodical or by means of a sound recording, film broadcast or cable programme and the author or owner of the copyright in the work is sufficiently acknowledged.

q) Limited use of copyrighted work: Fair use" under the copyright law permits limited use of portions of a copyrighted work without the copyright owner's permission for purposes such as criticism, comment, news reporting, teaching, scholarship, or research. The Copyright Act establishes four basic factors to be considered in deciding whether a use constitutes a fair use. These factors are:

a) The commercial nature or non-profit educational? Nature or purpose of copyrighted work.
b) The portion used: The amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
c) The Market effect: The effect of the use upon the potential market for or value of the copyrighted work.

A person's right to use a copyrighted work without permission is not determined by any one of the factors listed above, but by all collectively.

r) Electronic Media: The Copyright law protects electronic media interests also. The Copyright law stipulates that one, who purchases a copy of software can load that copy onto a single computer and to make another copy only for "archival" purposes. He cannot use the same software in more than one computer or distribute copies to some other persons for any other purpose. Such an act of using the software without permission will be illegal and may invite penalties. If one uses the pirate software he may face not only a civil suit for damages and other relief but criminal liability as well including fines and jail terms of up to one year. By these provisions the law is protecting the investment of computer software companies in software development and those who provide their work online. With these protections, the copyright law serves the cause of promoting broad public availability of new and innovative products.

s) Education Media: There are certain exemptions for education purposes, generally. Following are some guidelines for the educational institutions running without profit motive, regarding books and journals:

Exemptions on Educational purposes: A teacher can use one copy. Only a single copy of any of following by a teacher or for a teacher, on his request is permitted. It can be used for scholarly research of use in teaching or for preparing for class.

a) A chapter from a book;
b) An article from a periodical or newspaper;
c) A short story, short essay or short poem, whether from collective work;
d) A chart, graph, diagram, drawing, cartoon or picture from a book, periodical or newspaper.

Using in a Classroom*:* For each student, one copy can be used; it can exceed the number of the students. Teacher can make use of those copies for using in classroom or in a meeting for discussion, etc. However, it is subjected to a condition that the copying meets the tests of brevity and spontaneity.

t) Prohibitions: Though the law permits usage as mentioned above, still, certain acts, listed below are not permitted under the copyright law.

a) Copying shall not be used to create or to replace or substitute for an anthology, its compilations or collective works. Such replacement or substitution may occur whether copies of various works or excerpts therefrom are accumulated or are reproduced and used separately.

b) There shall be no copying of or from works intended to be "consumable" in the course of study or teaching. These include workbooks, exercises, standardized tests and test booklets, and answer sheets and like consumable material.

c) Copying shall not:

   i. substitute for the purchase of books, publishers reprints, or periodicals;

   ii. be directed by higher authority;

   iii. be repeated with respect to the same time by the same teacher from term to term

   iv. No charge shall be made to the student beyond the actual cost of photocopying.

CHAPTER IV
RIGHT TO INFORMATION AND RIGHT TO KNOW

Media's need for information needs little reiteration anywhere in the world. Likewise, it is a question of vital importance in India, where media is perceived to be a link between people and government and a vehicle of mobilization, having played a major role in the freedom struggle as well in the protection of freedoms in times of jeopardy as when an internal emergency[130] was clamped on the country and there was a complete suspension of civil and political rights. Certain sections of the media had then resisted the censorship even at the risk of incarceration. Although critics claim that certain sections of the media have abrogated this role to a certain extent by self- censorship and by selling out to 'market forces' the media's right to information is by and large viewed not as a special privilege of freedom of the press, but as emanating from the people's right to know. This has gained credence from the utterances of the Supreme Court of India in cases where the press has come before it for protection of its fundamental rights under the Constitution.[131]

The problems for the media in accessing information are many. In the absence of an open information regime, balanced reporting is very often not possible. Substantiating facts becomes very difficult and the directive to journalists to double check with a second source is difficult to follow with the 'source' very often being some government official who refuses to talk about the issue, howsoever mundane. This has also created a regime of garnering information through illegitimate means such as bribing and pandering to the whims of various government officials to eke out information.

4.1. Right to Know: Vital Component of Democracy

It is now widely recognised that openness and accessibility of people to information about the government's functioning is a vital component of democracy. The veil of secrecy that has traditionally shrouded activities of governments is being progressively lifted and this has had a salutary effect on the functioning of governments in free societies. Right to know has evolved with maturity of the democratic form of governance.

It is wrong to consider democracy as a form of government where the participation of people is restricted merely to periodical exercise of the right of franchise. Citizens need not retire to passivity between two elections.

[130] Internal emergency in force between 1975 and 1977.
[131] Right to Freedom of Speech and Expression under Article 19 (1) (a)

The right to know together with the other concept, the right to communicate provides the basis of a New World Information and Communication Order. UNESCO is committed to remove the obstacles on the free flow of information.

While legislation on the right to information exists in Tamil Nadu, Goa and Madhya Pradesh in some form or the other, a comprehensive central law is not there. The corruption and other vested interests of elected governments and bureaucracy subservient to those rulers survived on culture of secrecy. The first Official Secrets Act was made in 1889, which was almost similar to British Officials Secrets Act. The British rulers further consolidated the Official Secrets Act in 1923 on the lines of repressive British Official Secrets Act of 1911. The British Government relaxed this stringent law and replaced 1911 Act with a new British Official Secrets Act 1989. This new Act has narrowed the categories of information prohibited for disclosure. However, none of these laws define what the official secret is. It is left to the officials to decide and classify any information as the official secret.

4.2. Information-Brokers

Mrs. Devaki Panini, the project officer, Right to Information Common Wealth Human Rights Initiative says, “In reality the practice of official secrecy is far more oppressive and predominant here in India than it is in Britain. What makes official secrecy even more unbearable in our country is the presence of middle-men in government departments, who act as “information-brokers”, withhold information and extort money from harassed citizens for releasing even the most basic information.” While the new British Act states that it would be sufficient defence for a person charged with an offence to prove that he did not know or had no reasonable cause to know that the disclosure of the information, document or article in question would be damaging as per the Act, in the Indian Act no such defence lies for ignorance of such “damaging” nature of information.

Under the power of these secrecy maps, government orders, information about the government tenders and contracts and even notified rules and regulations and copies of Bills which are to be "put up" in Parliament etc are also held up. Sometimes even the notifications which are published in official Gazettes are prohibited from disclosure either by classification or by practice. The officials also withheld even the draft Right to Information Act. Since it will be an offence to disclose any information in their control, it will become a habit not to disclose anything, even when it is not prejudicial to the interests of the state. The moment it is notified as the confidential, no official will be inclined to reveal it and makes himself 'guilty'.

In 1994, the Court said in Pankaj Jain Agencies versus Union of India and others, that the failure of making the law known made the notification valueless and "the notification ceased to have the element of operative news and enforceability. In this case there was no access

available to the petitioner even though the law was published in official gazette. It was not available for a purchase also. There was no other mode of access to the law.

4.3. Access to Public Records

A long process of waiting is to be completed before the citizen gains an access to the information in the control of thy executive.

The people at large have a right to know in order to be able to take part in a participatory development in the industrial life and democracy. Right to know is a basic right which citizens of a free country aspire in the broader horizons of the right to live in this age on our land under Article 21 of the Constitution. That right has reached new dimensions and urgency. That right puts greater responsibility upon those who take upon the responsibility to inform.[132] Thus, for the first time the Supreme Court recognized the right to information as part of the right to live under Article 21 in 1989.

4.4. Sweden and Openness in Administration

Sweden was the first to enforce the policy of openness in administration. There all governmental information is public unless certain matters are specifically listed as exemptions from the general rule. They have provided for a system of appeal against the wrongful withholding of information by public officials, as long ago as 1766. It provided constitutional safeguards under Freedom of Press Act, 1766, the oldest and probably still the most liberal of its kind in the world. It has been revised and modernized a number of times, most recently in 1978. Sweden has proved that legitimate national interests can as well be safeguarded under conditions of administrative openness.[133]

Sweden has established culture that access to government department and documents as a right and non access an exception. The principle gives any one, actually even aliens, the right to turn to a State or Municipal agencies and ask to be shown any document kept in their files, regardless of whether the document concerns him personally or not. Officials are legally required to comply and even to supply copies of the document requested if it is feasible. In Sweden and other Scandinavian countries documents dealing with national security, foreign policy and foreign affairs can be withheld from public scrutiny but the government is bound to give a written statement quoting legal authority for withholding the document.

Australians are amongst the world's most avid media consumers and there is legislation protecting their rights of access to Federal Government documents of interest to them. In December 1982, Australia enacted Freedom of Information legislation, which gives its

[132] Reliance Petrochemicals Ltd. v. Indian Express Newspapers, AIR 1989 SC 190
[133] Dr.S.R. Maheshwari: Open Government in India, p.3

citizens and persons entitled to permanent resident status in Australia a free access to various Federal Government Records. Main features of this Act are the creation of public right of access to documents, the right to amend or update incorrect government records, the right of appeal against administrative decisions barring access and the waiving of any need to establish interest before being granted access to documents.

4.5. In Finland

Finland made a law on the public character of Official Documents in 1951. Norway and Denmark have also statutorised public access to official information sources. Canada and Australia also made useful legislation on this subject. A French Commission on Access to Administrative Documents has been formulated. French Constitution recognizes the free communication of thoughts and opinions as among the most precious rights of man.

4.6. In Britain

In Britain, a campaign for reduction of secrecy was going on. They have a rule for non-disclosure of sensitive information for about thirty years. When 1957 documents were released, they showed that Prime Minister Harold Macmillan had ordered suppression of information on the Windscale nuclear accident. It was a startling revelation because it was the worst known nuclear disaster before Chernobyl. But the nation came to know only after thirty years. Under their Official Secrets Act some documents could even be blocked for a hundred years.[134] Even in America the tendency is to increase the items under the list of exemptions to freedom of information. When some documents released under the Act revealed that FBI and CIA illegally harassed Dr Martin Luther King Jr. and several other things like illegal surveillance of dozens of writers and political groups for over a period of 30 years.

4.7. In South Africa

The South African law on this right is a unique example of principle of open governance. The South African Open Democracy Bill provides for public access as "swiftly inexpensively and effortlessly and reasonably possible to information held by governmental bodies without jeopardising good governance, personal privacy and commercial confidentiality. It also empowers the public to effectively scrutinise and participate in governmental decision making that affects them. It also provided a mechanism to correct the inaccurate information possessed by the government about them and protects individuals against abuse of information about themselves held by the government or private bodies. Canada made Access to Information Act, 1980, and New Zealand enacted the Official Information Act, 1982.

[134] Indian Express, March 30, 1989

4.8. Three Acts in America

In America there are three Acts which upheld the freedom of press and information. A) Freedom of Information Act was made in 1966, which was amended in 1974 to make it more effective, B) The Privacy Act, 1974 protected individual privacy against the misuse of federal records while granting access to records concerning them which are maintained by federal agencies and C) The Government in the Sunshine Act, 1976 provided that meetings of government agencies shall be open to the public. The US Supreme Court has recognized the right to know more than fifty years ago. The right to freedom of speech and press has broad scope…This freedom embraces the right to distribute literature and necessarily protects the right to receive it."

First Amendment contains no specific guarantee of access to publications. The basis of right to know is the freedom of speech, which is protected under Bill of Rights. The policy behind the Freedom of Information Act is to make disclosure a general rule and not the exception, to provide equal rights of access to all individuals, to place burden on the government to justify the withholding of a document, not on the person who requests it, to provide right to seek injunctive relief in the court if individuals are denied access improperly.

Right to know is the cornerstone of citizen participation. Under the Information Act any person, nor merely an affected individual or group, is eligible to ask for information because what is aimed at is not merely redressal of grievances but encouragement of an informed citizenry.

The 1966 Freedom of Information Act requires the executive branch agencies and independent commissions to make available to citizens, upon request, all documents and record except those, which fall into the following exempt categories:

1. Secret national security or foreign policy information.
2. Internal personnel practices.
3. Information exempted by law.
4. Trade secrets or other confidential commercial or financial information
5. Inter agency or intra-agency memos;
6. Personal information, personnel or medical files;
7. Law enforcement investigatory information;
8. Information related to reports on financial institutions;
9. Geological and geophysical information.

But there are major problems. They are: Bureaucratic delay and cost of bringing suit to force disclosure, and excessive charges levied by the agencies for finding and providing the requested information. To meet these problems, Act was amended in 1974. Main provision of amendment is allowing federal judge to review a decision of the government to classify certain material. Another provision set deadlines for the agency to respond to a request for information under the law. Another amendment permitted judges to order payment of attorney's fees and court costs for plaintiffs who won suits brought for information under the act.

4.9. The existing information regime in India

While there exists in India as in other Commonwealth countries a common law right to have access to 'public information', the whole flow of information is severely restricted by four factors:

- A pervasive culture of secrecy and arrogance of the bureaucracy towards the common man in which the government holds back as and is perceived by the public as lord and master. This is compounded by the fact that while there are several laws prohibiting or restricting giving of information, there is no clear enabling legislation for the public's right to access information held by the government. Where such legislation has been attempted, it lacks the teeth and systems to be effective.

- Poor record keeping

- Low levels of literacy and awareness of rights among the general masses.

- Restrictive legislation like the Official Secrets Act, which is a bit of colonial past which the government of independent India has chosen to cling to towards its own ends, even while it has undergone major overhauling and is even on the brink of repeal in its parent country, the UK.

4.10. More a matter of mindset

In most cases, the refusal to part with information is the result of sheer mindset. Most requests for information of any kind are met with hostility or apathy or both. In Madhya Pradesh, where, pending legislation, a series of executive orders[135] were passed in several departments to implement the right to information, people faced actual hostility and blunt refusal on approaching the departments for information on the basis of those orders. In one case, the applicants were asked what their 'qualification' for asking for information and the other resulted in threats of physical harm to the applicant. In Bihar, a well-known and

[135] Detailed in a later section

respected activist went to jail for several months on a false charge,[136] for daring to demand the details of expenditure of a local school building. In Bihar again, a woman who requested for information on the *Indira Awaas Yojana*, a housing scheme for the poor, was rudely asked, "*aainey mein mooh dekhlil ba*?"[137] In Rajasthan, where the right to get information from the local bodies has been notified since 1997, civil society groups have had a virtual battle to get records of simple development works from the local panchayats. After a series of maneuvers to avoid giving the records, including a formal 'resolution' of the *gram sabha*[138] denouncing the requester[139] as a 'trouble maker working to create disharmony in society' the matter was taken to court and a temporary injunction against giving the documents was obtained on the instance of the *gram sewak,* a local functionary.

Even in cases where there is no conflict of interest or no aspect of money is involved and the information is of a routine nature-either a long protected right under the common law such as access to land records must be routinely given, such as information about minimum wages, etc., queries about anything whatsoever are routinely treated either with complete apathy, outright hostility ranging from rude refusals to threats of outright physical harm or a statement of inability to give the information citing reasons which range from the ubiquitous Official Secrets Act to unavailability of paper.

4.11. State of the records

The state of the records in most areas leaves a lot to be desired. A typical government office is a picture of stacks of dusty files – in cupboards, on shelves and on the floor. It must be said for these places, however, that they *are* able to retrieve documents when there is a will to do so-usually after the cogs of the machinery are 'greased' by the seeker. Most of the times, getting anything out of the 'records section' of an office is a harrowing experience-delays, bribes and very often inability to access on the basis of 'misplaced'. A few places now have computers, but the personnel are rarely sufficiently trained to use them to good effect, adding to the confusion. When 'computerisation' started, most of the computers found their way only into the offices of the higher staff. In the last few years, some states have started large- scale computerization programmes to reach out to village level communities. Almost all the states are now vying for a share in the "IT" pie, though perhaps less out of developmental concerns than attracting investment in their states. Information technology, which got a fillip in the late seventies and early eighties is now undoubtedly on an upward swing and is seen as contributing a lot to increasing the flow of information- " IT makes the best use of information…..it lets people access information ……Breakthrough in IT will

[136] Under the Prevention of Atrocities on Scheduled Castes and Scheduled Tribes Act.
[137] A colloquial form of abuse to remind a person of his/her low station in life, literally meaning, "have you seen your face in the mirror?"
[138] A body comprising of all members of a village eligible to vote. Meets about two to three times in a year. Most *gram sabhas* are thinly attended and usually cannot garner the required quorum.
[139] The Mazdoor Kisaan Shakti Sangathan

expand our reach. This can empower our rural masses. We ought to put information related to all kinds of government projects on our websites. It will lead to better management of our resources. People in villages can actually get to know of the projects aimed at their development and the kind of funds that are available. They can demand better management from the administration."[140]

The hope reposed in IT has shown good results in some places, notable amongst which is the '*Gyandoot*'[141] experiment in Dhar District of Madhya Pradesh. Started in January 2000, it networks and caters to about 600 villages (about half a million people). A computer installed in the *Gram Panchayat* office can give information to any villager upon payment of a fee, such as information about market prices or his land records. Complaints can also be sent through e-mail to the authorities. Other states that are taking information to the villages through computers are Andhra Pradesh and Rajasthan.

However, the "IT" success stories need to be critically examined to see whether the outreach is really as much as is claimed. A recent appraisal[142] points out three factors due to which these experiments will have a limited impact- lack of availability of electricity, lack of connectivity and lack of software in regional languages. Discourses in civil society also point to the factor of the reliability of the information provided through computers.

4.12. Low literacy levels and poor means of communication

The resistance to giving information of any sort is compounded by two factors- the levels of illiteracy and lack of effective communication methods. The methods of communication are unimaginative and just not geared to catering to a largely illiterate population. There is a surprising over-dependence on the written word and traditional means of communication such as *munadi* [143]are given a go-by.

Simple cases illustrate these. For example, for many years the traffic authorities in New Delhi used the slogan 'Lane driving is sane driving' to encourage people to adhere to traffic safety. This, in a scenario where the majority of the bus and truck drivers are, at worst, illiterate, or don't know English- certainly not enough to comprehend this cryptic piece of wisdom. The lack of appropriate communication can sometimes seriously jeopardize people's lives and safety. Three years ago, a cyclone warning to fishermen in Gujarat was being flashed across the screen of the national TV channel while a popular film was being screened. The warning was flashed in English, which few people can read, instead of Gujarati, or even Hindi.

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[140] N.Vittal, Chief Vigilance Commissioner and Member of the Prime Minister's IT Task Force. Source: Down to Earth, Vol……

[141] 'Gyandoot', in Hindi means "Messenger of Knowledge". The project has won the Stolkholm Challenge Award for Public Service and Democracy.

[142] Down to Earth……

[143] Beat of drums

This brings us to the crucial issue of simplification of official language. Not only laws, but rules, notifications and orders are all issued in complicated legalese, which the common person cannot comprehend. Even notices meant for information to the public are poorly worded, without keeping the user group in mind.

The use of the mass media to inform people has been effectively used in recent times and has proved to be a vehicle for social change as well. Two successful experiments have been radio programmes like *Tinka Tinka Sukh* [144] and the Leprosy eradication programme. However, by and large, the government-owned mass media's response to situations in which information should be given accurately and fast is still slow as illustrated above. A reader[145] complained that on the day of the earthquake in Gujarat, when tremors were also felt in Bangalore, rumours ruled the roost as All India Radio gave news only in the late afternoon.

Even with effective communication, with only 3% of the population having newspaper readership, 8.1% to 9.2% radios and 6.1 % TVs,[146] the actual impact of information disseminated through these would be fairly small, in terms of numbers covered.

4.13. In the name of the law - Secrecy

The system of governance in India has been traditionally opaque, with the state donning the mantle of colonial secrecy almost right from the beginning, by retaining the Official Secrets Act as well as the administrative structure which was designed to distance the masses from governance. Added to that is the traditional feudal mindset which presupposes a distance between the 'rulers' and the 'ruled' and makes the former a privileged class. Consequently, information sharing as a culture was neither consciously developed, nor reflected in major legal changes until a few years ago when the requirements for public hearings or mandatory disclosures under laws like the Environment Protection Act or the Consumer Protection Act were put into place.

4.14. The statutory framework

The Official Secrets Act of 1923, a colonial relic readily adopted by the new political and bureaucratic class of independent India, clearly comes out as the main culprit in setting the tone for the culture of secrecy in the country. Experience has infirmed the fears of one of India's foremost statesmen and Jurists when he said in the Central Legislative Assembly: "Your provisions are so wide that you will have no difficulty whatever in running in anybody who peeps into an office for some, it may be entirely innocent enquiry as to when there is

[144] A Hindi 'infotainment' programme broadcast by All India Radio.
[145] The New Indian Express, February 8,2001
[146] Article by Saif Shahin, Pioneer, April11,2000, reproduced in Vidura, Journal of the Press Institute of India.

going to be the next meeting of the Assembly or whether a certain report on the census of India has come out and what is the population of India recorded in that period."[147]

The Official Secrets Act, 1923 is a replica of the original British Official Secrets Act. While the formers have been watered down to a great extent, the latter has been retained almost in its original form, with minor amendments in 1967.

The catch all Section 5 of the OSA is seen to be responsible for most of the state responses in clamping down on all sorts of information, even to the extent of curtailing people's fundamental rights. A case in point often quoted is the use of the Act in the Narmada Valley[148] to prevent activists and journalists from going there. The cumulative effect of the wide Sections 3 and 5 of the OSA is to choke the flow of information, howsoever innocuous.

The main critics of these provisions have been the Press Commissions. However, their stand has varied over the years. While in 1954, the First Press Commission remarked, "In view of the international tensions and consequent need for ensuring that secret policies are not divulged, they did not recommend modification of the provisions of the Act".[149] However, the same body in 1982 felt that the provisions of the Act have 'a chilling effect on the press" and that "section 5 as it stands can prevent any information from being disclosed to the public and there is widespread public opinion in the country that the Section has to be modified or replaced and substituted by a more liberal one."[150]

A.G.Noorani[151] summarises his critique of the OSA[152] to say that it is a breach of the fundamental right to freedom of speech and expression[153], as well as of the right to life and liberty[154] . An allegation of an offence under the Act must be put to strict proof and the defence of 'public interest' must be available.

4.15. Some laws which facilitate disclosure

A "Freedom of Information Act in its embryonic form"[155] exists in the Indian Evidence Act 1872 Section 76 of which reads as under:

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[147] Sir Hari Singh Gour, quoted by A..G.Noorani, at 31 above.
[148] Where a large dam being constructed on the Narmada river is being resisted for the huge displacement it will cause.
[149] Quoted in A.G. Noorani, "The Right to Information" in "Corruption in India-An Agenda for Change" Ed.S.Guha and Samuel Paul.
[150] 38
[151] Lawyer and author.
[152] In 38, above
[153] Article 19 (1) (a) of the Constitution of India
[154] Article 21 of the Constitution of India
[155] A.G.Noorani, "The Right to Information" in "Corruption in India-An Agenda for Change", ed. Guha and Paul.

Section 76: Certified copies of public documents: Every public officer having the custody of a public document, which any person has a right to inspect, shall give that person on demand a copy of it on payment of the legal fees therefore, together with a certificate written at the foot of such copy that it is a true copy of such document or part thereof, as the case may be, and such certificate shall be dated and subscribed by such officer with his name and his official title, and shall be sealed, whenever such officer is authorized by law to make use of a seal; and such copies so certified shall be called certified copies.

Explanation.- Any officer who, by the ordinary course of official duty, is authorized to deliver such copies, shall be deemed to have the custody of such documents within the meaning of this section.

Section 75 defines 'Public Documents as: The following documents are public documents-

(1) Documents forming the acts or records of the acts –

i. of the sovereign authority,

ii. of official bodies and tribunals, and

iii. of public officers, legislative, judicial and executive, of any part of India or of the Commonwealth, or of a foreign country;

iv. public records kept in any State of private documents.

There are several laws, which have mandatory provisions for giving information. A few illustrations are mentioned below[156].

The Factories Act, 1948, provides for compulsory disclosure of information:

Section 41-B - The occupier shall disclose in the manner prescribed all information regarding dangers including health hazards and the measures to overcome such hazards arising from the exposure to or handling of the materials or substances in the manufacture, transportation, storage and other processes, to the workers employed in the factory, the Chief Inspector, the local authority within whose jurisdiction the factory is situate and the general public in the vicinity.

While this is an excellent provision and would seem to take care of suo motu disclosure from private parties on certain matters concerning the health and environmental aspects, in practice, however, the conditions imposed by the Chief Inspector are treated as confidential documents. This provision is violated with impunity because "there is no recourse provided

[156] Compiled by Nagarika Sewa Trust, an organization working on environmental issues in "A note on Right to Information".

to the aggrieved individuals on non-compliance with the provision other than filing a case in court."

4.16. The Water (Prevention and Control of Pollution) Act 1974

Section 25(6) – Every state shall maintain a register containing particulars of conditions imposed under this section and so much of the register as relates to any outlet or any effluent from any land or premises shall be open to inspection at all reasonable hours by any person interested in or affected by such outlet, land or premises as the case may be, or by the person authorized by him in this behalf and the condition contained in such register shall be conclusive proof that consent was granted subject to the conditions.

The Water (Prevention and Control of Pollution) Act, 1974 and the Air (Prevention and Control of Pollution) Act, 1981

Both of these Acts have provisions for disclosure of information to enable an aggrieved citizen to prosecute? However, both have provisions for withholding information if disclosure is 'against the public interest' without specifying what the nature of the public is, which this provision seeks to protect.

4.17. The Environment (Protection) Act, 1986, The Environment (Protection) Rules 1986 and the Environmental Impact Assessment Regulations

Section 3 of the EPA empowers the government to 'take measures to protect and improve the environment'. Rules framed under this Act, in particular Rule 5(3) (a), empower the government to call for objections from the public within sixty days from the date of publication of the notification against the intention of the government to impose restrictions and prohibitions on the expansion and modernization of any activity or new projects being undertaken unless environmental clearance has been accorded.

The Environment Impact Assessment Regulations[157] further lay down, in paragraph 2 (I) (a) read with Schedule IV, a procedure for public hearings and the requirement for the public to be given the executive summary of the proposal prepared by the person seeking to execute any such project. Although this provision is meant to be a tool for voicing citizens' concerns, the limited nature of the access is a hindrance in making the provision effective and environmental groups have had to take recourse to courts for disclosure of the complete information.

[157] Ministry of Environment and Forests Notification No. S.O.60 (E), dated 27th January,1994

4.18. Right to Information Acts in States:

Several states drafted legislation to make right to information enforceable. Based on the recommendations of a committee headed by consumer activist H.D. Shourie a central Right to Information Bill has been drafted. The Department of Personnel currently holds it in "confidentiality", says Devaki Panini.

Tamil Nadu and Goa have passed Right to Information Acts. Madhya Pradesh and Rajasthan proposed such laws. Andhra Pradesh is planning to have one such enactment. Devaki Panini found Goa law more progressive than that of Tamil Nadu. Goa Act defined the right to information as the right to access to information and includes the inspection of works, documents, records, taking notes and extracts and obtaining certified copies of documents or records or taking samples of material. The Act states that every citizen has the right to obtain information from a competent authority within a time limit. It made access to information the norm and allows restrictions on information only in exceptional cases. Generally these restrictions are found in almost all Acts or Bills awaiting legislative approval.

4.19. Restrictions:

The restrictions on right to information are as follows:

1. Sovereignty & Integrity

   Categories of information that might prejudicially affect the sovereignty, integrity or security of the country or the state, international relations, public order, administration of justice or investigation of an offence.

2. Invasion of Privacy

   Other information relating to an individual or information which has no relationship to any activity of the government would be exempt from the right to information since this would amount to an unwarranted invasion of personal privacy.

3. Commercial Secret

   Information that pertains to trade and commercial secrets

4. Privilege of Parliament

   The disclosure of Information, which would constitute a breach of Parliament or Legislative Assembly Privilege

5. Insecurity to Life

   Information, which endangers the life of any person

6. Confidential Source

Information, which helps in identifying the source of information given in confidence for law enforcement is not accessible.

4.20. Culture of Official Secrecy

V.R.Krishna Iyer, in his “Freedom of Information” at page XXVI, said “at this stage, it is good to recollect that sycophants and claques around those in power, including the lapdog media (to adapt a Jack Anderson idea), thrive on a culture of official secrecy and surrender of the freedom of speech”. At a different context, Krishna Iyer said: “A cultural reorientation making secrecy a sin, distortion of facts a crime and disclosure of truth a duty is basic to democracy. For all these goals, literacy, the conveyer belt of knowledge, is essential. And knowledge is prerequisite for progress.

4.21. Obstructions to Information

While the right to information is integral to fundamental freedoms there are various factors obstructing this right. India and some other third world countries have still a large section of illiterate people. The Constitution of India imposed an obligation on the State to impart compulsory primary education to the children. In the absence of education a docile democracy is assured. Whereas an enlightened people make democracy vibrant.

Another problem is the code of confidentiality of civil services who maintain an ethic of silence in public affairs or communicate lies to the people. Government and civil servants must be under a duty to disclose to their citizens the truth of things. Because the freedom of information will open up the decision making process. The jurisprudence of disclosure and the privilege of exclusion have a justice dimension. Access to justice and access to information is necessary. They are mutual requirements also. Without basic information a citizen is not enlightened to seek justice. The right to know, in its varied manifestations, covers the demand of the public to be authentically informed about matters of grave concern, which require to be authoritatively investigated and reported with intelligence and integrity so that the truth may come to light and people’s conscience satisfied. The right of public to watch intervene and participate in open inquiries is a branch of the citizen’s right to know.

The Press Council of India has scrutinised parallel legislations in countries like USA Canada and New Zealand and proposed a draft on right to information. The working group headed by eminent Consumer Activist H.D.Shourie was set up by the Government, which had finally come out with a report. Entire system is thriving on secrecy. Most of the reports in press about scandals are plants made available either to force the government to take a decision or fix to a rival. According to H.D.Shourie, "while it made sense for the British to ensure secrecy in administrative matters when they were ruling a colony, secrecy doesn't serve any purpose today. The government is still functioning in secrecy and people cannot approach government officials directly". He warned that the secrecy breeds corruption and

information on policy matters should be passed on to the public. The report suggested that nothing shall be an offense under the Official Secrets Act if the information predominantly and substantially sub-serves public interest. The Draft aimed at transparency it ensures that certain categories shall be exempted from disclosure under the provisions of this Act. It also suggested that the classification of document as top-secret, secret and confidential should be decided after careful scrutiny. The draft proposes to amend the Official Secrets Act and the Civil Service Conduct Rules (1964)

4.22.1. A Bold Struggle for Information: Saga of MKSS

Over the last five years, Mazdoor Kisan Shakthi Sangathan MKSS pioneered an agitation for people's right to information. It has evolved a programme called Jan Sunwai, i.e., public hearing, wherein public demand accountability from the government officials and the legislators. The MKSS was founded in 1990 and was engaged in a struggle for minimum wages on government work sites. In 1992 it took small interest free loans from its members and went into business. Started several Mazdoor Kisan Kirana, grocery stores where high quality groceries are supplied on low profit. They gained confidence by experience and united action. MKSS activists, then, started demanding accountability from the officers and elected representatives. To ensure this, they realised the need to access to all records of local government works. They wanted to curb the siphoning of funds for which the information and access to records is vital.

4.22.2. Jan Sunwai: Forum against Secrecy

In 1994 activists of MKSS went door to door in the villages of Kot Kirana Panchayat, urging people to attend the Jan Sunwai. They caught hold of some documents from Panchayat Office, and read them out in public. Various kinds of irregularities were revealed to the utter surprise of the villagers. The muster role of one famine relief work site showed the names of people who never worked even a day there. The Jan Sunwai revealed major siphoning of public funds by local officials. In the last five years Jan Sunwais were being held by MKSS in these areas leading to a tortuous conflict with the government of Rajasthan. Their main demand is that ordinary citizens must not only be able to access files of government works, they should be entitled to a copy of any document.

4.22.3. Information, Corruption, and Democracy

There should be a legal provision to punish any official who denies access to information. When citizens expose cases of corruption the administration must act immediately to process the case and prosecute the guilty. The result of this demand is very interesting. One Sarpanch asked the MKSS activist. "If we don't make money from local projects how will we meet our election expenses?" This means that in the absence of corruption money, an ordinary citizen at the lowest end of the economic scale will have a

chance in the electoral fray. This is a practical and vital link between the right to information and the democracy. Key to strengthening the democracy at the very roots of society is the right to information.

The success of MKSS has led to a national campaign for the Right to Information and now it is attracting the attention of the other countries. A senior IAS officer who is also a leading activist of this campaign, said that "such a law will have to secure for every citizen the enforceable right to question, examine, audit, review and assess government acts and decisions, to ensure that these are consistent with the principles of public interest, probity and justice.

After Goa and Tamilnadu have enacted right to information legislation, the Madhya Pradesh government has instituted several practices to ensure easier access to information. Eariler this year the Congress government in Rajasthan made the MKSS the nodal agency in drafting a bill for the right to information.

The people in village know that the legislation will just facilitate further and work no wonders. The true test will lie in finding ways to actually enforce the law at the ground level. Though the newspapers and other media projected the success of Jan Sunwais in Rajasthan, people elsewhere did not start such an imaginative work at all. Even for holding effective Jan Sunwai one needs a good level of awareness and enlightenment. One has to work meticulously to find the details of the schemes from the official records and to catch improprieties and irregularities. Then only ground will be prepared for Jan Sunwai.

Such information is a weapon to fight the corruption. The Government, which talks about the transparency, fears to be transparent. Jan Sunwais is an example of transparency, which has to be imposed by the people on the government. Corruption is undoubtedly a wide spread cancer. But the cynicism about the corruption that it is impossible to curb and natural or inevitable is the real problem. Aruna Roy, MKSS activist, suggested that this cynicism about corruption stemmed from the fact that "the middle class is itself intellectually pauperised and so it feels the whole country is the same. Now we must look to the working class for ideas, not just mobilisation"

The law providing Right to Information will definitely entitle the activists and make them effective and innovative to check the corruption and to see the proper utilisation of public money. Rajni Bakshi, a writer said: "However, the truly great qualities of the MKSS are indeed worth emulating and these are not obvious on superficial observation. At the core of the organisation's effort is the power of good intent and a certain quality of human relations, bonds of affection, which goes deeper than any specific cause. This in turn nurtures the conviction that the means must be as noble as the end objective." (Rajni Bakshi, Right to Information, The Hindu, November 28, 1999 page V)

4.23. Enlightenment and Entitlement

Thus access to government records provide much needed enlightenment and entitlement to the people to fight the corruption and bring in the peaceful progress. It is true that more than sixty percent of the public money meant for a development scheme or for a plan is being siphoned and only a little of the amount trickles in to real work. As the Prime Minister Rajiv Gandhi himself was on record that a very little amount is reaching the village. Unless the people know the details of programme or plan and its working, it is not possible to check the pilferage and ensure the work quality.

Every Bank or a financial agency or a government agency should be obliged to publish the list of the beneficiaries under their loaning scheme or a Housing scheme, so that the people can know it and question the eligibility of that beneficiary or expose the irregularity if any. The Law on Right to Information should consist of such provisions as to compel the authorities to come out with details of working of their schemes and with the list of beneficiaries. It also should provide for a mechanism for initiating the prosecution and other disciplinary proceedings against the erring officers on charges of corruption besides a schedule for recovery of money siphoned by the officers or public representatives.

"The right to part with information will require a change in the mindset of legislators and bureaucrats who have been weaned on secrecy and paranoia for decades"-says Anuradha Raman in her article on "Lifting the veil of Secrecy". (The Pioneer June 17, 1997, p11) This country has inherited secrecy in governance as a prime legacy. It is very difficult to throw it off altogether. Information is power. It is rightly said that it takes courage to share it.

The Right to Information Act, 2005 is a landmark legislation in India, which was celebrated as another independence day in Rajasthan and other parts of the country, and considered one of the very progressive legislation ushering in participatory democracy in its true terms arming and empowering the people with information that wrapped up so far within the files of public authorities.

4.24. Objective, Purpose and Features of Right to Information Act, 2005

1. Access to state records as a right

The ‘state’ in a democratic society has an obligation to disclose the information that has been generated at its level for the purpose of people. There is no doubt that the entire information built in files of the state government office is for the people and that entitles the people to have an implied right to access that information. It is one of the cardinal principles of administration that the officers dealing with people should be transparent and information must be made accessible to the people. As the officers tend to belief to be the masters of the people and forget the fact that they are supposed to serve as servants the interests of the

people, there is a need to declare that people have right to access the information that the officers are holding within their confines. This took the shape of a statutory right as a consequence of democratic struggles and agitations for over decades and centuries. India also recently passed a law called 'Right to Information Act, 2005 providing for a statutory right to information and obligation on the part of the state to provide for information either in response to a request or on its own.

The Act lays down the machinery for the grant of access to information. The Public Authorities are required to designate Public Information Officers and Assistant Public Information Officers within 100 days of the enactment and whose responsibility it is to deal with requests for information and also to assist persons seeking information. Provision has been made for transfer of a request by a public authority to another public authority wherein the subject matter / information is held by the latter. A time limit of 30 days has been prescribed for compliance with requests for information under the Act, which, can be extended to 40 days where third-party interests are involved. The Fee has to be reasonable and also, no fee to be charged from persons who are below poverty line. Further, information to be provided free of charge where the response time limit is not adhered to.

Certain categories of information have been exempted from disclosure under sections 8 and 9 of the Act. The categories, by way of illustration, include, information likely to affect security of the State, strategic, scientific or economic interests of the State, detection and investigation of offences, public order conduct of international relations and Cabinet papers. Trade or commercial secrets, information the disclosure of which would cause breach of privilege of Parliament or State Legislature and personnel information which has no relationship with public activity and could cause unwarranted invasion of the privacy of any person, are also exempted from disclosure. However, exemptions provided are not absolute and withholding of information must be balanced against disclosure in the public interest. Information to be released even if harm is shown to the public authority if the public benefit in knowing the information outweighs the harm that may be caused by disclosure.

Subject to 3 exceptions, the Act also contains a provision for reveal of information, which is otherwise, exempted from disclosure under section 8 on completion of 20 years after the completion of the event.

The Act also incorporates the principle of severability.

The Act envisages creation of an independent non-judicial machinery, viz., Central Information Commission and State Information Commissions comprising a Chief Information Commissioner and Information Commissioners to decide 2nd stage appeals.

Legal framework of exercise of powers by the Commission defined in the Act. The Act also provides a two-tier Appellate Forum First appeal to departmental officer senior to the Public Information Officer. The second appeal to be made to Commission.

On a request for information being refused, the applicant can prefer an appeal to the prescribed authority within 30 days of the decision; the time limit for disposal of appeal being also 30 days extendable to 45 days. Intelligence and security agencies specified in Schedule II to the Act have been exempted from being covered within the ambit of the Act. However, the exemption is not absolute; agencies shall have the obligation to provide information in matters relating to corruption and human rights violations.

The jurisdiction of subordinate courts has been barred expressly by section 23 of the Act. The provisions of the proposed Act have been made overriding in character, so that the scheme is not subverted through the operation of other minor Acts. Monitoring and reporting-Act makes a provision to produce statistics to assess its implementation so that improvements could be effected. The Central Information Commission and State Information Commissions have to monitor the implementation of the Act and prepare an Annual Report to be laid before Parliament/ State Legislature. The Central Government has to prepare programmes for development of 'information' regime. This law has repealed the Freedom of Information Act 2002.

4.24.2. The Right to Information:

Section 3 says: All citizens shall have the right to information, subject to the provisions of the Act.

It casts an obligation on Public Authorities to grant access to information and to publish certain categories of information within 120 days of the enactment. The responsibility about suo-moto disclosure/ publication by public authorities has been considerably enlarged.

The Act will apply to "Public Authorities" which means any authority or body or institution of self-government established or constituted by or under the Constitution; by any law made by the appropriate Government or, any other body owned, controlled or substantially financed directly or indirectly by the appropriate Government, and includes non-government organisations, substantially financed by the government. The ambit covers the two Houses of Parliament, State Legislatures, the Supreme Court/ High Court/ Subordinate Courts including their administrative offices, Constitutional Authorities like Election Commission, Comptroller & Auditor General, Union Public Service Commission etc. Only domestic and foreign private bodies working within the country have been excluded from the purview of the Act.

Thus the public authority means any authority or body or institution of self-government established or constituted [S.2(h)]

- by or under the Constitution;
- by any other law made by Parliament;
- by any other law made by State Legislature;
- by notification issued or order made by the appropriate Government and includes any-

a. body owned, controlled or substantially financed

b. non-Government organization substantially financed directly or indirectly by the appropriate Government.

a. Meaning of the Information

Information means any material in any form including records, documents, memos, e-mails, opinions, advices, press releases, circulars, orders, logbooks, contracts, reports, papers, samples, models, data material held in any electronic form and information relating to any private body which can be accessed by a public authority under any other law for the time being in force but does not include "file notings" [S.2(f)].

b. Meaning of Right to Information

It includes the right to –

i. inspect works, documents, records.

ii. take notes, extracts or certified copies of documents or records.

iii. take certified samples of material.

iv. obtain information in form of printouts, diskettes, floppies, tapes, video cassettes or in any other electronic mode or through printouts [S.2 (j)]

4.24.2. Obligation to Give Information:

1. What are the obligations of public authority?

It shall publish within one hundred and twenty days of the enactment:-

i. the particulars of its organization, function and duties;

ii. the powers and duties of its officers and employees;

iii. the procedure followed in its decision making process, including channels of supervision and accountability;

iv. the norms set by it for the discharge of its functions;

v. the rules, regulations, instructions, manuals and records used by its employees for discharging its function;

vi. a statement of the categories of the documents held by it or under its control;

vii. the particulars of any arrangement that exists for consultation with, or representation by the members of the public, in relation to the formulation of policy or implementation thereof;

viii. a statement of the boards, councils, committees and other bodies consisting of two or more persons constituted by it. Additionally, information as to whether the meetings of these are open to the public, or the minutes of such meetings are accessible to the public;

ix. a directory of its officers and employees;

x. the monthly remuneration received by each of its officers and employees, including the system of compensation as provided in its regulations;

xi. the budget allocated to each of its agency, indicating the particulars of all plans, proposed expenditures and reports on disbursements made;

xii. the manner of execution of subsidy programmes, including the amounts allocated and the details and beneficiaries of such programmes;

xiii. particulars of recipients of concessions, permits or authorizations granted by it;

xiv. details of the information available to, or held by it, reduced in an electronic form;

xv. the particulars of facilities available to citizens for obtaining information, including the working hours of a library or reading room, if maintained for public use;

xvi. the names, designations and other particulars of the Public Information Officers.[S.4(1)(b)]

4.24.3. Penalties:

Section 20 empowers the Information Commissioners to impose penalties against the Public Information Officers for refusing to give information. Penalty begins at Rs 250 per day and cannot go beyond Rs.25,000. Apart from penalty the Information Commissioner may have to recommend the public authority to take disciplinary proceedings against officers who refuse to give information.

Section 20 says, where the Central Information Commission or the State Information Commission, as the case may be, at the time of deciding any complaint or appeal is of the opinion that the Central Public Information Officer or the State Public Information Officer, as the case may be, has, without any reasonable cause, refused to receive an application for information or has not furnished information within the time specified under sub-section (1) of section 7 or malafidely denied the request for information or knowingly given incorrect, incomplete or misleading information or destroyed information which was the subject of the request or obstructed in any manner in furnishing the information, it shall impose a penalty of two hundred and fifty rupees each day till application is received or information is furnished, so however, the total amount of such penalty shall not exceed twenty five thousand rupees;

Provided that the Central Public Information Officer or the State Public Information Officer, as the case may be, shall be given a reasonable opportunity of being heard before any penalty is imposed on him: Provided further that the burden of proving that he acted reasonably and diligently shall be on the Central Public Information Officer or the State Public Information Officer, as the case may be.

(2) Where the Central Information Commission or the State Information Commission, as the case may be, at the time of deciding any complaint or appeal is of the opinion that the Central Public Information Officer or the State Public Information Officer, as the case may be, has, without any reasonable cause and persistently, failed to receive an application for information or has not furnished information within the time specified under sub-section (1) of section 7 or malafidely denied the request for information or knowingly given incorrect, incomplete or misleading information or destroyed information which was the subject of the request or obstructed in any manner in furnishing the information, it shall recommend for disciplinary action against the Central Public Information Officer or the State Public Information Officer, as the case may be, under the service rules applicable to him.

4.24.4. Exempted Information

The following is exempt from disclosure [S.(8)].

i. information, disclosure of which would prejudicially affect the sovereignty and integrity of India, the security, strategic, scientific or economic interests of the State, relation with foreign State or lead to incitement of an offence.

ii. information which has been expressly forbidden to be published by any court of law or tribunal or the disclosure of which may constitute contempt of court;

iii. information, the disclosure of which would cause a breach of privilege of Parliament or the State Legislature;

iv. information including commercial confidence, trade secrets or intellectual property, the disclosure of which would harm the competitive position of a third party, unless the competent authority is satisfied that larger public interest warrants the disclosure of such information;

v. information available to a person in his fiduciary relationship, unless the competent authority is satisfied that the larger public interest warrants the disclosure of such information;

vi. information received in confidence from foreign Government?

vii. Information, the disclosure of which would endanger the life or physical safety of any person or identify the source of information or assistance given in confidence for law enforcement or security purposes;

viii. information which would impede the process of investigation or apprehension or prosecution of offenders;

ix. cabinet papers including records of deliberations of the Council of Ministers, Secretaries and other officers;

x. information which relates to personal information the disclosure of which has no relationship to any public activity or interest, or which would cause unwarranted invasion of the privacy of the individual;

xi. Notwithstanding any of the exemptions listed above, a public authority may allow access to information, if public interest in disclosure outweighs the harm to the protected interests.

a. Partial Disclosure

Only that part of the record which does not contain any information which is exempt from disclosure and which can reasonably be severed from any part that contains exempt information, may be provided. [S.10]

b. Organizations Excluded from obligation

Central intelligence and Security agencies specified in the Second Schedule like IB, R & AW, Directorate of Revenue Intelligence, Central Economic Intelligence Bureau, Directorate of Enforcement, Narcotics Control Bureau, Aviation Research Centre, Special Frontier Force, BSF, CRPF, ITBP, CISF, NSG, Assam Rifles, Special Service Bureau, Special Branch (CID), Andaman and Nicobar, The Crime Branch-CID-CB, Dadra and Nagar Haveli and Special Branch, Lakshadweep Police, Agencies specified by the State Governments through a Notification will also be excluded. The exclusion, however, is not absolute and these organizations have an obligation to provide information pertaining to allegations of

corruption and human rights violations. Further, information relating to allegations of human rights valuations could be given but only with the approval of the Central or State Information Commission, as the case may be. [S.24]

4.24.5. Procedure for seeking information:

4.24.5.1. The Application Procedure for requesting information

1. Apply in writing or through electronic means in English or Hindi or in the official language of the area, to the PIO, specifying the particulars of the information sought for.

2. Reason for seeking information are not required to be given;

3. Pay fees as may be prescribed (if not belonging to the below poverty line category).

4.24.5.2. The time limit to get the information

1. 30 days from the date of application

2. 48 hours for information concerning the life and liberty of a person

3. 5 days shall be added to the above response time, in case the application for information is given to Assistant Public Information Officer.

4. If the interests of a third party are involved then time limit will be 40 days (maximum period + time given to the party to make representation).

5. Failure to provide information within the specified period is a deemed refusal.

4.24.5.3. The fee

1. Application fees to be prescribed which must be reasonable.

2. If further fees are required, then the same must be intimated in writing with calculation details of how the figure was arrived at;

3. Applicant can seek review of the decision on fees charged by the PIO by applying to the appropriate Appellate Authority;

4. No fees will be charged from people living below the poverty line

5. Applicant must be provided information free of cost if the PIO fails to comply with the prescribed time limit.

4.24.5.4. The ground for rejection

1. If it is covered by exemption from disclosure. (S.8)

2. If it infringes copyright of any person other than the State. (S.9)

4.24.5.6. Machinery for Providing Information:

a. The Public Information Officer (PIOs)

The PIOs are officers designated by the public authorities in all administrative units or offices under it to provide information to the citizens requesting for information under the Act. Any officer, whose assistance has been sought by the PIO for the proper discharge of his or her duties, shall render all assistance and for the purpose of contraventions of the provisions of this Act, such other officer shall be treated as a PIO.

b. The duties of a PIO?

- PIO shall deal with requests from persons seeking information and where the request cannot be made in writing, to render reasonable assistance to the person to reduce the same in writing.

- If the information requested for is held by or its subject matter is closely connected with the function of another public authority, the PIO shall transfer, within 5 days, the request to that other public authority and inform the applicant immediately.

- PIO may seek the assistance of any other officer for the proper discharge of his/her duties.

- PIO, on receipt of a request, shall as expeditiously as possible, and in any case within 30 days of the receipt of the request, either provide the information on payment of such fee as may be prescribed or reject the request for any of the reasons specified in S.8 or S.9. Where the information requested for concerns the life or liberty of a person, the same shall be provided within forty-eight hours receipt of the request.

- If the PIO fails to give decision on the request within the period specified, he shall be deemed to have refused the request.

- Where a request has been rejected, the PIO shall communicate to the requester – (i) the reasons for such rejection, (ii) the period within which an appeal against such rejection may be preferred, and (iii) the particulars of the Appellate Authority.

- PIO shall provide information in the form in which it is sought unless it would disproportionately divert the resources of the Public Authority or would be detrimental to the safety or preservation of the record in question.

- If an owing partial access, the PIO shall give a notice to the applicant, informing:

a. that only part of the record requested, after severance of the record containing information which is exempt from disclosure, is being provided;

b. the reasons for the decision, including any findings on any material question of fact, referring to the material on which those findings were based.

c. the name and designation of the person giving the decision;

d. the details of the fees calculated by him or her and the amount of fee which the applicant is required to deposit; and

e. his or her rights with respect to review of the decision regarding non-disclosure of part of the information, the amount of fee charged or the form of access provided.

- If information sought has been supplied by third party or is treated as confidential by that third party, the PIO shall give a written notice to the third party within 5 days from the receipt of the request and take its representation into consideration.

- Third party must be given a chance to make a representation before the PIO within 10 days from the date of receipt of such notice.

4.24.5.7. The Information Commissioners:

a. The Central Information Commission

1. Central Information Commission to be constituted by the Central Government through a Gazette Notification.

2. Commission includes 1 Chief Information Commissioner (CIC) and not more than 10 Information Commissioners (IC) who will be appointed by the President of India.

3. Oath of Office will be administered by the President of India according to the form set out in the First Schedule.

4. Commission shall have its Headquarters in Delhi. Other offices may be established in other parts of the country with the approval of the Central Government.

5. Commission will exercise its powers without being subjected to directions by any other authority. (S.12)

b. The eligibility criteria and the process of appointment of CIC/IC

1. Candidates for CIC/IC must be persons of eminence in public life with wide knowledge and experience in law, science and technology, social service, management, journalism, mass media or administration and governance.

2. CIC/IC shall not be a Member of Parliament or Member of the Legislature of any State or Union Territory. He shall not hold any other office of profit or connected with any political party or carrying on any business or pursuing any profession. (S.12)

3. Appointment Committee includes Prime Minister (Chair), Leader of the Opposition in the Lok Sabha and one Union Cabinet Minister to be nominated by the Prime Minister.

c. The term of office and other service conditions of CIC

1. CIC shall be appointed for a term of 5 years from date on which he enters upon his office or till he attains the age of 65 years, whichever is earlier.

2. CIC is not eligible for reappointment.

3. Salary will be the same as that of the Chief Election Commissioner. This will not be varied to the disadvantage of the CIC during service. (S.13)

d. The term of office and other service conditions of IC

1. IC shall hold office for a term of five years from the date on which he enters upon his office or till he attains the age of sixty-five years, whichever is earlier and shall not be eligible for reappointment as IC.

2. Salary will be the same as that of the Election Commissioner. This will not be varied to the disadvantage of the IC during service.

3. IC is eligible for appointment as CIC but will not hold office for more than a total of five years including his/her term as IC (S.13)

e. The State Information Commission

1. The State Information Commission will be constituted by the State Government through a Gazette notification. It will have one State Chief Information

Commissioner (SCIC) and not more than 10 State Information Commissioners (SIC) to be appointed by the Governor.

2. Oath of office will be administered by the Governor according to the form set out in the First Schedule.

3. the headquarters of the State Information Commission shall be at such place as the State Government may specify. Other offices may be established in other parts of the State with the approval of the State Government.

4. The Commission will exercise its powers without being subjected to any other authority.

f. The eligibility criterion and what is the process of appointment of State Chief Information Commissioner/ State Information Commissioners

The Appointments Committee will be headed by the Chief Minister. Other members include the leader of the Opposition in the Legislative Assembly and one Cabinet Minister nominated by the Chief Minister.

The qualifications for appointment as SCIC/SIC shall be the same as that for Central Commissioners.

The Salary of the State Chief Information Commissioner will be the same as that of an Election Commissioner.

The salary of the State Information Commissioner will be the same as that of the Chief Secretary of the State Government. (S.15)

g. The powers and functions of Information Commissions

1. The Central Information Commission/ State Information Commission has a duty to receive complaints from any person-

   a) who has not been able to submit an information request because a PIO has not been appointed;

   b) who has been refused information that was requested;

   c) who has received no response to his/her information request within the specified time limits;

   d) who thinks the fees charged are unreasonable;

e) who thinks information given is incomplete or false or misleading ; and

f) any other matter relating to obtaining information under this law.

2. Power to order inquiry if there are reasonable grounds.

3. CIC/SCIC will have powers of Civil Court such as-

a) summoning and enforcing attendance of persons, compelling them to give oral or written evidence on oath and to produce documents or things;

b) requiring the discovery and inspection of documents;

c) receiving evidence on affidavit;

d) requisitioning public records or copies from any court or office

e) issuing summons for examination of witnesses or documents

f) any other matter which may be prescribed.

4. All records covered by this law (including those covered by exemptions) must be given to CIC/SCIC during inquiry for examination.

5. Power to secure compliance of its decisions from the Public Authority includes-

a) providing access to information in a particular form;

b) directing the public authority to appoint a PIO/APIO where none exists;

c) publishing information or categories of information;

d) making necessary changes to the practices relating to management, maintenance and destruction of records;

e) enhancing training provision for officials on RTI;

f) seeking an annual report from the public authority on compliance with this law;

g) require it to compensate for any loss or other detriment suffered by the applicant;

h) impose penalties under this law; or

i) reject the application. (S.18 and S. 19)

h. Reporting procedure

1. Central Information Commission will send an annual report to the Central Government on the implementation of the provisions of this law at the end of the year. The State Information Commission will send a report to the State Government.

2. Each Ministry has a duty to compile reports from its Public Authorities and send them to the Central Information Commission or State Information Commission, as the case may be.

3. Each report will contain details of number of requests received by each Public Authority, number of rejections and appeals, particulars of any disciplinary action taken, amount of fees and charges collected etc.

4. Central Government will table the Central Information Commission report before Parliament after the end of each year. The concerned State Government will table the report of the State Information Commission before the Vidhan Sabha (and the Vidhan Parishad wherever applicable). (S.25)

i. The Role of Government:

1. The role of Central/State Governments

1. Develop educational programmes for the public especially disadvantaged communities on RTI.

2. Encourage Public Authorities to participate in the development and organization of such programmes.

3. Promote timely dissemination of accurate information to the public.

4. Train officers and develop training materials.

5. Compile and disseminate a User Guide for the public in the respective official language.

6. Publish names, designation postal addresses and contact details of PIOs and other information such as notices regarding fees to be paid, remedies available in law if request is rejected etc. (S.26)

2. The Rule making power

Central Government, State Governments and the Competent Authority as defined in S.2 (e) are vested with powers to make rules to carry out the provisions of the Right to Information Act, 2005. (S.27 & S.28)

3. The power to deal with the difficulties while implementing this act

If any difficulty arises in giving effect to the provisions in the Act, the Central Government may, by Order published in the Official Gazette, make provisions necessary/expedient for removing the difficulty. (S.30)

a. Tasks of Government before Commencement of the Act

(1) Preparing Manuals

Clause 4 (1) (b) of the RTI Act lays down that each public authority shall compile and publish, within 120 days from the enactment of the Act, the following 17 manuals:

(i) the particulars of its organisation, functions and duties;

(ii) the powers and duties of its officers and employees;

(i) the procedure followed in the decision making process, including channels of supervision and accountability;

(ii) the norms set by it for the discharge of its functions;

(iii) the rules, regulations, instructions, manuals and records, held by it or under its control or used by its employees for discharging its functions;

(iv) a statement of the categories of documents that are held by it or under its control;

(v) the particulars of any arrangement that exists for consultation with, or representation by, the members of the public in relation to the formulation of its policy or administration thereof.

(vi) a statement of the boards, councils, committees and other bodies consisting of two or more persons constituted as its part or for the purpose of its advise, and as to whether meetings of those boards, councils, committees and other bodies are open to the public, or the minutes of such meetings are accessible for public;

(vii) a directory of its officers and employees;

(viii) the monthly remuneration received by each of its officers and employees, including the system of compensation as provided in its regulations;

(ix) the budget allocated to each of its agency, indicating the particulars of all plans, proposed expenditures and reports on disbursements made;

(x) the manner of execution of subsidy programmes, including the amounts allocated and the details of beneficiaries of such programmes;

(xi) particulars of recipients of concessions, permits or authorisations granted by it;

(xii) details in respect of the information, available to or held by it, reduced in an electronic form;

(xiii) the particulars of facilities available to citizens for obtaining information, including the working hours of a library or reading room, if maintained for public use;

(xiv) the names, designations and other particulars of the Public Information Officers;

(xv) such other information as may be prescribed; and thereafter update these publications every year;

Six of these publications have, in fact, been retained from the FOI Act, 2002 and these must have already been compiled by the public authorities under the State Government as part of operationalisation of the FOI Act. Action should be urgently initiated to have all 17 manuals in place in anticipation of the Bill being enacted in the present form.

(2) Designation of Public Information Officers and Assistant Public Information Officers.

The contemplated legislation also casts an obligation on each public authority to designate, within one hundred days of the enactment of the Act, its Public Information Officers whose duty it would be to provide information to those who ask for it [Section 5 (1)]. Such authority is also required to designate Assistant Public Information Officers at each sub-divisional or sub-district level to receive the applications for furnishing information or appeals under the Act and forward them to the authority or to the Government [**Section 5 (2)].** Since these appointments have to be made **within one hundred days of the enactment**, it may perhaps be advisable to take steps to determine now itself the number of such officers as may be required by an authority and simultaneously identify them so that these appointments are made within the contemplated statutory period.

(3) Designation of authorities to whom the first appeal lies

Section 19 (1) provides that any person aggrieved by the decision of a State Public Information Officer may prefer an appeal to such officer who is senior in rank to the State Public Information Officer in each public authority. It may perhaps be advisable to take steps to determine and identify now itself such senior officers in each public authority so that the appellate machinery is fully in position and equipped to handle the first stage appeals as and when these are made.

(4) Constitution of State Information Commission

Section 15 of the RTI Act lays down that every State Government shall constitute its Information Commission, comprising of one Chief Information Commissioner as also Information Commissioners (not exceeding 10 in number) who shall deal with appeals from citizens aggrieved by the decision of the State Public Information Officer/ first appellate authority. The Commission shall also monitor the implementation of the Act by Public authorities under the State Government and prepare an annual report which shall be laid before the State Legislature. Section 16 (6) of the Act lays down that the State Government shall provide the Commission with requisite number of officers and employees in order to discharge its functions. It would be appreciated if this aspect receives adequate attention and Commission is set up preferably by the time the Act comes into force.

(5) Amendments to existing Acts. Rules, etc.

Section 22 of the RTI Act, which has provisions similar to Section 14 of the FOI Act, 2002, envisages that the contemplated Act would over-ride any other Act, Rule or Order. It is suggested that immediate review may be made of all such Acts and instruments administered by the State Government and, amendments made thereto, wherever necessary, so that the points of conflict between the RTI At and other Acts/ Rules/ instructions etc. are restricted.

(6) Intelligence and Security Organisations

Section 24 of the Act provides that the Act shall not apply to such intelligence and security organisations established by the State Government and which have been specified as such by the Government to a notification in the Official Gazette. Similar provisions exist in the Freedom of Information Act, 2002. This aspect may be given immediate attention so that the decision regarding

exemption of an agency from the Act is taken, and the requisite notification issued, well before the Act comes into operation.

(7) Framing Rules

Section 27 of the Act lays down that the State Government may make rules to carry out the provisions of the Act. Such rules may provide for all or any of the following matters, namely:-

(a) the cost of the medium or print cost price of the materials to be disseminated under sub-section (4) of section 4;

(b) the fee payable under sub-section (1) and (5) of section 7;

(c) the fee payable under sub-sections (1) and (5) of section 7;

(d) the salaries and allowances payable to and the terms and conditions of service of the officers and other employees under sub-section (6) of section 13 and sub-section (6) of section 16;

(e) the procedure to be adopted by the Commission in deciding the appeals under sub-section (10) of section 6; and

(f) any other matter which is required to be, or may be, prescribed.

Section 28 of the RTI Act confers on the various competent authorities the power to make rules so as to carry out the provisions of the Act. Accordingly, the State Government may initiate action to frame rules under the above enabling provisions and also bring these to the notice of all the public authorities under its control well before the Act comes into force. In case there is any public authority which is attached or administratively under the control of the State Government, and for which the competent authority, as defined in Section 2 (b), is required to make rules for giving effect to the provisions of the RTI Act, suitable action may be initiated in this regard on priority.

(8) Internal procedures

There is another key operational aspect of which has to be looked into by each public authority. Considering that the organisational set up varies from one public authority to another, it is not feasible to lay down in the enactment itself, or for that matter in the rules to be framed there under, internal procedures for processing requests as would be common to all such authorities. However, the understanding is that once the Act comes into force, each public authority shall have to follow well-defined procedures so that the entire process is streamlined and the decisions on requests are taken at an

appropriate level. Keeping this in view, it may be desirable to examine the issue now itself so that internal procedures, which includes the channel for collecting information, creating facilities for inspection of documents/ taking of samples, fixing levels at which a decision shall be taken on a request, preparation of a document for supply to the requester, etc., are formulated in advance. **Internal procedures** should, likewise, be also devised by each public authority under the State Government to process appeals as are submitted under the Act.

(9) Annual Report of the State Information Commission

Section 25 of the Act provides that the State Information Commission shall monitor the implementation of the Act by public authorities under the State Government and prepare an annual report which shall be laid before the State Legislature. For the purpose of compilation of the Report, the Commission would require certain statistical information from the various public authorities under the State Government. Action may be taken to apprise the public authorities of the provisions in this clause so that action may be taken by them to compile the statistics from the date the Act comes into operation as would enable the Commission to prepare its Annual Report.

b. Tasks before the Act

Section 26 of the Act lays down that the State Government may, to the extent of availability of financial and other resources, prepare programmes for the development of the information regime. In particular, sub- Section (2) lays down that within 18 months from the commencement of the Act, the State Government shall compile in its official language a guide containing such information as would be helpful to citizens who wish to exercise any right specified in the Act. After the Act comes into force, action may be initiated to prepare necessary programmes as also publish a guide for the users.

j. Commencement of the Act

It came into force on the 12th October, 2005 (120th day of its enactment on 15th June, 2005). Some provisions have come into force with immediate effect viz. obligations of public authorities [S.4 (1)], designation of Public Information Officers and Assistant Public Information Officers [S.5 (1) and 5(2)], constitution of Central Information Commission (S.12 and 13), constitution of State Information Commission (s.15 and 16), non-applicability of the Act to Intelligence and Security Organizations (S.24) and power to make rules to

carry out the provisions of the Act (S.27 and 28). The Act extends to the whole of India except the State of Jammu and Kashmir [S. (12)]

k. How to use the right to information?

The law is made and statutory right to information is now available. It is for the people to use it. What is needed in democracy is the citizens' activism rather than anything else, since the eternal vigilance is the price of democracy. Despite the defects, and enormous limitations, the people's right to know is established.

The argument in favour of the public's right to know was succinctly put forth by James Madison[158], one of America's constitutional fathers: "A popular government without popular information or the means of acquiring it is but a prologue to a farce or a tragedy, or perhaps both. Knowledge will forever govern ignorance; and a people who mean to be their own governors must arm themselves with the power that knowledge brings[159]."

Conflict is between haves and have not's, i.e., those who do not have information. The fight for information takes place between the public who want it and those in power who do not want them to have it. Madison's philosophy suggests:

- that secrecy impedes the political education of a community so that electoral choices are not fully informed;
- that opportunities for individuals to respond meaningfully to political initiatives are blunted; and,
- that a political climate is generated in which the citizen views government not with responsibility and trust, but with malevolence and distrust.

According to another observer, "Just as the middle and working classes sought power and were given the vote, so today's professional classes seek power and are given information. The process is called participation, and the result is called accountability[160]."The fight is, in many ways, a costly and unnecessary

[158] Quoted by John McMillan, Freedom of Information Legislation, (Office of the Australian Ombudsman) presented to the 1980 Meeting of Commonwealth Law Ministers, Barbados (Commonwealth Secretariat, London, 1980)
[159] For details see http://www.transparency.org
[160] Robert Gregory, "Knowledge as Power? An Overview" in Robert Gregory (ed.) The Official Information Act: A Beginning", (NZ Institute of Public Administration, Wellington, 1984).

one for there are clear advantages to all concerned for an administration being open with information:

- a better informed public can better participate in the democratic process;
- Parliament, press and public must be able properly to follow and scrutinise the actions of government and secrecy is a major impediment to this accountability;
- public servants take important decisions which affect many people, and to be accountable the administration must provide greater flows of information about what they are doing;
- better information flows produce more effective government and help towards the more flexible development of policy; and,
- public cooperation with the government will be enhanced by more information being available[161].

The right to know is linked inextricably to accountability, the central goal of any democratic system of government. Informed judgment and appraisal by public, press and Parliament alike is a difficult, even fruitless task if government activities and the decision-making processes are obscured from public scrutiny. Where secrecy prevails, major resource commitments can be incurred, effectively closing the door to any future review and re-thinking in the light of an informed public debate. There are, of course, other mechanisms within government such as the Legislature, the courts or an Ombudsman that act as a check on the abuse of power by an Executive. However, for these to be effective, their own access to information is an imperative. Given that such a right is worthy of recognition, how best can it be guaranteed?

4.25. To fight Corruption:

According to assessment of Ms Aruna Roy, the Right to Information campaign has contributed to significantly bringing down the levels of corruption in the drought of relief programme of Rajasthan during 2001-2002 wherein Rs. 600 crore was spent. The Public vigilance over muster rolls and drought relief works also provided the most effective means to tackle corruption in works sanction under the new Rural Employment Guarantee Act, 2005, which eventually came in the same year along with Right to Information Act, 2005. In

[161] Towards Open Government, the report of the Danks Committee (Government Printer, Wellington, 1980) as summarised by Geoffrey Palmer in Unbridled Power: An Interpretation of New Zealand's Constitution and Government (Oxford University Press, Auckland, 1979, 1987).

Janwad Panchayat, the public records and there after public hearing revealed more than Rs. 70 lakh fraud in a six year period. This was almost the status of corruption in all 9000 Panchayats in Rajasthan during that period.

4.26. Key points of Right to Information Act are that it:

- confer legal rights on citizens that can be enforced
- seek to change the culture of secrecy within the civil service;
- provide access to records not just information;
- define exemptions; and,
- define rights of appeal.

Freedom of information legislation not only establishes the citizen's legal right of access to information, it also confers on government the obligation to facilitate access. The law should include provisions requiring agencies subject to the law to publish information relating to:

- their structure, functions and operations;
- the classes of records held by the body;
- arrangements for access; and,
- the internal procedures used by the agency in the conduct of its business.

4.27. Press and Community groups:

Press and Community groups can bring so many reports from public authority to domain of the public. The Media and NGOs can play a major role in realizing the fruits of right to information. Perhaps the best known example of FOI legislation is that of the United States, where it has been demonstrated repeatedly that reports, studies and other documents can be taken into the public domain by the press and by community groups, to the benefit of public knowledge and understanding.

The Ugandan government in November, 1995, invited ten journalists to participate in a meeting of its anti-corruption stakeholders, including senior law enforcement officials. The meeting was held to review progress in implementing the country's national integrity action plan. The exchanges at the meeting were open and crisp, and the eventual reporting was considerable and highly favourable. It is one of the open debates that stand as an example of effect of transparency.

It was an extraordinary decision by President Mkapa of Tanzania to release the Wariobac Commission Report to the press in 1996 before even his own cabinet had been able to see it—some of whom were named in the report as being complicit in corrupt activities.

President Mkapa's decision was the more remarkable as his country had had, ever since independence in 1961, a culture of official secrecy and this was the first report of any significance to be shared with the public.

Investigative Journalism

The international reach of freedom of information laws, too, can be considerable. Information censored in the United Kingdom, on occasion, becomes available to British investigative journalists when the same material is held in the United States and has been made accessible to the public at large there by the more liberal FOI United States legislation. Increasingly, investigative journalists are learning where to go to find the information that governments in their own countries deny them.

4.28. Tool of Information and right to information

With super high way of Information on small screen, the Internet, the ability of governments to control what their people can or cannot access has greatly reduced, and it affords individuals and organizations unrivalled opportunities to carry information into the public arena. "Official secrets" banned in one country, perhaps more for political than for security or public interest reasons, can be quick to find their way onto the web. A court order suppressing a well-known person's name in one country will quickly appear on a website outside it. A country can, of course, continue to control people and web sites within its borders. China is among those who have tried to stop web sites from "leaking state secrets".

The Internet, too, has struck a blow in favour of access to information and against the domination of news dissemination by a small group of media magnates. However, at the same time it has posed genuine problems for governments struggling to combat pornography and organized crime, which have been quick to seize on the opportunities the Internet presents for swift transmission of encrypted messages which are virtually untraceable, particularly if mobile telephones are used to establish links to service providers. Therefore there can be increasingly strenuous efforts by governments to enhance their ability to monitor transactions on the Internet.

The Internet has also opened up new possibilities for governments to interact with their citizens. Malaysia is one country at the forefront of using the Internet to conduct as many of its transactions with its citizens as are possible, and is in the process of developing "electronic government". Obviously, this option is not open to countries where access to the Internet is limited, but it would seem to be the shape of things to come.

4.29. Privacy laws

The Right to information should not, of course, be used to invade the personal privacy of individuals.

4.30. What are not valid reasons for withholding information?

Instances which should not constitute valid reasons for withholding information include that its release:

- would be inconvenient to the Minister (or the department);
- might show the department in a bad light;
- might embarrass the Minister politically;
- is no business of the requester; or that it
- might be misunderstood by the requester, or by the media, (in which case the wisest course may be to provide an explanation or material that will set the information in its proper context).

Defence, national security, foreign relations, law enforcement and personal privacy and, to some extent, the internal deliberative processes of a government agency may each have legitimate claims to protection or exemption from FOI legislation. The Swedish Secrecy Law, for example, has as many as 250 exemptions, some defined by their relation to protected interests and others by reference to categories of documents. Many exemptions contain a time limitation on the life of the exemption, which varies from as much as 70 years to as little as two. Still other exemptions protect documents only until a particular event has occurred. The options are many and varied, but the issue appears to be one of growing importance among civil societies around the world.

It is also said that too much openness can impede free and frank exchanges of opinion between public officials and that officials cannot operate efficiently in a "goldfish bowl". This argument has some merit, but it must be weighed against the alternative: secrecy and a lack of accountability. Can anyone seriously argue that decision-making which is not accountable is better than decision-making, which is subject to scrutiny?

4.31. Records Management: Duty of Public Authority

Even legally enforceable rights of access to information are meaningless if government records are chaotic. Although information may be available in principle, if it cannot be found then it cannot be made available to citizens. Not only does this limit government

accountability and its credibility in the eyes of citizens, but it also has a serious impact on the capacity of government to discharge its duties efficiently. The Right to Information Act made some specific provisions imposing obligation to maintain records in an accessible manner and index them. They are supposed to be made available for the people so that they can inspect or seek a copy.

A nation-wide government records management policy is essential--not just to provide citizens with information but also to ensure that individual civil servants can be held accountable for their actions. If there is no paper trail, chances of errant civil servants being identified and sanctioned are slight. Not only must the records exist, but they must also be readily accessible by those who need them. Records should not be simply kept in a capital city and members of the public be required to travel from rural areas if they want to consult them. Furthermore, documents of general interest should be prepared in a form understandable to the general public, especially such major documents as those of the Auditor-General to the Legislature. These can also be placed on the Internet at little or no cost for the benefit of those with access to it.

A sound records management policy will vest an agency with over-all responsibility for records management, usually in the form of a national archive. Such a central agency will provide guidance to departments on the creation, maintenance and disposal of files, and will itself serve as the ultimate custodian of documentation once it has ceased to be of use to a department. The national archive should conduct periodic records management audits of departments to ensure that the records management policy is being faithfully carried out. Improved access to information will not of itself enhance public participation in decision-making. Not everyone has access to technology, but all have a right to contribute to decisions which affect them. This places a heavy burden on the mass media to include more investigation and interpretation of the actions of government than ever before. They will have access to information on behalf of the public at large, and it is a central feature of the media's role for it to use this availability for the widest public benefit.

4.32. Effective access to information

- Is there a policy on the provision of information which favours access, unless the case against access in a particular instance meets prescribed and narrow grounds, justifying its being withheld?

- Do rights of access to information extend to information held by local governments and state-owned enterprises? Does it include records of private companies that relate to government contracts?

- Are there clear procedures and effective guarantees for citizens and journalists to access the official information they require?

- If access to information is refused by a government department, is there a right of appeal or review? Is this independent of government?
- Do courts award punitive sums in libel cases involving public figures? If so, do these serve as a deterrent to the media?
- Do the courts give appropriate protection to journalists' sources?
- Is training given to officials in the proper handling of records and the making of information available to the public?

4.33. Public sector records

- Is there an official body with a legal duty for records maintenance (records tracking)?
- Are there clear administrative instructions on the maintenance of public records? If so, are these generally observed?
- Do citizens have a right of access to their personal files (other than those concerned with law enforcement) and the right to insist on corrections where these contain errors?
- Do public officials or others seeking information experience difficulties in obtaining it? If they do, what are the problems?
- What policies exist concerning the provision of information to the public (e.g. to service a complaint)?
- Can officials provide credible and timely audited accounts, and information about personnel numbers, etc?
- Does legislation cover the records of regions and districts (or their equivalents)

The constitution of Information Commissions at Center and States under the Right to Information Act, 2005 has attracted criticism for choosing mostly from bureaucrats after retirement. The law aimed at securing the independence of Information Commission in selection, appointment and removal processes, apart from giving appellate powers along with civil court authority. The search committee consisting of Prime Minister, Leader of Opposition and PM's nominee from Council of Minister would recommend the names for the positions of Information Commissioner and Chief Information Commissioner. But in practice the recommendation of PM and his nominee will become the recommendation of the Committee including that of leader of opposition. The Leader of Opposition suggests some names in the meeting but it is of no use because, the Prime Minister or Chief Minister (in case of states) and nominee of cabinet will have final say. In fact, the Leader of Opposition in

Andhra Pradesh was on record demanding that some of names suggested by him should be considered or else he shall be discontinued as member of the search committee. On building such institutions, the political party leaders should not think of filling the top position with their followers or persons of their choice but should select those who could do justice to the post of Information Commission. Though the law prescribes some qualifications and fields from which the people have to be selected, the strength of institutions depends on appointment of impartial personalities with integrity and character. The National Campaign for People's Right to Information urged the Government to be transparent in setting up the Information Commissioners. It also expressed concern for appointing retired and serving civil servants as Information Commissioners. Persons of eminence in public life with wide knowledge of and experience in law, science and technology, social service, management, journalism, mass media or administration and governance. The Act did intend or restrict these important posts to civil servants. The Information Commissioner is expected to ensure the transparency and liberal in interpreting the provisions of law in favour of disclosure than concealment. The bureaucratic mindset should be pursued and guided towards dissemination. Filling these positions in routine manner with bureaucrats would render the Information Commission with another layer of authority to decide in the same way as the steel frame of bureaucracy would do.

The Information Commissioner has an important role in developing systems and mechanisms for disclosure and dissemination of information, considering public interest and necessity of right to know. A lot has to be done by the Information Commissioners as the RTI Act left them with wide discretion, and there are no specific rules or guidelines in the Act, except broad outlines and objectives. A suggestion was also made that a person who has served in a particular ministry should not be made the Information Commissioner responsible for that Ministry because there would be a conflict of interest.

According to the Central Chief Information Commissioner Wajahat Habibullah, the Commission has to act as non-government orbiter which is not an interested party: an entity which could be expected to take a neutral and disinterested decision on the basis of the facts and the law[162]. The CIC explained the division of work and mechanism. There is an informal division of work to ensure the smooth functioning of the Commission and a clear demarcation of responsibilities. The allocation is in terms of hearing appeals of Ministries with departments and for interaction with States to ensure coordinated implementation of the Right to Information Act. Each Information Commissioner will have his own assigned work, but the Information Commissioner concerned may wish for another Commissioner to sit in with him or her for a particular case. To start with cases are received at the office of the registrar (who will be the joint secretary) and the deputy registrar. They will assign cases according to an informal division as laid down. The concerned registrar may also find that

[162] Interview with Chief Information Commissioner, The Hindu, November 4, 2005, page 11

the case does not qualify to go before the Commission and has a right to reject it, but that will be subject to the approval of the concerned Information Commissioner looking after the particular Ministry or Department.[163]

Most important aspect of the enforcement of access law is its publicity. People should know that they have a new right called right to information. The Commonwealth Human Rights Initiatives in New Delhi reported that there exists since the past one year right to information act in Assam. People of Assam are not aware of this discovery and probably not even of the Act. That is the situation regarding almost every law in India. Access law should find access to people.

The use of the access law can be better understood by experience. Let the people draw from the experience of others and go on asking for the information which might improve their civil life. Following are some of the instance reported in media, each of which will tell us the success story of effective use of right to information.

4.34. Ask the questions

Almost all of the people pay taxes. In fact it is everybody who pays tax that run the government. Even a beggar or beedi smoker on the street pays sales tax whenever there is a purchase. This money belongs to all of us. Let us try to know where does this money go? How it is being spent? Why are there no medicines in the hospitals? Why are the people dying of starvations? Why are the roads in such pathetic conditions? Why are the taps dry?

Every citizen has a right to question governments. The Right to Information Act empowers citizens to question governments, inspect their files, and take copies of government documents and also to inspect the government works.

People are using this new Right to hold governments accountable and to check corruption. The access to information will have a serious impact on corruption and arbitrary exercise of power. This information would include, for example in the context of maximum interface of the ordinary citizen with government, the following: For instance,

- Municipal Corporation improved quality of roads when people demanded copies of contracts.
- Street lights, which were not functioning for years, lit up with the use of right to information.
- People started getting rations after years when records of ration shops were sought.
- A number of people could get their work done without bribes and harassment using RTI.

[163] ibid

4.35. What can be asked?

Several things pertaining to public activity of public authority can be asked. Here are some of examples.

- All estimates, sanctions, bills, vouchers and muster rolls (statements indicating attendance and wages paid to all daily wage workers) for all public works.
- Criterion and procedure for selection of beneficiaries for any government programme, list of applicants and list of persons selected. P
- Per capita food eligibility and allotments under nutrition supplementation programmes, in hospitals, welfare and custodial institutions.
- Allotments and purchase of drugs and consumable in hospitals.
- Rules related to award of permits, licences, house allotments, gas, water and electricity connections, contracts, etc., list of applicants with relevant details of applications, and list of those selected, conditions of award if any.
- Rules related to imposition of taxes such as property tax, stamp duty, sales tax, income tax, etc., copies of tax returns, and reasons for imposition of a particular level of tax in any specific case.
- Copies of all land records.
- Statements of revenue, civil and criminal case work disposal.
- Details of afforestation works, including, details of land/sites, species and numbers of plants, expenditure on protection.
- List of children enrolled and attending school, availing of scholarships and other facilities.
- Rules related to criterion and procedure for selection of persons for appointment in government, local bodies or public undertakings, copy of advertisement and/or references to employment exchange, list of applicants with relevant details, and list of beneficiaries elected.
- Prescribed procedures for sending names from employment exchanges, relevant details of demands from prospective employers, list of candidates registered and list referred to specific employers.
- Rules related to criterion and procedure for college admission, list of applicants with relevant details, and list of persons selected.
- Copies of monthly crime report.

- Details of registration and disposal of crimes against women, tribals and dalits (literally the oppressed, groups traditionally subjected to severe social disabilties) and other vulnerable groups, crimes committed during sectarian riots and corruption cases.
- Number and list of persons in police custody, period of and reasons for custody.
- Number and list of persons in custodial institutions including jails, reasons for and length of custody, details of presentation before courts etc.
- Mandatory appointment of visitors committees to every custodial institution, with full access and quasi-judicial authority to enquire into complaints.
- Air and water emission levels and content with regard to all manufacturing units, coupled with the right of citizens' committees to check the veracity of these figures; copies also of levels declared safe by government authorities, to be published and made available on demand.

Questions are plenty and increase as people go on asking. Putting questions to a public authority puts the public authority on alert and administration will be accountable. The chance of corruption will be reduced as the scope for hiding is drastically cut when a public eye is watching the activities.

CHAPTER V
MEDIA AND JOURNALISTS

5.1. Working Journalists Act and Wage Boards for Newspaper Employees

To ensure minimum wages to the journalists working in newspapers, the Government of India has passed an enactment, the Working Journalists and Other Newspaper Employees (Conditions of Service) and Miscellaneous Provisions Act 1955. This is the result of prolonged agitations by working journalists. This Act made it mandatory for employers to pay salaries fixed by the wage board constituted especially for security of office and welfare of the journalists.

This Act is brought into existence to regulate the working conditions of the working journalists and ensure proper wages and stability of employment. This was necessitated to recognize the significance of the media of the press, though under the control of private enterprise, and the need was felt to regulate in the interest of protecting the freedom of speech and independence of journalists. One of the significant aspects of this law is that an independent wage board is envisaged to be constituted for fixing a just and reasonable salary for the working journalist, and to make it a statutory obligation of the management to pay it without allowing any defence on the basis of economic viability of the media organization. The Working Journalists (Amendment)Act 1962, The Central Labour Laws (Extension to Jammu and Kashmir) Act, 1970, The Working Journalists (Conditions of Service and Miscellaneous Provisions (Amendment) Act 1974, The Working Journalists and Other Newspaper Employees (Conditions of Service) Miscellaneous Provisions (Amendment) Act 1981, The Working Journalists and Other Newspaper Employees (Conditions of Service) Miscellaneous Provisions (Amendment) Act, 1989, The Working Journalists and Other Newspaper Employees (Conditions of Service) Miscellaneous Provisions (Amendment) Act 1996 were passed to amend the Working Journalists Act from time to time.

What is a Newspaper?

The expression "newspaper" is defined by section 2(b) of the Act as follows: " "Newspaper" means any printed periodical work containing public news or comments on public news and includes such other class of printed periodical work as may, from time to time, be notified in this behalf by the Central Government in the Official Gazette."

Whether the publisher of judgments with head notes, the All India Reporter, is a newspaper was the question before the Bombay High Court. The High Court held that All India Reporter was not a newspaper in 1983[164]. But the Supreme Court reversed this

[164] All India Reporter Limited v. State of Maharashtra, (1983) II LLJ 387 (Bom)

decision. Law reports are held to be newspapers and their employees should be extended the benefit of order of Central Government made on Recommendations by Palekar Award, Which was constituted under the Working Journalists Act. Palekar Tribunal was the first Wage Tribunal which determined the wage structure for the journalists. This decision was given in ***All India Reporter Karamchari Sangh vs. All India Reporter Ltd.*** [165]

The question which arose for consideration in this case was whether the law reports namely, All India Reporter, Criminal Law Journal, Labour and Industrial Cases, Taxation Law Reports, Allahabad Law Journal and U.P. Law Tribune published by the 1st respondent, All India Reporter Limited, are newspapers as defined in the Working Journalists and Other Newspaper Employees (Conditions of Service) and Miscellaneous Provisions Act, 1955 (Act No. 45 of 1955) (hereinafter referred to as 'the Act') and whether the employees of the 1st respondent engaged in the production or publication of the said law reports are entitled to the benefits conferred upon the employees of newspaper establishments by the Act.

After referring to the definition of the expression `newspaper' in the Press and Registration of Books Act, 1867, the Indian Post Offices Act, 1898, the Parliamentary Proceedings (Protection of Publication) Act, 1956, the Delivery of Books and Newspapers Act, 1956 the Newspaper (Price and Page) Act, 1956, etc. the High Court of Orissa held that the Cuttack Law Times was not a newspaper because according to it the necessary pre-requisite of a periodical in order to make it a newspaper was that it should contain mainly public news or comments on public news and that books containing authoritative reports for future reference could, by no means, be said to contain news so as to become newspaper.

Supreme Court observed that it is significant that the expression `newspaper' as defined in the Act includes not merely `public news' but also `comments on public news'. Every law report contains the editorial note at the commencement of the decisions printed therein and also comments on some of the recent decisions. Law reports also contain, newly enacted Acts, Rules and Regulations, book reviews and advertisements relating to law books handwriting and finger print experts etc., speeches made at conferences in which the legal fraternity is interested etc. Though the publication of these items by itself may not occupy a substantial part of a law report to make it a newspaper, the publication of the recent judgments itself is sufficient to make a law report a newspaper which may after some time cease to be a newspaper and become a book of reference. The Act in question is a beneficent legislation which is enacted for the purpose of improving the conditions of service of the employees of the newspaper establishments and hence even if it is possible to have two opinions on the construction of the provisions of the Act the one which advances the object of the Act and is in favour of the employees for whose benefit the Act is passed has to be accepted.

[165] AIR 1988 SC 1325

Supreme Court finally held that the law reports published by the All India Reporter publishers are newspapers and the employees employed by them in their publication of law reports should be extended the benefit of the orders passed by the Central Government on the basis of the recommendations made by the Palekar Award.

A "newspaper employee" is defined by section 2(c) of the Act as any working journalist, and includes any other person employed to do any work in, or in relation to, any newspaper establishment. "Newspaper establishment" is defined by section 2(d) of the Act as an establishment under the control of any person or body of persons, whether incorporated or not, for the production or publication of one or more newspapers or for conducting any news agency or syndicate. The expression "working journalist" is defined by section 2(f) of the Act as a person whose principal avocation is that of a journalist and who is employed as such, either whole time or part-time, in or in relation to, one or more newspaper establishments and includes an editor, a leader-writer, news editor, sub-editor, feature-writer, copy-tester, reporter, correspondent, cartoonist, news-photographer and proof-reader, but does not include any such person who is employed mainly in a managerial or administrative capacity, or being employed in a supervisory capacity, performs, either by the nature of the duties attached to his office or by reason of the powers vested in him, functions mainly of a managerial nature. A "non-journalist newspaper employee" means any person employed to do any work in, or in relation to, any newspaper establishment, but does not include any such person who is a working journalist, or is employed mainly in a managerial or administrative capacity or being employed in a supervisory capacity, performs, either by the nature of the duties attached to his office or by reason of the powers vested in him, functions mainly of a managerial nature as stated in section 2(dd) of the Act.

Newsagent is, held, not to be a working journalist as his principal avocation was not journalism[166].

Wages means all remunerations capable of being expressed in terms of money, which would, if the terms of employment, express or implied, were fulfilled, be payable to a newspaper employee in respect of his employment or of work done in such employment, and includes:

I. such allowances (including dearness allowance) as the newspaper employee is for the time being entitled to;
II. the value of any house accommodation, or of supply of light, water, medical attendance or other amenity or of any service, or of any concessional supply of food-grains or other articles;
III. any travelling concession, but does not include-

[166] (1986) II LLJ 72 Kant)

a) any bonus
b) any contribution paid or payable by the employer to any pension fund or provident fund or for the benefit of the newspaper employee under any law for the time being in force;
c) any gratuity payable on the termination of his service.

Explanation: In this clause, the term 'wages' shall also include new allowances, if any, of any description fixed from time to time. 2 (eee). This definition was included by amendment in 1989.

Apart from definitions given in the Act, the definitions available under Industrial Disputes Act 1947 are also applicable for the interpretation of labour problems of the working journalists. Section 3 and Section 2(g) make this amply clear. General Labour Welfare legislations do apply to the Working Journalists while the Working Journalists Act provides certain special safeguards and fixed wage structure coupled with a statutory obligation on the management to pay irrespective of its financial capacity.

Section 9 of the Act authorises the Central Government to appoint a Wage Board consisting of two persons representing employers in relation to newspaper establishments; two persons representing working journalists; and three independent persons, one of whom shall be a person who is, or has been, a Judge of a High Court or of the Supreme Court and who shall be appointed by that Government as the Chairman thereof for the purpose of making recommendations with regard to fixation or revision of wages of working journalists. Similarly, section 13C of the Act provides for the constitution of a Wage Board for the purpose of making recommendations regarding the fixation or revision of the rates of wages in respect of non- journalist news-paper employees. Section 13AA which was inserted by Act 6 of 1979 provides for the constitution of a Tribunal for fixing or revising rates of wages in respect of working journalists where the Central Government is of opinion that the Board constituted under section 9 for the purpose of fixing or revising rates of wages in respect of working journalists under the Act has not been able to function effectively. That Tribunal has to consist of a Judge of the High Court or of the Supreme Court. Similarly section 13DD of the Act empowers the Central Government to constitute a Tribunal where it is of opinion that the Board constituted under section 13C of the Act has not been able to function effectively. Section 13AA and section 13DD of the Act came into force with effect from January 31, 1979. In the exercise of the powers conferred by section 13AA and section 13DD of the Act, the Central Government constituted under two separate notifications two Tribunals on 9.2.1979 with Justice Palekar, a former Judge of the Supreme Court, as the member of each of the two Tribunals to make recommendations in respect of fixing or revising wages of working journalists as well as non-working journalists. Justice Palekar made his recommendations on 12.8.1980. In exercise of its powers under section 12 of the Act the Central Government accepted a part of the recommendations and made an order thereon on

26.12.1980 and accepted the remaining part of the recommendations and made another order thereon on 20.7.1981.

Applicability of Industrial Dispute Act 1947:

While provisions of Industrial Dispute Act 1947 are made applicable to working journalists, some changes were also proposed under Section 3 of Working Journalists Act.

Period Notice in Retrenchment:

The period of notice to be given to workers for retrenchment under Industrial Dispute Act is not applicable to working journalists. The period of notice of retrenchment for editor is six months and for other working journalists, it is three months. (S 3)

Payment of Gratuity:

S 5 deals with the Payment of Gratuity for Working Journalist with three years of service on termination (other than by punishment) or retirement, or voluntarily resigns, or dies in service. Under above circumstances the working journalist shall be paid 15 days average pay for every completed year of service or part in excess of 6 months. Section 5A which was inserted in 1962 Amendment, says that a working journalist can nominate a nominee to receive gratuity, in which case the nominee alone shall be entitled to receive the same, except where he predeceases the working journalist.

Working Hours:

Section 6 fixes Hours of work as not more than 144 hrs in 4 weeks and says that the Rest day must be provided for not less than 24 hours for every seven days of work.

Fixation of wage rates

The Central Government is empowered to fix or revise the wage rates for the working journalists through Wage Boards. (s 9)

Wage Board has to be constituted with 3 representatives of employers, working journalists, four independent persons under chairmanship of High Court or Supreme Court former Judge.

The Board has to issue Notice to newspaper establishments, working journalists and other persons to give representations for fixing wages for working journalists, based on cost of living comparable employment etc. (S 10) Wage Board has Powers of Industrial Tribunal under ID Act. (S 11) On recommendations of the Wage Board, the Center can issue an order notifying the wage fixation. The Center has power to enforce recommendations of the Wage Board under Section 12. Center can modify the recommendations without altering the

character of the recommendations. The Working Journalists entitled to wages at rates not less than those specified. (S 13) The Government can also fix interim rates of wages (13A). Government can constitute the Wage Board for fixing or revising rates of wages in respect of working journalists by notification, under Section 13AA.

Chapter II of the Act deals with certain conditions of service of the working journalists. Those provisions relate to the retrenchment, payment of gratuity, hours of work, leave, fixation or revision of wages etc. Chapter IIA deals with the non-journalists employed in Newspaper organizations. According to Section 13B the Revision of wages for non journalist employees for time work or piece work, can be done by center through the wage board.

Chapter III deals with the Application of certain Acts to Newspaper Employees. The provisions of Industrial Employment (Standing Orders) Act, 1946, are made applicable by Section 14 to newspaper establishment with 20 or more employees.

Provident Fund Act:

Section 15 says that the Employees Provident Fund Act 1952 shall apply to every newspaper establishment in which twenty or more persons are employed on any day as if such newspaper establishment were a factory to which the aforesaid Act had been applied by a notification of the Central Government under Sub-Sec (3) Sec 1 thereof, and as if a newspaper employee were an employee within the meaning of that Act.

Inconsistent Agreements:

Chapter IV dealing with miscellaneous aspects provide a safeguard to working journalists. As per section 16, the agreements inconsistent with provisions and protections available in law or in the terms of award, agreement or contract of service whether made before or after the commencement of working journalists act would be void. Such Agreements are not valid and not enforceable even if signed by the working journalists. (S16)]

No dismissal by reason of liability for payment of wages

Section 16A says that Employer shall not dismiss, discharge or retrench any newspaper employee by reason of his liability for payment of wages at the rates specified in an order of the Central Government.

Recovery of Money from Employer through the Government:

Section 17 provides for Recovery of money from employer, through state, Collector, or by reference to Labour Court. Where any amount is due under this Act to a newspaper employee from an employer, the newspaper employee himself, or any person authorized by

him in writing in this, can make an application to the State Government or such authority as the State Government may specify in this behalf, which shall issue a certificate for the amount to collector, and the Collector shall proceed to recover that amount in the same manner as arrears of land revenue.

If there is any dispute regarding amount due, State Government may on its own motion or upon application made to it, refer the question to any Labour court. The decision of the Labour court may be executed through the collector.

Section 17A imposes a duty on management to maintain the registers, records and master-rolls. Under Section 17B State can appoint inspectors for ascertaining compliance of provisions of this Act. Section 18 says that a penalty for contravention extending up to Rs 200 and if the same employee is again convicted for same offence the penalty can be extended up to Rs 500.

According to Section 19 no suit or prosecution shall lie against Chairman or member of board or inspector for their acts done in good faith. Section 20 gives the central government the power to make any rules by notification in official gazette to carry out the purposes of this Act.

Accordingly the Central Government passed Rules explaining gratuity, hours of work, holidays, leave and forms for maintenance of registers etc in 1957. Working Journalists and Other Newspaper Employees Tribunal Rules in 1979, Working Journalists Wage Board Rules in 1956, Working Journalists (Fixation of Rates of Wages) Rules in 1958, were also passed.

Latest Wage Board Questioned

Latest wage board is the G. R. Majithia Wage Board which recommended increased pay scales for the working journalists. The Union Govrnment has notified the salaries fixed by the Majithia Wage Board. Then the newspaper owners joined together and started a legal battle. However, the ABP Pvt Ltd, publishers of leading dailies Anandabazar Patrika and the Telegraph has challenged in the Supreme Court these recommendations for the newspaper industry as well as the Working Journalists Act under which wage board has been constituted. Two more such petitions were also filed. The Indian Newspapers Society unanimously decided to challenge the Wage Board and the enactment.

The writ petition filed under Article 32 has submitted that the Working Journalists and Other Newspaper Employees (Conditions of Service) and Miscellaneous Provisions Act, 1955, be declared illegal, null and void and ultra vires the Constitution of India. Petitioners challenged legality and constitutionality of the wage boards and the Working Journalists Act.

They pleaded that the wage boards be declared ultra vires this 1955 Act, and that the Majithia wage board award and its recommendations be hence declared unconstitutional and illegal.

The employers of newspaper have contended in writ petition that the Article 19 (1) (a) guarantees the freedom of the Press, that is, freedom of owners to carry on their duties including the dissemination of information without onerous and prohibitive restrictions. They also contended that the 1955 Act amounts to a gross violation of the petitioners' right to carry on a newspaper business which is a basic fundamental right, guaranteed under the Constitution of India. The right of freedom of speech and expression, as guaranteed under Section 19 (1) (a) of the Constitution, is not a right that is restricted merely to freedom to write and publish whatever the author considers proper, but also includes the freedom to carry on the business of the Press.

The writ also says that Sections 8 and 9 of the Working Journalists Act are vague, ambiguous and confer unchartered powers on the wage board to determine wages and are hence violating the petitioner's right under Article 19 (1) (g) of the Constitution. In this context, writ petition has separately pointed out that the Majithia wage board's recommendations were beyond its jurisdiction as it has dealt with issues like retirement, pension and assured promotion and there was hence a serious jurisdictional error which would vitiate such recommendations. The petitioner also says that no other industrial establishment of national importance is regulated in this form and required to pay wages and other elements on the basis of a wage board and that this amounts to hostile discrimination. Further, the petition also flags the constitution of the latest Majithia wage board as it contends that the so-called independent members were not truly independent and alleges that this resulted in apparent bias, which it says violates Article 14 of the Constitution of India.

Newspaper owners questioned the very necessity of constituting a wage board only for the newspapers while no such boards are being constituted for other media and other industry. The National Commission on Labour, headed by the former labour minister Mr Ravindra Verma, had in its report submitted in 2002 recommended that there was no need for any wage board, statutory or otherwise, for fixing the wage rates for workers in any industry. Hence, the petition has pointed out that there was no justification for constituting the wage boards for journalists and non-journalists in 2007. Petitioners also pointed out that the practice of setting up wage boards in other industries has long been discontinued as it was felt that employers and trade unions have achieved sufficient maturity to bilaterally decide issues regarding wage fixation. There are no wage boards in other media sectors like television, radio, Internet, etc. Hence only newspapers have been singled out for this discriminatory treatment. The owners of newspapers also questioned the process and procedure adopted by the Majithia Wage Board saying it did not follow the prescribed procedure and this was a material irregularity as the draft report was prepared without any

prior consultations or without the tentative proposals being circulated among members. They claimed that stakeholders were not even given a chance to consider the financial viability of the print media or the capacity of the newspaper establishment to bear the additional wage burden imposed by the award. The petitioners were contending that the data used by the wage boards for determining the wage rates was not representative of the cross-section of the industry and the decision was only made on the basis of the available financial information which did not reflect the cross-section of the industry. The Supreme Court has issued notice to the Center. The case is pending before the apex court.

5.2. Media and Press Council Act

The First Press Commission observed perversities in profession, yellow, sensationalism, malicious and irresponsible attacks, objectionable writings, indecency, vulgarity, and recommended constitution of a Press Council for protecting the professional standards and independence of the Press besides providing a forum for hearing complaints against and by the press. The First Press Council was constituted under the chairmanship of Justice Mudholker, in 1966.

In 1975, the Press Council was abolished by the Central Government in Emergency, but was revived during Janata Government in 1978.

The Sweden, UK (Press Complaints Commission), US (National News Council) have Press Councils with similar objectives.

Justice G N Ray, former chairman Press Council said that the Press Council of India was born out of the anxiety of our constitutional fathers to ensure that democracy can flourish only where its citizens enjoy full freedom of speech and expression subject only to reasonable restrictions.

Constitution of Press Council:

The Press Council is a body corporate, a juristic personality functioning under the chairmanship of a person with legal background, with 28 members. It has quasi judicial functions. The Council consists of 13 working journalists, which includes 6 editors and 7 working journalists. Six representatives are chosen from management of newspapers. The Newspapers are classified as big if they have more than 75000 circulations, medium for circulation between 25000 and 75000 and small with less than 25000, each class can send two representatives to the Press Council of India. There will be one member from news agency management also. The Council shall also consist of three members with special knowledge on education, science, law and literature chosen from UGC, Bar Council and Sahitya Academy. Besides, it will have five Parliamentarians out of which three are chosen from Lok Sabha and two from Rajya Sabha. Its term will be three years.

Inquiry Committee:

The Press Council can constitute an Inquiry Committee with 11 of its members, to function as a quasi judicial body to hear complaints. The purpose is to maintain independence and freedom of press, to build up code of conduct, ensure maintenance of high standards of public taste, foster due sense of rights and responsibilities, watch developments restricting dissemination of news, study of newspapers, to hear complaint against newspaper or agency for offending standards of journalistic ethics or public taste or for committing any professional misconduct. It can hold inquiry after giving due opportunity to the person against whom the complaint is lodged with the Press Council. It has power to censure, and functions with the powers of a civil court. It can take issues suo moto. The Council can hear complaints by press against Government or other individuals for interfering with the functioning of press or threatening or doing any act which hinders their independent working or forces them to write against their will or reason.

Working of Press Council:

The Press Council has heard 800 complaints from 1966 to 1981, out of which 214 complaints involving freedom of press against the state and central governments, alleging discrimination in release of advertisements, denial of facilities and other kinds of harassment. However there were 566 complaints against newspapers by individuals and Government officers. Thereafter there was a tremendous increase in complaints.

Press Council and Code of Conduct:

The Most important duty of the Press Council is to frame a code of conduct to protect ethics of journalism. There is a view that if a code is framed it would be another restriction on Freedom of speech and Expression or Freedom of Press. The Code of Conduct has to be built case by case or the Code has to be prepared voluntarily by professional bodies to be enforced by Press Council. There is a demand for constituting the Regional Press Councils or reconstituting the press Council as Media Council to extend its scope to include various other forms of media. There is also a demand for providing more powers to the Press Council to make effective enforcement of ethical standards and its directions, which was opposed by a section as that works out to be an unreasonable restriction on the press. Another important function of the Press Council could be the training activity by which a media as a professional body will be strengthened.

Standards in Journalism

In order to check abuse of the press and yellow journalism there is a need to setup a body which could serve as a watch dog over the standards of journalism and functioning of the newspaper. The Press Council is such a forum where the grievances against the press by the readers and other criticised individuals and complaints by the journalists against the

authorities are addressed. This institution is intended to ensure a high standard of responsibility on the part of the Press, prevent the abuse by the press, and to arrest yellow journalism i.e., the publication of matters which debase public taste or indulge in intrusion into public lives even though such publication may not be punishable under the provisions of the existing law. At the same time this institution has been entrusted with responsibility of maintaining the freedom of the Press against unwarranted Governmental intrusion.

The Press Council Act. 1965 was repealed during Mrs. Gandhi regime, by enacting the Press Council (Repeal) Act 1976 and the Press Council was abolished with effect from January 1976. The grounds mentioned for abolition are that the press council has failed to set out and enforce any code of conduct, as envisaged by the Act of 1965, and that it also failed to build up any respectable body of case law because only complaints of minor importance were dealt with by the Council.

The Janata Government has enacted a fresh Press Council Act in 1978 to revive the Press Council with different composition and powers. The Press Council witnessed incidents that served to heighten the sense of effectiveness of the press manifested in ready acceptance of the responsibility and restraint by the print media. It was also weighed down by the hasty reporting of the happenings in the States like Punjab and Jammu and Kashmir. At the same time the council felt concerned at the increasing violence against the pressmen and other members of the fourth estate[167].

To ensure the high standard of public taste and responsibility in journalism the Press Council is empowered to build up a code of conduct for newspapers, agencies and journalists in accordance with high standards of profession. But the Press Council has taken a different view with regard to formulation of code of conduct. It said that any formal code would attain rigidity like a statute and that a better way would be to build up a code by a case-to-case treatment in course of time. The Second Press Commission has endorsed this view[168]. It is advised that the task of building the code of conduct must be left to voluntary action on the part of the Press or by way of self-restraint.

The Council took suo-motu cognizance of the incidents of violation against media persons and threats to press freedom. For example: Alleged hindrance of media persons in the discharge of their professional duties by the armed forces in Jammu and Kashmir on the basis of news reports titled “Media resents curbs” and “Valley Simmers newspapers suspend publication, say more may backfire” published by The Hindustan Times in its issue dated 8.7.2010. On perusal of the report, Hon’ble Chairman requested Hon’ble Chief Minister of Jammu & Kashmir to take personal intervention to ensure that the media is able to discharge

[167] Press Council of India.6th Annual Report, 1984. p1
[168] Report of Second Press Commission (1982} Vol I paras 27, 32

its duties without any fear or hindrance. Reports from the State Government and the newspaper were called for. Hon'ble Chief Minister of J&K vide his D.O. letter assured that no further action was taken against the newspapers and stated that he is an ardent supporter of freedom of press but it is equally necessary that the press conducts itself in a mature and responsible manner and does not distort or misreport facts.

Changing scenario of Media and Ethics: Monopoly Trends

> Press Council Chairman G N Ray in his foreword to Annual Report 2010-11 wrote:
> I am sorry to note that there has been paradigm shift in the functioning of media as a whole with no exception to print media in our country for quite some time past, propelled by various reasons including globalisation, corporatisation of media houses and above all ever increasing propensity to adopt a mind set for deriving higher and higher profits like ordinary commercial venture, thereby sacrificing the primary goal of a media house to remain deeply attached with a mission of being a vibrant partner of democracy[169].

The "paid news syndrome" i.e. reporting untruly and unfairly for monetary consideration both during the electoral process and also in day to day commercial activities have shocked the conscience of the Nation and obviously of the Press Council of India, the statutory regulatory body of the Print Media in India, Mr. Ray said.

Malpractices and Paid news

Another unethical practice Justice Ray spoke[170] about was the malpractices and corruption. Media, like other institutions has also succumbed to the vice of malpractices and corruption. In media, such malpractices operate in both explicit and implicit forms. Yellow journalism and blackmailing were the known forms of corruption in journalism. But in today's media functioning, subtle and implicit form of corruption is creating greater mischief. The distortion, disinformation and 'paid news syndrome' aimed to serve certain interests and suppression of news and concerns of other interests have become a usual feature in media. The promotion of certain politicians and political groups, business magnets, commercial and industrial interests, products and services, and entertainment programmes through induced news and favourable articles and in the process, maligning rivals through interviews, articles, reports, so called surveys and reviews have ushered in an era of tainted communication. In the last Parliamentary election media in general and print media in particular has indulged in nefarious monetary deals with some politicians and candidates by agreeing to publish only their views not as advertisements but as news items and not to publish the view points of other candidates and even publish news items against rival candidates as desired by the other party in exchange of specified amount of money. This paid news syndrome was so rampant

[169] http://presscouncil.nic.in/HOME.HTM, Annual Report 2010-11
[170] http://indiacurrentaffairs.org/the-changing-face-of-indian-media-justice-g-n-ray/ 4.8.2012

that voices of concern were raised by members of various journalists' unions and also members of civil society and eminent media personalities. Shortly after election, the Andhra Pradesh Union of Working Journalists in association with others held a seminar in Hyderabad to express their concern about this malpractice.

Newspapers enjoy freedom of speech and expression as the watchdog of the nation and as a representative voice of the people with a solemn duty to inform the people and the government correctly and dispassionately. They do not enjoy freedom of speech and expression to misinform and give distorted news and project views of a particular party or group in the guise of news for monetary consideration.

Proposal to convert into Media Council of India

When the Press Council of India was constituted in 1966, the electronic media, excepting broadcasting under the sole authority of the government, was not in existence in our country. Therefore, the Indian Parliament had no occasion to consider for regulation of electronic media. This media has come in a very big way in every corner of India and having visual impact, has become a very powerful source of news and entertainment communication process. The electronic media needs proper regulation without any delay. The Press Council of India has been proposing for years to be converted as Media Council of India by reframing its constitution thereby providing for appropriate representation of peer body of electronic media. Sooner such integrated regulation is made, it is better for the country.

CHAPTER VI

TRIAL BY MEDIA

General question is: whether media reporting influences the people in power and effect a change in the policy or program? Answer to these questions depends upon the standards of reporting and maturity of legal authorities including judges or rulers. However, media generates an opinion, provokes viewpoints which certainly will impact the administrator's decisions. But the first question which is about media influencing the judges will have a serious impact on the rights of people and on the administration of justice.

Investigation in the Arushi murder case has raised disturbing questions about the role of the police and media. The Supreme Court intervened into the investigation of the murder case of teenaged Arushi Talwar, which has shown how the proclivity of the police to go to the media with half-baked stories and theories, and the latter's trigger-happy reporting can completely muddle the search for truth. The case has raised several issues pertaining to the manner, in which information is leaked out, the victims' family's rights, journalistic ethics, the police and the media's liability for defamation and the people's right to know.

The Supreme Court cautioned the media (on 9th August 2010) against irresponsible reporting affecting the honour of a crime victim. Advocate Surat Singh filed a Public Interest Litigation in the Supreme Court in 2008 seeking restraint in reporting in the wake of "wild allegations" levelled by Noida police, which first investigated the Aarushi Talwar murder case. The Bench comprising Justices Altamas Kabir and A K Patnaik passed the order after counsel for Arushi pointed out the repeated telecasts casting aspersion on the character of the victim, the Talwars and their deceased servant. Surat Singh asked, "Can freedom of press be allowed to degenerate into a licence to malign the character of a dead person? Does our Constitution not guarantee the right to privacy even to the dead?" He sought the court's restriction on reportage till the investigation was complete. Arushi's father also sought similar restraint on media. Talwar said the reporting by a section of the electronic and print media was prejudicing their case and damaging their reputation.

With the police dishing out these types of comments, the media went down maligning the family and Arushi's friends and acquaintances. They spoke of the family's life style, Arushi's habits, her relationship with her friends and of course about the servant. Words such as relation, affair, nexus, closeness and friendship were used out of context to give rise to further suspicion and speculation. The state of the Talwars and Durranis marriages were questioned and rumour, bit of gossip or loose remark gave rise to 'breaking news' or 'turning point'.

As an interesting aside to this tirade the media trained its guns on the CBI reporting that it had begun an internal inquiry against those who had leaked information. It also reported that two officials had been sent on leave, a claim denied by CBI Director Vijay Shankar who

warned: "If any one person, whether a simple man, a CBI official or person in a specific business tries to obstruct the investigations, he would be dealt with….'' Shankar also lashed out at the speculation in the media.

After some interval the CBI alleged that a neighbour's servant, Krishna, had assaulted Arushi with the help of his associates Raj Kumar and Shambhu and had killed the servant as he was a witness to the murder. Former CBI Director, Arun Kumar, asserted in a July 2008 press conference that Krishna had confessed to the murder however they failed to gather evidence and were unable to file charges against the suspects. Meanwhile, no murder weapon has been found and the CBI has said that it was not a case of honour killing. Who should the media & the people believe - CBI or the Noida Police?

The credibility of the investigating agencies was further put to test when it was found that Arushi's DNA samples had been tampered with and an officer of the CBI told the media that the three who were suspected to have committed the murders did not have the resources to tamper with evidence. As part of the standard autopsy procedure, New Okhla Industrial Development Area-based doctor Sunil Dohere had drawn vaginal swabs from Arushi's body and reported that the swabs contained a white discharge, suggestive of seminal fluid. However, his superior, Dr. S.C. Singhal, later told the media that slides prepared from the swabs had tested negative for semen. Officials at the CDFD, India's premier DNA-testing institution, said there was indeed no semen in the slides sent to them by the CBI and added that corroborative testing left no doubt the material was not drawn from Arushi in the first place. (The Hindu, September 4, 2009).

The other significant issue thrown up by the case is the people's right to know details about a brutal crime and the progress being made by investigators. At such times public morale is low and it is the duty of the state to reassure them. The question is the extent to which revelations, which may constitute baseless speculation, may be made. Hearing a petition on November 7, 2008 the Delhi High Court (Indian Express, November 8, 2008) slammed senior police officers for rushing into press conferences to disclose "leads which are not leads at all" in sensational cases with little concern for an "honest" probe. ``Press conferences are hampering your own investigations. As an investigating body, don't you know how to preserve your evidence... these press conferences are giving away leads," a Bench of Chief Justice A P Shah and Justice S Muralidhar told senior Delhi Police counsel Mukta Gupta.

However, the right to know cannot authorize the police or media to make baseless character assassinations. While officers can be held responsible for information given during press conferences, who is responsible for the leaks by `reliable sources'? The need is for the establishment of some norms and guidelines on how information may be disseminated during such cases.

Another worrisome aspect of the 'trial by media' is that it has become a medium for character assassination of the victim. This character assassination is being used as a vital weapon by the person(s) accused of sexual offence. For instance, a blog was created to defame and demoralize the victim in the *Ayub* case. It could not be ascertained as to who was

the creator of the blog, its content made it amply clear that it was the mouthpiece of the school management. The blog claimed that it was created to foil the "malicious attempt to defame the director and the school" and lists in detail the victim's family background, her parents, siblings, amongst others.

Can Law Come to the Rescue of Victims?

The law makes it very clear that it would be a crime to reveal the identity of the victim of sexual assault. Section 228A of Indian Penal Code 1860 (IPC), which was introduced in 1983, prescribed 2 years of imprisonment and fine for this offence. The Supreme Court in ***Dinesh @ Buddha vs State of Rajasthan*** observed, "Section 228A of IPC makes disclosure of identity of victim of certain offences punishable ... True it is, the restriction does not relate to printing or publication of judgment of High Court or Supreme Court. But keeping in view the social object of preventing social victimisation or ostracism of the victim of a sexual offence for which sec. 228A has been enacted, it would be appropriate that in the judgments, be it of this court, High Court or Lower Court, the name of the victim should not be indicated."

One cannot ignore cases wherein media has played a positive role in drumming up public support against apparent injustice. It was because of media's relentless campaign in high profile murder cases of Jessica Lal, Priyadarshini Mattoo, and Nitish Katara that citizens were able to highlight injustice through mass peaceful protests/ rallies and appearance in media, both print and electronic. Notably, talk-shows of various news channels provided platform to the citizens to raise these burning issues and demand justice.

Priyadarshini Mattoo Case

Santosh Kumar Singh, son of a senior IPS officer, was accused of raping and brutally killing Priyadarshini Mattoo, a 25-year-old law student, in 1996. In 1999, the trial court acquitted him quoting manipulation of evidence by influential father of accused. The Delhi High Court in 2006 held him guilty and awarded him death penalty since his guilt was proved ''beyond any doubt by unimpeachable evidence,'' including DNA fingerprinting. It is relevant to refer here to the remarks of the then Chief Justice of India, Justice Y.K Sabharwal, who gave full marks to the media for being instrumental in spurring the judiciary into action in the instant case, which had been lying in cold storage for years. Undoubtedly, the media played a crucial role in pointing out the lacunae in the administration of justice which ultimately led to prompt action being taken.

Jessica Lal Murder Case

Manu Sharma, son of a wealthy politician in Haryana, was accused of killing Jessica Lal in 1999, because she refused to serve him liquor in a restaurant where she was working as a bar-

maid. A long and protracted trial followed which lasted seven years. In 2006 all the accused were set free due to lack of evidence. The case was re-opened following public outcry publicized extensively in the media. In the immense uproar, hundreds of thousands of people e-mailed and sent text messages conveying their outrage on petitions forwarded by media channels and newspapers to the President. A poll conducted by a leading newspaper showed that on a scale of 1 to 10, the public's faith in law enforcement in India was as low as 2.7. The prosecution appealed and the Delhi High Court conducted proceedings on a fast track with daily hearings over a month. The lower court judgment was found faulty in law, and Manu Sharma was found guilty. He was sentenced to life imprisonment in December, 2006.

There is an interesting comment on Jessica Lal murder reporting: "The disparity between the reality and the public knowledge of that reality can be attributed to the media. *The light will determine the shadows cast*. Some accused persons are lovable, some are martyrs and some turn out to be criminals".[171]

Nitish Katara Murder Case

Nitish Katara, a young business executive, was murdered in 2002, by Vikas Yadav, son of an influential politician of Uttar Pradesh, and his cousin brother. The trial court had held that Nitish's murder was an honour killing because the family of the accused did not approve of the victim's relationship with the sister of the accused. The ensuing trial followed the path of similar cases which involve "money and muscle power" in India. A number of respectable witnesses, including key friends of both the victim and the girl, repudiated their initial testimony. The person in the eye of storm, Bharti Yadav, too retracted her initial verbal statements wherein she had admitted to her relationship with the victim. However, owing to intense media scrutiny, and also the strength of the evidence, a New Delhi fast track court awarded life sentence to the accused and his accomplice in May 2008. In the end, the victim's mother, Neelam Katra, who fought the six year long legal battle, thanked the media for supporting a just cause.

Right to fair trial includes the right to be tried an unbiased or prejudiced judge. This right was enunciated in ***Bhajan Lal, Chief Minister, Haryana v. Jindal Strips Ltd.***[172] The right to fair trial is guaranteed under the Constitution. It entitles a litigant to adjudication of a cause by a judge who is perceptibly and demonstrably unbiased and without prejudice.

[171] Navajyoti Samanta, *Trial by Media-Jessica Lall Case*, http://ssrn.com/abstract=1003644..

[172] 1994 (3) SCALE 703, (1994) 6 SCC 19.

In ***Zahira Habibullah Sheikh v. State of Gujarat***[173], the Supreme Court explained, "*Denial of a fair trial is as much injustice to the accused as is to the victim and the society. Fair trial obviously would mean a trial before an impartial Judge, a fair prosecutor and atmosphere of judicial calm. Fair trial means a trial in which bias or prejudice for or against the accused, the witnesses, or the cause which is being tried is eliminated.*"

Negative impact of sensational journalism

Sensational journalism has also had an impact on the judiciary. For instance, a 'trial-by-media' began almost immediately after terrorist Afzal's arrest in the attack on the Indian Parliament case. Only one week after the attack, on 20 December 2001, the police called a press conference during the course of which Afzal 'incriminated himself' in front of the national media.

Publication of confessions is considered contemptuous. Though a confession to police is inadmissible in law still publications of confessions before trial are treated as highly prejudicial and affecting the Court's impartiality and amount to serious contempt[174].

Justice P Venkatarama Reddy observed that the media played an excessive and negative role in shaping the public conscience before Afzal was even tried. Justice Reddy upholding the imposition of the death penalty on Mohammed Afzal, said "*the incident, which resulted in heavy casualties, had shaken the entire nation and the collective conscience of the society will only be satisfied if the capital punishment is awarded to the offender*."[175]

Media creates a court of public opinion and condemns an accused. If the public believes that justice is a noose around Afzal Guru's neck in the Parliament Attack case, then conviction is the only consequence as nothing will justify his acquittal. The heightened public clamor created by the media leads to a conviction in 'the court of public opinion', much before the conviction in a court of law.

Not only the accused in brutal rape and murder of Nirbhaya, but also the lawyers continue to lie with all impunity and it is a shame that they blame it as 'media trial'. The nation is once again shocked to know that accused shouted 'I am innocent' when Additional Judge Yogesh Khanna was pronouncing them guilty on 11 counts for the ghastly act. People watched with dismay when the defence lawyer said that accused were implicated, they were innocent etc. and also says if by any circumstances they committed any mistake, their lives should be spared because they were tried by media. The administration of justice needs a lawyer to

[173] (2004) 4 SCC 158.

[174] *See* 200th Report of the Law Commission of India on "Trial by Media-Free Speech and Fair Trial Under Criminal Procedure Code, 1973 (Amendments to the Contempt of Court Act, 1971), August 2006, 199.)

[175] State (N.C.T. of Delhi) v. Navjot Sandhu @ Afsan Guru, AIR 2005 SC 3820.

defend accused in any criminal case and like public prosecutor he also will be considered as officer of the court, who is expected to assist the system in bringing the truth out and seek justice to see that accused will not be disproportionately punished even if proved guilty. Accused might plead not guilty, because it is part of their freedom. But after a competent court convicted accused, the defence lawyer cannot reiterate his argument diametrically opposite to what was judged. Unless he discovered some deficiencies, mistakes or wrongful appreciation of evidence, he cannot challenge the veracity of the judgment with such a loose language and lack of reason.

It is true that what media communicates is the available information about the incident, in bits and pieces, and legally speaking the information need to be converted into valuable and admissible pieces of evidence, before putting them to strict examination and subjected to strong cross examination. Once information has been transformed into evidence, what necessarily follows is the conviction. Leaving out this fact, it is unethical to present a baseless condemnation of judgment saying they were just implicated. Does it mean that whole exercise of judiciary was a drama? Whether dying declaration of the victim, eye witness account of the friend of victim, forensic evidence, medical reports, corroborative pieces of evidence, DNA confirmations, established location of accused etc. are just packs of lies or fabrications?
Because of the conscious people and vibrant media, criminal law of rape is reformed after this Delhi incident, thanks also to Justice JS Verma and people who represented to him. Fear of people' watch is expected to remove the slackness, lapses and corruption from any governance including justice delivery mechanism.

People are expected to watch such proceedings and question. Only requirement is that such a keen observation should not be confined to one or two sensational or high profile crimes but extend to every injustice anywhere, because injustice somewhere is threat to justice anywhere.