



2 NMLR 2011

Section I  
Freedom of Speech & Expression  
Media Writing & Human Rights

Section II  
Media Ethics and Freedom  
The Problem of Paid News

NALSAR  
Media Law Review



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## Editorial

This second volume of the NALSAR Media Law Review has two sections. First section contains several articles on freedom of press and media ethics, and second section about 'paid news'.

Appreciating the media, Justice Markandeya Katju wrote: The media have informed the people about the tremendous poverty in the country, the suicide of farmers in various States, the so-called honour killings in many places by Khap panchayats, corruption, and so on. For this, the media in India deserve kudos. However, the media have a great responsibility also to see that the news they present is accurate and serve the interest of the people. If the media convey false news that may harm the reputation of a person or a section of society, it may do great damage since reputation is a valuable asset for a person.

Justice Katju quoted P Sainath saying: While there were 512 accredited journalists covering the Lakme India Fashion Week event, there were only six journalists to cover farmer suicides in Vidharbha. In that Fashion Week programme, the models were displaying cotton garments, while the men and women who grew that cotton were killing themselves at a distance of an hour's flight from Nagpur in the Vidharbha region. Nobody told that story except one or two journalists, locally.

Writing about depiction of disabled in film media the author Sameer Boeray raised a pertinent question: "However does this freedom be unchecked and come at the price of defaming a community that is already unfortunately ostracized by society?" While this paper has given a sneak peak to the reader on disability depiction, issues regarding awareness rising and discourse creation is to be considered the cornerstone of this paper.

Esha Goel explored the injury to the right to free trial caused by the trial by media in her analytical article. The freedoms granted by our constitution, including the freedom of speech and expression are often used, consciously or otherwise, to undermine the rights of citizens, especially those who are suspects or in any way involved with a criminal case. The enthusiasm of the members of the media in advancing its subjective notions of justice often results in grave miscarriage of justice. Very often the media has taken upon itself the function of determining guilt, a function entrusted exclusively to the judiciary.

Devdeep Ghosh wrote on bridging digital divide. He said 'there is overwhelming evidence that the open Internet has resulted in a re-engaged and deliberative political community'. The efficacy of the open Internet in this

regard is not merely due to its massive and cheap repository of information but because of the interlinking of users that it facilitates.

Smriti Patil makes an interesting writing focusing on Barbie vs Superman to explain gender stereotypes that appear in media when media publish about women. Author quotes: *When **Draupadi** raises the question of whether a lady of the royal family deserves this treatment, **Duryodhana** says that she deserves this treatment precisely because she is a lady from the royal family. She has to be humiliated because she is the 'woman' of the enemy. Thus, she is denied all agency and individuality.* In conclusion, author said, while gender is often seen as a narrow, special interest issue, gender awareness can lead to a better, more holistic understanding of any situation.

Arnab Basu analysed the proposed Cinematography Bill to explain the ills of film censorship and finally says: The Cinematograph Act, 1952 as well as the Cinematograph Bill, 2010 are interspersed with vestiges of the politics of the Raj and can be held guilty of statism that encourages political censorship.

Upasna Dasgupta made a fine analysis of impact of media and public opinion on the society including the judges. Finally author explains: ... the long term solution in this respect lies in respect of self-regulation by both the media and the judiciary.

Writing about ambush marketing, Mridishi Swarup says: an ambush marketing campaign is designed to intentionally confuse the buying public as to which company is in fact the official sponsor of a certain sports organization. Brand owners are tempted to ambush market because it is a relatively cheap way of attracting the consumers to their products.

## Second Section of NMLR

This second section of the NALSAR Media Law Review focuses on ethics of the media and its violation in the form of 'paid news', a new syndrome reflecting the role of money in spreading untruth. While note for vote brings in the issue of undue influence, note for writing falsity for publicity to candidates for votes, without calling it advertisement is worse than that. It is undue influence coupled with false propaganda or misrepresentation. Lofty promises and luring statements coupled with criticism against rival candidates can be understood as the common phenomenon of election campaign. But media which is supposed to inform the citizen about the contesting candidates to empower them to take right choice of representatives for coming five years cannot give wrong information.

The Press Council of India promptly reacted to this unethical practice and constituted a two member committee to study and report with suitable



recommendations, which it did. But the dynamics society and internal politics besides the forces close to ‘management’ have won the first round and the report did not reach its logical conclusion. However the making report available to the public itself is a big achievement, given the business atmosphere in the media. The members not only penned a comprehensive report but also shared their experience explaining the developments. A lot of literature is generated about the ‘paid news’ and related developments. A section of this issue presents in detail the state of affairs of misleading nature between the media and political process during elections.

Paranjaya Guha Thakurtha and K Srinivas Reddy, members of Press Council of India, made a very critical analysis of paid news problem describing it as blurring boundaries between news and advertisement, or calling them advertorials, in their exhaustive report, vital parts of which are extracted here as a significant reading of this journal. The publication or broadcast of “paid news” have not merely undermined democracy in India but also tarnished the country’s reputation as foreign newspapers have already started writing about, and commenting adversely on, such malpractices.

Senior Journalist Prabhash Joshi described the ‘paid news’ as media’s covert agreement with candidates. Such practices undermined and compromised the very basis of the role that an independent media is expected to play in a democracy.

Mrinal Pandey says many recent steps redefining news and its dissemination in the newspapers were taken hastily after bypassing the editorial department. They may have introduced lethal and invisible viruses within the system that may corrode and finally kill the newspaper.

The PCI report listed out the incidents of selling news. There is an interesting and intense debate on this unethical issue of paid news in Lok Sabha during March 2010, which reflects the opinion of the politicians from various parties. It is presented in brief in this issue.

Paranjaya Guha Thakurtha wrote about disappointing developments after their report was presented.

**Madabhushi Sridhar**

*Editor-in-Chief*



## **SECTION I**

**FREEDOM OF SPEECH & EXPRESSION:**

**MEDIA WRITINGS & HUMAN RIGHTS**



# FREEDOM OF THE PRESS AND JOURNALISTIC ETHICS

*Markandey Katju, J.\**

*Freedom is important, so is responsibility. In countries like India, the media have a responsibility to fight backward ideas such as casteism and communalism, and help the people fight poverty and other social evils.*

## I. Responsibility of the Media

Freedom of the press and journalistic ethics is an important topic today in India — with the word ‘press’ encompassing the electronic media also. There should be a serious discussion on the topic. That discussion should include issues of the responsibilities of the press, since the media have become very prominent and very powerful.

In India, freedom of the press has been treated as part of the freedom of speech and expression guaranteed by Article 19(1)(a) of the Constitution *vide Brij Bhushan v. The State of Delhi*<sup>1</sup> and *Sakal Papers (P) Ltd v. Union of India*<sup>2</sup>, among others. However, as mentioned in Article 19(2), reasonable restrictions can be placed on this right, in the interest of the sovereignty and integrity of India, the security of the state, public order, decency or morality, or in relation to contempt of court, defamation or incitement to an offence. Hence, freedom of the media is not an absolute freedom. The importance of the freedom of the press lies in the fact that for most citizens the prospect of personal familiarity with newsworthy events is unrealistic. In seeking out news, the media therefore act for the public at large. It is the means by which people receive free flow of information and ideas, which is essential to intelligent self-governance, that is, democracy. For a proper functioning of democracy it is essential that citizens are kept informed about news from various parts of the country and even abroad, because only then can they form rational opinions. A citizen surely cannot be expected personally to gather news to enable him or her to form such opinions. Hence, the media play an important role in a democracy and serve as an agency of the people to gather news for them. It is for this reason that freedom of the press has been emphasized in all democratic countries, while it was not permitted in feudal or totalitarian regimes.

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\* The author is a Judge of the Supreme Court of India. The article first appeared in *The Hindu*, June 3-4, 2011, New Delhi.

1 AIR 1950 SC 129.

2 AIR 1962 SC 305.

In India, the media have played a historical role in providing information to the people about social and economic evils. The media have informed the people about the tremendous poverty in the country, the suicide of farmers in various States, the so-called honour killings in many places by Khap Panchayats, corruption, and so on. For this, the media in India deserve kudos. However, the media have a great responsibility also to see that the news they present is accurate and serve the interest of the people. If the media convey false news that may harm the reputation of a person or a section of society, it may do great damage since reputation is a valuable asset for a person. Even if the media subsequently correct a statement, the damage done may be irreparable. Hence, the media should take care to carefully investigate any news item before reporting it.

I know of a case where the photograph of a High Court judge, who was known to be upright, was shown on a TV channel along with that of a known criminal. The allegation against the judge was that he had acquired some land at a low price misusing his office. But my own inquiries (as part of which I met and asked questions to that judge and many others) revealed that he had acquired the land not in any discretionary quota but in the open market at the market price. Also, sometimes the media present twisted or distorted news that may contain an element of truth but also an element of untruth. This, too, should be avoided because a half-truth can be more dangerous than a total lie. The media should avoid giving any slant to news, and avoid sensationalism and yellow journalism. Only then will they gain the respect of the people and fulfill their true role in a democracy. Recently, reports were published of paid news — which involves someone paying a newspaper and getting something favourable to him published. If this is correct, it is most improper. Editors should curb this practice.

Media comments on pending cases, especially on criminal cases where the life or liberty of a citizen is involved, are a delicate issue and should be carefully considered. After all, judges are human beings too, and sometimes it may be difficult for them not to be influenced by such news. The British law is that when a case is *subjudice*, no comment can be made on it, whereas U.S. law permits such comment. In India we may have to take an intermediate view on this issue: while on the one hand we have a written Constitution that guarantees freedom of speech in Article 19(1)(a) — which the unwritten British Constitution does not — the life and liberty of a citizen is a fundamental right guaranteed by Article 21 and should not lightly be jeopardized. Hence, a balanced view has to be taken on this. Also,

often the media publish correct news but place too much emphasis on frivolous news such as those concerning the activities of film stars, models, cricketers and so on, while giving very little prominence to much more important issues that are basically socio-economic in nature.

What do we see on television these days? Some channels show film stars, pop music, disco-dancing and fashion parades (often with scantily clad young women), astrology, or cricket. Is it not a cruel irony and an affront to our poor people that so much time and resources are spent on such things? What have the Indian masses, who are facing terrible economic problems, to do with such things? Historically, the media have been organs of the people against feudal oppression. In Europe, the media played a major role in transforming a feudal society into a modern one. The print media played a role in preparing for, and during, the British, American and French Revolutions. The print media were used by writers such as Rousseau, Voltaire, Thomas Paine, Junius and John Wilkes in the people's fight against feudalism and despotism. Everyone knows of the great stir created by Thomas Paine's pamphlet 'Common Sense' during the American Revolution, or of the letters of Junius during the reign of the despotic George III.

The media became powerful tools in the hands of the people then because they could not express themselves through the established organs of power: those organs were in the hands of feudal and despotic rulers. Hence, the people had to create new organs that would serve them. It is for this reason that the print media became known as the Fourth Estate. In Europe and America, they represented the voice of the future, in contrast to the feudal or despotic organs that wanted to preserve the status quo in society. In the 20th century, other types of media emerged: radio, television and the Internet. What should be the media's role? This is a matter of great importance to India as it faces massive problems of poverty, unemployment, corruption, price rise and so on.

To my mind, in underdeveloped countries like India the media have a great responsibility to fight backward ideas such as casteism and communalism, and help the people in their struggle against poverty and other social evils. Since a large section of the people is backward and ignorant, it is all the more necessary that modern ideas are brought to them and their backwardness removed so that they become part of enlightened India. The media have a great responsibility in this respect.

## II. Mass Media and the Disconnect with Mass Reality

Underdeveloped countries like India are passing through a transitional stage, between a feudal-agricultural society and a modern-industrial society. This is a painful, agonizing period. A study of the history of England of the 17th and 18th centuries and of France of the 18th and 19th centuries shows that for them such periods of transition were full of turbulence, turmoil, revolutions, intellectual ferment, and social churning. It was only after going through this fire that modern society emerged in Europe. India is going through this fire. The barbaric 'honour killings' in parts of the country of young men and women of different castes or religion who get married or wish to get married, among other incidents, show how backward we still are — full of casteism and communalism.

India's national aim must be to get over this transitional period as quickly as possible, reducing the inevitable agony. Our aim must be to make India a modern, powerful, industrial state. Only then will India be able to provide for the welfare of its people and get respect in the world community. Today, the real world is cruel and harsh. It respects power, not poverty or weakness. When China and Japan were poor nations, their people were derisively labelled 'yellow' races by Western nations. Today nobody dares use such terms as they are strong industrial nations. Similarly, if we wish India to get respect in the comity of nations, we must make it highly industrialised and prosperous. For this, our patriotic, modern-minded intelligentsia must wage a powerful cultural struggle, that is, a struggle in the realm of ideas. This cultural struggle must be waged by combating feudal and backward ideas, for example, casteism and communalism, replacing them with modern, scientific ideas among the masses.

The media have an extremely important role to play in this cultural struggle. But are they performing this role? No doubt, the media sometimes refer to farmer suicides in different States, the price rise, and so on, but these form only a small part of their coverage — maybe 5 to 10 per cent. Most of the coverage is given to cricket, film stars, astrology and disco-dancing. Sadly, India now has a disconnect between the mass media and mass reality. Here are a few facts from a speech delivered by P. Sainath, Rural Affairs Editor of *The Hindu* and Magsaysay award winner, on September 6, 2007 in Parliament House in the Speaker's Lecture Series:



- The mass reality in India (which has over 70 per cent of its people living in the rural areas), is that rural India is in the midst of the worst agrarian crisis in four decades. Millions of livelihoods in the rural areas have been damaged or destroyed in the last 15 years as a result of this crisis, because of the predatory commercialization of the countryside and the reduction of all human values to exchange value. As a result, lakhs of farmers have committed suicide and millions of people have migrated, and are migrating, from the rural areas to the cities and towns in search of jobs that are not there. They have moved towards a status that is neither that of a 'worker' nor that of a 'farmer.' Many of them end up as domestic labourers, or even criminals. We have been pushed towards corporate farming, a process in which farming is taken out of the hands of the farmers and put in the hands of corporates. This process is not being achieved with guns, tanks, bulldozers or *lathis*. It is done by making farming unviable for the millions of small family farm-holders, due to the high cost of inputs such as seed, fertilizer and power, and uneconomical prices.
- India was ranked fourth in the list of countries with the most number of dollar billionaires, but 126th in human development. This means it is better to be a poor person in Bolivia (the poorest nation in South America) or Guatemala or Gabon rather than in India. Here, some 83.6 crore people (of a total of 110-120 crore) in India survive on less than Rs. 20 a day.
- Eight Indian States in India are economically poorer than African states, said a recent Oxford University study. Life expectancy in India is lower than in Bolivia, Kazakhstan and Mongolia.
- According to the National Sample Survey Organisation, the average monthly per capita expenditure of the Indian farm household is Rs.503. Of that, some 55 per cent is spent on food, 18 per cent on fuel, clothing and footwear, leaving precious little to be spent on education or health.
- A report of the Food and Agriculture Organisation of the United Nations shows that between 1995-97 and 1999-2001, India added more newly hungry millions than the rest of the world taken together. The average rural family is consuming 100 kg less of food than it was consuming earlier. Indebtedness has doubled in the past decade. Cultivation costs have increased exorbitantly and farming incomes have collapsed, leading to wide-scale suicides by farmers.

- While there were 512 accredited journalists covering the Lakme India Fashion Week event, there were only six journalists to cover farmer suicides in Vidharbha. In that Fashion Week programme, the models were displaying cotton garments, while the men and women who grew that cotton were killing themselves at a distance of an hour's flight from Nagpur in the Vidharbha region. Nobody told that story except one or two journalists, locally.

Is this a responsible way for the Indian media to function? Should the media turn a Nelson's eye to the harsh economic realities facing over 75 per cent of our people, and concentrate on some 'Potemkin villages' where all is glamour and show business? Are not the Indian media behaving much like Queen Marie Antoinette, who famously said that if people had no bread, they should eat cake.

No doubt, sometimes the media mention farmers' suicides, the rise in the price of essential commodities and so on, but such coverage is at most 5 to 10 per cent of the total. The bulk of the coverage goes to showing cricket, the life of film stars, pop music, fashion parades, astrology. Some TV channels show cricket day in and day out. Some Roman emperor was reputed to have said: if you cannot give the people bread, give them the circus. This is precisely the approach of the Indian establishment. Keep the people involved in cricket so that they forget their economic and social plight. What is important is not price rise or unemployment or poverty or lack of housing or medicines. What is important is whether India has beaten New Zealand (or better still, Pakistan) in a cricket match, or whether Tendulkar or Yuvraj Singh has scored a century. Is this not sheer escapism?

To my mind, the role of the media in our country today must be to help the people in their struggle against poverty, unemployment and other social evils and to make India a modern, powerful, industrial state. For this, scientific thinking should be promoted. Science alone is the means to solve this country's problems. By science I do not mean physics, chemistry and biology alone. I mean the entire scientific outlook, which must be spread widely among our people. Our people must develop rational, logical and questioning minds, and abandon superstition and escapism. For this purpose the media can, and must, play a powerful role.

The nation is passing through a terrible socio-economic crisis. Artists, writers and media-persons must start acting responsibly and help the people solve their problems. And this they can do by focusing on the real issues —

which are basically economic — and not by trying to divert people's attention to non-issues.

The Urdu poet Faiz wrote: "*Gulon mein rang bhare bade naubabaar chale/ Chale bhi aao ki gulshan ka kaarobaar chale.*" Urdu poetry often has an outer, superficial meaning, and an inner real meaning. The real meaning of this sher is that the objective situation in the country is ripe, and patriotic people to come forward to serve the country. (The word 'gulshan' ostensibly means garden, but in this sher, it really means the country.)

# DISABILITY PORTRAYAL IN THE MEDIA THROUGH THE EYES OF BOLLYWOOD AND HOLLYWOOD

Sameer Boray\*

## I. Introduction

The proliferation of images of law and the legal processes in film is a phenomenon of great significance. Mass mediated images have turned out to be as powerful and persuasive as other 21<sup>st</sup> century social forces such as globalization and human rights.<sup>1</sup> Law and other social issues can live in images which have saturated our culture and have a power of their own. In the words of Samuel Weber, “the world itself has become a picture whose function is to establish and confirm the centrality of man as the being capable of depiction.”<sup>2</sup> It is also opined by Saul Morson that a film is just not a mirror in which we see legal and social realities reflected in some more or less distorted way.<sup>3</sup> Movies remind us of the contingencies of our legal and social arrangements. Social arrangements in the present study include those dealing with the portrayal of Disabilities.

With this quaint introduction on the portrayal of law and social issues in film, this paper attempts to analyze the role of movies and how they portray various disabilities in Hollywood and Bollywood. The structure of the analysis is as follows, *first* the depiction of Disabilities through popular cinema in Hollywood and Bollywood, *second* the impact such depictions have on society such as a learning capacity as well as the negative portrayals of such disabilities and finally how law can regulate and probably be more sensitive to disability portrayal in films vis-a-vis freedom of expression directors and movie makers have while producing a film. An additional aspect that shall be briefly looked into is with respect to whether the censor board can play a role in controlling what the public sees in movies in light of recent controversies such as Golmaal 3 in India, thereby being a responsible media.

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1 AUSTIN SARAT, LAWRENCE DOUGLAS AND MARTHA MERRILL UMPHREY, LAW ON THE SCREEN, 5, Stanford University Press (2005).

2 Samuel Weber, “Mass Mediaurisy; or, Art, Aura, and Media in the Work of Walter Benjamin,” in *Walter Benjamin: Theoretical Questions*, ed. David Ferris, 29, Stanford University Press (1996).

3 Saul Morson, *Narrative and Freedom: The Shadows of Time*, New Haven, Conn., 117, Yale University Press (1994).

## II. Depiction of Disabilities in Popular Cinema

A character with a disability serves as a lens through which an audience can view and define that disability. When members of the public have no direct experience with a disability, media representations such as film representations provide powerful and memorable definitions. In films that depict a character with a disability, the character rises to the occasion in order to exemplify people with that particular disability – showing to the audience how individuals with that disability behave, feel, communicate, exhibit symptoms and experience life.<sup>4</sup> Mainstream film makers have constructed many portraits of disabled characters for predominantly “able-bodied” audiences since the earliest years of the medium.<sup>5</sup>

At the outset, while studying disabilities, there are two model approaches that have been adopted, the medical and social model. In the Medical model, societal disturbances are rooted in the physiological or psychological cause of the disability. As a result, disability is viewed as a disease that must be cured. In this model, the solution for dealing with the disability is simple, scientific forces must completely cure all symptoms of abnormality for the disturbance to disappear.<sup>6</sup> Thus the act of being disabled can only be solved through curing the impairment. The portrayal of people with disabilities through the focal lens of the medical model is negative since they are perceived as problematic if such disabled people are not cured of their impairments. In film, this leads to a very negative portrayal of disabled people, as monsters, thereby distancing disabled people from the norm of society. This form was witnessed in the early years of film with movies such as *West of Zanzibar* and *The Unknown*.<sup>7</sup>

To contrast this with the negative attitudes portrayed by the medical model, in the social model, problems are not created by the disability itself but the society and environment the disability is placed into. In this case, society’s interaction with them determines their societal status. Although

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4 Anthony B Baker, *Recognizing Jake Contending with Formulaic and Spectacularized Representations of Autism in Film* in *AUTISM AND REPRESENTATION*, MARTIN OLSTEEN 313, Routledge (2008).

5 MARTIN F. NORDEN, *THE CINEMA OF ISOLATION: A HISTORY OF PHYSICAL DISABILITY IN THE MOVIES*, 7, Library of Congress (1994).

6 Megan Dowdy, *I Am Sam: Portrayal of Disabilities in Popular Film*, 4, Truman State University (2003).

7 P Darke, *Everywhere: Disability on film*. In Pointon, A. and Davies, C. (Ed.), *Framed: Interrogating Disability in the Media*, 10-14, London: British Film Institute (1997).

there is no cure in the social model, the model can be perceived as more progressive and modern.<sup>8</sup> Applying this construct to films, the social model can evaluate the varying depictions of people with disabilities. The differing cinematic portrayal over time shows society's changes in attitudes and social constructs. Post Second World War, in the second era of films, attitudes surrounding disabilities improved and held a rehabilitative connotation. Examples include *The Best Years of Our Lives* and *The Pride of the Marines*.<sup>9</sup>

Due to the cold war and general attitude linked to McCarthyism, there was a return to a cinematic construction of disabilities as 'freakish' (*Peter Pan*).

In the last era, cinematic construction of disabilities has been a more enlightened and tolerant view of disability. Films are now depicting disabled people in their efforts to overcome their challenges and fit in with society. Examples of films include *the Elephant Man*, *My Left Foot*, *Passion Fish* and *The Waterdance*. These films have presented a sympathetic view towards disability and portray a change in society's perspective. Thus through the social method, one can see the meandering interpretations of disabled people in movies from "freakish monsters" to rehabilitative and finally to a more tolerant view.

## 2.1 Analysis of Movies in both Hollywood and Bollywood.

*Rain man* starring Dustin Hoffman and Tom Cruise has served as the Public's main definitional text for autistic spectrum disorders. As a matter of fact, the term "rain man" has been popularly used to describe individuals who exhibit autistic characteristics. Additionally, autistic characters have also been shown to possess certain special powers, such as Dustin Hoffman's character in *Rain Man* shows having savant mathematical skills and a very good memory. Another notable Hollywood movie that has successfully depicted Autism in the form of a developmental disability is the 2001 hit, *I am Sam*.<sup>10</sup> The views expressed in the film can be assessed to determine how the representation of the protagonist Sam as a disabled

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8 C Riley, *Disability and the media: Prescriptions for change*, Hanover, 15 NH: University (2005).

9 Supra n.5 at p 42.

10 The Producers Guild of America presented the producers and the directors of the film with the first Stanley Kramer award for their ability to bring awareness to social concerns.

person can be compared with to the use of common cultural perceptions of disabilities.<sup>11</sup>

The understanding of autism as a disability is only in its nascent stage in India as far as mainstream cinema is concerned. The movie *Main Aisa Hi Hoon* which is the cultural adaptation and remake of *I am Sam* in India, attempts to highlight autism through the physical, behavioral and communicative dimensions of the protagonist Neel.<sup>12</sup>

In the film starring Russel Crowe *A Beautiful Mind*, Director Ron Howard has beautifully relayed the life of Nobel Prize Winner John Nash, so that the audience is able to witness the scientist's long, hard battle with schizophrenia and experience from it from the perspective of the Protagonist.<sup>13</sup> It is no surprise that the movie won many accolades including an Academy Award for Best Picture. Other Hollywood smash hits such as *My Left Foot* and *Forrest Gump* have tried to paint a picture on how those suffering from certain disabilities suffer and through these films; one can see the change in trend in interpreting disabilities through the Social Model.

Closer to home, Film makers in India have already begun to engage more seriously with the issue of disability as recent films such as *Koi Mil Gaya*, *Tere Mera Saath Rahen*, *Black*, *Iqbal* and *Taare Zamein Par*. In the context of the above, social observers and media commentators have argued about the lack of realistic representation of disability in our films. In Bollywood, with a few exceptions, films have lacked the credo to tackle the intricacies in the lives of people leading a physically or mentally maimed existence.<sup>14</sup> Those with disabilities are usually barricaded in the periphery existence. You rarely find a sense of realism like in Hollywood churning out at regular intervals films like *Rain Man*, *My Left Foot*, *Born on the Fourth of July* and *A Beautiful Mind*. However let us not completely disregard the works of Bollywood movie makers when directors make movies like *Khamoshi*, *Sparsh*, *Koshish* and *Black*. The above movies portrayed the life of disabled people realistically with a varying degree of success. The author is however not

11 Supra n.6 at p 5.

12 Sudha Rai, *Autism in Indian Cinema: Cultural Representations of Disability*, Department of English, University of Rajasthan, Jaipur, 2009 p7.

13 Barbara Duncan, *Portrayal of Disability in Recent Films: Notes*, Disability World, Issue no 12 Jan-Mar 2002, p 42.

14 In Particular Reference to the Golamaal 3 controversy, which shall be discussed later on in the paper.

submitting that Bollywood can learn a lot from Hollywood considering Hollywood itself took many years before portraying disabilities more realistically with a touch of sensitivity. Although there is scope for how Bollywood can control the churning out of movies which are disrespectful to the disabled by enforcing certain laws relating to defamation and censorship, which the author will be discussing in light of the recent *Golmaal 3* controversy in subsequent parts of this paper.

### III. Impact of Cinema on Creating Public Awareness

In the words of Morris, *“Disability in film has become a metaphor for the message that the non disabled writer wishes to get across in the same way that beauty is used. In doing this, movie makers draw on the prejudice, ignorance and fear that generally exist towards disabled people, knowing that to portray a character with a humped back, with a missing leg, with facial scars, will evoke certain feelings with the audience. Unfortunately, the more disability is used as a metaphor for evil or just to induce a sense of unease, the more the cultural stereotype is confirmed.”*<sup>15</sup>

It is the above stereotype that has to be deconstructed. The writer is firmly of the belief that movies, if portrayed well can truly re enforce the evocation of certain feelings which are realistic rather than merely confirming the cultural stereotype disabled people carry in society.

For many people with limited exposure to individuals with specific impairments, regardless of its accuracy, serves as a major information source on the very nature of disabilities.<sup>16</sup> Therefore movies can influence social acceptance for educational and community inclusion.

There are certain aims to be highlighted on why there should be a depiction of disabilities in films. First, motion pictures can furnish a barometer of social awareness and understanding.<sup>17</sup> For example, *Rain Man* provides viewers with a generally accurate profile of autism while also focussing on the uniqueness of a savant. Secondly, carefully selected movies can be used to educate students about individual adjustment and social barriers to independent living in an entertaining fashion. The widely

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15 Jenny Morris, *Pride Against Prejudice: Transforming Attitudes to Disability* London ,the Women's Press Ltd,1991, p 93.

16 Byrd, Keith and Timothy R. Elliott, *Feature Films and Disability: A Descriptive Study*,47 Rehabilitation Psychology (1985).

17 Hyler, S.E., Gabbard, G O. & Schneider, I, *Homicidal maniacs and narcissistic parasites: Stigmatization of mentally ill persons in the movies*, Hospital and Community Psychiatry, 1993, pp1044-1048.



acclaimed Award Winning film *Coming Home* offers scenes of accessibility, rehabilitation and sexuality for individuals with physical disabilities.<sup>18</sup>

Not only are images from films seen by millions worldwide, but it is suggested that viewing such films can also influence social attitudes.<sup>19</sup> If certain high profile award winning movies can provide an accurate, positive and representative understanding, they also have the capability of increasing awareness of individual abilities and social barriers encountered by people with disabilities. Recognition of negative portrayals can also help the public understand societal misconceptions and fears. Therefore through the creation of such awareness, certain inaccuracies and stereotypes can be challenged, thereby enhancing the public's knowledge and realistic attitudes towards disabilities.

In India, given the potential of mainstream popular cinema to sensitize the masses to an awareness of the nature of specific disabilities and the challenges they pose, mainstream cinema must steer clear of replicating the conservative and normative values of Indian Society which go against the progressive liberation of minorities with differences.<sup>20</sup> The role of the film maker will be to remove biases and stigma against the disabled, deconstructing superstitious and illiterate attitudes that show disability as a curse or as madness and finally correcting popular perceptions and stereotypes, by representing the disabled with understanding, sympathy, dignity, fortitude and conviction.

While we are on the subject of the value of depiction, *Music Within* is a movie which can be analysed, particularly by a Law and Poverty Student as it gives a good portrayal on how the American Disabilities Bill was passed. This seems to be important today in India as we are currently trying ourselves to come up with a new disability bill.

From an analytical perspective, it is submitted by the author that public discourse is influenced more by the frequency of portrayal and less by the quality of portrayal. This conclusion has been reached after a study which determined that a positive relationship between the number of movies viewed about disabilities and informal discussions within various

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18 Stephen, P. Safran, *Disability Portrayal in film: reflecting the past, directing the future*, 2 *Exceptional Children*, Winter (1998).

19 Id.

20 Id.

social circles.<sup>21</sup> As discussed earlier, the quality of disability portrayal has improved significantly over time, from the “magical cure” and “disfigured madman” of the early part of the 20<sup>th</sup> century to the more realistic and sensitive portrayals depicting independent living and beyond in the latter half of the 20<sup>th</sup> century and towards the dawn of the new millennium.<sup>22</sup> Emphasis is to be laid on sensitive portrayals because it is in light of this that certain controversies in India have risen, which shall be the next segment of this paper.

### 3.1 Controversies regarding depiction.

The Indian Stammering Association, after the release of the Hindi film *Golmaal 3* sent a legal notice to the makers of the film to delete certain scenes as they alleged that there has been an insensitive portrayal of stammering in the film. The matter reached the Uttarkhand High Court following which an order could be passed.<sup>23</sup>

A similar incident occurred with respect to a Tamil Film *Naan Kadavul* where there was once again an insensitive portrayal of a visually challenged girl. The argument proposed by the group fighting for this cause was whether the Censor Board would allow film makers to show unlimited violence in the guise of portraying the truth? However as mentioned above, for the truth to prevail, there must be a correct portrayal of the truth on disabilities. Thus the Central Censor Board in India must look into this area seriously and ensure that such movies in future do not harm the sentiments of certain communities, in this case the disabled community. The role of the Censor Board and how law can regulate this shall form the basis for the next segment in this platter.

### 3.2 Role of Law in controlling how disabilities are portrayed in Movies

When one thinks of controlling what the audience sees in movies, the first organization that comes to one's mind is the censor board. In India,

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21 Eichinger, J., Rizzo, T. L., & Sirotnik, B. W, *Attributes related to attitudes toward people with disabilities*, 53-56. International Journal of Rehabilitation Research (1992).

22 Stephen P Safran , *The first century of disability portrayal in film: An analysis of the literature*, 467 -478, The Journal of Special Education (1998).

23 '*Golmaal 3' runs into controversy for stammer scenes*' <http://oye.mybigflix.com/news/Golmaal-3-runs-into-controversy-for-stammer-scenes/804590>.

The Central Board of Film Certification is the government regulatory body and censorship board in India controlled by the Ministry of Information and Broadcasting. Its main functions include reviewing, rating and censoring motion pictures. It gains authority from the Cinematography Act, 1952. According to the Supreme Court, commenting on the role of the Censor Board, *“the combination of act and speech and sound in semi darkness of the theatre with elimination of all distracting ideas will have a strong impact on the minds of the viewers and can affect emotions.”*<sup>24</sup>

There is also a provision in the Cinematograph Rules, 1983 which mentions that there should be an assessment of public reactions to films as it has already been admitted that movies tend to have an impact on the public mind.<sup>25</sup> Based on this provision, if there is a reaction from the public against any film which has adversely portrayed any disability, the Censor Board is given the power to review such movies. This however did not happen with Golmaal 3 and instead the Indian Stammering Association approached the Uttarakhand High Court to seek a remedy as they see this as a kind of defamation of a person with a certain disability. Besides this provision, the Censor Board is also empowered under its objectives of film certification and remove scenes which *“show or ridicule of physically and mentally handicapped persons”*.<sup>26</sup> The author is trying to put across the point that there exists legislation and is by no means suggesting there be a special legislation to address the issue, however there must be a good sense of implementation. The censor board rants on censoring movies which might

24 S Rangarajan v Union of India and Ors (1989) 2SCC574 ¶ 22.

25 Cinematograph Rules, 1983. Section 11 Assessment of public reactions to films.- With a view to determining the principles to be observed in certifying films, the Board may take such steps as it thinks fit to assess public reactions to films, and for that purpose, the Board may hold symposia or seminars of film critics, film writers, community leaders and persons engaged in the film industry, or such other persons and also undertake local or national surveys to study the impact of various kinds of films on the public mind,

26 Section 5B(2) Cinematograph Act, 1952, *Principles of Guidance in Certifying Films*: “(i) anti-social activities such as violence are not glorified or justified (ii) the modus operandi of criminals, other visuals or words likely to incite the commission of any offence are not depicted; (iii) scenes showing involvement of children in violence as victims or perpetrators or as forced witnesses to violence, or showing children as being subjected to any form of child abuse; **showing abuse or ridicule of physically and mentally handicapped persons**; and showing cruelty to, or abuse of animals, are not presented needlessly (iv) pointless or avoidable scenes of violence, cruelty and horror, scenes of violence primarily intended to provide entertainment and such scenes as may have the effect of de-sensitising or de-humanising people are not shown; (v) scenes which have the effect of justifying or glorifying drinking are not shown; (vi) scenes tending to encourage, justify or glamorise drug addiction are not show.”

be immoral or against public policy, however the researcher's argument is that portrayals of marginalized groups, in particular disabled people in an insensitive and negative connotation should also be against public policy.<sup>27</sup>

There exists an argument by some film makers that every maker has a right to make a movie as he is entitled to a right to freedom and expression under Article 19(1) (a). However does this freedom be unchecked and come at the price of defaming a community that is already unfortunately ostracized by society? Although the burden of proving that a film should have restrictions and the burden of proof lies with the authority imposing the restriction, it is important to question what good it would hold if that same authority does not implement certain powers vested in it.

Since we are on the issue of the Censor Board being pro-active and taking a hard stance on films which depict disabilities in an insensitive method, in 2008, in the UK a film called *Special People* which is a movie about a director teaching a group of disabled students on how to make a film was given a rating which had the warning that it contained disability themes.<sup>28</sup> There was a furore from various groups questioning the rationale of that rating and asking why young children should also not be allowed to watch a movie that was depicting disabilities. In order to further understand this, a consideration may be placed upon the Film Censorship Guidelines for Censors. Section 24 deals with films depicting Disabilities.<sup>29</sup> The guideline is fairly clear on the aspect of how movies while depicting disabilities should be sensitive. However when the Censor Board goes beyond its powers and decides to not allow young children to watch movies depicting disabilities, one must wonder why such a step is taken.

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27 Central Board Of Film Certification, Ministry Of Information & Broadcasting, Government Of India, Annual Report, 2009 Film Censorship 10. *But this right is subject to "reasonable restriction" on grounds set out under Article 19(2) of the Constitution. Reasonable limitations can be imposed in the interest of the sovereignty and integrity of the state, friendly relations with foreign states, public order, decency or morality or in relation to contempt of court, defamation or incitement to an offence.*

28 <http://www.bbc.co.uk/ouch/opinion/b1tch/>, last accessed on 17<sup>th</sup> April, 2011.

29 In viewing films which treat the subject of mental or physical disability, the censor should examine whether the approach adopted is responsible. It should be borne in mind that it is not the fault of the sufferer if he is in this condition. Special attention should be paid to see whether such subjects as physical deformities, mental retardation or psychological aberrations are treated (if they have to be) with sympathy, understanding and a sense of responsibility on the part of the filmmaker. Censors should bear in mind that a film which encourages public hatred or fear of the physically or mentally handicapped is unlikely to be regarded as suitable for exhibition.

#### IV. Conclusion

One of the objectives of the *Convention on the Rights of Disabled People* includes a section on spreading of awareness, and the author personally believes that popular cinema is certainly a way to promote that.<sup>30</sup> While this paper has given a sneak peak to the reader on disability depiction, issues regarding awareness raising and discourse creation is to be considered the cornerstone of this paper. While the researcher has considered points regarding challenging stereotypes, notwithstanding the ability movies have in portraying a sensitive image to the public, the fact remains that even directors and movie makers have a right to produce their own movies in any way they wish to do so. However while making such depictions, certain standards regarding sensitivity should be maintained. In India, if the Censor Board can regulate movies which depict certain scenes in movies which are immoral, why can't mocking or mimicking a person with a disability be against morality thereby attracting the over used principle of public policy? Even if the law cannot deter movie makers, society should take up that responsibility and tarnish the movie makers' image. At the end, if the general mass can get an idea on the lives certain people with disabilities go through, the right message should be sent to the masses and if the wrong message is being sent, we should hope that the law can intervene.

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30 UN General Assembly, *Convention on the Rights of Persons with Disabilities : resolution / adopted by the General Assembly, 24 January 2007, A/RES/61/106, available at: <http://www.unhcr.org/refworld/docid/45f973632.html> [accessed 14 April 2011] Article 8 - Awareness-raising 1. States Parties undertake to adopt immediate, effective and appropriate measures: a) To raise awareness throughout society, including at the family level, regarding persons with disabilities, and to foster respect for the rights and dignity of persons with disabilities; b) To combat stereotypes, prejudices and harmful practices relating to persons with disabilities, including those based on sex and age, in all areas of life; c) To promote awareness of the capabilities and contributions of persons with disabilities. 2. Measures to this end include: a) Initiating and maintaining effective public awareness campaigns designed:*

- i. To nurture receptiveness to the rights of persons with disabilities;
- ii. To promote positive perceptions and greater social awareness towards persons with disabilities;
- iii. To promote recognition of the skills, merits and abilities of persons with disabilities, and of their contributions to the workplace and the labour market; b) Fostering at all levels of the education system, including in all children from an early age, an attitude of respect for the rights of persons with disabilities; c) Encouraging all organs of the media to portray persons with disabilities in a manner consistent with the purpose of the present Convention; d) Promoting awareness-training programmes regarding persons with disabilities and the rights of persons with disabilities.

## TRIAL BY MEDIA: A THREAT TO THE RIGHT TO A FAIR TRIAL

*Esha Goel & Aonkan Ghosh\**

*'A trial by press, electronic media or public agitation is the antithesis of the rule of law'<sup>1</sup>*

In today's age and world, the impact of media is far reaching. Electronic media as has an added advantage because visuals have greater ramification and impact as it directly and immediately influences the mind of the viewer. Electronic media now plays a major role in stirring public opinion. It is this potency to reach the public that entails that all the channels understand and realise the heavy responsibility that is thrust on them and that there is no case for possible misuse.<sup>2</sup>

The judicial institutions are cognizant of the immense and rising role the media plays in the lives of the citizens of our country. The duty of the press as the fourth pillar of democracy is immense.<sup>3</sup> In *Surya Prakash Khatri v. Smt. Madhu Trehan*<sup>4</sup> the Supreme Court equated the power of the press to nuclear power stating that 'it can create and it can destroy'. The Apex Court also stated that it is imperative for the media to exercise due care and caution before publication of a potentially damaging piece is published. It cannot be doubted that the media is well within its rightful domain when it seeks to use tools of investigative journalism to bring us face to face with the ugly underbelly of the society. But such right must be used cautiously.

The freedoms granted by our constitution, including the freedom of speech and expression are often used, consciously or otherwise, to undermine the rights of citizens, especially those who are suspects or in any way involved with a criminal case. The enthusiasm of the members of the media in advancing its subjective notions of justice often results in grave miscarriage of justice. Very often the media has taken upon itself the function of determining guilt, a function entrusted exclusively to the judiciary. These developments are innately disturbing and tend to usurp the powers of the judiciary.

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1 State of Maharashtra v. Rajendra Jawanmal Gandhi: (1997)8SCC386

2 Court on its Own Motion Vs. State 146(2008)DLT429, 2008(100)DRJ144

3 Ibid

4 92 (2001) DLT 665

'Trial by Media', emerged as a term of colloquial origin, indicating perhaps the media's assignment to itself the adjudicatory process. The media is often found publishing opinion and spreading prejudice under the garb of "news". Owing to the colloquial origin of the term, there exists no comprehensive definition. An attempt was made by the Supreme Court in *RK Anand*<sup>5</sup> to define the ubiquitous term in the following manner:

*"the impact of television and newspaper coverage on a person's reputation by creating a widespread perception of guilt regardless of any verdict in a court of law. During high publicity court cases, the media are often accused of provoking an atmosphere of public hysteria akin to a lynch mob which not only makes a fair trial nearly impossible but means that, regardless of the result of the trial, in public perception the accused is already held guilty and would not be able to live the rest of their life without intense public scrutiny."*

A trial by media amounts to travesty of justice if it causes impediments in the accepted judicious and fair investigation and trial.<sup>6</sup>

The Delhi High court has opined that great responsibility rests on the editor of a newspaper or journal, since their wide circulation and appearance in print make any utterances believable to the ignorant.<sup>7</sup> It is this trust that makes *trial by media* a potent phenomenon.

To put the interplay between the dignity of the court, the right to a fair trial and the freedoms granted to the media into perspective, it is imperative that we engage in a deeper analysis of contemporary state of each of these rights and values.

### I. Right to Fair Trial

The right to a fair trial finds recognition in customs, principles of natural justice, constitutions and various international conventions. Article 14 of the ICCPR embodies within itself the different ingredients of the right to fair trial, making it one of the quintessential human rights. The right to a fair trial is at the heart of the Indian criminal justice system. It is a holistic right representing the right to be presumed innocent until proven guilty, the right not to be compelled to be a witness against oneself, the

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5 R.K Anand v. Registrar, Delhi High Court (2009) 8 SCC 106

6 Manu Sharma Vs. State (NCT of Delhi) 2010(2)ACR1645(SC), AIR2010SC2352

7 Surya Prakash Khatri v. Smt. Madhu Trehan 92 (2001) DLT 665

right to a public trial, the right to legal representation, the right to speedy trial, the right to be present during trial and examine witnesses, etc.

While the right against self-incrimination is explicitly protected under Article 20(3) of the Constitution of India, the procedural aspects of the right to fair trial, for instance the right to examine a witness etc, are elaborately described and enforced through the Criminal Procedure Code, 1973 as well as the Civil Procedure Code 1908.

In India, the right to a fair trial is enshrined primarily in Article 21 of the Constitution of India.<sup>8</sup> In *Subhash Chander v S. M Aggarwal*<sup>9</sup> the Delhi High Court stated that one of the most valuable rights of our citizens is to get a fair and impartial trial free from an atmosphere of prejudice. This right makes it obligatory upon the State not to deprive any person of his life or personal liberty except according to the procedures established by law. If accused have a right to a fair trial then it necessarily follows that they must have a right to be tried in an atmosphere free from prejudice or else the trial may be vitiated on this ground alone.”<sup>10</sup>

Further in *Zabira Habibullah Sheikh v. State of Gujarat*<sup>11</sup>, the Supreme Court explained that a fair trial 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.

This paper looks at the impact of media influenced trials on the judicial process.

## II. Right of The Media

*“Where there is no publicity, there is no justice. Publicity is the very soul of justice. It is the keenest spur to exertion and the surest of all guards against improbity. It keeps the judge himself while trying under trial.”*<sup>12</sup>

*-Jeremy Bentham*

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8 Subhash Chander v. S.M. Aggarwal: 25(1984)DLT52 .

9 *Ibid*

10 *Ibid*

11 [(2004) 4 SCC 158].

12 Scott v. Scott(1911) ALL ER 1 p. 30; Samarias Trading Co Pvt Ltd v S. Samuel (1984) 4 SCC 666



The media in India enjoys wide constitutional protections. Article 19(1)(a) of the Constitution of India bestows upon the citizens of India a right to speech and expression. This sacrosanct right extends to the media as well- granting them the right to publish opinions and idea without unreasonable restrictions on circulation or content.<sup>13</sup>

In *Life Insurance Corporation of India v. Manubhai D Shab*<sup>14</sup> the Supreme Court clarified that the “freedom of speech and expression” in Article 19(1)(a) includes the right to express one’s convictions and opinions freely, by word of mouth, writing, printing, pictures or electronic media or in any other manner. The freedom includes the freedom of ideas, their publication and circulation<sup>15</sup>. The Apex Court further stated *Hamdard Dawakhana v. Union of India*<sup>16</sup>, that the right includes the right to acquire and impart ideas and information about matters of common interest.

Incidentally, the same set of rights that ensure the right to fair trial, also mandate that the trial be public.<sup>17</sup> The Supreme Court has stated in *Naresh Shridhar Mirajkar v. State of Maharashtra*<sup>18</sup> that “public trial in open Court is undoubtedly essential for the healthy, objective and fair administration of justice. Trial held subject to the public scrutiny and gaze naturally acts as a check against judicial caprice and vagaries, and serves as a powerful instrument for creating confidence of the public in the fairness, objectivity and impartiality in the administration of justice. Public confidence in the administration of justice is of such great significance that there can be no two opinions on the broad proposition that in discharging their functions as judicial Tribunals, Courts must generally hear causes in open and must permit the public admission to the Court-room.”<sup>19</sup>

International Conventions like the ICCPR also give a right to an accused to have a public trial<sup>20</sup>. The object of the right to a fair trial is not only to inform the ordinary citizen about the matters of public interest but also to put in place a mechanism to prevent and mitigate judicial error. Publicity of trials and court proceeding deter perjury by potential witnesses.

13 Bennett Coleman & Co. and Ors.Vs.Union of India (UOI) and Ors. AIR 1973 SC 106

14 1992 (3) SCC 637

15 Romesh Thapar v. State of Madras 1950 SCR 594

16 1960 (2) SCR 671

17 Article 14(1), ICCPR

18 [1966]3SCR744

19 [1966]3SCR744

20 Article 14(1), ICCPR

It therefore seems quintessential to a democracy that media be allowed almost unrestricted access to court proceedings. The same is recognised in Article 19(1)(d) of the Constitution and afforded as the right to publish a faithful report of the proceedings witnessed and heard in court as also in judicial and quasi-judicial tribunals.<sup>21</sup>

However, sensationalised news stories circulated by the media have steadily posed a grave threat at the guarantees of a right to fair trial. Often the media rampage has resulted in the undermining the sacrosanct “presumption of innocence” which is one of the most essential human rights. The media often errs on the wrong side of the line between reasonable exercise of the freedom of expression and grave violations of the right to a fair trial.

The pervasive influence of the media sometimes engulfs within itself the impartiality of the members of the judiciary. With each high-profile, media-publicised case it is getting harder to defend the media’s actions and influences under the auspices of freedom of expression. The next section aims to analyse the media’s influence on the right to fair trial and allied rights.

### III. Media and Fair Trial: A Tale of Blurring Boundaries

As a disseminator of public opinion, media has been instrumental in helping victims of crimes getting justice, when opaque bureaucracy and rampant corruption stifles prosecution of the powerful. The media played an unparalleled role in the Jessica Lal murder case. The media was successful in criticising the trial court’s acquittal of the son of a police inspector who raped and killed Priyadarshini Mattoo. Fearless media campaigns have unravelled ugly truths about Khap Panchayats. Such instances run into the hundreds, at national and local level.

There are though limits on the freedom of the press. In *Mother Dairy Foods & Processing Ltd v. Zee Telefilms*<sup>22</sup> it was recognised that while journalists and media are ‘distinctive facilitators’ and they must follow the virtues of accuracy, honesty, truth, objectivity and fairness. The court finally concluded that often the media conveys what the ‘public is interested in’ rather than what is in ‘public interest’. The freedom of the press should not

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21 Saroj Iyer v. Maharashtra Medical Council of Indian Medicine AIR 2002 Bom 97

22 AIR 2005 Delhi 195

degenerate into a licence to attack litigants and close the door of justice nor can it include any unrestricted liberty to damage the reputation of respectable persons.”<sup>23</sup>

Admittedly, the media has the right to be present and report court proceedings, which presumably is based on the media's role as a conveyor of information.<sup>24</sup> It is no secret that the content presented to the public is often inextricably laced with opinions, bias and subjective notions of justice. Every effort should, therefore, be made by media to maintain the distinction between trial by media and informative media. Trial by media should be avoided particularly, at a stage when the suspect is entitled to constitutional protections. Invasion of his rights is bound to be held as impermissible.<sup>25</sup>

Amongst the most important rights enshrined in the holistic right to a fair trial, is the right to be presumed innocent until proven guilty.<sup>26</sup> If presumption of innocence is destroyed at the threshold of the process of media trial, it will be opposed to the very basic rule of law and would impinge upon the protection granted to an accused under Article 21 of the Constitution.<sup>27</sup>

### 3.1 Media and the administration of justice

*“The tension between the courts and the media revolves around two general concerns. The first is that there should be no ‘trial by media’; and the second is that it is not for the press or anyone else to ‘prejudge’ a case. Justice demands that people should be tried by courts of law and not be pilloried by the press.”*<sup>28</sup>

Media's coverage of the incidents of crime, though sometimes laudable, often transgresses its boundaries. It is well settled that once proceedings in Court have begun, the media has no role to play in the administration of justice.

23 Bijoyananda v. Bala Kush AIR 1953 Orissa 249

24 *Supra*, note 20

25 Sidhartha Vashisht (Manu Sharma) Vs. State (NCT of Delhi) 2010(2)ACR1645(SC), AIR2010SC2352

26 Article 14 (2)

27 Anukul Chandra Pradhan v. Union of India and Ors. (1996) 6 SCC 354].

28 Rajeev Dhavan, “Publish and be damned – Censorship and Intolerance in India”, Tulika Books, 2008 p.210. Also available at <http://www.thehindu.com/opinion/Readers-Editor/article431603.ece>. Last accessed July 14, 2011.

In *M.P. Lobia v. State of W.B. and Anr*<sup>29</sup> freedom of speech and expression sometimes may amount to interference with the administration of justice as the articles appearing in the media could be prejudicial. The liberty of the press is subordinate to the administration of justice. The plain duty of a journalist is the reporting and not adjudicating cases.<sup>30</sup>

A popular argument in favour of the media is the people's right to know. Referring to the *Reynold's*<sup>31</sup> the Delhi High Court has clearly explained in the administration of justice, no balancing act is permissible. It is not permissible to contend that the public interest or the right to know outweighs the administration of justice. Such a view may shake the very structural foundations of an impartial justice delivery system.<sup>32</sup>

Media does not know what harm it is doing by having a parallel trial and reporting the proceedings in a manner by giving the news which are detrimental sometimes to the accused who is facing trial and sometimes even to the prosecution.<sup>33</sup>

Justice Frankfurter advocating contempt power in relation to misuse of the right to free speech opined that "to say that the framers of the Constitution sanctified veiled violence through coercive speech, directed against those charged with adjudication, is not merely to make violence an ingredient of justice; it mocks the very ideal of justice by respecting its forms, while stultifying its uncontaminated exercise."<sup>34</sup>

### 3.2 Impact on the judges

Regardless of the desirability, public opinion dictates all our action, albeit to different degrees. Media acts not only as carriers of public opinion but has the power to alter and influence the conscience of the people. The Supreme Court has rightly pointed out that an inherent problem with consideration of public opinion is its inarticulate state.<sup>35</sup>

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29 (2005) 2 SCC 686

30 Harnarain v. Gumori Ram AIR 1958 Punjab 273

31 Reynolds v. Times Newspapers Ltd. [1999] 4 All ER 609

32 Court on its own motion Vs. Respondent: State and Ors.151(2008)DLT695

33 Indian Council of Legal Aid and Advice v. State, WP ' No. 17595/2006 decided on 27th November, 2006

34 Justice Felix Frankfurter in *Bridges v. California* 314 U.S. 252 (1941),

35 Santosh Kumar Satishbhushan Bariyar Vs. Respondent: State of Maharashtra 2009(57)BLJR2348

It is in the design of our system of governance and our constitution to shield judges from public opinion. But, the force of public opinion, represented by the media is such that it permeates these safeguards. Justice Powell, in his dissenting opinion in *Furman*<sup>36</sup> has stated that assessment of public opinion is essentially a legislative and not a judicial function.

Justice Cardozo, one of the greatest Judges of American Supreme Court has observed that the judges are subconsciously influenced by several forces.<sup>37</sup> The Apex Court has accepted and expressed a similar view.<sup>38</sup>

The kind of media trial which is going on in this country creates bias not only in the minds of the general public but also vitiates the atmosphere and this certainly has the tendency to put pressure on the Magistrate or the Sessions Judge or on the court, while taking decisions, which is not a healthy sign for development of criminal jurisprudence. Media does not know what harm it is doing by having a parallel trial and reporting the proceedings in a manner by giving the news which are detrimental sometimes to the accused who is facing trial and sometimes even to the prosecution. Judges are also human beings and when hue and cry is made by the media it is possible that the equilibrium of a Judge is also disturbed. It is therefore time that under the garb of freedom of press the parallel proceedings of media in criminal trial should stop.<sup>39</sup>

It would not be an unreasonable stretch to imagine that members of the judiciary, especially in the lower judiciary let, either consciously or otherwise, public opinion affect their decisions. The Kerala High court has expressed its fear stating that the judiciary will curse the day when a judicial functionary will have to render decisions with one eye on the headline in the media next morning.<sup>40</sup> It cannot conclusively be ruled out, given the media rampage that this is not already prevalent.

S.A.R. Geelani, one of Afzal's co-defendants in the Parliament attack case, was initially sentenced to death for his alleged involvement despite an overwhelming lack of evidence. Large sections of the Indian media

36 *Furman v. Georgia*, 408 U.S. 238 (1972)

37 Benjamin Cardozo, *Nature of the Judicial Process* "Adherence to Precedent The Subconscious Element in the Judicial Process" (1921) (Yale University Press)

38 P.C. Sen In Re: AIR 1970 SC 1821 ; *Reliance Petrochemicals Ltd. v. Proprietors of Indian Express* 1988 (4) SCC 592

39 *Indian Council of Legal Aid and Advice v. State*, WP ' No. 17595/2006 decided on 27th November, 2006

40 *Shaji Vs. State of Kerala* 2005(4) KLT 995

portrayed him as a dangerous and trained terrorist. On appeal, the Delhi High Court overturned Geelani's conviction. The prosecution's case was described as "at best, absurd and tragic".<sup>41</sup>

The possibility that the media might be able to influence the judges, is horrifying for an accused. The lingering anxiety of the inductee that the media might influence the decision maker against him revolts against the fundamentals of the fair trial. <sup>42</sup>The law in the United Kingdom explicitly recognises the phenomenon of *pro-plantiff bias* which can dents into the perception of the fairness of a proceeding.

### 3.3 Impact on the right to legal representation

The media's assumption of guilt has far-reaching consequences including in some cases, a deprivation of the right to legal representation. Many times, it intimidates lawyers into refusing to represent accused persons.

The police investigations of 'serial-killings' in Noida in the outskirts of New Delhi, received extensive media coverage. Much of the media coverage proclaimed that Mohinder Singh Pandher, and his domestic help Surendra Kohli, had already confessed to the killings. Consequently, the local Bar Association announced that it had decided that no advocate from Noida would defend either of the accused. Likewise, when eminent lawyer Ram Jethmalani decided to defend Manu Sharma, a prime accused in a murder case, he was subject to public derision.

The gruesome 26/11 attacks on Mumbai resulted in country wide panic in India. Once his photos were released Mohammed Ajmal Amir Kasab became the most hated figure in India. For fear of public anger Kasab could not get a lawyer to defend him. Once he did, the lawyer was eventually forced to terminate his representation owing to the barrage of the media's cameras and questions. In the absence of proper legal representation Kasab's trial ran the risk of being vitiated. The lawyer's feared that the media would condemn them for guilt by association. There

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<sup>41</sup> These words were used by Delhi University Teachers In Defence of SAR Geelani in their press statement of 18 September, 2003. Some of this statement was subsequently reported in the Statesman, The Hindu, Navbharat Times and Asian Age, on 19 September.

<sup>42</sup> *Id.*

can be no better example to prove that the trial by media indeed is the very antithesis of rule of law.<sup>43</sup>

### 3.4 Impact on investigations

As early as 1961 the Supreme Court realised the detrimental effects of investigation by media. In *Saibal Kumar v. B.K Sen*<sup>44</sup> the Supreme Court stated that it would be mischievous for a newspaper to conduct an investigation into a crime for which a man has been arrested and to publish the results of that investigation. The Court opined that such action would tend to interfere with the course of justice.

A 'media trial' began almost immediately after Mohammed Afzal, prime accused in the 2001 attack on the Indian parliament was arrested. Only one week after the attack, on 20 December 2001, the police called a press conference during the course of which Afzal 'incriminated himself' in front of the national media. The media played an excessive role in shaping the public conscience before trial.

The Andhra Pradesh High Court in *Labour Liberation Front v. State of Andhra Pradesh*<sup>45</sup> observed that once an incident involving prominent person or institution takes place, the media is swinging into action and virtually leaving very little for the prosecution or the Courts..." The *Aarushi Talwar Case* is a prime example to demonstrate how the media has stifled investigation by taking it into its own hands.

### 3.5 Impact on court proceedings including witnesses

The determination of guilt of an accused and punishment thereof are the exclusive domain of the courts. Once proceedings have begun in a court of law or are otherwise imminent, the media has no role to play in the form of 'investigative journalism' or as a fact finder. The matter then rests entirely within the domain of the Court, litigants and their lawyers 'no matter how long the litigation lasts. The media ought to keep its hands off an 'active' case.<sup>46</sup>

The court recognised that before a cause is instituted in a Court of law, or is otherwise not imminent, the media has full play in the matter of

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43 State of Maharashtra v. Rajendra Jawanmal: (1997) 8 SCC 386

44 AIR 1961 SC 633

45 2005(1) ALT 740

46 Court on its own motion v..State and Ors. 2009CriLJ677

legitimate 'investigative journalism'. This is in accord with our Constitutional principle of freedom of speech and expression and is in consonance with the right and duty of the media to raise issues of public concern and interest. This is also in harmony with a citizen's right to know particularly about events relating to the investigation in a case, or delay in investigation or soft- pedalling on investigations pertaining to matters of public concern and importance.

Interference with the administration of justice may also be occasioned through conduct which carries a substantial risk of influencing a witness in an improper manner.<sup>47</sup>

Pre - investigation media publicity also renders effective investigation procedures useless. Test identification parades conducted under the CrPC are rendered useless if the witness has been exposed to the images of the persons comprising the parade. The idea of the parade is to test the veracity of the witness on the question of his capability to identify, among other persons, an unknown person whom the witness had seen at the time of occurrence<sup>48</sup>. The witness must not have seen the accused in the intervening period. As held by the Supreme Court<sup>49</sup>, the identification of witnesses in court would be vague and meaningless, if the witnesses had a chance of seeing the accused beforehand.

### 3.5 Post trial/acquittal impact

The outcome of a major case is widely publicised in the media. Many high profile cases often go to the higher courts either for appeal or for confirmation of sentence. In this regard

“Showering praise on a judgment while its confirmation was sub-judice would certainly amount to creating prejudice in the mind of the general public and would make the task of the court very difficult. In such a case if the High Court comes to a different conclusion it will be faced with an additional burden of dispelling the impression from the public mind that the approach adopted by the lower court was correct”<sup>50</sup>

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47 CJ Miller, *Contempt of Court*. (3rd ed) Oxford University Press Oxford 2000 at 324

48 Kanan v. State of Kerala 1979 Cr.L.J. 919.

49 Shaikh Umar Ahmed Shaikh and Anr.v. State of Maharashtra (1998) 5 SCC 103; Simon and Ors. v. State of Karnataka, JT2004(2)SC124.

50 *Supra*, note 10



The effect on the judges in the higher fora is the least of the post-trial effects of the media campaign surrounding any trial. The media not only runs parallel investigations but also runs campaigns propagating their own opinions as matters of fact. In essence they run a parallel trial under which if convicted the reputation and social image of the accused remains ruined even post acquittal.

The Supreme Court in the case of *R.K. Anandv.Delhi High Court*<sup>51</sup> clearly stated it would be a sad day for the court to employ the media for setting its own house in order and the media too would not relish the role of being the snoopers for the Court. Media should perform the acts of journalism and not as a special agency for the Court.

The thin line between legal prosecution and illegal *persecution* is consistently traversed by the media in the country.

### **3.6 Media and the Profit Motive - *Good journalism means Bad Business***

A statement by an official, a revelation in a murder case or a new lead all of these become fodder for profit for the media. The 15<sup>th</sup> July editorial in The Hindu read “the *Aarushi murder case* is a disturbing example of how a bungling police and a sensation-hungry media can make a horrendous travesty of justice. Arrested for killing his teenage daughter Aarushi on the basis of tenuous circumstantial evidence, condemned by fanciful and self-serving leaks by the Uttar Pradesh police, and tried and ‘convicted’ by the media, dental surgeon Rajesh Talwar has gone from a heartless murderer to a free but traumatized man in the space of less than two months. The CBI, to which the case was transferred, has dropped all charges against him.”

There is no dearth of data to suggest that these high-profile criminal cases generate a lot of revenue for the media<sup>52</sup>. Be it circulation figures for the papers or TRP ratings for the TV channels, all of them take a hike.

Such practice has far-reaching consequences. Desecration of the personal and professional lives of such innocent people reflects poorly on our media and our conscience as a nation.

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51 *Supra*, note 6

52 Hindustan Times, <http://www.hindustantimes.com/special-news-report/Aarushimurder/AAarushi-s-story-bigger-hit-than-cricket-on-TV/Article3-317023.aspx> June 13, 2008. Last accessed on 10th June 2011)

### 3.7 Existing measures and possible solutions

Media trials have become a common phenomenon in India. But, it is not the case the media is completely unregulated. Various statutory, constitutional and judicial checks from time to time have been put in place to regulate the press

In an attempt to restrict the right of the press the Supreme Court had stated in *Harijai Singh v. Vijay Kumar*<sup>53</sup> that the press or journalists enjoy no special right of freedom of expression and the guarantee of this freedom was the same as available to every citizen. The press does not enjoy any special privilege or immunity from law

#### III. Press Council of India

The Press Council of India (PCI) was established to preserve the freedom of the press and to improve the standards of news reporting in India. Under the Press Council Act 1978, if someone believes that a news agency has committed any professional misconduct, the PCI can, if they agree with the complainant, “warn, admonish or censure the newspaper”<sup>54</sup>, or direct the newspaper to, “publish the contradiction of the complainant in its forthcoming issue.” Given that these measures can only be enforced after the publication of news materials, and do not involve particularly harsh punishments, their effectiveness in preventing the publication of prejudicial reports appears to be limited.

Along with these powers, the PCI has established a set of suggested norms for journalistic conduct. These norms emphasise the importance of accuracy and fairness and encourages the press to “eschew publication of inaccurate, baseless, graceless, misleading or distorted material.” These norms recommend that reporters should avoid one-sided inferences, and attempt to maintain an impartial and sober tone at all times.

But significantly, these norms cannot be legally enforced, and are largely observed in breach.

Lastly, the PCI also has criminal contempt powers to restrict the publication of prejudicial media reports. However, the PCI can only exercise its contempt powers with respect to pending civil or criminal case.

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53 1996(6) SCC 466

54 Section 14, Press Council Act 1978

The Press Council of India, has limited membership as compared to the number of newspapers etc. Its powers are restricted only to censorship after publication, that too, only on receipt of a complaint. There is a need to increase the ambit, the strength and powers of the Press Council of India.

#### **4.1 Law Relating to Electronic Media**

Another avenue to look to for to fend of prejudice caused by trial by media is the Cable Television Networks (Regulation) Act, 1995 and the Rules framed thereunder. This act states in explicit terms that all transmission,<sup>55</sup> including advertisement<sup>56</sup> must conform to a code prescribed in the Cable Television Networks Rules, 1994 which states that no programme shall be carried on the cable network which amounts to 'contempt of court'<sup>57</sup>. Although this stands as a valid legislation, no new remedies have been offered to combat trial by media.

#### **4.2 Contempt of Court**

The Contempt of Courts act is used by the Courts as an effective mechanism to check media intervention into the administration of justice. In recent years it has become a lynchpin to protect the right to fair trial of the accused in the days of widespread media sensationalism. Art. 19(2) permits reasonable restrictions to be imposed by statute for the purposes of various matters including 'Contempt of Court'.

The Contempt of Court Act, 1971 imposes valid restrictions to the right of the media under Section 2 referring explicitly to the administration of justice. The Act explicitly defines and demarcates civil and criminal contempt.

While dealing with a case of publication of inaccurate and misleading publication in a court proceeding the Delhi High Court laid down that while reproducing the Court proceedings, no words may be added, omitted or substituted if their effect is to be more prejudicial to a party litigant than the actual proceedings. Any deviation in the report from the correct proceedings actually recorded must, if it offends the

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55 Section 5, Cable Television Networks (Regulation) Act, 1995

56 Section 6, Cable Television Networks (Regulation) Act, 1995

57 Rule 6 (f), Cable Television Networks Rules, 1994

law of contempt of Court, render the alleged contemnor liable to be proceeded against.<sup>58</sup>

Lord Diplock has observed that the due administration of justice requires *first* that all citizens should have unhindered access to the constitutionally established courts of criminal or civil jurisdiction for the determination of disputes as to their legal rights and liabilities; *secondly*, that they should be able to rely on obtaining in the courts the arbitrament of a tribunal which is free from bias against any party and whose decision will be based on those facts only that have been proved in evidence adduced before it in accordance with the procedure adopted in courts of law; and *thirdly* that once the dispute has been submitted to a court of law, they should be able to rely on their being no usurpation by any other person of the function of that court to decide it according to law. Conduct which is calculated to prejudice any of these three requirements or to undermine the public confidence that they will be observed is contempt of court.<sup>59</sup>

Section 3 of the Contempt of Courts Act when read with its Explanation<sup>60</sup> leaves much to be desired. Firstly, it lays down that the start of pendency of criminal proceeding is the issuance of challan, chargesheet or summons. It is only after such issuance that the court, under the Contempt of Courts act can take any action for contempt.

The 200<sup>th</sup> Law Commission of India report has recommendation include that the point of start of pendency of criminal proceeding shall be 'arrest', like it is under the UK Act, 1981. In absence of protection from prejudicial publication on and after the time of arrest, a great threat is posed to the freedom of the accused. By operation of Article 22(2) of the Constitution an arrestee must be produced before the magistrate within 24 hours. Any prejudicial publication might and does adversely affect the outcome of a bail hearing. The adverse effect of publication also trickles down as prejudice in the minds of judges, witnesses and public at the time of trial. The leading *Hall v. Associated Newspaper*,<sup>61</sup> deals with this precise point and has been followed in

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58 Brig. E.T. Sen v. Edatata Narayanan AIR 1969 Delhi 201

59 Skipworth's Case (1873) LR 9 QB 230

60 Explanation (B) to Section 3 judicial proceeding is said to be pending: (i) where it relates to the commission of an offence, when the charge-sheet or challan is filed, or when the court issues summons or warrant, as the case may be, against the accused

61 1978 SLT 241 (Scotland)

other jurisdictions to take account of arrest as the beginning of a criminal proceeding.

Secondly, it offers absolutely no protection to pre-trial publicity. This aspect is discussed in the subsequent section. In the absence of a backbone legislation, the efforts of the Courts in protecting the rights of fair trial from the wrath of the media is commendable. The considerable delay in implementing and discussing the 200<sup>th</sup> Law Commission report tends to show the legislative indifference to the issue, which must change.

#### **4.3 Pre-trial Publicity: Amendment to Article 19**

Pre-trial publicity often results in the most disparaging source of prejudice. A logical interpretation of the Contempt of Courts Act read with the Article 19 (2) limits the scope of Contempt of Courts to matters relating to the Court. Much of pre-trial publicity which is not covered cannot under our current constitutional regime be restricted. In the grounds included in Article 19(2) the ground of ‘administration of justice’ is a notable absentee.

Hence even if the legislature acts upon the recommendations of the law commission<sup>62</sup> to the expand the ambit of Contempt Courts Act to include peripheral issues relating to prejudicial publicity and parallel media investigations it is likely to fail the test of constitutionality. These issues of parallel investigations and publicity done much before the initiation of criminal proceedings cannot reasonably be covered by the term ‘contempt of court’. Since ‘administration of justice’ is not included as one of the grounds under Art 19(2) even a reasonable restriction to preclude the interference of administration will be held invalid until ‘administration of justice’ is included in the list of grounds. In absence of such amendment the hands of the legislature are tied with respect to regulating media investigation and trials. Therefore, a Constitutional recognition of the phenomenon of trial by media is the need of the hour.

Backbone legislation with a constitutional sanction will effectively deal with the menace of media trial.

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62 Law Commission of India Report, 200<sup>th</sup> report TRIAL BY MEDIA FREE SPEECH AND FAIR TRIAL UNDER CRIMINAL PROCEDURE CODE, 1973

# BRIDGING THE DIGITAL DIVIDE: NETWORK NEUTRALITY IN THE INDIAN CONTEXT

*Devdeep Ghosh\**

## I. Introduction

A recent article<sup>1</sup> in the Indian Express expressed the view that the Indian media had largely over-hyped Anna Hazare's fast against corruption on the ground that his protest at Jantar Mantar saw poor attendance. While it is appreciated that the piece was largely satirical, it would be erroneous to accuse the media of exaggerating the popularity of the movement as the correspondent omitted to mention one crucial factor – the groundswell of support that developed for the protest among 'netizens'. That is the undeniable role played by the Internet in today's civil society - a tool that has altered the world as we know it over the last two decades, which possesses an unimaginably large user base<sup>2</sup> and which could prove to be vital in India's persistent struggle against poverty.<sup>3</sup>

However, the open and free character of the internet which has played a major role in ensuring its global patronage is under siege. Current Internet Service Provider<sup>4</sup> (and Government) practices have often been deceptive, blocking content for anti-competitive and traffic management purposes.<sup>5</sup> It is in this context that Tim Wu, an Associate Professor of Law at the University of Virginia Law School, posited the *Network Neutrality* principle.<sup>6</sup>

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1 Mihir Sharma, *Breaking Fast*, INDIAN EXPRESS, April 9<sup>th</sup>, 2011 at p. 9 accessible at <http://www.indianexpress.com/news/breaking-fast/773642/0> (last accessed on April 9<sup>th</sup>, 2011).

2 The use of online social networking has exploded in the past five years, with 600 million users of Facebook and even more registered accounts using the Voice over Internet Protocol (VoIP) software supplied by Skype. Almost instant search through tens of billions of World Wide Web pages is conducted weekly for over a decade now, and YouTube hosts 15 billion video clips uploaded by its 500 million users since 2005. The numbers speak for themselves.

3 Sir Tim Berners-Lee, *Designing the Web for an Open Society: Keynote Speech at the 20<sup>th</sup> International World Wide Web Conference, Hyderabad, 2011* accessible at <http://portal.acm.org/citation.cfm?id=1963408&CFID=17121399&CFTOKEN=15854639> (last accessed on 1<sup>st</sup> April, 2011).

4 Hereafter referred to as 'ISP'.

5 Donahue, H., *The Network Neutrality Inquiry*, info, 12 (2) p. 3 (2010).

6 Wu, Tim, *A Proposal for Network Neutrality*, 17 HARV. J. L. & TECH. 85 (2003). A comprehensive definition and analysis of the principles of Network Neutrality can be found in Part II of this paper. This issue has snowballed into a raging issue in global circles with Japan, Norway, Canada and the European Union effectively incorporating Network Neutrality principles into legislation or regulation. De Beer, J., *Net Neutrality in the Great White North (and its Impact on Canadian Culture)*, 59 Tel J. of Aus 24.1 (2009). The European Union in late 2009 agreed to impose transparency

The *Network Neutrality* principle has not found as wide a mention in India. However, with a number of private ISPs operating in the Indian market, the researcher believes that it will not be long before the debate reaches Indian shores. Indian cyber laws are woefully inadequate in dealing with this threat. ISPs are coerced into allowing the Government to censor any and every content.<sup>7</sup> The TRAI Act and the Information Technology Act, 2000 do not tackle the problem either. The researcher's concerns are shared by industry bigwigs Google Inc.,<sup>8</sup> albeit for different reasons.<sup>9</sup>

The Government of India has announced its goal of achieving 40% broadband penetration by 2015.<sup>10</sup> The scope of my project shall not consider the modalities of how this goal is to be met. The essential scheme of my central argument can be structured in the following three steps:

1. Access to information and the capability to communicate cheaply and conveniently has great capacity to empower the impoverished and is intrinsic for the enjoyment of other rights.
2. The open Internet is today's dominant medium for access to information and communication. The Government has recognized this and has taken active steps to achieve 40 % broadband penetration by 2015.
3. However, access to an Internet that is marred by private ISP tampering and governmental censorship cannot empower to the extent that access to an open and neutral Internet which does not discriminate between content can. Therefore, governmental policies

and net neutrality conditions on ISPs in Directives 2009/136/EC and 2009/140/EC that must be implemented in national law by May 2011.

7 ISP License Agreement for the Provision of Internet Services (available at [www.trai.gov.in](http://www.trai.gov.in)).

8 Google's Comments on the TRAI's Consultation Paper on a National Broadband Plan for India, published on July 20<sup>th</sup>, 2010 and accessible at <http://www.trai.gov.in/WriteReadData/trai/upload/ConsultationPapers/209/39.pdf> (last accessed on April 5<sup>th</sup>, 2011).

9 Being a content provider, its interests lie in a neutral network and ensuring that the Internet remains a resource that is not owned by anyone. In early 2010, they wrote to the Telecom Regulatory Authority of India (hereafter referred to as the 'TRAI') pushing for the legislative implementation of Network Neutrality principles. They were dismayed to find that most senior TRAI officials were clueless about the topic. This ignorance of the most potent threat to our greatest information resource is what has motivated the researcher to analyze the debate.

10 Broadband Policy, 2004 released by the Department of Telecommunications (accessible on [www.trai.gov.in](http://www.trai.gov.in)).

to ensure broadband penetration will not be very effective unless the neutrality of the internet is preserved.

In step 3, the researcher is going beyond simply guaranteeing access to the Internet when he says that the need of the hour is access to an open and neutral Internet. Part I, II and III shall explain the reasoning behind this motivation.

The researcher makes two assertions in introduction. *First*, that the Internet is an essential enabling tool for Indians nationwide. *Second*, that the Internet is more important than all consumer-oriented technological innovations of the last century primarily since it can efficaciously provide a cheaper alternative in all cases be it digitized libraries, convenient shopping portals, televisions, telephones etc.<sup>11</sup> I shall further elaborate upon these assertions in Part I of this paper.

In Part I of this paper, the researcher shall explain his fundamental premise that an increased access to information and communication plays a proximate role in alleviating poverty. Subsequently, the researcher shall establish the close link between the Internet and factors that are traditionally viewed as empowering viz. education, increased political participation etc. Part II of this paper shall acquaint the reader with the finer contours of the Network Neutrality debate and the various manifestations in which the issue presents itself. Part III of this paper shall highlight the Indian scenario vis-a-vis the Network Neutrality debate. Though there is no outright legislation on the subject the researcher shall study the Indian ISP liability regime which provides wide latitude for private censorship.

## II. Ignorance isn't Bliss: *To be impoverished in the Information age*

### (A) Information and Communication Deprivation as a Cause of Poverty

Amartya Sen's 'Capabilities Approach' essentializes development as the expansion of human freedoms.<sup>12</sup> Political freedom,<sup>13</sup> economic

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11 An assertion that finds support in Marsden, Christopher T., *Network Neutrality and Internet Service Provider Liability Regulation*, p. 6 accessible at [papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1533428](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1533428) (last visited on April 4<sup>th</sup>, 2011).

12 SEN, AMARTYA, *DEVELOPMENT AS FREEDOM* 87 (1<sup>st</sup> ed. 1999).

13 People's opportunities to determine who should govern and under which principles, freedom to evaluate and criticize authorities, freedom of expression, right to dialogue, to oppose, to criticize, to vote, to choose among political parties, to be involved in Legislative and Executive elections.



facilities<sup>14</sup> and social opportunities<sup>15</sup> are among the freedoms conceptualized by Sen as intrinsic to development. Information and communication deprivation has proved to significantly curtail these freedoms inhibiting development.

This can be better understood through the lens of Henry Shue's theory of rights which stipulates that if people are granted a right but are denied access to 'x', 'y' and 'z' resources which are necessary for the enjoyment of that right, then there is no actual enjoyment of that right.<sup>16</sup> For example, if people enjoy the substantive right to political freedom but are denied the information which would allow them to compete with others who do possess the necessary information, then their right to political freedom is merely a proclamation and they cannot be said to 'actually enjoy the substance of the right'.<sup>17</sup>

In this regard, Manuel Castells recently argued that the world had entered an 'information age' wherein digital information technology had begun to 'provide the material basis' for the expansion of the 'networking form of organization' in every realm of social structure and that a person's participation in today's society is contingent on his access to information.<sup>18</sup> Gigler pointed out that 'information is not only a source of knowledge but also a special source of advancement of economic, social, political and cultural freedoms'.<sup>19</sup> He further goes on to explain how information poverty, though only an aspect of poverty, goes on to influence other critical dimensions of poverty such as education, health care, social networks, productivity and political participation.<sup>20</sup> Besides the need to strengthen the poor's capabilities for the ownership and use of economic

14 An individual's opportunities to use economic resources with the purpose of consumption, production or exchange. The economic ownership of a person depends on the possession of resources, use availability, exchange conditions and its distribution.

15 It refers to the way a society organizes itself to provide education, health and social services, which contribute to an effective participation on political and economic activities.

16 SHUE, HENRY, BASIC RIGHTS: SUBSISTENCE, AFFLUENCE AND U.S. FOREIGN POLICY 16 (2<sup>nd</sup> ed. 1996)

17 *Ibid* at p.17.

18 1 CASTELL, MANUEL, THE RISE OF THE NETWORK SOCIETY 468 (1<sup>st</sup> ed. 1996).

19 Gigler, B.S., *Enacting and Interpreting Technology from Usage to Well-being* (2005) as cited in Barja, Gover and Gigler, B.S., *The Concept of Information Poverty and How to Measure it in the Latin-American Context*, p. 15 accessible at [http://mpeirano.com/dirsi2/sites/default/files/dirsi\\_07\\_DP01\\_en.pdf](http://mpeirano.com/dirsi2/sites/default/files/dirsi_07_DP01_en.pdf) (last accessed on March 20<sup>th</sup>, 2011).

20 *Ibid*.at p. 15, 24.

assets, there is an imminent need to ensure new capabilities for the exchange of information and ideas about the economy, politics and society.

**(B) The Internet: An information-superhighway.**

After conclusively establishing the importance of information in the development of our freedoms, we must consider the ways and means of obtaining said information. Today, the Internet is the dominant media for the dissemination of information and convenient communication. A large part of the researcher's analysis is dependent on authoritative materials accessible on the Internet which would have been near impossible to glean despite a nearby library which can be said to have a superlative collection.

The defining characteristic of the Internet is that it operates on a fringe model of *end to end networking* rather than centralizing its intelligence in the central routers.<sup>21</sup> Furthermore, the Internet has evolved new forums for the expression of ideas and opinions. The researcher's reference to the Anna Hazare protest is illustrative of how the politics of unrest has moved from the Tianmen Squares and the Azad Maidans to Facebook wall posts and blogs.

**(C) The Socio-Economic Implications of Depriving People of Internet Access**

The versatility of the Internet can see it implicated in social change more deeply than any other technological innovation.<sup>22</sup> Its model of wide information dissemination and its capacity to empower and encourage entrepreneurship could reorder power relations and put the focus back on the individual creativity ridding him of State bureaucracy. The Internet can greatly reduce inequality as it significantly lowers the cost of information and empowers the impoverished to gather human capital.<sup>23</sup>

The enormous potential of the Internet should see it find its rightful place in the struggle against poverty. However, until recently, rural

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21 Lessig, Lawrence, *The Future of Ideas*, 52 DUKE L. J. 282 (2002). This characteristic has ensured the space required for human innovation spawning numerous success stories such as Facebook, YouTube, Google and closer home, naukri.com and rediff.com.

22 DiMaggio, Paul et al., *Social Implications of the Internet*, 27 ANNUAL REVIEW OF SOCIOLOGY 308 (2001).

23 Anderson, R. H. et al, *Universal Access to E-mail: Feasibility and Social Implications* (1995) as cited in DiMaggio, Paul et al., *Social Implications of the Internet*, 27 ANNUAL REVIEW OF SOCIOLOGY 310 (2001).

empowerment policies have largely neglected it. Scholars have already concluded that inequality in Internet access limits people's opportunities to find jobs, obtain education, access government information, participate in political dialog, and build networks of social support.<sup>24</sup> The researcher shall focus on two overwhelming benefits of improved Internet Access:

### 1. A Politically Engaged Public and a Renewed Public Sphere

There is overwhelming evidence that the open Internet has resulted in a re-engaged and deliberative political community.<sup>25</sup> The efficacy of the open Internet in this regard is not merely due to its massive and cheap repository of information but because of the interlinking of users that it facilitates.<sup>26</sup> The open internet can encourage deliberative democracy by 'enhancing the quality of political discussion and the viability, meaningfulness, and diversity of the public sphere by lowering the access barrier to meaningful public speech'.<sup>27</sup> Reference must also be again made to Shue's theory of rights which stipulates that the granting of a right envisages the actual enjoyment of the substance of that right. In that regard, if a resource is intrinsic to the enjoyment of a right then access to that resource must be ensured to all who enjoy the right. The open Internet plays a major role in mobilizing public opinion and empowering people to exercise their civil-political rights.<sup>28</sup>

### 2. Impact on Culture.

The open Internet can have a significant impact on individual contribution to culture as it significantly lowers entry barriers to publishing,

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24 DiMaggio, Paul et al., *op cit* 310. Though it can be argued that the Internet is still at a nascent stage of its development in countries with a great many rural poor and that it will diffuse in due course of time, it has been noted that inequalities in access to information services (e.g. telephone, cable) tend to persist in contrast to the rapid diffusion of information goods (e.g. radio, television, VCRs) that reach near saturation relatively quickly. This is because the former require ongoing expenditures, whereas the latter are based on one-time purchases.

25 BROWNING, G., *ELECTRONIC DEMOCRACY: USING THE INTERNET TO INFLUENCE AMERICAN POLITICS* 3 (2<sup>nd</sup> ed. 1996). Before the advent of the Internet, it took time and energy to interpret and analyze political incidents and information and therefore, it was simply easier to rely on the 'civic-attentiveness' of others.

26 For example, most news articles found online have an option that allows the reader to quickly and easily 'send or mail the article to a friend'.

27 *Ibid.*

28 Three politically related keywords were among Google's top 5 searches in 2011. 'Budget' at no. 2 lost the top spot to 'how to get pregnant'.

music recording etc.<sup>29</sup> Thus, the Internet is profoundly liberating – inspiring creation among people who would have otherwise shied away due to high entry barriers. It can democratize the flow of information, supplanting top-down dependence on traditional news and media organizations with bottom-up sharing among consumers themselves. Aside from being today's prime information-provider, the Internet has revolutionized the process of communication with e-mails and social networks relegating the postal systems (today, aptly titled 'snail mail') to oblivion. This has led to its own set of problems. Reference can be made to Iris Young's theory of cultural imperialism which is a consequence of a 'universalization of a dominant group's experience and culture and its establishment as the norm'.<sup>30</sup> People are culturally oppressed when they are excluded from the use of the dominant means of interpretation and communication in society. The culture of that society completely excludes the culture of the other – resulting in their inevitable oppression. Today, the Internet has occupied the place of the 'dominant media' of interpretation and communication. Not ensuring its access to all, would result in the cultural oppression of the excluded.

### III. Control 2.0: *The Tussle for the Internet*.<sup>31</sup>

The incredible popularity and profitability of the Internet has led to both ISPs and Governments rethinking their role in cyberspace. The ISP market is characteristically oligopolistic with a few very large players with huge consumer bases and numerous smaller companies. Till very recently, ISPs had been limited to the role of mere 'conduits' – only facilitating the passage of data packets from one end user to another with no intervention. However, of late, ISPs have been abusing their position by slowing down data traffic to either websites that they are not affiliated with or websites that they are in direct competition with.<sup>32</sup>

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29 For example, Justin Bieber, a teen pop singer, shot to fame by posting videos of his renditions on YouTube. Today, he is a teen icon. Had he not used the internet, he would have to audition for a record label with considerable personal expense.

30 YOUNG, I. M., *JUSTICE AND THE POLITICS OF DIFFERENCE* 59 (1st ed. 1990).

31 'Web 2.0' is the popular term used to refer to the internet in the 21st century. The title of this Part of my paper refers to the struggle for control over this media in modern cyberspace.

32 The first dispute arose in Norway between an ISP NextGenTel and the Norwegian state broadcaster NRK in 2006. NextGenTel slowed down data traffic to the website of NRK which the operator said was generating excessive traffic caused by its subscribers streaming free Internet TV provided by the broadcaster. The Norwegian regulator ruled in favour of the

Owing to the oligopolistic nature of the market, if one of the large players chose to significantly degrade traffic to any website, it would result in both, a deprivation of information for users trying to access that website and denial of the freedom of expression to the content provider.

It is in this background that Tim Wu's Network Neutrality principle enters the picture. The principle relates to the basic architecture and design of the Internet network. The idea is that a maximally useful public information network aspires to treat all content, sites, and platforms equally. This allows the network to carry every form of information and support every kind of application.<sup>33</sup> This neutrality protects the diverse nature of the Internet. The principle postulates an anti-discriminatory rule to preserve the Internet's decentralized and neutral nature in order to sustain its capacity to encourage innovation. If one user pays a certain amount for a certain level of connectivity and another user of another ISP does the same, the two should be able to connect at that designated speed and to all legal content available on the Internet.<sup>34</sup> The principle also

broadcaster. In 2008, Bell Canada, an ISP, was found to have throttled traffic for all its consumers. The Canadian regulator ruled against the ISP in an unsatisfactory judgment where it recognised that the ISP had over-ridden Network Neutrality principles as well as consumer rights but did not elaborate further. In 2009, ComCast Corp., the largest American ISP (in which Verizon, a telecommunication company had a large shareholding) was found to have deliberately throttled traffic to Skype and other VoIP websites (those that allow their users to make free of charge internet phone calls as Verizon was in competition with them. The Federal Communications Commission (FCC), a statutory body under the Telecommunications Act, 1996, intervened and penalized ComCast Corp. However, the American Supreme Court, in *Com Cast v. FCC* 600 F.3d 642, 390 U.S.App.D.C. 111 ruled in favour of the ISP as regulating Internet service was not within the purview of the FCC. It was held that the FCC could not exercise jurisdiction over the network management of ISPs as the FCC has no ancillary authority to bar an ISP from network interference since the exercise of this authority was not seen to be reasonably ancillary to the effective performance of its statutorily mandated responsibilities under the Telecommunications Act, 1996.

Marsden, Christopher T., *op cit*, p. 4. In India, there have been complaints where Tata Broadband has been alleged to have slowed down traffic to websites such as YouTube.com while expediting traffic to affiliated websites. In 2010, during the IPL season, Airtel freed up considerable bandwidth in order to facilitate YouTube to stream match videos faster, thereby slowing down other video sites. AirTel was rumoured to have been paid by YouTube for this facility.

33 This principle can be better understood through an analogy to the electric supply network. The electric grid does not operate differently with different appliances that are connected to it. The neutral nature of the electric grid has led to a lot of innovation in the electrical appliances market. [http://www.timwu.org/network\\_neutrality.html](http://www.timwu.org/network_neutrality.html) (last accessed on April 2<sup>nd</sup>, 2011)

34 Malik, Aman, *Network Neutrality: Where Does India Stand* accessible at <http://www.dare.co.in/strategy/it-outsourcing/network-neutrality-where-does-india-stand.htm> (last accessed on April 4<sup>th</sup>, 2011).

stipulates that content providers should not have to pay variable rates. The neutrality of the internet is not only threatened by private ISPs but also by the Government when it intervenes and proposes extensive censorship. I shall briefly flesh out the threat posed by these entities.

**(A) Private ISPs: *Free Market Or Forced Market?***

The Internet is a network of networks. The physical infrastructure that allows data packets to flow through this network is provided by the ISPs. Therefore they are in a position to mandate the speed at which the data packets of their consumers reach the servers of different websites or whether they reach them at all i.e. whether their consumers can access the website or not. Owing to the popularity of the internet, large companies have entered the ISP market with prior vested interests in ensuring that their consumers are not able to connect to the online avatars of their competitors. They are also seeking to capitalize on the Internet and get themselves a bigger share of the pie by charging content providers different rates. Thus, the demand of the private ISPs can be summed up as the following:

- i. That the Internet should have more than one information highway—one for the privileged users and content providers who can pay more and the other for lesser mortals.<sup>35</sup>
- ii. That they control the content users consume. In other words, if a certain website does not conform to your ISPs business interests, the ISP can simply block it.<sup>36</sup>

The Indian legislative framework does not prohibit the ISPs from discriminating against content. The Indian ISP liability regime gives ISPs every reason to block content on their networks as otherwise, they can be held absolutely liable in the eventuality that the content is found to be illegal. The TRAI Act only stipulates that the ISP act in public interest<sup>37</sup> - a provision that can be easily interpreted in a non-neutral ISPs favour

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35 For example, if Google is asked to pay more for the same service that say Yahoo or Microsoft gets at a comparatively cheaper rate, it can potentially seriously jeopardize Google's market share because Google's host of sites will open slower than Yahoo's or Microsoft's.

36 For example, if your ISP has a corporate tie-up with NDTV, it might choose to block you from visiting CNN IBN or Times Now's website, in which case the Internet becomes more or less a one way street.

37 TELECOM REGULATORY AUTHORITY OF INDIA ACT, 1997, § 11(b)(v).

should there ever be litigation on the matter. The Indian legislative framework vis-a-vis Network Neutrality is further elaborated upon in Part III of this paper.

### **(B) Governmental Censorship: *Big B(R)Other and the Internet***

The essential neutrality of the open internet has ensured that it has remained the last bastion of unhindered expression. However, Governmental influence could undo this vital feature as it has done in countries like China and Iran.

Governmental censorship can be both politically and economically motivated.<sup>38</sup> An example of politically motivated internet censorship would be the recent Jasmine Revolution in Libya and Egypt where the Internet, which had proved to be a major factor in spreading revolutionary sentiments, was all but shut down. Political dissent is easily expressed over the internet making it a censoring hotspot for not only totalitarian regimes but allegedly democratic poster boys such as Australia and the United States of America. Governmental censorship is needed on a certain level as the Internet provides space for nefarious activities. However network neutrality principles are violated when the Government goes beyond its brief in censoring legal content on the Internet. India's cyberspace is not immune from this menace either.<sup>39</sup>

Economically motivated governmental censorship is also prevalent. In 1999, users were downloading VoIP software to make international phone

38 Marsden, Christopher T., *Network Neutrality and Internet Service Provider Liability Regulation*, p. 6 accessible at [papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1533428](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1533428) (last visited on April 4<sup>th</sup>, 2011).

39 VSNL, a government run ISP with a broad consumer base, blocked access to the website of the Dawn newspaper during the Kargil War.

The DoT banned all Yahoo Groups in 2003 as one of them discussed the political aspirations of the Kynhun, a separatist minority group in Meghalaya. Andrew Orlowski, *India Blocks Yahoo! Groups* accessible at [http://www.theregister.co.uk/2003/09/24/india\\_blocks\\_yahoo\\_groups](http://www.theregister.co.uk/2003/09/24/india_blocks_yahoo_groups) (last accessed on April 11<sup>th</sup>, 2011).

In 2000, Seema Kazi, a member of an e-group called Middle East Socialist Network (MESN) which conducted debates on socialist activism, political economy, democracy, religion and politics, discovered that VSNL had blocked e-mails from her e-mail address to the e-group. A VSNL official explained this step by saying, "Muslims have links with Pakistan. And MESN posed a potential security hazard." *VSNL Under Fire for Blocking "Communal" E-mail*, THE FINANCIAL TIMES accessible at <http://www.financialexpress.com/old/fe/daily/20001129/efe29006.html> (last accessed on April 11<sup>th</sup>, 2011).

calls over the Internet, which was deemed a threat by VSNL as long distance was its monopoly. In an effort to restrict access to Internet telephony sites, VSNL blocked subscriber access to sites like Vocaltec (vocaltec.com), Web Phone (.NetSpeak.com) and Net2Phone (Net2phone.com). Thus, we see how governmental censorship is as detrimental to the neutrality of the Internet as the actions of private ISPs.

#### **IV. The Indian Scenario – *Should we be Bothered?***

There will inevitably be substantial criticism of the views expressed in this paper. Some might argue that internet access is not on the ‘priority list of the ultra-poor’ in India. However, as I’ve established in Part I and Part II, access to the Internet is inextricably linked with access to convenient and unbiased information as well as communication which are intrinsic to the enjoyment of other rights.<sup>40</sup> The Government of India has also recognised the potential of the Internet by setting the goal of 40% broadband penetration by 2014.<sup>41</sup> The need of the hour is for empowerment of India’s impoverished and it is the researcher’s argument that a heavily censored Internet or one which succumbs to the profit oriented policies of big business will not be able to empower its target group to the extent that the neutral Internet can.

Another possible criticism is that the instances of non-neutral Internet activities that the researcher has cited are largely incidents that have occurred overseas and have no bearing on the Indian scenario. However, the Internet must not be seen through the lens of geographic jurisdictions. A large number of websites hosted on the Internet are located in the United States of America and discrimination against their business would see its effect on Indian consumers.

##### **(A) India’s Vaguely Worded and Openly Flouted Cyber Legislations**

Leave alone a specific legislation preserving the neutrality of the Internet, there are gaping loopholes in the existing legislative framework. The TRAI Act, 1997 only stipulates that ISPs must act in consumer

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40 In this regard, an argument can be made that access to the Internet can qualify to be one of Henry Shue’s basic rights. However, this argument is beyond the scope of the researcher’s current study.

41 Broadband Policy, 2004 released by the Department of Telecommunications (accessible on [www.trai.gov.in](http://www.trai.gov.in)).



interest.<sup>42</sup> The sole other mention of Network Neutrality principles by the TRAI can be found in a consultation paper issued in 2006 where it foresees a situation where ISPs ‘may use their market power to discriminate against competing applications and/or content’.<sup>43</sup> The TRAI’s Quality of Service of its Broadband Service Regulations of 2006 did not incorporate any anti-discriminatory measure. The License Agreement (which an ISP must mandatorily enter into before being granted a license to operate in India) does stipulate that ISPs must refrain from discriminating between Internet content otherwise it stands to have its license cancelled.<sup>44</sup> However, that hasn’t stopped big business ISPs from openly flouting Network Neutrality principles.<sup>45</sup>

After the Information Technology (Amendment) Act, 2008 (which was modelled on the safe harbour provisions of the Digital Millennium Copyright Act, 1998),<sup>46</sup> ISPs were exempted from liability for illegal content on their networks<sup>47</sup> but for some reason best known to our legislators, this exemption did not extend to any content illegal under the Copyright Act, 1957 or the Patent Act.<sup>48</sup> Thus ISPs can still avail of the legal defence that they disabled content as they were under the belief that the content was illegal under the Copyright Act, 1957 or the Patent Act. The Honourable High Court of Delhi, in *Avnish Bajaj v. State*<sup>49</sup> ruled that the principle of absolute liability applied when an ISP was found to host illegal content on its network, thus giving ISPs further impetus to wantonly censor any and every content that might be illegal regardless of whether it is ultimately found to be so, often with *malafide* intentions. Safe harbour provisions such

42 TRAI ACT, 1997, § 11(b)(v).

43 Clause 3.6.2 of the TRAI Consultation paper on Internet Services (available at [www.trai.gov.in](http://www.trai.gov.in)).

44 Clause 10.2 of the ISP License Agreement for the Provision of Internet Services (available at [www.trai.gov.in](http://www.trai.gov.in)).

45 Recently, MTS, a telecom operator announced its Internet service which explicitly provides for faster access to websites such as Yahoo! India. Thus, we see that Network Neutrality is not a mere hypothetical any longer. Apar Gupta, *(TRAI)ing to Keep it Neutral* accessible at <http://www.iltb.net/2010/09/traiing-keep-it-neutral/> (last accessed on April 8<sup>th</sup>, 2011).

46 DIGITAL MILLENIUM COPYRIGHT ACT, 1998 § 512. Hereafter referred to as the DMCA. The safe harbour provisions of the DMCA exempt ISPs from all liability for illegal content that they might passively carry on their network thereby denying them the defence that they censored material in the fear that it might be illegal.

47 INFORMATION TECHNOLOGY ACT, 2000 § 79.

48 INFORMATION TECHNOLOGY ACT, 2000 § 81. The proviso to Section 81 says that despite the overriding effect of the IT Act, nothing in the Act can restrict any person from exercising any rights conferred under the Copyright Act, or the Patents Act.

49 *Avnish Bajaj v. State*, 150 (2008) DLT 769, ¶19.

as the one in the DMCA would go a long way in ensuring ISP adherence to Network neutrality principles in the Indian context.

As regards government censorship, numerous clauses of the ISP License Agreement grant the government the authority to over-ride ISPs and monitor the data on their network if such censorship is in the 'interest of the State'. Thus we see that the law does not actively prohibit the violation of Network Neutrality which could be detrimental to the effectiveness of the Internet as a tool for empowerment.

## V. CONCLUSION

In conclusion, the researcher would like you to reconsider the three steps of his central argument:

1. Information and communication have the ability to empower and enrich. Access to both can ensure that power relations in society are re-ordered with the ultimate objective of attaining a more equitable society. It is essential for the ability to exercise other guaranteed rights. An informed society has the ability to hold their public officials accountable. A people with access to the dominant medium of communication has the ability to assert their cultural presence and their political opinion. To deny information is to deny the opportunity to participate in society.
2. The open Internet has emerged as the most viable medium for obtaining information and communicating your own views in the quickest, cheapest and most convenient way.
3. Though the Government of India has recognized the potential of the Internet, it has failed to notice the gradual alteration of its most important characteristic – its neutrality. Private ISPs must be prevented from using their market power to deprive the masses of their access to unhindered and unbiased information. Similarly, the Government must refrain from exerting its influence to smother the Internet. Only then can the Internet realize its potential to empower.

The people have something to say – let them say it.

# GENDER STEREOTYPES: WOMEN IN THE MEDIA

*Smriti Patel & Sristi Patel\**

## I. Introduction: Barbie v Superman

*"What women suffer is more insidious than invisibility. It is deliberate erasure."<sup>1</sup>* This is the undisputed belief of all academicians and researchers with regard to women's representation in media. Women professionals and athletes persist to be under-represented in news reporting, and are habitually stereotypically portrayed when they are integrated. Although there has been a steady increase in the number of women professionals over the past 20 years, most mainstream press coverage continues to rely on men as experts in the fields of business, politics and economics<sup>2</sup>. Women in the news are more prone to be attributed in stories about mishap, natural catastrophe, or domestic violence than in stories about their professional capability or proficiency.

Women in politics are correspondingly tangential. Many studies have revealed that journalists tend to focus on the domestic aspects of the politically active woman's personal life rather than her position on the issues<sup>3</sup>. In the media, women's analysis is solicited chiefly in the outline of "average citizens" and hardly ever as an authority, and political or economic achievement stories were overpoweringly masculine. The number of female politicians interviewed is inconsistent to their number in Parliament or in the Assembly. In such a condition, it is vital to comprehend the various characteristic of gender portrayal in media.

## II. Genesis: The Perfect Woman Throughout History

Since the 1960s, the women's movement has been engaged in a systematic and constant critique of media institutions and their output<sup>4</sup>. Women's portrayal in the media helps to keep them in a position of relative weakness. The term 'symbolic annihilation', coined by **George Gerbner** in 1972, became a powerful and widely used metaphor to describe the ways in which media images render women invisible<sup>5</sup>. This 'mediated' invisibility is

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1 Ang Len. 1991. *Desperately Seeking the Audience*. London: Routledge.

2 Bartel, Diane. 1988. *Putting On Appearances: Gender and Advertising*. Temple University Press.

3 Bem, S. L. (1993). *The lenses of gender: Transforming the debate on sexual inequality*. New Haven: Yale University Press.

4 Batchelor, Suzanne "Traditional Women Are Tobacco's New Global Market." *Women's Enews*, 18 August 2003 URL: <http://www.womensenews.org/article.cfm/dyn/aid/1491/context/archive>

5 Cann, A. (1993). Evaluative expectations and the gender schema: Is failed inconsistency better? *Sex Roles*, 28, 667-678.

achieved not merely through the non-representation of women's points of view or outlook on the world. When women are 'visible' in media content, the manner of their representation reflects the biases and assumptions of those who define the public - and therefore the media - agenda<sup>6</sup>. Despite measures to redress gender imbalances, the power to define public and media agendas is still mainly a male privilege<sup>7</sup>.

Gender must be brought within the span of human rights. Every case of insensitive reporting is as much a violation of human rights as it is of gender rights<sup>8</sup>.

### III. Media Coverage Of Women: Present But Not Heard

Inadequate women's coverage is a worldwide phenomenon<sup>9</sup>. Some time back, the Association of Women Journalists (AFJ) conducted a study of news coverage of women and women's issues in 70 countries<sup>10</sup>. It reported that only 18 per cent of stories quote women, and that the number of women-related stories came to barely 10 per cent of total news coverage<sup>11</sup>. News talk shows are equally problematic. Only speak 10 per cent of the time women come in such shows<sup>12</sup>. That leaves 90 per cent of the tête-à-tête to the male guests. Another setback is that the media often typecasts politically dynamic women; when **Hillary Clinton** was still first lady, she was referred to as a "witch" or "witchlike" at least 50 times in the press<sup>13</sup>. **Rivers** writes, "*male political figures may be called mean and nasty names, but those words don't usually reflect stereotypes*"<sup>14</sup>."

6 Condry, J. C., & Condry, S. (1976). Sex differences: A study in the eye of the beholder. *Child Development*, 47, 812-819.

7 Flanders, L. (1997). *Real majority, media minority: The cost of sidelining women in reporting*. Monroe, ME: Common Courage Press.

8 Gardner, A. et al. (1989) Equity, Excellence, and Just Plain Good Teaching. *The American Biology Teacher*, 72-77

9 Hall, R.M. (1982) The Classroom Climate: A chilly one for women. *Project on the Status of Women, Association of American Colleges*. Washington D.C.

10 Jones, M. (1991). Gender stereotyping in advertisements. *Teaching of Psychology* 18, 231-233.

11 Katz, N. (2003) Gender Stereotypes- What you need to know about stereotypes. *Women's Issues*, <http://womensissues.about.com/cs/genderstereotypes/a/>

12 Ibid

13 Darrell M. West, (2003). How Hillary Clinton Can Become America's First Female President. <http://www.insidepolitics.org/heard/HillaryClinton.pdf>

14 Ibid

Women athletes are also not given ample space in the media. Only about nine per cent of airtime is devoted to women's sports, in contrast to the 88 per cent devoted to male athletes<sup>15</sup>. In India, women sportspersons get very little publicity.

Commentators (97 per cent of whom are men)<sup>16</sup>, use different language when they talk about female athletes. Men are represented as "big," "strong," "brilliant," "gutsy" and "aggressive". Women are more frequently referred to as "fatigued," "frustrated," "panicked," "vulnerable" and "choking." Often journalists take enthusiastic attention in any of the athletes' poses that could be seen as evocative. A classic case is the excessive attention accorded *Anna Kournikova*—for her beauty rather than her game; *Sania Mirza*, for her nose ring initially, and more recently, for her wedding to a Pakistani cricket player than her expertise at tennis.

Media metaphors of women in sports are also very diverse from the proverbial pictures of male sportsperson in feat. Female athletes more photographed in hyper-sexualized poses. Most of the women journalists on TV have the added saddle of looking superior. Many women journalists have surgically altered their faces to appear younger and more "beautiful"<sup>17</sup>.

By and large, the media panorama in India is that media does not deal with serious topics about misuse and uneven behaviour toward women in diverse field but is keen on reporting sex related incidents by way of sensationalizing news of violence on women. Thus, instead of emphasizing the operation of woman they end up becoming one of the foundations in adding aggression as their coverage more often than not is disposed to deify the crime against women. It is true that media has brought to light, as never before, certain delinquency against women but in a much understated manner it also disseminated the stereotyped image of woman as a householder and an insignificant entity in the traditional value system<sup>18</sup>. Usually, women's problems never figure on the front page of a newspaper unless it is a ghastly murder or a case of rape. Even the women's pages in

15 Lindsey, L.L. (1994) *Gender Roles: A Sociological Perspective*, New Jersey: Prentice Hall

16 Macrae, C. N., Hewstone, M., & Griffiths, R. J. (1993). Processing load and memory for stereotype-based information. *European Journal of Social Psychology* 23, 77-87.

17 Miller, D. T., Taylor, B., & Buck, M. L. (1991). Gender gaps: Who needs to be explained? *Journal of Personality and Social Psychology*, 61, 5-12.

18 Peirce, K. (1990). A feminist theoretical perspective on the socialization of teenage girls through Seventeen magazine. *Sex Roles*, 23, 491-500.

newspapers do not characteristically address pertinent issues of women empowerment but is more concerned with beauty tips, recipes and fashion syndrome.

It is regrettable that there is lack of understanding among the newspapers in general, to women and their problems. There was a study conducted by the **Media Advocacy Group** viz. “Violence against Women: Media Coverage and Representation”<sup>19</sup>. The Media Advocacy Group made the following proposal on reporting violence against women:

- a) Media needs to take an extensive, far-reaching analysis of crimes against women. It has to be instrumental in controlling a social assessment on issues accountable for increasing crimes, predominantly against women and children, as well as unconcerned analytical trial, miscarriage of impartiality, and mounting social impunity of the perpetrators of crime.
- b) It also has to be instrumental in creating consciousness among civil society of the causes and nature of the crime itself, and of the preventive measures.
- c) When treating these issues, media has to be tremendously accurate and practical.

The study also stated that the only regulation that governs sensitive reporting on this issue is that the rape victim’s name should not be disclosed<sup>20</sup>. Exclusive of this, the study found that everything else is explicitly reported. Often the victim’s family name and address is referred to, making a mockery in the letter and fortitude of the regulation. Though much of this breach and negligence are committed by a small group of publications, others are prompted on to emulate and keep pace with the astounding inclination. Therefore, the media needs to take a serious look on the subject and do self-regulation and self-monitoring with tremendous care and concern.

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19 Rosser, S. (1995) Teaching the Majority: Breaking the Gender Barrier in Science, Mathematics, and Engineering. USA, *The Athena Series*, Teachers College Press.

20 Shacrar, R. (1996) Teacher training and the promotion of gender equality: A case study of Israeli Society. *Women and the University Curriculum Towards Equality, Democracy, Peace*, 247-268. Paris, France.

*Aarushi* murder case is another chief example of reckless and sensational reporting by the media. The horrible murder of a teenage girl has been the sound basis of augmented TRPs of the News Channels. The media, both electronic and print, are ethically and lawfully bound to shun the sensationalisation of news relating to victims of crimes. The Press Council of India had already drawn strategy on the subject and petitions to media to pursue them scrupulously while reporting atrocities on women/child<sup>21</sup>.

#### IV. Issue Of Gender Portrayal: The Stage And The State

Portrayal of gender in media has been a controversial issue for a long time<sup>22</sup>. Thus it forms a favorite topic for media study. Many research studies have been accomplished on this issue. Most of these studies reveal the one-sided representation in media with regard to gender<sup>23</sup>. Men usually get represented more and in generally favorable manners<sup>24</sup>. Women, on the other hand get second-class treatment in the media. Here are some major findings of research on gender portrayal in media.

##### A. Gender representation is biased: Losses related to Gender Bias

Men are portrayed in many assorted roles, women almost always in traditional feminine roles. For example, in many of the Bollywood films starring *Akshay Kumar* and *Katrina Kaif*, the female star always portrays “the damsel in distress” roles, whereas, the actor is always shown to be a “khiladi”, “tees maar khan”, “ladies man” or a “lover boy”.

##### B. Women get less coverage: Fair or Foul?

Women and women-related issues account for 7 per cent of the time in hard news and 14 per cent in all news programmes<sup>25</sup>. Analysis of any media reveals women getting less amount of coverage in terms of time and

21 Sommers-Flanagan, R., Sommers-Flanagan, J., & Davis, B. (1993). What's happening on music television? A gender role content analysis. *Sex Roles*, 28, 745-753.

22 Tavis, C. (1992). *The mismeasure of woman*. New York: Simon & Schuster.

23 Adams, C. (1991, April). The straight dope. *Triangle Comic Review*, p. 26.

24 ABgeier, E. R. (1987). Coercive versus consensual sexual interactions In. V. p Makosky (Ed.), *The G. Stanley Hall Lecture Series* (vol. 7, pp: 7-63). Washington, DC: American Psychological Association.

25 Boron, L. & Straus M. A. (1989). *Four theories rape in American society*, New Haven, CT: Yale University press.

space<sup>26</sup>. Coverage of women and women-related issues gets relegated to weekly 'gender or women pages'. Female presence was more through advertisements, news of crime and social events.

Newspapers cover women's problems drawing the awareness of legislators to issues requiring immediate attention such as the adverse sex ratio, infant and maternal mortality, crime against women and the effects of poverty on women and their families<sup>27</sup>. But this coverage is narrow with the rest of the space occupied by cinema actresses, models, video jockeys (veejays) and the rich women and their hobbies. Many of the women's magazines are dedicated to fashion, glamour, beauty aids, weight reduction, cookery and how to sharpen 'feminine instincts' to keep men and their in-laws happy. There are moderately fewer critiques on career opportunities, health awareness, entrepreneurship, and legal aid, counseling services, childcare services and financial management. A study in this regard was conducted in Jharkhand, Chhattisgarh, Uttaranchal, Uttar Pradesh and Jammu and Kashmir. Two regional newspapers and two English newspapers were chosen for the study. Prominent newspapers only publish 5% of women related issues and 8% are published on main page and remaining are placed inside<sup>28</sup>. Study showed no importance is given to development issues of women.

In the television serials women are the central characters, but they are portrayed largely as tormentors or the victims while the men very often take tangential and just seem caught in a trap of hostile situations. This can be illustrated in serials like, "*Kasauti Zindagi Ki*", "*Kahani GharGhar Ki*", "*Kyunki Saas Bhi Kabhi Bahu Thi*" et al. Television culture has portrayed a kind of feeble, irresolute man trapped by conniving women when in reality men also play an active role in oppressing women in various ways including subjecting them to physical assault, rape, pushing them into the sex trade and even abandoning them<sup>29</sup>. It is only desirable that serials should be close to reality and give message to the viewer's how society is going wrong.

This interpretation of women in media has led the National Commission for Women to recommend amendment in the Indecent

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26 Basow, S. A. (1992). *Gender: Stereotypes and roles* (3rd ed.). Pacific Grove, CA: Brooks/Cole

27 'The best in the house' 1988, October 19). New York Times, p. 52

28 Anand, Meenu (2006) Commodification of Women: The Irony. 'Women's Watch' Vol. 3 Issue 3, April- June 2006. NFIW

29 Bathla, Sonia (1998) Women, Democracy and the Media. Sage Publications



Representation of Women (Prohibition Act), 1986<sup>30</sup>. The NCW wants to include new technologies like MMS and the electronic media and some which were left outside the ambit of the Act like posters and TV serials which perpetuate stereotypes of women<sup>31</sup>. Explaining the reason for including soaps in proposed amendment in the Act, National Commission for Women has stated that “*women are either being portrayed as Sita (Ramayana) or as Kaikayee (Ramayana) and there seems to be nothing in between the two extreme characters being shown in Soaps. Divorces, adultery are highlighted frequently in Soaps where characters break the law without repercussion*”<sup>32</sup>.

### C. Promotion of stereotypes and symbols: Hopes and Hiccups expressed

The media draws from a ready reservoir of gender differentiating stereotypes, myths, legends and symbols<sup>33</sup>. Women are portrayed in sex roles *as sati-savitri*, and vamps. Men are portrayed as wage earners and decision-makers. *Jo apni bini se karta ho pyar, who Prestige se kaise kareinkar!*. This is an example of gender stereotyping.

### D. ‘Masculinity’ as a value: Society’s Difference Dividend

The backing of masculinity as a virtue works as a method to promote patriarchy. Masculinity is estimated through roles of policemen, authoritarian leaders, successful businessmen, and bureaucrats, etc. Popular films are full of such message ‘manly men control and protect their women’ – *Kabhi Khushi Kabhi Gam* – **Shah Rukh Khan** marries to safeguard **Kajol** when she loses her protector, her father. Honor, glory and martyrdom are linked to masculine individuality and a ‘masculine’ concept.

## V. Gender Representation In Media: Career, Beauty And Motherhood

The place of women in genuine journalistic role in Indian language newspapers is minimal<sup>34</sup>. Their (women journalists’) numbers are less, the

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30 Joseph, A & Sharma, K (2006) Whose News: The Media & Women’s Issues. Sage Publications

31 Ibid

32 Ibid

33 Nigam, Shalu (2002) Women, Obscenity and the law Legal News and Views. Vol 16 No.12. Social Action Trust

34 Centre for Advocacy and Research 2002. Regional Initiative on women and Media. From <http://www.tech.nic.in> (Retrieved January 26, 2007).

jobs are few and intolerance against them is formidable.<sup>35</sup> Another such area is portrayal of women in TV serials. What worries most people is that so many women are coming into television as directors and writers and there is still no change in the stereotyping of women in popular television serials.

A recent study by the Press Institute of India for the National Commission on Women on the status of women journalists in the print media confirms this trend<sup>36</sup>. **Pamela Bhagat** coordinated the research with the support of media representatives from various regions, who together formed a National Study Group<sup>37</sup>.

Major concerns that emerged from the study were job insecurity<sup>38</sup>. This is because journalists are employed like daily wage labourers<sup>39</sup>. Other problems include: contract system of employment; neglect of maternity, negligible or no child-care provisions, and sexual harassment<sup>40</sup>. Other issues raised by respondents were: Women journalists are conscientious, diligent and people relate more easily to us<sup>41</sup>. However, male bosses do not give credit for professionalism -- instead speak of women exploiting their gender<sup>42</sup>. Then there is no lucidity in policy matters - entitlements, rights and promotion principle.

Sexual harassment also surfaced as a chief apprehension of most respondents. But when asked whether they had to put up with sexist remarks / gestures or if they had been sexually harassed in any way at their workplace or in association with their work, 22.7 percent said they had<sup>43</sup>.

35 Cooper SR 1999. Women in India today From <http://www.tech.nic.in> (Retrieved April 23, 2006).

36 Desai P 1996. The image portrayal in TV serials. From <http://www.face.media.html>. (Retrieved March 19, 2006).

37 Dewey L 2001. About Face Facts on the Media. from <http://www.face/.org> (Retrieved January 26, 2007)

38 Gahualnt A 2002. Women in advertisements, films and serials in Kerala. <http://www.ibnlive.com>. (Retrieved May 28, 2007).

39 Jain, A 1996. Media images of women in India. *Journal of Advertising*, 30(3): 51-52.

40 Jyotin S 2002. The beauty of success. From <http://www.herworld.htm>. (Retrieved April 21, 2007).

41 Kishwar M 2007. Portrayal of women in 'k' serials .from <http://www.ibnlive.com>. (Retrieved February 19, 2007).

42 Karthika, N. 2005. Women in bad light. From <http://www.thehindu.com/> (Retrieved February 24, 2006).

43 Rajagopal R 2002. Media representation and self-concept of women in Kerala. from <http://www.wiap.org/>. (Retrieved January 29, 2007).

An interesting finding is that, of those who had experienced sexual harassment, 31.5 percent said it had 'seriously' undermined their confidence and affected their work<sup>44</sup>.

What, then, are the stumbling blocks to opportunities for women journalists? Newspapers are high pressure environments where male gender, flair and push are irrefutable tickets to success. Women are sometimes hampered because they refuse to assimilate into the work culture<sup>45</sup>.

## VI. Gender Differences: Getting the Balance Right

The conventional journalism of male-owned media reports news in the third person<sup>46</sup>. Women's journalism reports its news in the first person, allowing the newsmakers to speak for themselves. Both claim their styles result in greater accuracy<sup>47</sup>.

Men tend to define "news" as conflict and violence- fights (political, economic, physical), murders, suicides, floods, fires, and catastrophes of all kinds<sup>48</sup>. Attacks and name-calling usually guarantee a well-attended press conference and subsequent news coverage. Women-owned media define news differently. They seek to generate harmony and interconnection by taking good care of the words and images<sup>49</sup>. Women journalists refuse to print works, which are racist, classist, culturally elitist, which may create further divisions among people<sup>50</sup>.

The objective of women journalists is to transform the violent macho role models, and create media heroes and heroines who are intelligent

44 Vishav R 2003. *Impact of Portrayal of Women in TV Serials and Advertisements*. A Project Report by Department of Sociology, University of Jammu.

45 Shrivastava N 1992. *Women and Mass Media*. New Delhi: Women Press Publications.

46 Durriya H.Z. Khairullah, Zahid Y. Khairullah, (2009) "Cross-cultural analysis of gender roles: Indian and US advertisements", *Asia Pacific Journal of Marketing and Logistics*, Vol. 21 Iss: 1, pp.58 - 75

47 Ibid

48 Lee, Menkart, Okazawa-Rey: *Beyond Heroes and Holidays: A Practical Guide to K-12 Anti-Racist, Multicultural Education and Staff Development*. (Teaching for Change: Washington, DC 2008), 132-136

49 See Wikipedia- International Development - [http://en.wikipedia.org/wiki/International\\_development](http://en.wikipedia.org/wiki/International_development) accessed February 20, 2008

50 This paragraph draws from Cornwall A, Men, Masculinity and 'gender in development', *Gender and Development*, Vol 5, No 2, pp 8 - 13.

instead of belligerent, cooperative rather than combative, nurturing rather than destructive<sup>51</sup>.

Male-owned media assert a journalistic goal of "objectivity." The journalistic goal of women's media is the "*effective use of media as an instrument of change.*" They claim that, "*More than a simple conveyor belt of information, it has also served as an agent for change*"<sup>52</sup>.

## VII. A Glimpse at the Representation of Women in Various Boulevards: "the Devil is a Woman"

### A. Historical Evidence: the tragedy of Draupadi, the Dangerous Beauty

The game of dice is the central episode in The Mahabharat. The notation, choreography and script that builds up, sustains and establishes the game of dice is totally conceived, executed and dictated by patriarchy<sup>53</sup>. *Draupadi's* vastra-haran in the court in full view of everyone present is the worst transgression of human rights conceivable. Draupadi stands for no more than an "icon" of honor of the Pandavas; "*her body is a blank page on which scripts of revenge and humiliation, the story of men fighting like a pack of dogs are written. When she raises the question of whether a lady of the royal family deserves this treatment, Duryodhana says that she deserves this treatment precisely because she is a lady from the royal family. She has to be humiliated because she is the 'woman' of the enemy. Thus, she is denied all agency and individuality*"<sup>54</sup>.

### B. Newspapers and Interviews: 'Transforming Eve'

Some thought it 'cute' – a photograph in English daily of the future mayor of Mumbai shown cooking in her kitchen<sup>55</sup>. But why, one questions, should a person who desires to hold an important public post, be placed in the kitchen? Who has ever seen a picture of a male politician carrying the bazaar bag home, or changing the bulb? Media decides the background in which a woman should be placed, and highlights it persistently. Take, for

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51 Nongbri Tiplut, 'Deconstructing masculinity: fatherhood, matriliney and Social Change'

52 Ibid

53 Anant Sadashiv Altekar, *The position of women in Hindu civilization, from prehistoric times to the present day*, 2nd revised and illustrated edition, (Motilal Banarsidass, 1959), p. 112–113.

54 Hildebeitel, Alf (1991). The Cult Of Draupadi Mythologies: From Gingee To Kuruksetra. 1. Motilal Banarsidass.

55 Nathanson, Paul; Katherine K. Young (2001). Spreading Misandry: The Teaching of Contempt for Men in Popular Culture. McGill-Queen's Press. p. 108

instance, an episode of Crime Time on TVI channel. The theme: exertion of a woman police officer's job. The very first illustration is of Pratima Sharma, a police inspector, combing her child's hair and saying how much she loves to cook. In the next scene, her husband describes how much the family suffers due to his wife's job<sup>56</sup>.

Even Phoolan Devi, the dacoit was shown serving food to her husband<sup>57</sup>. The media loves to see women as home-makers, and it loves to see her as a fervent consumer. The woman is the one who buys without end. Her hair, her dress, her shoes; each bears the stamp of the latest, the classiest products. Practically no woman in any of the serials repeats a dress<sup>58</sup>. She makes sure that her house is adorned with the latest appliances and that her family spends their holidays in places straight of out travel company brochures.

A study conducted by the Delhi based Media Advocacy group highlighted instances of stereotyping and of discrimination<sup>59</sup>. Interviews of men in newspapers, says the study, hardly ever mentions their marital status or their sartorial sense<sup>60</sup>. The focus is on their work. By contrast, women achievers are subject to irrelevant, even distasteful queries<sup>61</sup>. Take for example the interview of Tarjani Vakil, a banker, which was carried in a leading daily. The interview treated the reader to intricate details about her appearance and personal life, such as her penchant for beautiful sarees, her decision to stay single, and her living in an extended joint family. Her feminine qualities like her soft voice were emphasized and she was 'no

56 Mogford Liz ( 2007) Community Level Determinants of Domestic Violence in Rural Uttar Pradesh, paper presented at Population Association of America Annual Meeting 2007 on 29th March 2007 ; Session 20.

57 See Menon and Bhasin *Borders and Boundaries: Women in India's Partition* and Butalia *The Other Side of Silence: Voices From the Partition of India* for details.

58 Anderson, R. (1994). .Reality TV and criminal justice.. *The Humanist* 8:8-13.

59 This background information detailed here is drawn largely from Mankekar, 1999 and <http://www.indiantelevision.com/indianbroadcast/history/historyoftele.htm>

60 Agnihotri, Satish, *Sex Ratio Patterns in the Indian Population: A Fresh Exploration*, New Delhi, India: Sage, 2000.

61 Richard Palmer-Jones, and Ashok Parikh, "Missing Women in Indian Districts: A Quantitative Analysis," *Structural Change and Economic Dynamics*, 2002, 13, 285-314.

power lady<sup>62</sup>. The amount of coverage women get overall is also much less than men do.

The study also reveals that men are provided with a larger number of opportunities to present their viewpoints and shown in diverse role, in all areas like administration, law, business, science and technology<sup>63</sup>. Representation of women varies from negligible to total exclusions and women in certain accepted professions are interviewed and talked about<sup>64</sup>. For example, women educationists or women doctors, if they are interviewed for achieving success in a 'male' profession, then the article often goes to great pains to point out her 'femininity'<sup>65</sup>. For example in a television interview the senior police officer Kiran Bedi was asked if she liked to cook<sup>66</sup>.

### **C. Position of women in the political sphere: 'it should not be mars and venus'**

Even when the question of reservation of seats for women in Panchayats was discussed on television, it was men who did the discussion while women sat as silent spectators. When expert opinion is sought on an issue, 90 per cent of the people interviewed by the media are men<sup>67</sup>. When women were shown leading Dharnas against the Dunkel Draft, not even a woman parliamentarian like Margaret Alva was approached for her views.<sup>68</sup>

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62 Bardhan, Pranab, \On Life and Death Questions," Economic and Political Weekly, 1974, 9, 1293{1304.

63 Della Vigna, Stefano and Ethan Kaplan, \The Fox News Effect: Media Bias and Voting," Quarterly Journal of Economics, 2006, forthcoming.

64 Fernandes, Leela, \Nationalizing 'The Global': Media images, Cultural Politics and the Middle Class in India," Media, Culture and Society, 2000, 22 (5), 611 {628.

65 Hornik, Robert and Emile McAnany, Theories and Evidence: Mass Media Effects and Fertility Change," Communication Theory, 2001, 11 (4), 454471.

66 <http://blogs.reuters.com/great-debate-uk/2010/03/04/kiran-bedi-on-being-indias-first-woman-police-officer/> Kiran Bedi on being India's first woman police officer Reuters , July,2010.

67 Sen, Amartya, \Missing Women," British Medical Journal, 1992, 304, 587, 588.

68 No democracy in Indian parties'. *The Statesman*.

[http://www.thestatesman.net/index.php?option=com\\_content&view=article&id=262876:%E2%80%98No%20democracy%20in%20Indian%20parties%E2%80%99&catid=36:india&from\\_page=search](http://www.thestatesman.net/index.php?option=com_content&view=article&id=262876:%E2%80%98No%20democracy%20in%20Indian%20parties%E2%80%99&catid=36:india&from_page=search). Retrieved 2010-01-20

#### D. Plight of Bollywood Queens: 'Greek Tragedy to Bollywood'

While the women in Bollywood films may no longer be portrayed as self-sacrificing door-mats, they are often portrayed as hysterical bimbos<sup>69</sup>. Screaming, shrieking, and weeping is part and parcel of woman's response to a hectic situations, never mind if in real life it's the men who make the most noise. Also, there are any number of movies where women who affirm themselves are considered 'bad', like Kareena Kapoor in *Kambakth Ishq*, while men, even if they make fun of and batter women are considered 'heroes'. Not much has changed where portrayal of women in the media is concerned. Though more films are being made with women in strong roles, these are mostly the women-centric films<sup>70</sup>. An exception was seen in the latest commercial Hindi film *Kabhi Alvida Na Kehna*. Preity Zinta was portrayed as a composed, unruffled woman who could take her own decisions, and today on Indian soaps, women are portrayed quite badly, perhaps worse than before, as evil, conniving and selfish.

#### E. Literature and Arts: 'Still a Man's Game'

Even *Kiran Desai*, the winner of the Booker prize this year for her novel *The Inheritance of Loss* was questioned about why she was not married and did not have children. In her trademark style, she replied that writing took her to a 'lonely dark place' and she would not have been able to give a child what he/she needed<sup>71</sup>, but wonder if a man would have been asked this question?

#### F. Men's Men and Women's Women: How TV Commercials Portray Gender to Different Audiences

Even a modern TV advertisement, like that of "MOOV" is based on the same philosophy<sup>72</sup>. The lady in this advertisement is shown as the single person doing all the housework, and attending to the whims and fancies of all her family members, from her husband to kids, to mother and father-in-

69 Sharpe, Jenny (2005). "Gender, Nation, and Globalization in Monsoon Wedding and Dilwale Dulhania Le Jayenge". *Meridians: feminism, race, transnationalism* 6 (1): 58–81 [60 & 75].

70 K. Moti Gokulsing, K. Gokulsing, Wimal Dissanayake (2004). *Indian Popular Cinema: A Narrative of Cultural Change*. Trentham Books. p. 17

71 "Kiran Desai interview". *Jabberwock* (blog). 2006-01-20.  
[http://jaiarjun.blogspot.com/2006/01/kiran-desai-interview\\_20.html](http://jaiarjun.blogspot.com/2006/01/kiran-desai-interview_20.html). Retrieved 2011-06-14.

72 S. Munshi, *Wife/mother/daughter-in-law: Multiple avatars of homemaker in 1990s Indian advertising. Media, Culture and Society*, 2000.

law, and simply everybody. She is allowed a break from her work only when she cries out in pain from a backache. And then the family decides to recognize her presence by passing a tube on ointment around, and the husband offering to apply the ointment for her. But those moments of respite are few, as she is back on her feet the moment the pain recedes, and the bombardment of orders and requests begin again. The submissive, compliant nature of the woman is obvious, although not meant to be so perhaps.

Another image of women in India that has grown in the recent years is the one that we have aped from the west and which gradually is gaining momentum<sup>73</sup>. This is the portrayal of the woman as a showpiece or an icon of glamour<sup>74</sup>. We barely come across an advertisement these days where we don't see a pretty model beaming at us, be it the advertisement of a new model car or that of a cold drink. We see the advertisement of the new "*Maruti Zen*" where the tiger stalks a young woman in a dark alley. The advertisement had to be withdrawn due to public pressure<sup>75</sup>.

In other words, the portrayal of women in the Indian media vacillates between these two extremes: the "mother India" and the "glamour girl" image.

It is indeed a very sad phenomenon. For example, companies like Wipro, Infosys, IBM, Microsoft etc., employ almost equal number of men and women<sup>76</sup>. But when it comes to a TV advertisement vis-à-vis computers, we always find that it is the projection of a man behind the monitor. The woman has to use '*fair & lovely*' and wear a pink dress to become a cricket commentator.

### **VIII. Women Related issues that do not get Covered: 'Twice Censored'**

The following are the important categories of indispensable women's issues that do not get reported at all in the mass media. These are:

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<sup>73</sup> Ibid.

<sup>74</sup> Id.

<sup>75</sup> Id.

<sup>76</sup> S Bharat, Attitudes and sex-role perceptions among working couples in India. *Journal of Comparative Family Studies*, XXVI(3), 1995.



### **A. Health and safety issues**

Millions of Indian women basically lack the freedom to go out of the house in search of health services they need. According to National Health Survey – 2 only 52% women in India are not even consulted on decision about their own health<sup>77</sup>. The antenatal and postnatal care is beyond the reach of many Indian women<sup>78</sup>. The National Health Survey – 2 estimate mentions that some 1, 00,000 to 1, 20,000 women die every year due to pregnancy related causes<sup>79</sup>. In some States death rate is quite high and alarming<sup>80</sup>. The rate in India is much higher than the maternal mortality rate surveyed in Cuba, China, Srilanka and Vietnam<sup>81</sup>. The majority of women go through life in state of dietetic stress. They are anemic and emaciated. Girls and women face bias within the family; eating last and least.

### **B. Economic issues**

Economic information, such as what to do when you experience discrimination; location of child care centres' and their costs; income sources such as educational opportunities, training, scholarships, loans, and fellowships available to women; how to go into business, and how women have handled special problems that arise<sup>82</sup>.

## **IX. Steps To Improve Coverage Of Women In Media: Achieving Gender Equality And Empowering Women**

There is a pressing call for superior media assortment in all areas - ownership, content and viewers. A large number of studies have highlighted how the media is failing in one of its core roles- giving voice to the voiceless. Globalization has concentrated media ownership and the dissemination of news in a few male hands, and has increased the

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77 Barrera A. (1990). The Role of Maternal Schooling and its Interaction with Public Health Programs in Women Health Programs in Programs in Women Health Production , Journal of Development Economics, (32:69-91).

78 Ibid

79 Id.

80 Id.

81 Id.

82 Schramm, Wilbur. Men, women, messages and media. . New York: Harper and Row Publishers, 1982.

inclination to depict women as sex objects rather than comprehensive beings.

The Global Media Monitoring Project (GMMP) has found that across the world women constitute 21 percent of news sources (19 percent in Southern Africa)<sup>83</sup>. The HIV and AIDS and Gender Baseline Study shows that HIV and AIDS comprises less than four percent of media coverage and that People with HIV constitute less than three percent of sources on the topic<sup>84</sup>.

Many other studies show that women and men across the globe would like to see women portrayed in a more diverse series of roles; that the kind of subjects that interest women most (like education, HIV and AIDS and social issues) get no coverage in the news; and that women and men would like more local, human interest and positive news stories<sup>85</sup>.

The distortion of veracity by the media has augmented the gap of understanding between the different sections of society. Effectual informative communication is one of the most important channels for the escalation and development of women in the informal or unorganized sector, as without information regarding services and benefits available through legislation, government schemes, banks and voluntary organizations, women can hardly take advantage of them<sup>86</sup>. Thus the media should take into consideration the following points<sup>87</sup>.

- a) The media must project the working women in the unorganized sector as worker and not merely as performing the duties of wife/daughter. They being major earners, they must be projected as producers and not merely consumers.
- b) The media should make conscious endeavors to not only project the problems of women in poverty, but should scrutinize in such a way

83 Press, Andrea L. *Women watching television: gender, class, and generation in the American television experience*. Philadelphia: University in Pennsylvania Press, 1991.

84 Mahoney, Deirdre M. "More than an Accomplishment: Advice on Letter Writing for Nineteenth-Century Women." *Huntington Library Quarterly* 66.3/4 (2003): 411-423

85 Smith-Rosenberg, Carroll. "The Female World of Love and Ritual: Relations between Women in Nineteenth-Century America." *Signs* 1.1 (Autumn 1975): 1-29.

86 Abbandonato, Linda. "A View from 'Elsewhere': Subversive Sexuality and the Rewriting of the Heroine's Story in *The Color Purple*." *PMLA* 106.5 (October 1991): 1106-1115.

87 Babb, Valerie. "*The Color Purple*: Writing to Undo What Writing Has Done." *Phylon* 47.2 (Second quarter 1986): 107-116.

that contradictory role models are not illustrated, nor disparaging references to their work are made.

- c) To improve substance and reporting, corresponding efforts for increased interaction between NGO's, women's social action group, research organizations, institutes of mass communication, and the media personnel should be developed.

There are quite a few Reports findings on the complex subject relating to women empowerment. Very often the media come up with study on women related subjects which more often than not are driven by market forces<sup>88</sup>. One study claims that women prefer men with hybrid cars while another says women are genetically devised to shop. Then there is a study which says women are more attracted to bad boy types. This reveals that women have become new research subject mostly in less significant areas<sup>89</sup>. In fact, research is necessary to understand women in its potentiality to usher in a new era. It is difficult to distinguish between indisputable research and studies that are publicity stunts more so when news reports do not identify where these studies are coming from. A large share of the research findings available in major news outlets today is histrionically packaged to draw attention. This is where the media must step in to help readers to know pertinent facts concerning women empowerment. It will be only appropriate if in the interests of full exposé, they should make clear in their reports who was funding the study and which scientific journal published it. This information can help readers to decide for themselves which pieces of research are closer to the truth and which are not. Various studies were undertaken on the women and media to ascertain how the media portrays women and how the women related issues are presented, how much significance is given to them<sup>90</sup>. Such study has revealed that issues pertaining to development of women are never accentuated adequately. Women are portrayed not for feminine beauty and artistic portrayal but for infusing sex appeal more often than not entering the arena of obscenity<sup>91</sup>. It is necessary to have unruffled in-depth study by social

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88 Berlant, Lauren. "Race, Gender, and Nation in *The Color Purple*." *Critical Inquiry* 14.4 (Summer 1988): 831-859.

89 Walker, Alice. *The Color Purple*. New York: Harcourt, 1982 (1970).

90 Warhol, Robyn R. "How Narration Produces Gender: Femininity as Affect and Effect in Alice Walker's *The Color Purple*." *Narrative* 9.2 (May 2001): 182-187.

91 Worthington, Pepper. "Writing a Rationale for a Controversial Common Reading Book: Alice Walker's *The Color Purple*." *The English Journal* 74.1 (January 1985): 48-52

activists and media to establish why obscenity has begun so much in media. Unless there is any change in the social sensitivity of women, it will be difficult to restrain obscenity in media.

## **X. Conclusion: Contradiction that Lessened Women's Potential Then and Now**

Media representations in general and of women in particular are deeply embedded in political and economic contexts<sup>92</sup>. Studies and commentary point to the often-contradictory ways in which the media and advertising are compromising women's multiple identities in contemporary Indian society<sup>93</sup>. Images of the 'new woman' as an independent consumer whose femininity remains intact, or as a hard-headed individualist whose feminine side must be sacrificed, illustrate new stereotypes of women whose 'femaleness' is always the core issue<sup>94</sup>.

This illustrates that despite the small shifts noted in retrospective analyses, the media content, by and large, still reflects a masculine vision of the world<sup>95</sup>. A wide-scale social and political transformation, in which women's rights - and women's right to communicate - are truly understood, respected and implemented both in society at large and by the media, needs emphasis<sup>96</sup>. The manipulation of gender images by male dominated media should make us critically examine what we see every day on TV, in magazines and newspapers<sup>97</sup>. Global media-monitoring programmes undertaken by different groups in different countries show that nothing much has changed over the years<sup>98</sup>. The same misrepresentations and stereotypes continue.

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92 Benshoff, Harry M. and Sean Griffin. *America on Film: Representing Race, Class, Gender, and Sexuality at the Movie*. 2nd ed. Malden, MA: Wiley-Blackwell, 2009

93 Creedon, Pamela J., and Judith Cramer. *Women in Mass Communication*. 3rd ed. Thousand Oaks, CA: Sage, 2006.

94 Dines, Gail, and Jean M. Humez, eds. *Gender, Race, and Class in Media: A Critical Reader*. 3rd ed. Thousand Oaks, CA: Sage, 2010

95 Douglas, Susan J. *Where the Girls Are: Growing Up Female with the Mass Media*. New York: Three Rivers Press, 1994.

96 Gauntlett, David. *Media, Gender and Identity: An Introduction*. 2nd ed. London and New York: Routledge, 2008

97 Kearney, Mary Celeste, ed. *The Gender and Media Reader*. New York: Routledge, 2011.

98 Lind, Rebecca Ann. *Race/Gender/Media: Considering Diversity Across Audiences, Content, and Producers*. 2nd ed. Allyn and Bacon, 2009

On the one hand, by sanctioning a few laissez-faire reforms like equal pay, the media emphasizes the note that women have every right to expect to be treated as equal citizens, with the same rights, responsibilities, and opportunities as men<sup>99</sup>. On the other hand, by mocking and dismissing the way feminist activists look, dress, behave and talk, the media also endorses the notion that in some cases, female subordination and sexual objectification were not only fine but desirable as well<sup>100</sup>.

This opposition, sanctioning the notion of women as independent and equal citizens while also supporting the idea that women are around to be gazed at (advertisements, beauty contests, fashion parades, film), has lessened women's potential then and has the same effect today. Although the media did foster the spread of the liberation movement through its vast coverage, the media also hampered the movement's potential and women's potential as individuals by placing female attractiveness at the forefront<sup>101</sup>.

In conclusion, while gender is often seen as a narrow, special interest issue, gender awareness can lead to a better, more holistic understanding of any situation.

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99 Ross, Karen. *Gendered Media: Women, Men, and Identity Politics*. Lanham, MD: Rowman and Littlefield, 2010.

100 Wood, Julia T. *Gendered Lives: Communication, Gender, and Culture*. 9th ed. Boston, MA: Wadsworth, 2011.

101 Bore, Inger-Lise Kalviknes. "(Un)funny women: TV comedy audiences and the gendering of humour." *European Journal of Cultural Studies* 2010 13: 139. EBSCO.Web. 17 Nov. 2010.

# THROUGH THE LOOKING GLASS: A GLOBAL PERSPECTIVE ON THE FILM CENSORSHIP REGIME IN INDIA IN LIGHT OF THE CINEMATOGRAPH BILL, 2010

*Arnab Basu & Anagh Sengupta\**

*"Censorship is to art as lynching is to justice."*

-Henry Louis Gates

## I. An Overview Of The Cinematograph Act, 1952 And The Film Censorship Regime In India

### A. The Background behind the promulgation of the Cinematograph Act, 1952

The law relating to censorship and film morality in India has been governed till date by the Cinematograph Act, 1952. However the seeds of this Act were sown as early as 1918. The revolution in the film industry brought along with it a sensational rage of moral-policing in the form of censorship. It all started with the coming of D. W. Griffith's *Intolerance* (1916) at the peak of the First World War.<sup>1</sup>

The British Government of colonial India made the first distinct effort to censor films and cinematography in India.<sup>2</sup> It came in the form of the promulgation of the Cinematograph Act in 1918. This Act, at that point of time, had two characteristic parts, one dealing with regulation of the licensing of cinemas, while the other providing for censorship laws.<sup>3</sup> It is worth noting that the censorship part was made a state subject, with the responsibility entrusted to the five centres at Bombay, Calcutta, Madras, Rangoon and Lahore.<sup>4</sup> Thus, we see that in its initial stage the Cinematograph Act was quite liberal in nature, allowing for films to be exhibited in the 1920s and 30s with comfortable ease.<sup>5</sup>

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1 S. V. Raman, *Cutting Edge: Senseless Censors*, Liberty and Society Seminar, Liberty, Art and Culture Seminar, Kolkata, India, November 6, 2004, p. 111, available at <<http://ccs.in/ccsindia/lssreader/34lssreader.pdf>> (Last accessed on July 14, 2011).

2 Priya Jaikumar, *More Than Morality: The Indian Cinematograph Committee Interviews (1927)*, THE MOVING IMAGE – VOL. 3, NO. 1 (2003), p. 82.

3 *Supra* note 1. Also see Dr. Someswar Bhowmik, *A Medium Besieged: Legitimisation of Film Censorship in post-colonial India* available at <<http://www.esocialsciences.com/data/articles/Document108472412006550.1960108.doc>> (Last accessed on July 14, 2011).

4 *Supra* note 1, p.112.

5 *Ibid.*

As India faced partition and with the coming of Independence in 1947, India slowly began moving towards being a country which held an immense potential. However, to streamline growth and development in a progressive path, India had to bring forth a system of regulations and checks.<sup>6</sup> The country saw several progressive changes in various fields, and when such changes began reflecting in the films of that age, the Parliament considered it important to promulgate a legislation regulating such films. This legislation came in the form of The Cinematograph Act, 1952, which was adopted on the 21<sup>st</sup> March, 1952.

### **B. The Constitutionality of Film Censorship: Does it violate freedom of Speech and Expression?**

It is well known that India has a free press. The question that which immediately comes to our mind while looking at censorship and regulation of film and cinema is whether the same degree of freedom should be applied to such enterprises as well. Under Article 19 (1) (a) of the Constitution of India, every person in India is granted the right to freedom of speech and expression.<sup>7</sup> This freedom is an institutional right. However, neither freedom of press, nor freedom of cinema or cinema exhibition is listed under the Constitution of India.<sup>8</sup> *Freedom of expression* means the right to express one's opinion by word of mouth, writing, printing, picture or any other manner, including movies.<sup>9</sup>

However, it is important to note here that freedom of speech and expression is subjected to '*reasonable restriction*' on the basis of the grounds set out under Article 19(2) of the Constitution of India.<sup>10</sup> Among the reasonable restrictions listed under Article 19(2), the most important are restrictions in the interest of sovereignty and integrity of the State, in order to maintain friendly relations with foreign States, to uphold public order, decency or morality or in cases of contempt of court, defamation or incitement to an offence.<sup>11</sup> It is the duty of the State to guarantee freedom

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6 *Ibid.*

7 Constitution of India, Article 19(1) (a).

8 Constitution of India. *Also see*, Official Website of the Central Board of Film Certification (India), 2.2, available at < [http://cbfcindia.gov.in/html/uniquepage.aspx?unique\\_page\\_id=20](http://cbfcindia.gov.in/html/uniquepage.aspx?unique_page_id=20) > (Last accessed on July 14, 2011).

9 *Ibid.*

10 Constitution of India, Article 19 (2).

11 *Ibid.* *Also see*, Alladi Kuppaswami, *Conduct Rules and Fundamental Rights*, FRONTLINE, Vol. 16, ISSUE 18, August 28 - September 10, 1999, available at <

of speech and expression. However, in order to maintain control and preserve order, along with a regard for public morality, the State has to impose certain reasonable restrictions.

Thus, it is seen that films indeed are a mode of expression and the right to make and exhibit films for mass viewing falls under the right to freedom of speech and expression. However, this right can be curbed by the State if it feels that such films can fall under the '*reasonable restrictions*' listed under Article 19 (2). This forms the basis of the right of the State to censor films. The justification can be derived from the '*reasonable restrictions*' given under Article 19(2). This allows the State to censor films on the basis of public morality, as well as in the interest of the sovereignty and integrity of the nation.<sup>12</sup> However, the authors feel it pertinent to note that they have contested this point of conformity of '*reasonable restrictions*' with the Constitutional freedoms, while critiquing the Cinematograph Bill, 2010.

### C. An overview of the existing Film Censorship Regime in India

The Cinematograph Act, 1952 has been amended several times but all such amendments have been minor in nature. Additionally, the last amendments were in 1981 and 1984. The film censorship regime in India is thus governed by this Act, the Cinematograph (Certification) Rules promulgated in 1983 and the guidelines issued from time to time.<sup>13</sup> The guidelines are issued under section 5(B) of the Act.<sup>14</sup>

The basic objectives of the Cinematograph Act, 1952 is to certify films for exhibition, and for regulation of such exhibition by issue of such certificates such as U, U/A, A and S.<sup>15</sup> The matter of concern which has presented itself before the film industry for quite some time now, is that

<http://www.hindu.com/fline/fl1618/16180860.htm>> (Last accessed on July 14, 2010). *See also*, Official Website of the Central Board of Film Certification (India), available at < [http://cbfcindia.gov.in/html/uniquepage.aspx?unique\\_page\\_id=20](http://cbfcindia.gov.in/html/uniquepage.aspx?unique_page_id=20) > (Last accessed on July 14, 2011).

12 *Ibid*.

13 *See* Official Website of the Central Board of Film Certification (India), available at < [http://cbfcindia.gov.in/html/uniquepage.aspx?unique\\_page\\_id=20](http://cbfcindia.gov.in/html/uniquepage.aspx?unique_page_id=20) > (Last accessed on July 14, 2011).

14 *Ibid*.

15 Expenditure Reforms Commission, Rationalising of the Functions Activities and Sure of the Ministry of Information & Broadcasting, Second Report, Part III (September 20, 2002) p. 102, available at < <http://expenditurereforms.nic.in/ib.pdf> > (Last accessed on July 7, 2011).



this Act had not been amended or revised keeping in mind the fast moving Indian society. The truth remains that except for some minor revisions in the years 1983-84, the original piece of legislation has almost remained untouched. Filmmakers face the brunt of this problem, as with a progressing society, their adventures into alternative forays are often classified into a restricted zone by virtue of the prevailing Act. The authorities in India still refer this Act while enforcing ratings upon films which have to be exhibited in India.

The objectives of film censorship as listed by the Act, when it was amended slightly in 1983, clearly lays down guidelines to the censorship authority, that films must be moderated in such a way that they are responsible and sensitive to the values and standards of society, and that artistic expression and creative freedom are not unduly curbed.<sup>16</sup> It further promises that censorship should be responsive to social change.<sup>17</sup> The whole purpose of these objectives and guidelines prescribed by the Act fails if the Act itself does not manage to mould itself to the changing society.

The Cinematograph Act 1952 includes provisions relating to the constitution and functioning of the Central Board of Film Certification.<sup>18</sup> Apart from this, it also lays down the guidelines to be followed for certifying films. These guidelines too have changed over time, keeping in mind global advancements. Initially, there were only two categories of certificates 'U' (Universal exhibition) and 'A' (restricted to adult audiences).<sup>19</sup> Later, two other categories were added: 'U/A' for unrestricted public exhibition subject to parental guidance for children below the age of twelve and 'S' films for public exhibition restricted to special classes of persons such as doctors.<sup>20</sup>

The Central Board of Film Certification was set up initially in Mumbai, with regional offices in some other cities.<sup>21</sup> This organization annually

16 See Cinematograph (Amendment) Act. *Also see, Bobby Art International v. Om Pal Singh Hoonand Others* (1996) 4 SCC 1.

17 *Ibid.*

18 Hereinafter the CBFC or Board. Note that at the time when the Act came into force, this body was called the Central Board of Film Censors).

19 *Supra* note 13.

20 *Ibid.*

21 *Supra* note 1, p. 103. It has 9 regional offices in Bangalore, Calcutta, Chennai, Cuttack, Guwahati, Hyderabad, Mumbai, New Delhi and Thiruvananthapuram. *Also see*, Right to Information: Central Board of Film Certification, available at < <http://cbfcindia.gov.in/html/RTI/RTI.pdf>> (Last accessed on July 7, 2011). *Also see*, Official Website of the CBFC, available at

certifies about 2500 India and around 750 foreign language video as well as feature films.<sup>22</sup> The objective of this Board is exactly carrying out the purpose of the Cinematograph Act, 1952. Apart from the above, a Film Certification Appellate Tribunal (FCAT) has also been constituted under section 5D of the Act for hearing appeals against any order of the CBFC to which the applicant has been unsatisfied.<sup>23</sup>

Unlike the Act in the colonial era, the certification of films is a subject in the Union List, and thus the states have to enforce these censorship provisions and bring any violations to the notice of the CBFC.<sup>24</sup> Section 5 B (2) of the 1952 Act lays down that in addition to general guidelines laid down in section 5 B (1), the Government may issue '*such directions as it may think fit setting out the principles which shall guide the authority competent to grant certificates under this Act in sanctioning films for public exhibition*'.<sup>25</sup>

## II. The Need for Amendment of the Cinematograph Act

The following segments will seek to analyse the rating systems prevalent in select countries of the world, namely the United Kingdom and the United States, and contrast it with the present day ratings regime in India. The study will also look into what our country is lacking in contrast to the other existing film rating and censorship regimes across the world. This will lead to finding out those specific shortcomings or faults in the existing regime and provide justification for amendment of the Cinematograph Act, 1952.

### A. The present day ratings systems worldwide- A comparative study

Ratings systems are operative in the United Kingdom, the United States and India, among other movie-making nations. The authority in the United Kingdom with regard to censorship and providing ratings is the British Board of Film Classification.<sup>26</sup> The British Board currently uses

<<http://webcache.googleusercontent.com/search?q=cache:http://cbfcindia.gov.in/>> (Last accessed on July 7, 2011; Google Cache reproduced as official site is currently unavailable).

22 *Supra* note 1, p. 104.

23 *Supra* note 13.

24 *Supra* note 3.

25 *Supra* note 13.

26 Hereinafter the BBFC. The apex censorship authority in United Kingdom was named British Board of Censors prior to 1985. The Board lists its objective as a "*body to bring a degree of uniformity to the classification of film nationally*." See Official Website of the BBFC, available at <<http://www.bbfc.co.uk/>> (Last accessed on July 12, 2011-07-12).

eight classifications for films.<sup>27</sup> The eight classifications<sup>28</sup> are as follows: **'U'** given to films which are suitable for all audiences aged 4 and above (in 2010, given to *Hachi- A Dog's tale*, *Toy Story 3*, *Shrek Forever After*, *Marmaduke*, *Despicable Me*),<sup>29</sup> **'PG'** given to films which are for general viewing but may be unsuitable for certain children (in 2010, given to *Megamind*, *Tron Legacy*, *Alice in Wonderland*, *The Chronicles of Narnia*),<sup>30</sup> **'12 and 12A'** given to films which are suitable for viewers of 12 years or above (in 2010, given to *The Back-Up Plan*, *The King's Speech*, *Harry Potter and the Deathly Hallows- Part I*, *The Social Network*, *Inception*),<sup>31</sup> **'15'** given to films suitable for audiences 15 years or above and includes scenes of blood and violence (in 2010, given to *Four Lions*, *Kick-Ass*, *Chat-room*, *Centurion*, *127 Hours*),<sup>32</sup> **'18'** given to films suitable only for adults (in 2010, given to *This is England '86*, *The Killer Inside*, *I Spit on Your Grave*, *Fantasm Comes Again*, *Repo-Men*),<sup>33</sup> and **'R18'** including films to be supplied only in sex-shops to adults not less than 18 years.<sup>34</sup>

In the United States, on the other hand, movies are given a very different form of classification: **'G'** given to films suggested for general audiences (in 2010, given to *Toy Story 3*), **'PG'** given to films where parental guidance is suggested as some material may not be suitable for children (in 2010, given to *Alice in Wonderland*, *Despicable Me*, *Shrek Forever After*, *Megamind*), **'PG13'** given to films where a sterner parental guidance is suggested because of the existence of material which might be

27 This system is mainly designed to provide parents with guidelines about what material might be suitable for their children to see, and to clearly isolate sexually explicit material as available only to persons over eighteen years of age.

28 The BBFC Annual Report, 2010, available at <[http://www.bbfc.co.uk/download/annual-reports/BBFC\\_AnnualReport\\_2010.pdf](http://www.bbfc.co.uk/download/annual-reports/BBFC_AnnualReport_2010.pdf)> (Last accessed on July 12, 2011).

29 *Ibid.*, p. 22. Note that the film *Marmaduke* had to remove the word 'spaz' in order to be granted the 'U' certificate. Otherwise it would have been given a '12A' certificate.

30 *Ibid.* p. 26.

31 *Ibid.*, p. 32. Note that the film *Made in Dagenham* was not given 12A certificate for more than 20 uses of strong language (it had been rated 15). However, *The King's Speech*, with approximately the same number of uses was granted a 12A certificate. The dark penultimate *Harry Potter* received a 12A rating. Again *The Social Network* was also rated 12A though the film includes a scene showing a party, at which young characters snort cocaine off an apparently naked woman's body. The lack of express nudity or drugs allowed the movie to get away with a 12A rating.

32 *Ibid.*, p. 38. The movie *127 Hours* was classified as 15 simply because of the self-inflicted gory injury that the protagonist caused to himself in order to free himself from being trapped underneath the boulder.

33 *Ibid.*, p. 46. Movies in this category are so classified as they contain an element or duration of sexual violence, found clearly for a substantial amount of time in *I Spit on Your Grave* and *Fantasm*.

34 *Ibid.* p. 58.

inappropriate for children below 13 years of age (in 2010, given to *Inception*, *Iron Man 2*, *Deathly Hallows*, *Sherlock Holmes*), ‘R’ given to films to which persons below 17 years is not allowed unless accompanied by parent (in 2010, given to *Shutter Island*, *The Expendables*), ‘NC-17’ given to films which are completely restricted to persons below 17 years.<sup>35</sup> The censorship authority in the United States is the Motion Picture Association of America.<sup>36</sup>

In India, as previously discussed, there are only four different types of ratings, ‘U’ given when the film is suitable for unrestricted public exhibition, ‘U/A’ given when the film is suitable for unrestricted public exhibition subject to parental guidance for children under 12 years of age, ‘A’ given to films restricted only for adult audiences and ‘S’ given to films of a special nature, which are restricted to specific audiences only. India probably has the largest movie business in the world, producing almost eight hundred films in a year. It has a Central Board of Film Certification, as prior discussed, in order to impose ratings on the films released.

From the above discussion, we see that the rating systems prevalent in the United Kingdom and the United States move more or less on a similar pattern. It is worth noting that while the United Kingdom fixes its upper restriction limit at 18 years, the United States is satisfied with an upper restriction limit of 17 years of age. Apart from this minor difference, the two countries have a nearly similar manner of rating, and providing differential ratings for children below the 12-13 years of age (who are advised parental guidance), a general parental accompaniment for a certain type of rating. However, the British system makes a further division at the

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35 NC-17 was not introduced until 1990. It was first used to classify *Henry and June* (1990). Prior to that the MPAA used X as a rating for movies with significant sexual content. The reason for this change was that the X rating was not trademarked by the MPAA, meaning that any filmmaker could use it. During the 1970s and 1980s, producers of pornography adopted the X rating for their films and so in the public’s view the rating became synonymous with pornography. Hence, while the MPAA had applied the X rating to films such as *A Clockwork Orange* (1971) and *Taxi Driver* (1976), it chose to adopt the trademarked NC-17 rating to dissociate any of its sanctioned films from pornography. See Susan Dwyer, *Censorship in The Routledge Companion to Philosophy and Film* (Paisley Livingstone & Carl Plantinga eds., Routledge) p. 29-38, available at <<http://www.umbc.edu/philosophy/dwyer/papers/Censorship.pdf>> (Last accessed on July 12, 2011).

36 Hereinafter the MPAA. For a study of the MPAA and its objectives see Official Website of the Motion Picture Association of America, available at <[www.mpa.org](http://www.mpa.org)> (Last accessed on July 14, 2011).

age of 15 years and provides a different type of rating to films not suitable for children below 15 years of age. The United States makes no such distinction. India, on the other hand, follows a much cleaner look of ratings, differentiating only between films for all and films for adults only. A further control is enforced by the U/A rating which recommends parental guidance. However, the structure of the acronym is so weak that the general public fail to interpret the mechanism of parental guidance. This analysis clearly shows us that in this progressive world where different movies come out every day targeting different groups of audiences, India must keep up as well. The lack of different ratings for different age-groups make it very difficult for the film-makers to create audience specific movies, which in turn might lead to loss of revenue if their film is placed under the restricted category. The presence of a proper system of ratings with several cogs proves to be beneficial for both the film makers as well as the censorship authorities.

#### **B. The Censorship Authorities: A Comparative study of the role, organization and functional powers**

The United States uses the MPAA rating system to rate the films exhibited in their country. The objective of the MPAA is regulating films to be exhibited in the United States on the basis of content and thematic suitability. It is worth noting here that the MPAA is a voluntary system and is not formed under any legislation. The MPAA gives ratings to films mainly to assist parents in deciding what movies are suitable for children to watch. There exists a comprehensive framework of ratings as has been illustrated above. The MPAA, however, does not issue specific rules to decide what content, if included in the film, will result in what rating. The commonly included factors are obviously considered and include violence, blood and gore, sexual content, nudity, language and usage of drugs. The voting on the rating of the films is usually done by the Classification and Rating Administration of the MPAA, which is supposedly rated by a broad variety of people or rather parents who decide what content is suitable for children. The identities of the people on the panel are kept secret, thus making it difficult to obtain further data on the same. The film usually has to operate with the rating given to it by the panel. However, a system of appeals is allowed before an Appeals Board, which shall take in different considerations before retaining or changing the rating. Alternatively the producer can re-submit the film for consideration of the panel after

required editing and apply for a new rating. Critics say that the general public is largely unaware of how the ratings system works.<sup>37</sup>

The policies of the board and the panel member details are confidential, and critics claim that this stops the Board as well as the MPAA from being accountable to both film producers as well as the general public.<sup>38</sup> This point is severely contested by the MPAA, who say that the anonymity is important as it is used to prevent such board members from being unnecessarily pressurised by film makers to give specific films a different rating.<sup>39</sup> This kind of rating system and secret panel has been criticised by producers world-wide, on a different ground, where they question the competence of the members on the panel giving the rating. The MPAA clears this point by saying that there indeed is no specific qualifications required for someone to be a Board Member; he or she must simply have a parenthood experience and also be of '*intelligent maturity*' or at least have the capacity to put themselves in the place of regular American citizens.<sup>40</sup>

Apart from this, the top theatre companies, who own maximum percentages of screens and exhibition places all over the United States are often reluctant to screen movies which have been given an NC-17 rating.<sup>41</sup> Such a situation proves to be economically harsh on the producers, who have to cut relevant material from their films in order to get a lower rating. The MPAA in argument contest that filmmakers are not obliged to be rated

37 Susan Dwyer, *Censorship in The Routledge Companion to Philosophy and Film* (Paisley Livingstone & Carl Plantinga eds., Routledge) p. 32, available at <<http://www.umbc.edu/philosophy/dwyer/papers/Censorship.pdf>> (Last accessed on July 12, 2011). This is further illustrated in the documentary *This Film Is Not Yet Rated* (2006) where the secrecy and arbitrariness surrounding the MPAA ratings procedure is raised and severely questioned.

38 *Ibid.*

39 *Id.*

40 *Id.* See also MPAA (Motion Picture Association of America) Film Ratings, *MPAA website* available at <[www.mpa.org/FilmRatings.asp](http://www.mpa.org/FilmRatings.asp)> (Last accessed on July 14, 2011)

41 Susan Dwyer, *Censorship in The Routledge Companion to Philosophy and Film* (Paisley Livingstone & Carl Plantinga eds., Routledge) p. 33, available at <<http://www.umbc.edu/philosophy/dwyer/papers/Censorship.pdf>> (Last accessed on July 12, 2011). See also, J. Eliasburg, *The Film Exhibition Business: Critical Issues, Practice, and Research* in CONCISE HANDBOOK OF MOVIE INDUSTRY ECONOMICS (C. C. Moul ed., Cambridge University Press, 2005).

by their rating, but such films might find it hard to find a distributor, which will again adversely affect them on the economic front.<sup>42</sup>

The United Kingdom's rating system is mainly governed by the BBFC, which is a non-governmental organisation, and funded in effect by the film industry in Britain. This body rates films released in the United Kingdom, as well as video games and videos. Though local authorities have the power to decide what films are shown in theatres, they commonly follow ratings given by the BBFC. The system is similar to the United States, with the only difference being that both the examiners and directors are hired on a permanent basis, thus making the system more transparent.

In India, on the other hand, the film ratings are prescribed by the CBFC. The CBFC derives its legal authority from the Cinematograph Act itself as well as the Cinematograph (Certification) Rules 1983. Usually the Chairman and members are appointed for a term of three years maximum, which may be extended by direction from the Government.<sup>43</sup> The members are usually chosen from amongst eminent persons excelling in different fields including social sciences, law, education, art, film etc.<sup>44</sup> Along with the members, there also exists an Advisory panel in every regional branch of the CBFC.<sup>45</sup> Again, these members are selected from esteemed persons in different fields. The Advisory Panel holds office till such time as the Government may direct but which must not exceed two years.<sup>46</sup> The members are eligible for re-appointment.

The CBFC follows a two-fold system for certification of films, as it comprises of an Examining Committee as well as a Revising Committee.<sup>47</sup> In case the applicant of the certificate or the Chairman is not satisfied with the rating given, the Revising Committee's help is sought for correction or stay.

Thus, we see that the Indian system, in contrast to the systems prevalent in the United Kingdom and the United States, has a much larger accountability to the Government and the general public. This allows the censorship body to function in a much more open manner and allows film-

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42 *Ibid.*

43 *Supra note 13.*

44 *Ibid.*

45 *Id.*

46 *Id.*

47 *Id.*

makers to be assured of an unbiased censorship rating. The censorship authority derives its mandate from a statute and thus is responsible to the Government of India as well. The essence of the CBFC is thus on a firmer footing than both the BBFC and the MPAA and the goal of the Amendment Bill should be to bring about changes without upsetting this balance of accountability and promoting the CBFC's perceived lack of bias while considering application for film certificates.

### C. The Need for Amendment of the Cinematograph Act, 1952

Films as a medium of expression are of paramount importance. The influence wielded by films over the masses cannot be understated in anyway whatsoever<sup>48</sup>. With such a social backdrop, a piece of legislation like the Cinematograph Act assumes great importance insofar as it regulates public communication involving citizens of India, by means of films. Now, the means by which this communication is regulated, the regulating authority and the extent of such regulation are all matters of concern and introspection in the proper functioning of a democracy. In India, the laws related to media have both an enabling character; promoting freedom of speech and expression as laid down in Art. 19 (1) (a) of the Constitution,<sup>49</sup> and a restrictive character as noticed by the various reasonable restrictions imposed upon the right to freedom of speech and expression<sup>50</sup>, thus narrowing down its scope.

The Cinematograph Act, 1952 is clearly restrictive in nature as it treats the visual medium with some amount of misgiving, showing traces of the legislation's colonial origins.<sup>51</sup> With the Ministry of Information and

48 Akhila Vasan, *Films and TV: Viewing patterns and influence on behaviours of college students*, Health and Population Innovation Fellowship Programme, Working Paper, No. 13, available at < [http://www.popcouncil.org/pdfs/wp/India\\_HPIF/013.pdf](http://www.popcouncil.org/pdfs/wp/India_HPIF/013.pdf) > (Last accessed on July 14, 2011). Also see, Craig A. Anderson and Ors., *The Influence of Media Violence on Youth*, Psychological Science in Public Interest, VOL. 4, NO. 3 (2003), available at < <http://www.psychologicalscience.org/pdf/pspi/pspi43.pdf> > (Last accessed on July 14, 2011).

49 Art. 19 (1) (a) of the Constitution of India guarantees certain citizens, the right to freedom of speech and expression. Although freedom of press is not directly stated, such has been interpreted by various decisions of the Court. See *Ajay Goswami v. Union of India*, AIR 2007 SC 493. In this case, the Court explicitly states that Art. 19(1)(a) of the Constitution contains the freedom of press, in addition to the freedom of speech and expression.

50 See Constitution of India. Article 19 (2) which allows the Government to impose reasonable restrictions on the right to freedom of speech and expression.

51 Arpan Banerjee, *Political Censorship and Indian Cinematographic Laws: A Functionalist Liberal Analysis* in DREXEL LAW REVIEW, VOL. 2 (2010), p.557. He says, "The Cinematograph Act is riddled with



Broadcasting drafting a new amending legislation, nearly six decades later, seeking to bring the old Cinematograph Act up to speed, what must be kept foremost in mind are the thoughts that Banerjee has so succinctly articulated in his paper,<sup>52</sup> that the judicial attitudes towards political criticism have become much more liberal since Independence, coupled with the fact that overwhelming changes have taken place in the attitudes of the public. Popular national magazines publish annual 'sex surveys' which are usually well-received, attesting to the fact that sweeping changes have struck the Indian middle class, who are showing an increasing willingness to talk about subjects related to sex and sexuality in a non-critical manner.<sup>53</sup>

With these essentials in mind, the authors shall now attempt to establish a critique of the Cinematograph Bill 2010, which seeks to bring in fundamental amendments to the existing Act, with a view to bringing it up to contemporary standards.

### III. A Critique of The Cinematograph Act (Amendment) Bill

To analyse the Cinematograph Act (Amendment) Bill, the authors will enter into a point-by-point analysis of the entire bill, list the possible problems and give recommendations for the same.

#### A. The Definition clause

Section 2 (f) of the Bill is a definition clause.<sup>54</sup> It defines 'exhibition' for the purposes of viewing of a cinematographic film. The clause seeks to define 'exhibition' as the display or making available of a cinematograph film to those individuals who are not directly connected with production of a film

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*colonial and statist traces that encourage political censorship. These anachronisms are incompatible with the spirit of the Indian Constitution, which was inspired by the Western liberal belief that political speech must not be suppressed."*

52 *Supra* note 51, Introduction.

53 MDRA, *Making Whopee*, Outlook:Outlook-Moods Survey 2011, available at <<http://www.outlookindia.com/article.aspx?269999>> (Last accessed on July 13, 2011). *Also see*, India Today: India Today Sex Survey 2010, available at <<http://indiatoday.intoday.in/special/sexsurvey2010/index.shtml>> (Last accessed on 13th July, 2011).

54 *See* s. 2 (f) of the Cinematograph Bill, 2010, a draft of which has been made available by the Ministry of Information and Broadcasting at [http://mib.nic.in/writereaddata/html\\_en\\_files/actsrules/act\\_films/draftcinematographbill2010.pdf](http://mib.nic.in/writereaddata/html_en_files/actsrules/act_films/draftcinematographbill2010.pdf) (Last accessed on July 14, 2011).

or pre-production or post-production activities such as filming, distribution, promotion or certification.

The clause does not set out any differentiation between ‘*public exhibition*’ and ‘*private exhibition*’. The Supreme Court has held in *Directorate of Film Festivals and Ors. v. Gaurav Ashwin Jain*<sup>55</sup>, that the requirements set out under sections 4 and 5A of the Act relating to certification by the Board which have been drawn up by applying the guiding principle set out in s. 5B of the Act, to which a film must adhere in order to be certified for ‘*public exhibition*’, is a reasonable restriction on the right to freedom of speech and expression within the scope of Article 19 (1) (a) of the Constitution.<sup>56</sup> Thus, the requirements prescribed by the Act can be held as constitutional as comprising reasonable requirements only to the extent that they apply to ‘*public exhibition*’. Any such restrictions on ‘*private exhibitions*’ lack constitutional sanction, and thus by equating public and private exhibitions, the amended clause brings an unconstitutional restriction on the same level as a constitutional restriction, thus providing adequate reason for calls to bring in a change in the amended clause.

The amended clause should be changed with clear distinctions being drawn between public and private exhibition, such that restrictions on ‘*public exhibition*’ which are constitutional restrictions are not equated with similar restrictions of ‘*private exhibition*’ which would be of an unconstitutional nature.

Section 2 (i) of the Bill is another definition clause<sup>57</sup>, which defines the place of exhibition as being either a building or a house or a tent and any form of transportation on air, land or sea. This clause again turns out to be problematic, in that if the present definition of a place of exhibition is adhered to, then there will arise difficulties as to how films reserved for ‘*private exhibition*’ are to be treated vis-à-vis films which are meant for ‘*public exhibition*’.

For example, a film shot by a person on his old school, which is meant to be privately displayed to his old classmates in his own house or in a friend’s house, would fall under the purview of the Act. This not only leads to a constriction of creative expression, but will also lead to a disturbing

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55 AIR 2007 SC 1640, para. 13. See also *A. Abbas v. Union of India*, AIR 1971 SC 481.

56 *Supra* note 7.

57 *Supra* note 54, s. 2 (i).

tendency whereby even home videos will fall under the purview of the Act; something that is clearly neither desirable, as it brings into question issues on the Right to Privacy, nor is practically feasible as the Board does not have the infrastructural wherewithal to individually inspect personal films made by people for domestic viewing and display.

### **B. Sanction for Exhibition and Certificate or Rating Issued**

Section 6 (vii) of the Bill bestows the Board with the power of refusal to sanction a film for exhibition<sup>58</sup>. This clause basically provides the Board with the power of refusal of certificate merely as a matter of opinion. There is no proviso that there should be an actual contravention of provisions of the Act, for refusal of certificate. The Delhi High Court in *Maqbool Fida Husain v. Raj Kumar Pandey*<sup>59</sup> stated that although an artist who portrays something different from the prevailing view point of society, if often labelled as unpleasant and discomforting, such labelling cannot be sufficient grounds for curbing artistic freedom on grounds of obscenity. The Board cannot be given a blanket power to refuse the issuance of a certificate merely on grounds of its own opinion that the film's message may be against prevalent social norms. The amended provision must be drafted such that the Board can only refuse certificate to a film in case there has been a substantial violation of a statute or the display of the film has constituted an offence.

Section 6 of the Bill lays down the actions that need to be taken by the Board after it has gone through a film submitted to it for certification, for example, the Board may sanction the film for public viewing or might withhold certificate. The section includes a proviso that any action that the Board takes must only be after it has given the person concerned an opportunity of being heard. But, the section contains no provision which speaks about a time limit within which the Board must either clear a film, or refuse it a certificate. Thus, being given no time limit within which to act decisively, the Board may be inclined to remain inert when faced with a particular film which contains a message of political criticism against the ruling dispensation or contains a potentially controversial message, but a certificate to which cannot otherwise be lawfully refused by the Board. In such problematic cases, the Board could be disposed to withhold a

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<sup>58</sup> *Ibid.*, s. 6 (vii).

<sup>59</sup> 2008 Cri. L. J. 4107, para. 117.

certificate as long as possible. For example, the noted filmmaker Anurag Kashyap's film *Paanch* had lain with the Board for six long years before the Board had issued it with a certificate.<sup>60</sup>

Any delay, for the abovementioned reason or otherwise, would cause substantive financial damage to the producer(s) of the film, and keeping this view in mind, the authors are of the opinion that a provision must be entered into s. 6 in the form of sub-section (3) whereby a particular period ought to be set within which a film submitted to the Board for its consideration must be disposed.

### C. Certification of Films and principles therein

Section 8(2) (a) deals with the certification of films and provides that the Board may pass an order to refuse the grant of certificate for a film. As argued above, the authors would like to once again point out that this provision should be amended suitable such that the Board does not have blanket power to refuse a certificate to a film. Media laws in India derive their authority from Art. 19 (1) (a) of the Constitution which is a provision of an enabling nature, guaranteeing freedom of speech and expression. Granting blanket powers to the Board for banning films from viewing would lead to stifling the unfettered public debate over matters of national interest which the Constitution vide its articles seeks to promote.

Section 9 of the Bill<sup>61</sup> sets out the principles which ought to guide the Board during certification of films. Section 9 (1)<sup>62</sup> sets out restrictions on the sanction of exhibition of films, stating that the Board may refuse certification for a film, if the film is against the interest of sovereignty or integrity or security of India, or India's friendly relations with other states, or if the film is against public order, decency or morality.

While interpreting this provision, the authors have felt very strongly against the obfuscation introduced by the vague wording of the clause. Media laws in India derive their authority primarily from art. 19 (1) (a) which gives them both an enabling nature as seen from the guarantee of

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60 See *Paanch* ready for release, minus cuts, available at [http://articles.timesofindia.indiatimes.com/2003-07-10/news-interviews/27212994\\_1\\_vijay-anand-film-release](http://articles.timesofindia.indiatimes.com/2003-07-10/news-interviews/27212994_1_vijay-anand-film-release) (Last accessed on 13th July, 2011). See also Movie Review: *Paanch*, available at <http://sarthak-verma.blogspot.com/2009/12/movie-review-paanch-2003.html> (Last accessed on 13th July, 2011).

61 *Supra* note 54.

62 *Ibid*.

right to freedom of speech and expression, and a restrictive nature as is obvious from the various reasonable restrictions placed upon that right by different sub-clauses of art. 19.<sup>63</sup> With the Ministry of Information and Broadcasting as the drafting body for drafting and introducing the new amendments into the Cinematograph Act, 1952 an attempt must be made to bring the legislation up to speed with contemporary happenings, and in doing so the drafting body must keep in mind the sweeping changes that have taken place in terms of film technology and in the attitudes and morality of Indian society. The phrase 'security of the state' is one which is not just loosely worded but also unnecessary broad in scope and vague in conceptualisation. Terms such as 'morality' and 'decency' come with their own baggage of value-laden subjectivity and as such hold the potential to be the harbingers of denial of right to freedom of speech and expression on the basis of transitory sentiments.

Derived from Article 19 (2), constitutional morality is as a concept, very different from traditional societal notions of morality or decency, which as public perceptions are ever-changing and should not be held as the index for imposing restrictions on the rights given by Article 19 (1) (a). Furthermore, the grounds of 'public order' as a reason for restriction of the right to freedom of speech and expression, proves to be a redundant concept since incitement to commission of an offence has been included as a separate guiding principle. A film ought not to be banned on the grounds of 'public order', unless it is clearly designed to incite communal crimes, caste violence or any other crime.

In addition to this, it must be noted that the grounds for restrictions to rights bestowed by Article 19 (1) (a), which have been enumerated in Article 19 (2) can only be legislated upon by legislative bodies, such as Parliament or State Legislative Assemblies. The Board, as an executive authority cannot curtail a fundamental right on a subjective basis. The Delhi High Court in *Naz Foundation v. Govt. of NCT and Ors.*<sup>64</sup> has opined that constitutional morality which has been derived from constitutional values are different from popular morality, which are based on shifting, subjective notions of right and wrong. Hence, broad notions of 'morality' and 'obscenity'

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63 See Constitution of India, Art. 19 (2), (3), (4).

64 2010 Cri.L.J. 94, ¶ 79. See also *Ajay Goswami v. Union of India*, AIR 2007 SC 493. In this case the Supreme Court has stated in unambiguous terms that the minds of imagination of anybody including minors cannot be subject matters of debate in a court of law.

employed in this Bill do not reflect the changes in the manner in which the judiciary has defined these terms in recent times in context of films.

#### **D. Suspension and revocation of Certification**

Section 13 of the Bill<sup>65</sup> deals with the suspension and revocation of certification for a film, and vide Section 13 (1) (ii) the Central Government is mandated to revoke certification for any film, by resorting to Section 9 (1) of this Bill. It defies common sense as to how exactly the Central Government can enjoy such power of revocation of the decisions of a validly constituted statutory authority. Neither are the grounds for such revocation listed out. This provision should be suitable amended clearly listing out the grounds on which the Central Government can avail of its power to revoke film certificates issued by the Board, in order to ensure that arbitrary and unconstitutional use of this power is negated.

#### **E. Power to issue directions**

Section 15 of the Bill<sup>66</sup> gives sweeping powers to the Central Government to issue directions to the Board for reviewing its decision with regard to the grant of certificate to a film, under Section 8 if in the opinion of the Government the provisions of Section 9 (1) have not been adhered to while sanctioning exhibition of the film. The provision also mandates the compliance of the Board with such directions. On hindsight the provision gives unencumbered power to the Government, essentially the Ministry of Information and Broadcasting, to censor a film or revoke its certificate, leaving the producers without a remedy. This sections strikes at the entire structure of the Act, and constitutes what can be termed as an unreasonable restraint on the freedom of speech and expression, as it arbitrarily overrides that provisions and procedures put in place by the Act, by a mere executive order.

### **IV. Conclusion**

The Cinematograph Act, 1952 as well as the Cinematograph Bill, 2010 are interspersed with vestiges of the politics of the Raj and can be held guilty of statism that encourages political censorship. These relics of colonialism are thoroughly mismatched with the liberal democratic ideals of

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<sup>65</sup> *Supra* note 54, Section 13.

<sup>66</sup> *Ibid.*, Section 15.

justice and freedom which our Constitution stands for. By adopting a liberalist ideology more suited to changing social norms and mores of a modern consumerist society, the Indian judiciary has emphasized the need to encourage frank criticism of the State in what the Bombay High Court has called the ‘*counter-view*’, in its obiter in the *Anand Patwardhan* case<sup>67</sup>. While the media in our country is free, our censorship regime is one of the more stringent among the successful vibrant democracies, within which fraternity India proudly takes its place. However, the moderating hand of an enlightened film censorship regime is needed in view of the fact that it is in the general interest of the discerning film-going public to examine the product of critical film-making before it goes out for public consumption, because of the effect that the visual medium can have on people, which usually wields much more influence than on the public, than the print media. Film certification is thus the end product of a process of pre-viewing of the film and it leads to a decision either to not public viewing for a particular film, or to allow its public exhibition with certain deletions, or alterations. Intelligent and thoughtful censorship ensures that members of the public are not exposed to psychologically damaging material.

Jagannatha Shetty J. in *S. Rangarajan v. P. Jagjivan Ram*<sup>68</sup>, emphasized on the fact that cinema motivates thought and action and assures a high degree of attention and retention of the sight and sound in the semi-darkness of the theatre with elimination of all distracting ideas. Therefore films have as much potential for good as for evil, and have an equal potential to encourage and influence good or violent social behaviour. Films cannot be compared to other media solely due to the fact that the reach and influence of films is incomparably more effective than other forms of mass media. What can therefore be suggested is that the present censorship regime which conforms to a strict structure of issuing ratings<sup>69</sup> of “U”, “U/A”, “A” and “S”, whereas a more flexible and relevant system of ratings need to be evolved. Section 8 (1) of the Cinematograph Bill which provides for a new rating system based on age of the viewers<sup>70</sup> is an important step in the

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67 (2003) 5 Bom C. R. 58, para. 32.

68 (1989) 2 SCC 574, para. 10.

69 Expansion of the Ratings. U – Unrestricted Public Exhibition; UA – Unrestricted Public Exhibition, but with a word of caution that parental discretion is required for children below the age of 12; A – Restricted to Adults; S – Restricted to any special class of persons. *See supra* note 15.

70 *See supra* note 54, Section 8(1).

correct direction for remedying the strictures of the anachronistic rating system of the old Act. More varied and age-based ratings usually provide film-makers with the opportunity to fine-tune the contents and style of delivery of their films, so as to ensure that they can reach their intended target audience.

The Cinematograph Bill, 2010 which has been lying in Parliament for quite some time now, is slated to be introduced during this Monsoon Session. It is a timely exercise and an extremely relevant one. The present Bill, though in need of several changes and amendments is a fine piece of legislation indeed, which goes a long way in liberalizing and updating the film censorship regime of the country. With the Ministry of Information and Broadcasting seeking the participation of civil society and the general public in suggesting and incorporating changes in the Bill, it is hoped that the Bill and the subsequent amended Act shall serve to be an empowering piece of legislation that shall allow Indian film-makers to build upon the base of excellence that they have already created for themselves, and to experiment in newer and more thought-provoking types of cinema.



# **MEDIA AND PUBLIC OPINION-DO THEY SUBCONSCIOUSLY AFFECT THE JUDGES?**

*Upasana Dasgupta\**

## **I. Introduction**

The Oxford Dictionary defines 'public opinion' as 'views, esp. moral, prevalent among the general public'. It is basically the will and opinion of the general public. The term "public opinion" dates back to the eighteenth century and has derived from the French *l'opinion publique*, first used in 1588 by Montaigne. People form and express their opinions on each other, which, collectively, form public opinion. Public opinion is formed due to a variety of reasons by the people- for the sake of something to talk about; to gratify this or that momentary feeling; but the effect of such opinions, when formed, is quite independent of the grounds of their formation. It is media which is instrumental in forming of such public opinions have potential to affect the legislators, judiciary and administrators. In this paper, I would deal with the importance of media and the public opinion it is instrumental in creating, holds in subconsciously affecting that branch of the State that claims to be insulated from the influence of media and public opinion- the judiciary.

The origin of term 'public opinion' is shrouded in obscurity. Though the term was actually not used till the 18th century, parallel expressions that closely resemble the term seem to have occurred in many historical epochs. The term was first popularized in modern times. Jacques Necker, the finance minister for Louis XVI on the eve of the French Revolution. "This public opinion," Necker wrote, "strengthens or weakens all human institutions."<sup>1</sup>The American political scientist V.O. Key defined public opinion in 1961 as "opinions held by private persons which governments find it prudent to heed."<sup>2</sup>The theory of public opinion is a derivative from democracy as a form of government as by its very nature, the democratic process encourages the citizens to form opinions. Thus, the importance of public opinion in a democratic republic like India cannot be undermined.

Media is called the Fourth estate- the fourth limb of democracy. However, there have been opinions which say that with the growth of media and its

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1 Encyclopedia Britanica, <http://www.britannica.com/EBchecked/topic/482436/public-opinion> last accessed on 8<sup>th</sup> July 2011.

2 *Ibid.*

power, it has also influenced the judicial decisions which have been detrimental to our society. This paper thus tries to analyze whether judges actually get influenced by media and public opinion and if true, then what steps should be taken prevent it.

Thus the question is whether the media and public opinion can affect the Judges and whether the Judges, as human beings are not susceptible to such indirect influences, at least subconsciously or unconsciously? As Justice Frankfurter once stated: “No Judge fit to be one is likely to be influenced consciously, except by what he sees or hears in Court and by what is judicially appropriate for his deliberations. However, Judges are also human and we know better than did our forbears how powerful is the pull of the unconscious and how treacherous the rational process ... and since Judges, however stalwart, are human, the delicate task of administering justice ought not to be made unduly difficult by irresponsible print.”

### **1.1 Media and Public Opinion- their importance in a democracy**

In recent years, the advent of cable television, local radio networks and the internet has greatly enhanced the reach and impact of the mass media. The circulation of newspapers and magazines has also been continuously growing in our country. This ever expanding readership and viewership coupled with the use of communication technologies has given our media organizations an unprecedented role in shaping popular opinions and preferences. It goes without saying that a free press creates an informed citizenry and thereby deepens the functioning of democratic institutions.<sup>3</sup>

Bentham was the first English writer to develop theories of public opinion. His theory was based on giving importance to the public opinion as it would ensure maximum happiness for maximum number of people. The State cannot maintain law and order merely by sanction and should enable individuals to have maximum satisfaction and maximum freedom to assert themselves. Soon the important role played by society and the people in constituting the state was recognized.

In fact, that is why customs continue to exist and often take form of law. Customs have been coming down from generations have turned into laws as they have sanction from the public. Also, it must be remembered

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3 Speech by Justice K.G. Balakrishnan, Regional Workshop on ‘Reporting of Court proceedings by media and administration of justice’, at the High Court of Orissa, Cuttack (August 30, 2008)

that it is not only in democracy that public opinion exists. No form of society can be entirely democratic or entire despotic, even though there exists a stark contrast between them. While in a monarchy, the ruler cannot expect to have absolute power and is answerable to his subjects; similarly in what is called a democracy, the elected representative from among the people rises above the people and has some form of authority over them. Therefore, it is to be accepted that no form of government can exist without consent of the people it consists of. And media which has grown and flourished in last few decades has become a powerful mode of forming and influencing public opinion. In fact, it can be said that it has become so powerful that it has now become the most important medium of forming public opinion- hence talking of the one automatically leads to talking about the other. Public Opinion and media indeed has its own importance in a democracy. They have started movements which have led to laws being passed. One example of it is the Right to Information Act.

However, it is not always that public opinion and media affect the legal system. A times, the law can also develop public opinion. Some good examples are the Prohibition of Sati Act and decriminalization of homosexual sex. Several such laws-legislatures made or judge made, may not be accepted by the public at first and public opinion in these cases, become an obstacle in implementation of laws, but gradually are accepted by the people often by imposing sanctions. .

Thus law can exercise its control over public opinion, but only to a limited extent. The main problem with these laws is that they are not endorsed by the public, and thus cannot succeed completely or take a long time to come into force successfully. Thus public opinion and the media have an important role to play in the democracy.

## **1.2 Independence of Judiciary and Public Opinion**

Public opinion and media's role in creating it is no doubt important in a democracy but what is questioned is whether it is right if such public opinion affect the mind of the judges. The essential qualifications of a judge, in the words of the celebrated Greek philosopher Socrates (470-399 BC), are that he should be able to hear courteously, answer wisely, consider soberly and decide impartially. That all judges have these qualifications is a perception that has continued through the ages, even though there has been

credible evidence of serious deficiencies and transgressions on the part of judges in recent times.<sup>4</sup> In deciding each case, the judge must be free from any form of pressure, direct or indirect. One of the hallmarks of a civilised, developed community is an independent judiciary. Thus judges should be independent. Independence means not subject to control or influence of another; not dependent or contingent on something else<sup>5</sup>; being free of influence of something<sup>6</sup> The Bangalore principles of judicial conduct, following a meeting of judges of the Commonwealth, sums it up : '*Judicial independence is a pre-requisite to the rule of law, and a fundamental guarantee of a fair trial.*' The judge being independent would mean that he shall exercise the judicial function independently on the basis of his assessment of the facts and in accordance with a conscientious understanding of the law, free of any extraneous influences, inducements, pressures, threats or interference, direct or indirect, from any quarter or for any reason.<sup>7</sup>

Under UN initiative a code of conduct have been formulated for the judges. They are designed to provide guidance to judges. it is a framework for regulating judicial conduct.<sup>8</sup> The principals are:

- i) Judicial independence is a prerequisite to the rule of law and a fundamental guarantee of a fair trial. A judge shall therefore uphold and exemplify judicial independence in both its individual and institutional aspects.
- ii) Impartiality is essential to the proper discharge of judicial office. It applies not only to the decision itself but also to the process by which the decision is made.
- iii) Integrity is essential to the proper discharge of the judicial office
- iv) Propriety, and the appearance of propriety, are essential to the performance of all the activities of the judge

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4 Jethmalani, Ram, *Judging The Judges*, in JUDGING THE JUDGES 21(K. Mahesh & Biswajit Bhattacharya eds , Gyan Publishing House 1999 )

5 BLACK'S LAW DICTIONARY, 838(Ninth Edition)

6 P.Ramanatha Aiyar's *The Law Lexicon* 927 ,( 2<sup>nd</sup> Edn 2006)

7 *Commentary in the Bangalore Principles of judicial conduct*, 2002 (The Judicial Integrity Group, March 2007). <http://www.coe.int/t/dghl/cooperation/ccje/textes/BangalorePrinciplesComment.PDF> last accessed on 5 July 2011

8 THE BANGALORE PRINCIPLES OF JUDICIAL CONDUCT 2002, [http://www.unodc.org/pdf/crime/corruption/judicial\\_group/Bangalore\\_principles.pdf](http://www.unodc.org/pdf/crime/corruption/judicial_group/Bangalore_principles.pdf). last accessed on 5 July 2011

v) Ensuring equality of treatment to all before the courts is essential to the due performance of the judicial office.

vi) Competence and diligence are prerequisites to the due performance of judicial office.<sup>9</sup>

Thus judiciary should be independent and should not be influenced by the media and the public opinion. Unlike legislators, they should not cater to public opinion but should concentrate on protecting the constitutional values. In *Naz Foundation Case*, the court rightly said that morality and public opinion which are against homosexuality, by itself cannot be a valid ground for restricting the right under Articles 14 and 21<sup>10</sup>. It is unreasonable to classify non-procreative carnal intercourse as crime whereas procreative intercourse is not just permitted but enforced by many laws. Thus the court went against the law commission report which “We are inclined to think that Indian society, by and large, disapproves of homosexuality and this disapproval is strong enough to justify it being treated as a criminal offence even where adults indulge in it in private.”<sup>11</sup>

The contentions that were made in the *Naz Foundation Case* are a part of the larger Hart v. Devlin debate which followed the Wolfenden Report in England. Devlin said that law should be reflection of the shared morality and public opinion and what is considered immoral by society, should not be made legal, otherwise the society will disintegrate society is justified in taking the same steps to preserve its moral code as it does to preserve its government.<sup>12</sup> However, it was strongly refuted by Hart who said that morality should be left open to one’s own interpretation and law should not interfere in morality. He questioned, ‘Why should the conventional morality of a few members of the population be justification for preventing people doing what they want?’ According to Hart, societal basic values and morals do undergo changes and history has proved that societies do survive such

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9 *Guide to Judicial Conduct*, drafted by a working group of judges set up by the Judges’ Council, under the chairmanship of Lord Justice Pill (Judges’ Council) [http://www.judiciary.gov.uk/Resources/JCO/Documents/Judges%20Council/judicialconduct\\_update0408.pdf](http://www.judiciary.gov.uk/Resources/JCO/Documents/Judges%20Council/judicialconduct_update0408.pdf) last accessed on 5 July 2011

10 *Naz Foundation v. Government of NCT and Ors*, MANU/DE/0869/2009, Para 24.

11 The Law Commission of India Report (No. 42) of 1971 pp. 281

12 History shows that the loosening of moral bonds is often the first stage of disintegration, so that society is justified in taking the same steps to preserve its moral code as it does to preserve its government. The suppression of vice is as much the law’s business as the suppression of subversive activities, Patrick Devlin, *The Enforcement of Morals*, 45 Proceedings of the British Academy 1 (1959).

changes. Therefore, skepticism of Devlin is unfounded. Hart did not that the criminal law does and should enforce morality when it punishes theft, murder, rape, and the like, but he wants to deny that the criminal law should enforce morality when the conduct sanctioned is not harmful.<sup>13</sup> It was this argument of Hart which was strongly supported by the Court in the *Naz Foundation Case*. Thus, the case clearly reiterated that the Court should decide independently of public opinion and safeguard constitutional values.

## II. Impact of Media on Judges-the Real Scenario

Theoretically, a judge should be independent and not be influenced by any extraneous considerations. A case may excite public controversy with extensive media publicity, and the judge may find himself or herself in what may be described as the eye of the storm. Sometimes the weight of the publicity may tend considerably towards one desired result. However, in the exercise of the judicial function, the judge must be immune from the effects of such publicity.<sup>14</sup> In a book recently released named *Free Press vs. Fair Trials*, the authors claim that influence of media on judge's mind in sensational trials is not much. For judges, the impact may come in sentencing. Also, publicity alone isn't enough to affect the verdict in most cases.<sup>15</sup>

But it is doubtful, how much of it is true in real scenario? Are judges who are also human not all affected by media publication and the public opinion –at least subconsciously or unconsciously? Lord Denning in the Court of Appeal had observed that professionally trained judges are not easily influenced by publications.<sup>16</sup> However, it seems that it is more of a statement of policy rather than literal truth.<sup>17</sup> His view was not accepted by the House of Lords.<sup>18</sup> Disagreeing with Lord Denning, Lord Dilhorne held in the same case, “This claim to judicial superiority over human frailty is

13 Hamish Stewart, *Legality And Morality In H.L.A. Hart's Theory Of Criminal Law*, 52 SMU L. Rev. 201

14 *Commentary in the Bangalore Principles of judicial conduct*, 2002 (The Judicial Integrity Group, March 2007). <http://www.coe.int/t/dghl/cooperation/ccje/textes/BangalorePrinciplesComment.PDF> last accessed on 5 July 2011

15 Jon Bruschke and William E. Loges, *FREE PRESS VS FAIR TRIALS: EXAMINING PUBLICITY'S ROLE IN TRIAL OUTCOMES* (Lawrence Erlbaum Associates , Inc, 2004).

16 *Att Gen v.BBC* : 1981 AC 303 (315) CA

17 Borrie and Lowe, *COMMENTARY ON CONTEMPT OF COURT* (3<sup>rd</sup> edn, 1996).

18 *Att Gen vs. BBC* 1981 AC 303 (HL)

one that I find some difficulty in accepting. Every holder of a Judicial Office does his utmost not to let his mind be affected by what he has seen or heard or read outside the Court and he will not knowingly let himself be influenced in any way by the media, nor in my view will any layman experienced in the discharge of Judicial duties. Nevertheless, it should, I think, be recognized that a man may not be able to put that which he has seen, heard or read entirely out of his mind and that he may be subconsciously affected by it.” The Supreme court of India has accepted that the media affects the judges subconsciously.<sup>19</sup>

The Judiciary, according to Justice Frankfurter could not function properly if what the press does is reasonably calculated to disturb the judicial judgment in its duty and capacity to act solely on the basis of what is before the Court. The judiciary is not independent unless Courts of Justice are enabled to administer law by absence of pressure from without, or the presence of disfavour. As Justice Cardozo rightly pointed out, ‘No effort or revolution of the mind will overthrow utterly and at all times the empire of these subconscious loyalties.’<sup>20</sup> Other judges at the time also acknowledged that personal values may influence judicial decisions<sup>21</sup> and such values are created and affected by the media and public opinion.

Federal Circuit Judge Amistead Dobie in 1951 observed that,, a judge must deal with an imperfect legal order. He wrote, “There never has been, and there never will be, a judge worthy of his salt who can be classified as a cool and clammy thinking machine. No judge, however he may try, can, in his decisions, completely and effectively divorce himself from what he has seen, has heard, has experienced and has been.”<sup>22</sup>

Also, in *Pennekamp v. State of Florida*, it was observed that:

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

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19 P.C. Sen (*in Re*) :AIR 1970 SC 1821

20 Brian Z. Tamanaha, *The realism of Judges Past and Present*, 57:77 CLEV. St. L. Rev 83-84

21 *Ibid*, at 84.

22 *Ibid* at 85

*for contempt of court is a safeguard not for Judges as persons but for the functions which they exercise. It is a condition of that function – indispensable in a free society – that in a particular controversy pending before a court and awaiting judgment, human beings, however strong, should not be torn from their moorings of impartiality by the undertone of extraneous influence. In securing freedom of speech, the Constitution hardly meant to create the right to influence.*<sup>23</sup>

Deep below consciousness are other forces, the likes and the dislikes, the predilections and the prejudices, the complex instincts and emotion and habits and convictions, which make the man, whether he be litigant or Judge...The great tides and currents which engulf the rest of men, do not turn aside in their course, and pass the Judges by.<sup>24</sup>

This brings us back to the realism theory that judges are influenced by circumstances, situations and has their own prejudices.<sup>25</sup> As Justice Cardozo said, “We may try to see things as objectively as we please. None the less, we can never see them with any eyes except our own”.<sup>26</sup>

To deny that bludgeoning or poisonous comment has power to influence, or at least to disturb, the task of judging is to play make-believe and to assume that men in gowns are angels.<sup>27</sup> Especially in the administration of the criminal law-that most awesome aspect of government-society needs independent courts of justice. This means judges free from control by the executive, free from all ties with political interests, free from all fears of reprisal or hopes of reward.<sup>28</sup> The safety of society and the security of the innocent alike depend upon wise and impartial criminal justice. Misuse of its machinery may undermine the safety of the State; its misuse may deprive the individual of all that makes a free man's life dear.<sup>29</sup>

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23 *Pennkamp v. State Of Florida*, 328 U.S. 331 (1946)

24 Cardozo, *Nature of the Judicial Process* (Lecture IV, Adherence to Precedent. The Subconscious Element in the Judicial Process) (1921) (Yale University Press)

25 V. D. Mahajan, JURISPRUDENCE AND LEGAL THEORY 51 [Eastern Book Co., 2001].

26 Cardozo, THE NATURE OF JUDICIAL PROCESS 13 (1921) .

27 *Rex v. Davies*, (1945) 1 K.B. 435, 445; *Parashuram Detaram Shamdasani v. King-Emperor*, (1945) A.C. 264

28 *Pennkamp v. State Of Florida*, 328 U.S. 331 (1946)

29 *Ibid*



## 2.2 Responsibility of Media

Today the media has become very powerful and clearly shapes the public opinion and might even affect professionally trained judges. Hence, freedom of media also entails a certain degree of responsibility. But the media, so as to get attention in the highly competitive market often distort facts, sensationalize the news, and indulge in intrusive practices during newsgathering which often impede the privacy of the people who are the subject of such coverage.<sup>30</sup> The problem finds its worst manifestation when the media extensively covers matters sub judice and publishes information and opinions which are clearly prejudicial to the interests of the parties and vitiates the constitutional right of the parties to receive a fair trial.<sup>31</sup> This problem is especially acute in respect of criminal trials and matters involving celebrities, where media reporting can swing popular sentiments either way.<sup>32</sup> This has been popularly termed as –trial by media. The Supreme Court of India has defined the term to mean “the impact of television and newspaper coverage on a person’s reputation by creating a widespread perception of guilt regardless of any verdict in a court of law.”<sup>33</sup> This may have the effect of denying the accused the right to have a fair trial as the eminent lawyer Mr Ram Jethmalani once pointed out. This calls for a balance between the constitutional guarantees of ‘freedom of press’ on one hand and the ‘right to fair trial’ on the other.

The press does have the right, which is its professional function, to criticize and to advocate. Freedom of press is beneficial to society as it aids in discovery of truth and that leads to societal progress. However, when such freedom is harmful to others, it should be curtailed. This is the classical theory propounded by John Stuart Mill- a concept also incorporated in our Constitution. Whereas Article 19(1)(a) gives the citizens the right of freedom of speech and expression, Article 19(2) imposes reasonable restrictions on such freedom. The public function which belongs to the press makes it an obligation of honor to exercise this function only with the fullest sense of responsibility without which a free press may readily become a powerful instrument of injustice. There is

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30 Speech by Justice K.G. Balakrishnan, *Regional Workshop on ‘Reporting of Court proceedings by media and administration of justice’*, at the High Court of Orissa, Cuttack (August 30, 2008)

31 *Ibid*

32 *Id.*

33 *Anand v. Registrar*, (2009) 8 S.C.C. 106

perhaps no area of news more inaccurately reported factually, on the whole, though with some notable exceptions, than legal news. Some part of this is due to carelessness, often induced by the haste with which news is gathered and published, a smaller portion to bias or more blameworthy causes.<sup>34</sup>

Supreme Court of India in *Saibal kumar v. B.K. Sen.*<sup>35</sup> held that, “No doubt, it would be mischievous for a newspaper to systematically conduct an independent investigation into a crime for which a man has been arrested and to publish the results of the investigation. This is because trial by newspapers, when a trial by one of the regular tribunals of the country is going on, must be prevented. The basis for this view is that such action on the part of a newspaper tends to interfere with the course of justice, whether the investigation tends to prejudice the accused or the prosecution” In *Sanjeev Nanda’s* case, the Delhi High Court observed that while it was the job of the media to expose the “misdeeds” of the “high and mighty,” it could not go “over board.”<sup>36</sup>

In *M.P. Lobia v. State of West Bengal*<sup>37</sup>, the Supreme Court deprecated, two articles published in a magazine in a one-sided manner setting out only the allegations made by the woman’s parents but not referring to the documents filed by the accused to prove that the lady was a schizophrenic. The court observed, “These types of articles appearing in the media would certainly interfere with the course of administration of justice.” Duty of a journalist is to report cases and not adjudication. Liberty of the press is subordinate to the administration of justice.<sup>38</sup> The freedom of speech guaranteed under Article 19(1)(a) of Indian Constitution is not an absolute right and the restrictions stated in Article 19(2).<sup>39</sup> The press or journalists enjoy no special right of freedom of expression and the guarantee of this freedom was the same as available to every citizen. The press does not enjoy any special privilege or immunity from law.<sup>40</sup> In *Express Newspapers vs. Union of India*<sup>41</sup>, the Supreme Court exhaustively dealt with freedom of the press but stated that it can not be unbridled. Like other freedoms, it can

34 *Pennekamp v. State Of Florida*, 328 U.S. 331 (1946)

35 (1961) 3 SCR 460

36 (2009) 160 D.L.T. 775

37 2005(2) SCC 686

38 *Rao Harnarain v. Gumori Ram*, AIR 1958 Punjab 273

39 *Reliance Petrochemicals Ltd. vs. Proprietors of Indian Express*, 1988(4) SCC 59

40 *Harijai Singh v. Vijay Kumar* : 1996(6) SCC 46

41 1959 SCR 12

also suffer reasonable restrictions. In fact, the responsibility of the press is greater than the responsibility of an individual because the press has a larger audience.<sup>42</sup>

While reporting the media should keep the following in mind:

1. There is an obligation on the media agencies to ensure fair and accurate reporting of proceedings. This is a cause for concern since it is a very common occurrence to come across news-reports wherein statements made by judges and lawyers in the courtroom are distorted and cited without an explanation of their context.<sup>43</sup>
2. In some kinds of cases there is a compelling need to protect the identity and privacy of parties in order to safeguard their interests and ensure a fair trial. Ordinarily judicial proceedings should be open to public scrutiny, but there is a need to check the same in some circumstances. For instance news agencies should not disclose the identity of victims of sexual offences.<sup>44</sup> Furthermore, our procedural laws provide for in camera proceedings in family-related disputes as well as in rape trials so as to protect the victims as well as the witnesses from undue pressure. In fact, in respect of the interface between media freedom and criminal law, one of the Siracusa principles (1984) stipulates<sup>45</sup>:

*All trials shall be public unless the Court determines in accordance with law that:*

*(a) the press or the public should be excluded from all or part of a trial on the basis of specific findings announced in open Court showing that the interest of private lives of the parties or their families or of juveniles so requires; or*

*(b) the exclusion is strictly necessary to avoid publicity prejudicial to the fairness of the trial or endangering public morals, public order or national security in a democratic society.*<sup>46</sup>

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42 Bijoyananda v. Bala Kush AIR 1953 Orissa 249

43 Speech by Justice K.G. Balakrishnan, *Regional Workshop on 'Reporting of Court proceedings by media and administration of justice'*, at the High Court of Orissa, Cuttack (August 30, 2008)

44 R. Rajagopal & Anr. v. State of Tamil Nadu, (1994) 6 SCC 632

45 Speech by Justice K.G. Balakrishnan, *Regional Workshop on 'Reporting of Court proceedings by media and administration of justice'*, at the High Court of Orissa, Cuttack (August 30, 2008)

46 The Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights, E/CN.4/1985/4.

3. There is an obligation on media to check prejudice against parties which can arise as a consequence of reporting on sub judice matters.<sup>47</sup> As Justice J.D. Kapoor observed while pronouncing the verdict in the Bofors pay-off case, 'Fairness of trial is of paramount importance as without such a protection there would be trial by media which no civilised society can and should tolerate.'<sup>48</sup>

## 2.2 Law to curb influence of Media on judges

Restriction on media trial is necessary so that the people may not have a wrong perception of the administration of Justice system. The main legal remedy against the problem of prejudicial reporting on sub judice matters is that of the power of judges to punish for contempt which has been put as a reasonable restriction under Article 19(2) of the Constitution. Also, to ensure that the media and public opinion do not interfere in the administration of justice, we have the Contempt of Court Act 1971 in India which lays down the power of judges to punish for criminal contempt in instances of scandalizing the court, prejudicial acts and the obstruction of justice. It has been argued by some that giving such vast powers to court will stand in the way of right of free speech but as we have seen in recent times with the media often transgressing its limits that such a power is necessary. However, contempt of court is a matter of discretion of the Court and such discretion must be exercised with caution and only when it is necessary.<sup>49</sup> Section 3 of the Contempt of Courts Act, 1971 restricts the freedom of speech and expression which includes both freedom of the media, both printed and electronic. The threshold for the same is 'If any publication interferes with or obstructs with or tends to obstruct the course of justice in connection with any civil or criminal proceeding which is actually pending'. Further, Section 3(1) of the Act incorporates the 'innocent publication' rule which protects the publication if the person who made the publication had no reasonable grounds for believing that the proceeding related to the subject-matter was pending at the time.

In *Y.V. Hanumantha Rao v. K.R. Pattabhiram and Anr*,<sup>50</sup>

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47 Speech by Justice K.G. Balakrishnan, *Regional Workshop on 'Reporting of Court proceedings by media and administration of justice'*, at the High Court of Orissa, Cuttack (August 30, 2008)

48 *Court concern over trial by media*, THE HINDU, Feb 5, 2004.

49 *A.K. Gopalan v. Noordeen*: AIR 1969(2) SCC 73

50 AIR1975 AP 30

*“When litigation is pending before a Court, no one shall comment on it in such a way there is a real and substantial danger of prejudice to the trial of the action, as for instance by influence on the Judge, the witnesses or by prejudicing mankind in general against a party to the cause. Even if the person making the comment honestly believes it to be true, still it is a contempt of Court if he prejudices the truth before it is as-certainied in the proceedings. To this general rule of fair trial one may add a further rule and that is that none shall, by misrepresentation or otherwise, bring unfair pressure to bear on one of the parties to a cause so as to force him to drop his complaint or defence. It is always regarded as of the first importance that the law which we have just stated should be maintained in its full integrity. But in so stating the law we must bear in mind that there must appear to be 'a real and substantial danger of prejudice.'”*

At present, Section 3(2) of the Act allows unrestricted freedom of publication, granting immunity from contempt if there is no civil or criminal proceeding actually ‘pending’ in a court at the time of publication. In fact, the fundamental right to freedom of speech will be unduly restrained if it is held that there should be no comment on a case even before an arrest had been made. In fact, in cases of public scandals involving companies, it is the duty of free press to comment on such topics and draw the attention of the public.<sup>51</sup>

Under sec 3 of the Act, the starting point of the pendency of the case is only from the stage where the court actually gets involved when a charge-sheet or Challan is filed under Section 173 of the Code of Criminal Procedure, 1973 or when the criminal court issues summons or warrant against the accused. Any publication before such events if it interferes or tends to interfere with rights of suspects or accused for a fair trial, is not contempt.<sup>52</sup>

The 200th Report of the Law Commission of India on ‘Trial by media’ deals with the ambiguity in the Contempt of Courts Act, 1971 over the stage at which a matter can be considered sub judice and prescribes for certainty in law on the issue would be beneficial. The amendment proposed

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51 A.K. Gopalan v. Noordeen : (AIR 1969(2) SCC 73

52 Speech by Justice K.G. Balakrishnan, *Regional Workshop on ‘Reporting of Court proceedings by media and administration of justice’*, at the High Court of Orissa, Cuttack (August 30, 2008)

by the Law Commission suggests that the word 'pending' requires clarification.<sup>53</sup>

### III. Conclusion

In this paper, I have dealt with opinion of several jurists on whether media influences the judiciary and what are the laws to deal with this. I have also discussed whether the media is permitted to influence the judges under their fundamental right of freedom of expression guaranteed by the Article 19(1)(a) of the Constitution or whether there are restrictions on such right. The paper also relates situations when the media may face contempt of court for trying to mislead the judges. Thus it discusses the need for the media to be responsible and not create hurdles in administration of justice..

Media and public opinion came to limelight in the wake of democratic set-up. The governmental policies gradually became the function of opinion rather than of force and it was a welcome change. However, with the increase of its power, media started crossing the thin line between freedom of speech and right of accused of fair trial by deciding on matters sub judice and thus encroaching upon proper functioning of constitutional mechanisms. Time and again, the courts have expressed their concern over the 'trial by media' and said that the functions of the court could not be usurped by any other authority in a civilized society.<sup>54</sup> Bofors case is an a nefarious example which manifestly demonstrates how the trial and justice by media can cause irreparable, irreversible and incalculable harm to the reputation of a person and shunning of his family, relatives and friends by the society and such a person is ostracised, humiliated and convicted without trial.<sup>55</sup> So was the case with Punjabi Pop singer Daler Mehndi, who faced humiliation and pseudo trial through media. The Arushi Talwar case too has raised several troubling questions for the media and the police, questions that strike at the heart of the process of investigation and news reporting. The worst effect of these irresponsible acts by media is that they often end up in influencing the judges. This is against the constitution as the judges should be independent and should not be affected by any outside opinion. But media often creates such hue and cry regarding certain

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53 Law Commission of India, 200<sup>th</sup> Report on 'Trial By Media Free Speech and Fair Trial under Criminal Procedure Code, 1973', August 2006.

54 *Court concern over 'trial by media'*, THE HINDU, Feb 5, 2004.

55 *Ibid*

cases that it almost becomes impossible for a judge to ignore it and may get influenced. As I have already discussed in this paper, judges are human beings and might get affected subconsciously by these media trials and opinions. This is detrimental to the interest of administration of justice. Hence, there is indeed law with its force of sanction required to curb such irresponsible behavior by the media. Contempt of Courts Act 1971 serve the purpose. However, we must understand that the long term solution in this respect lies in respect of self-regulation by both the media and the judiciary.

# ON YOUR MARK, GET, SET, ADVERTISE: AN INTERNATIONAL LOOK AT AMBUSH MARKETING

*Mridushi Swarup & Mohar Majumdar\**

## I. Introduction

Ever since sponsorship of individual television programmes was first introduced, the idea of programmes being "in association with" or "brought to you by" has been very much part of the viewing experience.<sup>1</sup> Many researchers have noted the extraordinary growth in sponsorship over the last two decades and its increasingly commercial orientation<sup>2</sup>. Television sponsorship offers sponsors an opportunity to be associated with the content of television programmes and channels and is therefore seen as a powerful marketing option.<sup>3</sup>

As sponsorship's popularity has increased, so too has competition to secure and protect sponsorship rights.<sup>4</sup> In 2004, Coors pays \$13 million to be known as the official beer of the NFL. It sets up a billboard along a Houston highway proudly displaying the official NFL logo and giving a daily tally of the number of days until the Super Bowl. Across the highway, a non-sponsor beer company erects its own billboard, showing the tag line, "Our Super Parties, Our Beer" on top of a football.<sup>5</sup>

Welcome to the world of ambush marketing or "parasitic advertising". This practice is by no means new, but nevertheless has not been heavily litigated--mainly because, in most countries, it is essentially legal.<sup>6</sup>

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\* The authors are students of IV year, HNLU, Raipur.

1 Debra Brown, *Television Sponsorship - An Advertising Opportunity Or A Pitfall For the Unwary?*, Entertainment L. R (2010).

2 J Crimmins & M Horn, *Sponsorship: From management ego trip to marketing success*, 36 JOURNAL OF ADVERTISING RESEARCH 11-21 (1996); J Tripodi & M Sutherland, *Ambush marketing: An Olympic event*, 7(6) THE JOURNAL OF BRAND MANAGEMENT 412-422 (2000).

3 K Parker, *Sponsorship: The Research Contribution*, 25 (11) EUROPEAN JOURNAL OF MARKETING 22-30 (1991).

4 J Hoek & P Gendall, *When do ex-sponsors become ambush marketers?* 3 (4) INTERNATIONAL JOURNAL OF SPORTS MARKETING & SPONSORSHIP 383-402 (2002).

5 *Ambushing the Super Bowl (or at least trying to)*, SPORTS BUSINESS NEWS (July 1, 2010), [http://www.sportsbusinessnews.com/index.asp?story\\_id=31942](http://www.sportsbusinessnews.com/index.asp?story_id=31942); J. Burnett, A. Menon, & D.T.Smart, *Sports Marketing: A New Ball Game With New Rules*, 33(5) JOURNAL OF ADVERTISING RESEARCH 21-35 (1993).

6 T.B.Cornwell & I.Maignan, *An International Review Of Sponsorship Research*, 27 JOURNAL OF ADVERTISING 1-21 (1998); R.J.Dornoff & C.B.Tankersley, (1975). *Perceptual Differences In Market Transactions: A Source Of Consumer Frustration*, Journal of Consumer Affairs (Summer) 97-103 (1975)



Event owners and official sponsors have campaigned vigorously against this practice. However, their arguments rest on ethical assumptions that have no standing in court; in fact, the case law to date indicates that many alleged instances of ambushing are quite legitimate.<sup>7</sup>

Corporate sponsorship of sports has grown into a multibillion dollar worldwide industry.<sup>8</sup> In the United States and Canada, it is estimated that corporations spent over \$14 billion in 2007 on sport sponsorship.<sup>9</sup> Some companies, such as Nike and Coca-Cola, will spend hundreds of millions of dollars each year to obtain these sponsorships.<sup>10</sup> With such high stakes, corporations and their sponsored teams, leagues, and events have a strong interest in making sure that they receive the best possible returns on these highly lucrative sponsorship agreements. Yet a persistent threat to the viability of these corporate sponsorship agreements lurks, and if more is not done to address it, corporations may become less willing to shell out millions of dollars for them. That threat is ambush marketing.

## II. Ambush Marketing - Defined

Ambush marketing is an amorphous concept.<sup>11</sup> This uncertainty is hardly surprising because, until comparatively recently, these marketing practices could only be prevented by using a broad range of legal rights and remedies, including intellectual property laws, planning laws, advertising

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7 Dean Crow and Janet Hoek, 14 Marketing Bulletin (2003) Article 1; D. Doust, *The Ethics Of Ambush Marketing*, THE CYBER-JOURNAL OF SPORT MARKETING 1(3) (July 1, 2010), [www.cad.gu.edu.au/cjsm/archives.htm](http://www.cad.gu.edu.au/cjsm/archives.htm)

8 F.D.Sturdivant & A.B.Cocanougher, *What Are Ethical Marketing Practices?*, 51 (Nov-Dec) HARVARD BUS.R. 10-12 (1973); Kaplan, *Nike Spending Billions for Endorsements and Sponsorships*, PORTLAND BUS. J. (Aug 2, 2010) <http://portland.bizjournals.com/portland/stories/2008/04/14/daily39.html>

9 *Weak Forecast for Corporate Sponsorships in 2009*, (June 28, 2011), [http://www.philly.com/philly/blogs/phillyinc/Weak\\_forecast\\_for\\_corporate\\_sponsorships\\_in\\_2009.html](http://www.philly.com/philly/blogs/phillyinc/Weak_forecast_for_corporate_sponsorships_in_2009.html) ; Harbottle & Lewis, *Ambush Marketing* (June 29, 2011) [http://www.legal500.com/devs/uk/en/uk\\_en\\_065.htm](http://www.legal500.com/devs/uk/en/uk_en_065.htm).

10 D Shani & D Sandler, (1998) *Ambush Marketing: Is Confusion To Blame For The Flickering Of The Flame?*, 15(4) PSYCHOLOGY AND MARKETING 367-383(1998).

11 T.L.Carson, R.E. Wokutch & J.E.Cox, *An Ethical Analysis Of Deception In Advertising*, 4 JOURNAL OF BUSINESS ETHICS 93-105 (1985); H. Padley, *London 2012: Five Years And Counting*, I.S.L.R. 33, 34 (2007); P. Dore, *Let the Games Begin*, I.S.L.R. 40, 41 (2006); C. Pina and A. Gil-Robe, *Sponsorship Of Sports Events And Ambush Marketing*, E.I.P.R. 93, 94 (2005); C. Garrigues, *Ambush Marketing: Robbery Or Smart Advertising?*, E.I.P.R. 505, 505-506 (2002); N. Bitel, *Ambush Marketing*, 5(1) S.A.T.L.J. 12 (1997).

regulation and contract and real property laws.<sup>12</sup> Definitions have been proposed by supporters of the interests of event organizers and sponsors; by supporters of the rights of ambushers; and by others who take a more or less balanced view of the various rights and relationships.<sup>13</sup> A further complication to achieving a ready understanding of the concept of ambush marketing is the distinction that has recently been introduced between ambush marketing by association and ambush marketing by intrusion

The term has been defined in many ways ranging from an intentional effort to weaken or ambush a competitor's official association with a sports organization which acquired its rights through payment of sponsorship fees<sup>14</sup> to the 'ability to reasonably confuse' the consumer regarding the ambushing company's status as an official sponsor<sup>15</sup>. It is "a practice whereby companies attempt to make the consumer think their product or service is somehow affiliated with a popular sporting event or league" even though the companies have not paid to sponsor that sporting event or league.<sup>16</sup> In its most offensive form, ambush marketing refers to the intentional efforts of one company to weaken, or 'ambush,' a competitor's

12 Phillip Johnson, *Look Out! It's An Ambush!*, 2/3 I.S.L.R.24-29 (2008)

13 A selection of some contrasting views of ambush marketing includes the following:

"[A] mbush marketing is a deliberate attempt to deceive the consuming public, thereby achieving an undeserved advantage for a company that passes itself off as a sponsor, but pays nothing to support the event or its participants." M. Payne (International Olympic Committee), *Ambush Marketing: The Undeserved Advantage*, 15 PSYCHOLOGY AND MARKETING 323, 325 (1998).

"Ambush Marketing ought to be understood simply as a marketing strategy with its programmatic outcomes, occupying the thematic space of a sponsoring competitor, and formulated to vie with that sponsoring competitor for marketing preeminence (sic). Successful ambush strategies feed on ill-conceived sponsorships and inept sponsors; in that regard, Ambush Marketing is the natural result of healthy competition and has the long-range effect of making sponsored properties more valuable, not less, in that successful ambushes, over time, help to weed out inferior sponsorship propositions." J. Welsh, *Ambush Marketing: What it is, what it isn't*, POOL 2002 (June 30, 2011) <http://www.poolonline.com/archive/issue19/iss19fea5.html>

"Ambush marketing, or parasitic marketing, consists, in the sports context, of the unauthorized association by businesses of their names, brands, products, or services with a sports event or competition through any one or more of wide range of marketing activities." S. Townley, D. Harrington & N. Couchman, *The Legal and Practical Prevention of Ambush Marketing in Sports*, 15 PSYCHOLOGY AND MARKETING 333 (1998)

14 S. McKelvey, *NHL V. Pepsi-Cola Canada, Uh-Huh! Legal Parameters Of Sports Ambush Marketing*, 10 THE ENTERTAINMENT AND SPORTS LAWYER 5-18 (1995).

15 A.C.McAuley & W.A.Sutton, *In Search Of A New Defender: The Threat Of Ambush Marketing In The Global Sport Arena*, 1 INTERNATIONAL JOURNAL OF SPORTS MARKETING & SPONSORSHIP 64-86 (1999).

16 John Vukelj, *Post No Bills: Can The NBA Prohibit Its Players From Wearing Tattoo Advertisements?*, 15 FORDHAM INTELL. PROP. MEDIA & ENT.L.J.507, 518 (2005).

official association with a sports organization, which has been acquired through the payment of sponsorship fees.<sup>17</sup>

The term is used in both narrow and broad sense.<sup>18</sup> In a narrow sense, it commonly contravenes intellectual property and/or trade practices laws, giving a cause of action to the event organizer.<sup>19</sup> In contrast, ambush marketing in the broad sense includes many activities that do not infringe any intellectual property rights or make any misrepresentation as to sponsorship.

## 2.1 Consequences

At first glance, such practices may seem like nothing more than competitive marketing. However, ambush marketing poses a real threat to sponsors because it reduces the incentive for companies to spend millions of dollars on sponsorships when they can potentially achieve the same advertising results. Most often, an ambush marketing campaign is designed to intentionally confuse the buying public as to which company is in fact the official sponsor of a certain sports organization.<sup>20</sup> Such conduct directly conflicts with the officially sanctioned company within the ambusher's product or service category. It is seen as giving ambushers the benefits of association with an event, without the burden of paying licensing fees to become an official sponsor.<sup>21</sup> This is argued to be unfair to event organizers, who should be able to internalize income flowing from their

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17 J Sebel & D Gyngell, *Protecting Olympic Gold: Ambush Marketing and Other Threats to Olympic Symbols and Indicia*, 22 UNIVERSITY OF NEW SOUTH WALES L.J 691-707, 692 (1999).

18 J. Davidson and J. McDonald, *Avoiding Surprise Results at the Olympic Games*, no.115 MANAGING INTELLECTUAL PROPERTY 22 (December–January 2002).

19 Whether the event organiser has the time and funding to enforce legal rights is another matter. For instance, many events are of short duration, meaning that in the time taken to obtain relief – such as an interim injunction – considerable harm may have already occurred..

20 IEG's *Complete Guide to Sponsorship: Everything You Wanted to Know about Sponsorship*, CHICAGO: IEG, INC. 42 (1999); S. Fullerton & D. Taylor, *A Comparison of New Zealand and American University Students' Views of Various Aspects of Sports Sponsorship*, THE CHALLENGE: SPORT MANAGEMENT BEYOND 2000 20-21 (January 2000)..

21 P O'Sullivan & P Murphy, *Ambush Marketing: The Ethical Issues*, 15(4) PSYCHOLOGY & MARKETING 349-366, 354-355(1998).

event.<sup>22</sup> Furthermore, these activities may involve the use of rights that have been purchased legitimately and at considerable expense.<sup>23</sup>

## 2.2 Ambush Marketing Strategies

Ambushers are becoming increasingly astute at developing ways to circumvent legal attempts to sponsor marketing strategies. Several methods of ambush marketing can be illustrated if the broadest meaning of the term is accepted. A few of these methods to ambush the marketing attention away from the advertisements away are:

### 2.2.1 Direct Ambushing

These activities usually happen when a brand intentionally tries to make itself seem associated with an event or property for which it has purchased no rights and is not an official sponsor. The reasons behind this may include capitalizing on the large audience generated by the event or team or simply attacking their rivals.

#### 2.2.1.1 Predatory Ambushing

This involves intentionally attacking a rival's official sponsorship in an effort to gain market share and to confuse consumers as to who the official sponsor is. Campaign by American Express against Visa during the 1992 Summer Games can be a good example.<sup>24</sup>

#### 2.2.1.2 Coattail Ambushing

This type of ambushing includes the attempt by a brand to directly associate itself with a property or event by using a legitimate link other than becoming an official sponsor of the property or event. For example, a sports-apparel company may sponsor an athlete who is participating in an event not sponsored by the brand, an event that perhaps is even sponsored by a rival brand.<sup>25</sup>

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22 K Skildum-Reid, *The Ambush Marketing Toolkit*, 12 (2006); M.W.Miller, *Saving games from ambush: LogoCops*, WALL ST. J. A8 (Feb 18, 1994).

23 T Meenaghan, *Ambush marketing: Corporate strategy and consumers' reactions*, 15(4) PSYCHOLOGY AND MARKETING 305-322 (1998).

24 (June29, 2011)  
<http://online.wsj.com/article/SB10001424052970204731804574391102699362862.html>

25 T Meenaghan, *Point of view: Ambush marketing - Immoral or imaginative practice?*, 34 (3) JOURNAL OF ADVERTISING RESEARCH 77-88 (1994)

### **2.2.1.3 Property Infringement**

This involves the intentional unauthorized use of protected intellectual property. Such properties can include the logos of teams or events, or making use of unauthorized references to tournaments, teams or athletes, words and symbols.<sup>26</sup>

### **2.2.1.4 Self Ambushing**

Self ambushing activities include marketing activities by an official sponsor above and beyond what has been agreed on in the sponsorship contract. This includes things like handing out free promotional T-shirts at a game, without the sports organization's permission. The brand may have already covered the stadium with its signs, or the organization may have earlier agreed to let a different brand hand out shirts. In either case, it clutters the marketing space, ambushes the organization the brand is supporting and infringes upon other official sponsors.<sup>27</sup>

### **2.2.2 Indirect Ambushing**

These type of activities are defined as the intentional association of a brand with an event or property through suggestion or indirect reference. As in direct ambushes, many companies using this type of ambush marketing see it as simply another way to publicize and market their goods, with no motives concerning their rivals' sponsorship activities.

#### **2.2.2.1 Associative Ambushing**

This type of ambushing includes use of imagery or terminology to create an allusion that an organization has links to a sporting event or property. In the summer of 2008, for example, marketing campaigns by Nike Inc. made frequent use of the number 8, which is a symbol of luck and fortune in China, as well as a symbol for the Games. Nike was not a sponsor of the Beijing Games.<sup>28</sup>

#### **2.2.2.2 Distractive Ambushing**

Setting up a promotional presence at or near an event without making specific reference to the event itself, its imagery or themes, in order to

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<sup>26</sup> *supra* note 24

<sup>27</sup> *Id.*

<sup>28</sup> *Ibid.*

intrude upon public consciousness and gain awareness from the event's audience constitutes this type of ambushing.<sup>29</sup>

#### **2.2.2.3 Values Ambushing**

This includes the use of an event or property's central value or theme to imply an association with the property in the mind of the consumer. In its soccer-related advertising during the spring and summer of 2008, for example, Germany's Puma AG included the slogan "June 2008: Together Everywhere." The European soccer championships were played that month, and the tournament's own marketing was emphasizing themes of unity and anti-racism.<sup>30</sup>

#### **2.2.2.4 Insurgent Ambushing**

This type of ambushing may be defined as the use of surprise street-style promotions at or near an event. For example, on a major road leading to the 2008 French Open tennis tournament in Paris, sports-shoe and apparel-maker K-Swiss Inc. parked a car that appeared to have been squashed by a giant K-Swiss-branded tennis ball. Across the street, a K-Swiss van distributed gifts and marketing materials highlighting the brand and its involvement with tennis.<sup>31</sup>

#### **2.2.2.5 Parallel Property Ambushing**

This involves the creation or sponsorship of an event or property that is somehow related to the ambush target and competes with it for the public's attention. For instance, seven days after the Beijing Olympics ended, Nike launched an annual, one-day global running event held in cities across the world.<sup>32</sup>

### **2.2.3 Incidental Ambushing**

This happens when consumers think that a brand is a sponsor or is associated with an event or property without any attempt on the brand's part to establish such a connection. Even if it's not intentional, this kind of

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<sup>29</sup> *Id.*

<sup>30</sup> *Id.*

<sup>31</sup> *Id.*

<sup>32</sup> *Id.*

ambushing can be an issue for the host organization and for other sponsors because it clutters the marketing environment.

### **2.2.3.1 Unintentional Ambushing**

Sometimes media coverage will mention equipment or clothing used by an athlete, or a company that is providing a service in support of an event. Consumers can come away thinking the company is an official sponsor of the event.<sup>33</sup>

### **2.2.3.2 Saturation Ambushing**

Saturation ambushers increase their advertising and marketing at the time of an event, but make no reference to the event itself and avoid any associative imagery or suggestion. Their goal seems to be simply to capitalize on the increased broadcast media attention and television audiences surrounding the event.<sup>34</sup>

Whatever the method, the goal is always the same: to attract attention to one's products or services by taking advantage of the "glow" of a big event. Some view this practice as ethically questionable, while others simply find it smart marketing.<sup>35</sup>

## **2.3 Certain Instances of Ambush Marketing**

### **2.3.1. Kodak, Fuji and the 1984 and 1988 Olympic Games**

Fuji was the worldwide sponsor of the 1984 Olympic Games in Los Angeles. Kodak sponsored the ABC's television broadcast of the event and became the 'official film' of the US track team.<sup>36</sup> In the subsequent 1988 Seoul Olympic Games, Kodak was the worldwide sponsor, and Fuji

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33 (June 29, 2011)  
<http://online.wsj.com/article/SB10001424052970204731804574391102699362862.html>

34 *Id.*

35 Kevin Goldman, *No "Ambush" Campaigns Here, Atlanta Olympics Organizers Vow*, WALL ST. J. B10 (November 3, 1994).

36 See T Meenaghan, *Ambush Marketing – A Threat To Corporate Sponsorship*, SLOAN MANAGEMENT REVIEW, 103-113, 106-107 (1996) R. Wyand, *2012 Olympic Games sponsor protection goes too far*, THE LAWYER (July 14, 2006); See JK Schmitz, *Ambush Marketing: The Off-Field Competition at the Olympic Games*, 3 (2) NORTHWESTERN JOURNAL OF TECHNOLOGY AND INTELLECTUAL PROPERTY 203-208, 205 (2005)

sponsored the US swimming team.<sup>37</sup> These activities have been cited as one of the first examples of ambush marketing.<sup>38</sup>

### 2.3.2 .Qantas and the 2000 Sydney Olympic Games

Ansett was the official airline partner of the Sydney 2000 Olympic Games. Qantas ran a marketing campaign in the lead-up to the Games that included advertisements featuring Olympic athletes such as Cathy Freeman and using expressions such as ‘we welcome the spirit of competition’.<sup>39</sup> Qantas was also said to have associated itself with the Games through individual sponsorship deals with athletes, and sponsorship of pre-Olympic meets and selection trials.<sup>40</sup> Later polling indicated many more Australians believed Qantas was a sponsor of the 2000 Olympics, rather than Ansett.<sup>41</sup>

### 2.3.3. Sydney Olympics: Official Sponsor – Nike, Ambusher - Adidas

After several years of ambushing the Olympics and its sponsors, Nike finally signed on as an official sponsor. It also had another vested interest in that it sponsored one of Australia’s star athletes, Cathy Freeman.<sup>42</sup> Adidas ambush strategy included hospitality and media centres that made Adidas backed athletes available to the press. Although these events were staged at sites away from the official Olympic venues, they were well covered by the various international media.<sup>43</sup> Adidas also sponsored another sensational Australian athlete, swimmer Ian Thorpe. When receiving one of his gold medals, Thorpe obscured the Nike logo on his official team uniform by draping the Australian flag over his shoulders.

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37 J Hoek, *Ring Ring: Visual pun or passing off?*, 5 ASIA-AUSTRALIA MARKETING JOURNAL 33-44 (1997)

38 T.L.Besser, *Community Involvement And The Perception Of Success Among Small Business Operators In Small Towns*, 37 JOURNAL OF SMALL BUSINESS MANAGEMENT 16-29 (1999)

39 O Gourley, *Ambush Marketing – The Olympic Experience*, 19(4) COMMUNICATIONS LAW BULLETIN 20-21 (2001)

40 J Hoek J & P Gendall, *Ambush Marketing: More Than Just A Commercial Irritant?*, 1(2) ENTERTAINMENT LAW 72-91 (2002)

41 *Id.*

42 C. Pritchard, *Sydney’s Ambushers Strike Gold*, 105(4) MARKETING MAGAZINE 6 (November 6, 2000).

43 *supra* note 13



### **2.3.4. 2008 Beijing Olympics**

Entire countries were tuned into the Opening Ceremonies, and worldwide, millions more saw former Olympic gymnast Li Ning light the torch and learned that he owns a shoe company with the same name, a direct rival of Adidas and quite famous in China, but not an official Olympic sponsor.<sup>44</sup>

### **2.3.5. 2010 FIFA World Cup**

A South African budget airline pulled back its ambush ad after a FIFA complaint that it infringed its trademark during the 2010 World Cup. Kulula.com's ad described the firm as the "Unofficial National Carrier of the You-Know-What". It also had pictures of stadiums, vuvuzelas and national flags.<sup>45</sup> But FIFA said the airline could not use the symbols - even the word "South Africa", kulula.com's spokeswoman said. FIFA, however, said the images taken together were "ambush marketing".

Also during the tournament, 2 Dutch women were arrested for ambush advertising and 36 women ejected from the stadium when they were spotted wearing short orange dresses made by the Dutch brewery Bavaria on 14th June 2010. Anheuser Busch's Budweiser is the official beer of the event. ITV media pundit Robbie Earle was sacked from his role when it was claimed by FIFA that he had sold tickets meant for family and friends on to the Dutch beer company.

## **III. Need for a Legislation to Prevent Ambush Marketing**

There is no doubt that the practice of ambush marketing is an unethical business practice<sup>46</sup>, and the past two decades have shown how important it is to have more stringent intellectual property protection besides what is provided for in the current regime. While it may be argued that it is each corporation's free right to advertise during such international events which involve national pride, it is unjust to a corporation that enters

44 (June 30, 2011) <http://www.rthreecom/images/analysis/Ambush%20Marketing%20Could%20Hit%20New%20High%20at%20Beijing%20Olympics.pdf>

45 (June 28, 2011) <http://www.moneyweb.co.za/mw/view/mw/en/page292681?oid=485130&sn=2009+Detail>

46 (June 30, 2011) <http://www.bonham.com/insight/glossary.html>; Bhattacharjee Sudipta, Ambush Marketing – The Problem and the projected solutions vis-à-vis intellectual property law – A Global Perspective, *Journal of Intellectual Property Rights*, 8 (5) (2003) 375-388.

into agreements with the event organizers and pays millions to acquire exclusive rights to advertise on the one hand and corporations that have not paid a single penny also enjoy the same benefits on the other hand. It is only fair to put a cost on acquiring a right of association especially when the benefits accrued far exceed the initial cost.<sup>47</sup>

Another issue of concern to event organizers is that the practice of ambush marketing has jeopardized their ability to fund events due to their inability to retain top sponsors.<sup>48</sup> Ambush marketing affects event organizers considerably and possess a substantial threat to their economic interests.<sup>49</sup> Sponsorship costs for London Olympics that are to take place in 2012 are estimated to be £ 2 billion, which forms a substantial portion of the funds required to organize the event. With such astronomical costs at stake, ambush marketing poses a huge threat of losing out on sponsorship resulting in an enormous dent on the budget.<sup>50</sup>

While there are various acts of ambush marketing that come within the ambit of trademark, copyright infringements or passing off, they are not threatening, since they can be resolved through legal means. However, the other acts of ambush marketing which corporations resort to by circumventing the above mentioned IP protections, are the ones that are of major concern.

#### IV. Legal Scenario in the Practice of Ambush Marketing

Ambush marketing decreases the value of a sponsorship, as companies may no longer be willing to pay the sky-high fees required to call themselves "official sponsors."<sup>51</sup> The proliferation of ambush marketing as an advertising strategy suggests there are few if any legal obstacles to this

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47 Crimmins J & Horn M, *Sponsorship: From management ego trip to marketing success*, JOURNAL OF ADVERTISING RESEARCH, 36 (1996) 11-21.

48 Sue Landau, *Budweiser seeks curbs on World Cup ambush marketing*, REUTER NEWS SERVICE, July 15, 1999.

49 As stated by the Marketing Director of International Olympic Committee. Also, the worldwide sponsorship program has increased the income of the IOC by 900 percent over a period of 20 years which makes the risk of losing sponsors colossal; Preuss Holger, et al., *Ambush Marketing in China : Counterbalancing Olympic sponsorship efforts*, *Asian Business of Management*, 7 (2008) 243-263

50 *Olympics budget rises to 9.3 billion pounds*, BBC NEWS, 15 March, 2007

51 Edward Vassallo, Kristin Blemaster & Patricia Werner, *An International Look At Ambush Marketing*, THE TRADEMARK REPORTER (November-December, 2005).

strategy.<sup>52</sup> Since ambush marketing is legal in most countries, the process of restraining ambushers and protecting sponsors is difficult. Hence, it is important to recognize the legal issues that have arisen related to ambush marketing and how different sport organizations and countries have taken different approaches to combat or deter ambush marketing as a result of the first legal challenges.<sup>53</sup>

This begs the question, what, if anything, can be done to stop ambush marketing?

#### 4.1 Legislations Enacted for Specific Events

The actual laws of most countries are not adequate to prevent ambushing activities and seem to be ineffective in most cases, due to the creativity of the ambushers and the way they circumvent those regulations as well as the reluctance of courts. Intrusion ambush marketing needs special legislation regarding the protection of major sporting events. Sydney 2000 was among the first games in which this type of special and ad hoc legislation was put in practice and Athens 2004 followed.<sup>54</sup>

Most countries have also taken the tactic of passing anti-ambush laws just to cover what for them will usually be an once-in-a-lifetime event: the Olympics. The need for this type of legislation is recognized by the European Sponsorship Association (ESA).<sup>55</sup>

One example of this approach is the United States, which has had its Amateur Sports Act (ASA)<sup>56</sup> in place since 1978. While the ASA does not expressly refer to ambush marketing, similar legislation in Australia and China has been passed with the additional goal of guarding against instances of ambush marketing.<sup>57</sup>

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52 Anita M. Moorman, T. Christopher Greenwell, *Consumer Attitudes Of Deception And The Legality Of Ambush Marketing*, JOURNAL OF LEGAL ASPECTS OF SPORT (Summer 2005).

53 J. Curthoys and C. Kendall, "Ambush Marketing and the Sydney 2000 Games (Indicia and Images) Protection Act," *Murdoch University Electronic Journal of Law*, 8, no. 2, (2001).

54 *supra* note 40

55 F. Mendel and C. Yijun, *Protecting Olympic Intellectual Property*, CHINESE LAW AND PRACTICE 1(May 1, 2003)

56 36 U.S.C. § 220501-29.

57 Kerry L. Timbers and Julia Huston, *The "Artistic Relevance" Test Just Became Relevant: The Increasing Strength of the First Amendment as a Defense to Trademark Infringement and Dilution*, 93 TMR 1278 (2003).

Australia has passed a wide variety of legislation specific to the Olympics, particularly right before it hosted them in Sydney in 2000. One example is the Sydney 2000 Games (Indicia and Images) Protection Act 22, 1996, now repealed but put in place specifically for the 2000 Olympic Games.<sup>58</sup> That legislation broadly prevented the use of Olympic-related expressions and images for commercial purposes.

China passed its own regulations protecting Olympic intellectual property rights shortly after Beijing was selected as the host city of the Olympics for 2008. These are the Protection of Olympic Symbols Regulations,<sup>59</sup> effective April 1, 2002 (the "Regulations").

Other examples of ad hoc legislations are the ones adopted by Portugal for the UEFA Euro 2000 Nations Cup; the one adopted by Korea for the FIFA World Cup of 2002; the same status quo was granted in South Africa for the Cricket World Cup; in Germany for the Leipzig Winter Olympics; Australia for the 2003 Rugby World Cup and in London for the 2012 Olympics.<sup>60</sup>

There may be primarily two legal remedies - trademark infringement and misappropriation of goodwill, when sponsorship rights have been violated or exploited by an unauthorized company.<sup>61</sup> The first thing to do is for the organizers is to effectively protect – usually via trademark registrations- the official symbols and logos of the event, including the eventual mascot, if existing. This would be helpful to combat ambush marketing by association.<sup>62</sup>

## 4.2 Remedies to the Problem

Ambush marketing has emerged in recent years as in effective, yet controversial weapon, in the arsenal of marketing departments seeking to associate themselves with sporting events without official authorization or endorsement of event organizer.<sup>63</sup> Various cases have come up before the

58 Kellech Smith, *Olympic Advertising--Watch Out* (June 29, 2011) [http://www.afa.org.au/WebStreamer?page\\_id=616](http://www.afa.org.au/WebStreamer?page_id=616)

59 Promulgated by Decree No. 345 of the State Council of the People's Republic of China on February 4, 2002, effective April 1, 2002.

60 *supra* note 26

61 *supra* note 14

62 Ricardo Richelet III, *Ambush Marketing* (July 1, 2011) [www.richelet.com.ar](http://www.richelet.com.ar)

63 Townely Stephen, Harrington Dan and Couchman Nicholas, *The Legal and Practical Prevention of Ambush Marketing in Sport*, 15(4) PSYCHOLOGY AND MARKETING, 333-348 (1998).

courts in an attempt to hold a corporation liable for infringement for a wide range of activities. However, the affected parties have alleged trademark or copyright infringement or passing off. Since the act of ambush marketing does not evidently fit into any of the above categories, the defendants have been successful in evading liability. Besides there are various cases that never reach courts due to various reasons. For instance, Hindustan Unilever's so called marketing move to outsmart Proctor and Gamble, the constant struggle to be at top between Pepsi and Coca Cola or Jet and Kingfisher, Nike's recent stint of ambush marketing at the Football World Cup have not gone to the courts for various reasons.<sup>64</sup>

Another remedy is available under common law principles of unfair competition. This remedy allows recovery for the misappropriation of goodwill and reputation of a sports organization. In this the sport organization needs only show that it is the owner of the event or right in question, that the ambusher has participated in unauthorized activity and that its goodwill or reputation has been appropriated or damaged through the use of false representations in relation to products or services.<sup>65</sup>

For eg : in the United States of America, the strongest remedy in terms of trademark protection is the Lanham Act. Section 32 and 43(a) of the Lanham Act prohibits the use in commerce of any registered mark which is likely to cause confusion, or to cause mistake, or to deceive without the consent of the registrant. . However, it does not easily adapt itself to protect a registrant from companies that do not include any mark or logo on their product but just use a similar mark or reference in a commercial advertisement and is hence not a serious threat.<sup>66</sup>

So far as the United States is concerned, the law has been on the side of ambush marketers as it does not involve such traditionally illegal activities as trademark infringement or manufacturing of counterfeit goods.<sup>67</sup> Despite the prevalence of the practice, only two U.S. cases have dealt with the issue of ambush marketing to date, and neither case involved

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64 Kala Vijayraghavan, *Ambush Marketing : HUL's last-minute surprise foxes P&G*, (July 1, 2011) <http://economictimes.indiatimes.com/news/news-by-industry/services/advertising/Ambush-marketing-HUL's-lest-minute-surprise-foxes-P&G/articleshow/6230194.cms>

65 S. McKelvey, *Atlanta '96: Olympic countdown to ambush Armageddon?*, 4 SETON HALL JOURNAL OF SPORT LAW 397-445 (1994).

66 Natal Witness, *Ambush marketing fight at World Cup sinks to new lows* (2003)(July 1, 2011) [http://www.legalbrief.co.za/view\\_1.php?artnum=9133](http://www.legalbrief.co.za/view_1.php?artnum=9133).

67 Robert N. Davis, *Ambushing the Olympic Games*, 3 VILL. SPORTS & ENT.L.J. 423, 430 (1996).

"pure" ambush activity. However, false advertising, dilution and breach of contract are all potential causes of action that may be asserted against ambush marketing.

In the case of MasterCard International Incorporated v. Sprint Communications Co & ISL Football AG, MasterCard (sponsor of World Cup 1994) received exclusive right before and during the competition for the use of world cup logos on and in association with 'all card based payment and account access devices'. Sprint Communications, an official partner did not have as many rights as the official partner did not have as many rights as the official sponsor and was allowed to advertise only in the field of long distance communications. However, Sprint also started advertising in pre-paid telephone calling cards using world cup logos despite strong objections from MasterCard. A claim of dilution under the Federal Trademark Dilution Act was also brought against Sprint with the contention that the continued acts of Sprint would gradually erode the distinctiveness of MasterCard. In the Federal Court, MasterCard established that Sprint has infringed on its right to use the logo. The Court held that the consumers would, on seeing the Sprint card bearing a world cup logo, mistakenly assume that Sprint had rights in a category, that in fact belonged exclusively to MasterCard. Therefore, an injunction was granted against the act of ambush marketing.<sup>68</sup>

The problem of ambush marketing has been dealt by few other countries in various ways.

#### 4.2.1 Canada

Canada is home to NHL v. Pepsi,<sup>69</sup> the first case worldwide ever to deal head-on with ambush marketing in its purest form. The case made it clear that "pure" ambush marketing such as was involved in this case--involving no trademark infringement or other legal violations-- was an acceptable practice in Canada.<sup>70</sup>

Interestingly, however, the covenant that Canada signed regarding Vancouver's candidacy for the 2010 Olympic Games stated that, while ambush marketing is not specifically addressed in the Canadian

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68 30 USPQ 2d 1963 (SDNY 1994).

69 70 B.C.L.R. (2d) 27 (1992), aff'd, 59 C.P.R. (3d) 216 (1995).

70 *supra* note 13

Competition Act,<sup>71</sup> the misleading representations and deceptive marketing practices provisions of the Act could apply if a person, while engaging in ambush marketing, makes a materially false or misleading representation to the public. Thus, even in Canada, the door to ambush marketing actions may still be partway open.<sup>72</sup>

#### **4.2.2 Australia**

Australia has taken the lead in its attempt to control ambush marketing. When the 200 Summer Olympics came to Sidney, the Australian Government passes the Sydney 2000 Games (Indicia and Images) Protection Act, 1996, and the New South Wales government passed the Olympic Arrangements Act, 2000. As significant part of both laws was Games specific legislation enacted to prevent ambush marketing and provide for clean games venue to equip New South Wales and Australia for future sporting and large marketing programs. Even after the completion of the games, the Australian government has enacted similar laws for hallmark sporting events, the most recent being the Melbourne 2006 Commonwealth Games Protection Act, 2005. The Act contains a provision that the Registrar shall not register under the Trademarks Act, 1995, a trademark that contains or consists of any of the marks of Olympic motto, symbol, torch or any other design related to the Olympics registered as an artistic work. Also, a protected Olympic expression is not permitted to be used for commercial purposes except by the Australian Olympic Committee (AOC).

#### **4.2.3 South Africa**

South Africa has recently amended two of its laws to make ambush marketing essentially illegal. In particular, it is now a criminal offense in that country, and can result in heavy fines and even lengthy jail sentences, when done around the time of certain designated protected events.<sup>73</sup>

New sections have been inserted into South Africa's Trade Practices Act of 1974.<sup>74</sup> These sections prohibit the publication or display of false or misleading statements or ads implying a contractual or other connection

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71 R.S.C., ch. C-34 (1985).

72 *Covenant of the Government of Canada: Vancouver's Candidacy for the 2010 Olympic and Paralympic Winter Games* (June 29, 2011) [www.pch.gc.ca/special/2010/pubs/englishcoh.pdf](http://www.pch.gc.ca/special/2010/pubs/englishcoh.pdf)

73 "*Ambush marketers" face jail* (June 28, 2011) [http://www.icc-cricket.com/NEWSLETTER/icc\\_newsletter\\_1.pdf](http://www.icc-cricket.com/NEWSLETTER/icc_newsletter_1.pdf)

74 Trade Practices Act No. 76 of 1976, s. 52-53.

with a sponsored event or its sponsor.<sup>75</sup> A new provision was also introduced into the Merchandise Marks Act.<sup>76</sup> This provision outlaws the deliberate use of a trademark in relation to a sponsored event, without the authority of the event organizer and in a manner that is calculated to achieve publicity for the mark and thereby to derive gratuitous promotional benefit from the event.<sup>77</sup>

#### 4.2.5 India

With respect to the first category of ambush marketing, namely, piracy; the law of trademark and copyright provide adequate protection. Here, not only consumers are protected from deception but also business goodwill remains protected.<sup>78</sup>

As far as infringement of copyright is concerned, there are certain instances of ambush marketing that clearly fall within the category. For instance commercial interests of rights, benefits and privileges without authorization, explicit attempt to associate with an event without a licence, use of words, symbols or pictorials confusingly similar to the event, producing or selling counterfeit merchandise, registering website domain names with the Internet to profit using famous names, downloading copyrighted satellite feed of the official event broadcast and transmitting via the internet without proper authorization, unauthorized use of athlete appearances, images or likeness for advertising purposes during the event are all examples of either trademark and/or copyright infringement or passing off.<sup>79</sup>

In the case of *National Hockey League v. Pepsi-Cola Ltd.*<sup>80</sup> the first case in the world to deal with ambush marketing, NHL, an affiliated service company with 21 ice hockey teams, had an agreement with Coca Cola that it would be the official drink of the tournament. An amount of US \$ 2.6

75 Harbottle & Lewis, *Ambush marketing* (December 2003/January 2004) (June 28, 2011) [http://www.legal500.com/devs/uk/en/uken\\_065.html](http://www.legal500.com/devs/uk/en/uken_065.html)

76 Merchandise Marks Act No. 17 of 1941, s. 15A.

77 Owen H. Dean, *South Africa Avoids Ambush by Abusive Marketers* 58 (15) INTA BULLETIN (Aug. 15, 2003),

78 Bainbridge David, *Intellectual Property*, 4<sup>th</sup> edn (Financial Times, Pitman Publishing, London), 1999, at B6

79 Bhattacharjee Sudipta, *Ambush Marketing – The Problem and the projected solutions vis-à-vis intellectual property law – A Global Perspective*, 8 (5) JOURNAL OF INTELLECTUAL PROPERTY RIGHTS, 375-388 (2003).

80 92 DLR 4<sup>th</sup> 349



million was paid by Coca Cola to NHL for this purpose.<sup>81</sup> However, the advertising rights were given to another company which tied up with Pepsi-Cola, Coca-Cola's main competitor to advertise during the broadcasts. Thus, in between the broadcasts, Pepsi-Cola broadcasted a show with a well-known celebrity thereby reflecting that Pepsi was the official drink of the tournament. Contests were also organized using the show itself. At the trial court, NHL contended that such broadcasts portrayed that Pepsi was the official drink approved by NHL. Thus, Pepsi was liable for passing off. Pepsi on the other hand argued that it was doing nothing more than aggressive advertising and promotional campaign which was legitimate. The court held that not every kind of connection claimed can be called to be passing off. There must be a representation that the defendant's goods are connected with the plaintiff in such a way so as to lead people to accept them on the faith of the plaintiff's reputation. Thus, what the court thought fit to examine was the extent of advertising by Pepsi as to whether it misrepresented to the public that one or more of the plaintiffs approved, authorized or endorsed the contest, and thereby, by implication, the defendants products, or that there was some business connection between the plaintiffs and the defendant. The court held that though this was a clear case of ambush marketing; there is nothing that could be done to protect NHL or Coca-Cola. This may also be a case of trademark misappropriation though not recognized by court.<sup>82</sup>

In India, the Delhi High Court refused to accept ambush marketing as a plea for infringement of intellectual property when the International Cricket Council brought a suit against Britannia during the World Cup.<sup>83</sup> In *ICC Development International Ltd. (ICCDIL) v. Arvee*, the subject of dispute was a contest which was organized by Arvee to win tickets to World Cup. The catch phrase used to publicize the contest was the same as what the ICC had got registered. Arvee was therefore, sued on the grounds of passing off and ambush marketing. Again the claim of ambush marketing

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81 Hoek Janet and Gendall Philip, *Ambush Marketing – More the just a commercial irritant?* 1(2) ENTERTAINMENT LAW, 72-91 (Summer 2002)

82 Misappropriation theory rests on the premise that persons should not be able to appropriate the benefits of another's investment without a similar investment of their own, Barnes David W, Misappropriation of Trademark, *North Carolina Journal of Law and Technology*, 9(2) (2008) 171-186.

83 (June 28, 2011) <http://www.rediff.com/cricket/2002/dec/04/reject.htm>

was not recognized by the Court and the Acts of defendants were not considered misuse.<sup>84</sup>

In the case of ICC Development v. EGSS, an injunction was granted against the defendant for misuse of the world cup logo only because there was a copyright infringement as the logo was held to be an artistic work under the Indian Copyright Act.<sup>85</sup>

In the case of NCAA v. Coors Brewing Co., filed in US, the grounds on which the suit was filed were breach of revocable licence and unfair competition. Since the ground of ambush marketing was not recognized by the law, NCAA used other means to ensure that they got a favorable judgment.<sup>86</sup>

The above case laws show that in absence of a specific legislation for ambush marketing, defendants get away thereby leaving the plaintiff with no guaranteed remedy. The most successful ground against the defendant in cases of ambush marketing has been that of passing off.<sup>87</sup> Thus, the current intellectual property regime though not completely powerless, is not adequate to counter the issues of ambush marketing and there is a need to develop a specific law for the same.

As countries such as Australia, England and China among others have enacted legislative provisions defining ambush marketing and fixing a liability for those who commit such an act, such steps should encourage India to introduce similar legislations in light of various international events being organized in the country, where the probability of corporations taking advantage is very high especially in the absence of any law to prevent ambush marketing.

## V. Conclusion

Ambush marketing is a controversial and infrequently litigated issue. Brand owners are tempted to ambush market because it is a relatively cheap way of attracting the consumers to their products. However, by ambush marketing, brand owners jeopardize the viability of major sporting events.

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84 (2003) 26 PTC 245 (Del).

85 (2003) 26 PTC 228 (Del)

86 2002 US Dist LEXIS 21059; Vassallo Edward, Blemaster Kristin and Werner Patricia, An international look at ambush marketing, *The Trademark Reporter*, 95 (6) 2005, 1338-1356

87 Vassallo Edward, Blemaster Kristin and Werner Patricia, An international look at ambush marketing, *The Trademark Reporter*, 95 (6) 2005, 1338-1356

The creative use of ambush marketing tactics will probably always be a source of irritation to event owners and their official sponsors. Any discussion around this issue would raise the question whether this practice is ethical or not. However, it is difficult to draw a conclusion. The answer would depend on who this question is asked to and the facts involved.

What seems to be clear is that ambush marketing tactics constitute an ethical issue and a problem for sports organizers who must defend the sponsors which paid millions for the right to exclusively promote their marks, goods and services in association with the event against those who had paid nothing for such exclusivity.

Clarification of the actual rights purchased by sponsors will help minimize the negative impact of these activities on both sponsors and event owners. The reasons enunciated above, undoubtedly warrant the need to legislate to prevent the practice of ambush marketing. Unless a decision is taken by the courts or the legislature, the incidents of ambush marketing are only bound to increase.

# SAFEGUARDING THE PEN FROM THE LINE OF FIRE: NEED FOR A SPECIAL LEGISLATION TO PROTECT SCRIBES IN INDIA

*Ramya Mahidbara and Pranav Menon\**

*Journalism can never be silent: that is its greatest virtue and its greatest fault.*

*-Henry Anatole Grunwald<sup>1</sup>*

Journalism, a service oriented profession, often entails a great amount of courage. The media plays an essential role in generating a democratic culture extending beyond political systems, helping develop and attract public consciousness to important issues and allowing people to share their experiences, learn and become aware of their surroundings.<sup>2</sup> Journalists act like vigilant watchdogs of civil liberties, making critical scrutiny and carefully questioning various aspects of our everyday life, which generates healthy public discussions and debates that help augmenting the way we perceive human existence in society today.<sup>3</sup> There have been innumerable instances across the globe, where the mass media has performed an act of great service in uniting a country against various social evils and problems that require immediate attention.

India is one of the leading countries in terms of a pluralist press with over 40,000 publications, including dailies and periodicals, and dozens of public and private TV channels and growing number of FM radio stations.<sup>4</sup> However, owing to their widespread influence on the masses and the nature of their work, journalists, especially investigative reporters, whose free and critical writings inevitably tend to heckle some elements of society against whom such writings may have been directed, are particularly vulnerable to retaliatory attacks.<sup>5</sup> These elements by assaulting, threatening and

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1 TIME MAGAZINE'S 60TH ANNIVERSARY ISSUE, (Fall 1983).

2 Dr. S. Sivakumar, *Role of Media in a Democracy*, HALSBURY'S LAW MONTHLY, (February 2009), [www.lexisnexis.com](http://www.lexisnexis.com) (last visited on 5<sup>th</sup> July, 2011).

3 Justice K.G. Balakrishnan, *The Constitution, the media and the Courts*, THE FOURTH K.S. RAJAMONY MEMORIAL PUBLIC LAW LECTURE, Kochi, August 2008.

4 *IFJ Press Freedom Report in South Asia*, Pressing Times: Media under fire in South Asia, INTERNATIONAL FEDERATION OF JOURNALISTS, PREPARED FOR THE IFJ JOURNALISM FOR TOLERANCE PRIZE GIVING CEREMONY AND FORUM AND WORLD PRESS FREEDOM DAY, New Delhi, (2<sup>nd</sup> May, 2003), [www.ifj.org](http://www.ifj.org) (last visited on 6<sup>th</sup> July 2011) (Hereinafter referred to as IFJ Press Report).

5 Annual Report 2007 – 2008, Press Council of India, New Delhi, [www.presscouncil.nic.in](http://www.presscouncil.nic.in) (last visited on 8<sup>th</sup> July 2011).

sometimes even killing media personnel, intend to curb them from letting out confidential and secretive information to the masses, which may expose some scam, racket, criminal activity which has been persistent in society or when they write against the harmful acts of people who wield power and influence in society.<sup>6</sup> The recent brutal killing of Mid Day journalist Jyotirmoy Dey was due to similar aforementioned reasons, as reports suggested that he was exposing the oil mafia prevalent in India.<sup>7</sup> The recurring attacks on the media over the past few years in India, has angered the media fraternity, who have constantly been demanding a law which would protect them from such revenge attacks.

The recent turn of events has thus spurred a debate regarding the need for a special legislation for the protection of journalists in India, which the authors shall elaborate upon in the course of this paper. The aim of this paper is twofold. *First*, it intends to analyse *how in the absence of a law for the safety of scribes, the freedom of press which is guaranteed under the Constitution is infringed*. *Second*, it seeks to provide for some *valuable suggestions with regard to the creation and implementation of such a special legislation for this set of professionals*.

For the convenience of the reader in understanding the aim of this paper, the authors have divided it into four principle sections: Part I enunciates the constitutional guarantee of freedom of press and how this right would be infringed if media reporters are attacked; Part II discusses the various recent instances where scribes have been brutally assaulted or even killed in India and the failure on part of the government to take any action against the culprits; Part III elaborates upon the existing legislations across countries, for protection of media persons; and Part IV discusses some valuable suggestions to be incorporated for effective implementation of such a law according to the authors, which will guarantee journalists some amount of assurance while reporting sensitive issues.

### **I. Freedom of press under the Constitution of India & its infringement due to lack of protection for Journalists**

Since the media has often been referred to as the fourth estate which enhances public opinion, liberty of the press and freedom of information is

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6 Velly Thevar, *Protecting the pen from the sword*, Senior Correspondent, THE TELEGRAPH, (June 2011), [www.telegraphindia.com](http://www.telegraphindia.com) (last visited on 6<sup>th</sup> July 2011) (hereinafter referred to as Velly Thevar).

7 ET Bureau, *Mumbai crime journalist Jyotirmoy Dey shot dead*, THE ECONOMIC TIMES, (June 2011), [www.economictimes.com](http://www.economictimes.com) (last visited on 6<sup>th</sup> July, 2011)

an integral aspect in every democracy. A free press is free from compulsion from whatever source, governmental or social, external or internal.<sup>8</sup> Journalists, in any democratic setup, ought to be provided with certain rights such as the right to operate in a democratic legal framework with access to information, protection of sources, freedom to report professionally and to practice journalism in a safe environment.<sup>9</sup> The First Amendment in the Constitution of the United States of America<sup>10</sup> specifically provides for a free press guarantee, which acts like a neutral body outside the government as an additional check on its three branches<sup>11</sup> and provides for comprehensive and objective information on all aspects of a country's social, economic and political life.<sup>12</sup>

This freedom, unlike in the U.S.A, is not provided for in express terms as a separate right in any statute in India.<sup>13</sup> The Supreme Court of India, however in *Indian Express Newspapers v. Union of India*,<sup>14</sup> has regarded this freedom as inclusive in the guarantee of 'freedom of expression' under Article 19 (a) of the Indian Constitution and as an implied and deduced right which is both qualitative as well as quantitative.<sup>15</sup> This provision after its wide interpretation, comprehends the liberty to propagate one's own views, right to print, publish and circulate which may be borrowed from someone else or under someone's direction<sup>16</sup> and also right to reply against the criticism levelled against such views. This freedom is not only a benefit to the press but also a benefit to the general community which has the right to be supplied with such information and the government must ensure that people are given access to it.<sup>17</sup> As it has been aptly put by Gajendragadkar

8 See, DR. H.P. GUPTA & P.K. SARKAR, LAW RELATING TO PRESS AND SEDITION IN INDIA, p.31, (2nd Edn., 2009), Orient Publishing Co., New Delhi.

9 IFJ Press Report, Supra note 4.

10 Hereinafter referred to as U.S.A.

11 New York Times Company v. United States, 403 U.S. 713 (1971). (Pentagon Papers Case).

12 Terminiello v. Chicago, 337 U.S. 1.

13 Although this freedom was proposed in Dr. Munshi's draft as a separate right, it was not included in the Constitution at its inception. However, the Constituent Assembly thought that the freedom of press meant freedom of expression and no specific mention of the same was warranted; See Justice K.K. Matthew, *Freedom of Speech and Expression under Article 19 of the Constitution: Recommendation to Extend it to Indian Corporations*, ONE HUNDRED AND FIRST LAW COMMISSION REPORT, (May 1984).

14 (1985) 1 SCC 641; See also Brij Bhushan v. State of Delhi, AIR 1950 SC 129.

15 Bennett Coleman & Co. v. Union of India, (1972) 2 SCC 788

16 Romesh Thappar v. State of Madras, (1950) SCR 594 (607).

17 Printers (Mysore) Ltd. v. Assistant Commercial Tax Officer, (1994) 2 SCC 434.

C.J., the freedom of expression of opinion does not only mean tolerance of the expression of opinions with which one agrees but also tolerance of the expression of opinions which one positively dislikes or even abhors.<sup>18</sup> However, this freedom is not absolute but qualified and subject to reasonable restrictions provided under article 19 (2) of the Constitution for the interest of the public.<sup>19</sup>

The principles of the liberty of press and its limitations are relevant to every other legislation in force which relates to the press.<sup>20</sup> On the recommendations of the First Press Commission, the Press Council of India<sup>21</sup> was setup in 1966 for preserving the freedom of press and maintaining and improving the standards of newspapers and news agencies in India.<sup>22</sup> The Council uses its moral authority to administer not law but ethics. The Press Council also provides for recording complaints of any newspaper, journalist, institution or individual against the Central or State Government or any organization or person in cases where such independence of the press has been impaired or encroached upon by threats or attacks on media personnel, interfering in their free functioning.<sup>23</sup>

Despite recognizing this fundamental freedom in the Constitution as well as other legislations, the harassment to newsmen, in discharge of their professional duties, has been persistent and alarming. As the sector and its influence grows and as the media takes it upon itself to expose wrongdoers, people are responding with fists and guns. They get killed, attacked and maimed, their office-property is destroyed and often, their equipment – cameras, laptops or phones – are seized or smashed.<sup>24</sup> Threats to life, property and the family members of scribes have been some of the overt tactics used by militant outfits and anti social elements to thwart them in their fearless reporting and in their quest to showcase various

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18 *Express Newspapers Limited v. Union of India*, AIR 1958 SC 578, at 621.

19 *Sakal Papers v. Union of India*, AIR 1962 SC 305.

20 DURGA DAS BASU, *LAW OF THE PRESS*, p.10, Fourth Edn., (2002), Wadhwa Nagpur, (ed. by Justice B.P. Banerjee and Vepa P Sarathi).

21 Hereinafter referred to as PCI.

22 *History of the Press Council of India*, <http://presscouncil.nic.in/home.htm> (last visited on 7<sup>th</sup> July 2011).

23 Press Council Regulations, 1979 in consonance with Section 26 (c) of the Press Council Act, 1978 provides for the procedure to file a complaint.

24 Geeta Seshu, *Draft protection law double edged*, MEDIA LAW AND POLICY, June 2011, [www.thehoot.org](http://www.thehoot.org) (last visited on 10<sup>th</sup> July 2011) (Hereinafter Geeta Seshu).

misdeemeanors in society.<sup>25</sup> An assault or attack on a media person with such an intention indirectly curbs the freedom of press and reduces the free flow of information that would generally not be available in public domain for the masses. Such gruesome acts also results in developing fear in the minds of other fellow journalists, who either stop carrying out investigative reporting or do not disclose the information they have gathered about some illegality or existing scam in society, if already threatened, thereby failing to discharge their professional duty. These attacks also deter young aspirants who want to enter the field and make it among the unsafe career options any person can pursue.

As Henry Shue emphasizes, unless the actual substance of a right is enjoyed and such a right has been socially guaranteed against standard threats, it will not be effectively realized.<sup>26</sup> On drawing an analogy to the plight of the media persons, the continued threats and assaults on journalists is deterring the liberty of the press, which even though provided as a fundamental freedom under the Constitution, is not being fully realized and enjoyed by them.

## **II. Recent attacks on Media Persons across India and failure on part of the Government to take any action**

Although the shocking murder of Jyotirmoy Dey may have spurred the debate for a protective law for journalists, this demand has been persistent on the part of media persons due to the series of attacks on them escalating in the last few years across the country. In 2010 alone, there have been 27 attacks on journalists in different parts of India.<sup>27</sup>

Journalists in India, face several problems because of the prevailing political and social conditions, particularly due to the separatist and armed struggles going on in some parts of the not limited and confined to certain

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25 *Annual Report 2006 – 2007*, PRESS COUNCIL OF INDIA, New Delhi, [www.presscouncil.nic.in](http://www.presscouncil.nic.in) (last visited on 8<sup>th</sup> July 2011).

26 HENRY SHUE, *Basic Rights* in BASIC RIGHTS: SUBSISTENCE AFFLUENCE AND US FOREIGN POLICY, p.19, Princeton University Press, (1980).

27 *Free Speech Issues in India 2010, Part I: Media under attack*, SELECTIONS FROM THE FREE SPEECH HUB ON THEHOOT.ORG FOR VARIOUS INSTANCES OF VIOLENCE ON MEDIA PERSONS, available on <http://www.scribd.com/doc/50679747/Free-Speech-Issues-in-India-2010>. (last visited on 10<sup>th</sup> July 2011)



areas like Kashmir and the north east<sup>28</sup> or from certain classified groups such as militants, Naxalites or terrorists, but are increasingly from various political and religious factions in society and the local mafia of almost any part of the country.<sup>29</sup> Majority of these assaults have occurred not in situations of strife, war or riot but while reporting day to day issues like sand mining, oil pilferage and adulteration, environmental crimes, caste related issues, political chauvinism and so on.<sup>30</sup> Scribes are often subjected to attacks by political party workers when they publicize any opinion which may hurt their sentiments or affect their propaganda.<sup>31</sup> They also have suffered manhandling from public sector employees and workers, since their reporting has been critical of their organization.<sup>32</sup>

In spite of being among the largest democracies of the world and guaranteeing fundamental freedoms to all its citizens, India ranks a deplorable 122<sup>nd</sup> in the Press Freedom Index, 2010.<sup>33</sup> India is ranked seven in the list of unsafe countries of the world; with even terror stricken countries like Pakistan being better off in protecting their scribes.<sup>34</sup> In India, journalists sources are only partially protected by the decisions of the courts and is not recognized as a legal or constitutional right they possess.

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28 Terror groups like the ULFA have been constantly attacking journalists over the last decade in Assam, Manipur and Meghalaya.

29 CMS India, *The State of Newspapers Scene 2007*, REPORT SUBMITTED TO PRESS COUNCIL OF INDIA, New Delhi, (2008), [www.cmsindia.org](http://www.cmsindia.org) (last visited on 11<sup>th</sup> July 2011); See also IFJ Press Report, Supra note 4.

30 Three journalists killed in India in the last six months in the line of duty while reporting daily issues; Lyla Bavadam, *Midday Murder*, Frontline, Vol. 28, Issue 14, (July 2011).

31 Offices of IBN Lokmat and IBN7 were attacked by the Shiv Sainiks in 2009 beating up even women and destroying property, when the editor had commented on Bal Thackeray's criticism of Sachin Tendulkar for saying Mumbai is for Indians; Staff Reporter, *Sena Activists attack IBN offices in Mumbai, Pune, THE HINDU*, November 2009, <http://www.thehindu.com/news/national/article51940.ece> (last visited on 12<sup>th</sup> July 2011). Similar incidents occurred when the government in Andhra Pradesh issued a gag order against the media and sent the CBI to raid the offices of Eenadu in 2007.

32 K. Samu, *Freedom Of Press/Media – 2007*, HUMAN RIGHTS DOCUMENTATION, Indian Social Institute, New Delhi.

33 Reporters without Borders, *2010 Press Freedom Index Report*, (October 2010), available on [www.scribd.com](http://www.scribd.com) (last visited on 12<sup>th</sup> July 2011) (Hereinafter 2010 PFI Report).

34 Nishikant Thakur, *Truth about freedom of expression*, JAGRAN POST, June 2011, <http://post.jagran.com/> (last visited on 9<sup>th</sup> July 2011) (hereinafter referred to as Nishikant Thakur)

Maharashtra surprisingly has the dubious distinction of being the least safe state in India for journalists to work.<sup>35</sup>

The government has been passive and complicit about the whole issue. In spite of reiterating the importance of media and their right to free expression, it has failed to safeguard the fourth estate and keep a check on this gross human rights violation. They have promised speedy investigation and fast track trials for nabbing the assailants behind such horrific attacks on the press, but perpetrators are rarely caught even after identifying the suspects and if caught hardly ever convicted.<sup>36</sup> There exists no mechanism to keep a check the complacency and negligence of the authorities to follow up these attacks on scribes and hold them accountable. Although the Press Council records complaints of harassment of media personnel by government or other groups or persons, it does not provide for punitive compensation in cases of violence.<sup>37</sup> On examining the annual reports of the Press Council, even though there have been quite a few complaints regarding assaults on journalists, charges were substantiated only in one or two cases and the others have been discharged on the grounds of lack of evidence or amends were assured to be made by the oppressing party.<sup>38</sup>

Even six decades after independence, the journalist fraternity still awaits a concrete law for their protection and whenever there was an effort to push for such kind of legislation, the politicians have either pushed apart the request or have not shown keen interest about the same.<sup>39</sup> If professionals like doctors can be privileged by a law for their protection from attacks or mistreatment by relatives of deceased patient,<sup>40</sup> then journalists who strive hard to make accessible information to the people,

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35 Since 1992, an astonishing 1750 attacks have been made on journalists in Maharashtra & none of these cases have led to a conviction; Velly Thevar, *supra* note 6.

36 A case in point is the depressing information from journalists in Assam, where 23 journalists were killed since 1987, but not a single case has been solved; Accessed on [www.thehoot.org](http://www.thehoot.org) (last visited on 9<sup>th</sup> July 2011).

37 <http://presscouncil.nic.in/home.htm> (last visited on 12<sup>th</sup> July 2011).

38 Press Council of India, *Annual Report 2008 – 2009, Annual Report 2007 – 2008 & Annual Report 2006 – 2007*, New Delhi, [www.presscouncil.nic.in](http://www.presscouncil.nic.in) (last visited on 8<sup>th</sup> July 2011).

39 Nishikant Thakur, *Supra* note 30.

40 There exists a precedent in the form of a state legislation in Maharashtra called The Maharashtra Medicare Service Persons and Medicare Service Institutions (Prevention of Violence and Damage and Loss to Property) Act, 2008 to protect Doctors and Medical Staff from attacks.

should be provided with some basic form of protection from manhandling or assaults by anti social elements of society.<sup>41</sup>

### III. Various existing legislations for the protection of scribes across nations

Journalists, all over the world, aware of the unsafe nature of their profession, have been pressing for better and stricter implementation of existing laws to protect them from assailants. There are provisions under international conventions such as European Convention for Human Rights<sup>42</sup> and Geneva Convention<sup>43</sup> which provide some guarantees for media persons but have not been widely practiced, owing to the enforceability issues of international treaties. Private bodies such as International Covenant for Protection of Journalists and Press Emblem Campaign, in collaboration with local press guilds, also work for safeguarding journalists in war stricken regions and areas of civil unrest in Asia and Africa, but have been unable to urge these nations to create a protection law for scribes.<sup>44</sup>

Northern European countries however, have set an example for other nations to follow by respecting media and protecting journalists from abuse by implementing special statutes for their safety.<sup>45</sup> Authoritarian regimes in Africa on the other hand, are extremely unsafe for media personnel to carry out investigative reporting and the liberty of press in such countries is

41 Manoj R Nair, *Special Law to Protect Scribes: To implement or not to implement*, Special Correspondent, DAILY NEWS AND ANALYSIS (DNA), <http://www.dnaindia.com/> (last visited on 8<sup>th</sup> July 2011). (Hereinafter Manoj Nair)

42 Article 10, European Convention of Human Rights – reinforces the protection of journalist sources. Held in *Sanoma Uitgevers B.V. v. The Netherlands*, 31<sup>st</sup> March 2009, Grand Chamber of European Court, [www.echrblogspot.com](http://www.echrblogspot.com) (last visited on 12<sup>th</sup> July 2011).

43 Article 79, 1<sup>st</sup> Protocol of the Geneva Convention, 1949 provides for protection of journalists in armed conflicts.

44 They have urged authoritarian structures such as Egypt, Syria, Yemen to protect scribes from anti government protests and public outcry. They have also extended support to journalists in terror stricken areas such as Iraq, Afghanistan, Somalia, Myanmar etc; International Covenant for Protection of Journalists, (2007), <http://www.mediacovenant.org/1201.html>. (last visited on 13<sup>th</sup> July 2011)

45 *Iceland has implemented an exemplary bill called the Icelandic Modern Media Initiative which provides unique protection for journalists*; Jonathan Stray, *Iceland aims to become an offshore haven for journalists and leakers*, NIEMAN JOURNALISM LAB, Harvard University, (Feb 2010), <http://www.niemanlab.org/2010/02/iceland-aims-to-become-an-offshore-haven-for-journalists-and-leakers/> (last visited on 13<sup>th</sup> July 2011). Sweden, also through its Press Freedom Act provides for favourable conditions for media persons to work; 2010 PFI Report, *supra* note 31.

generally hindered by the government.<sup>46</sup> Numerous attacks on journalists are also prevalent in Central American countries too, since they have no adequate law to shield their scribes from being harassed and preserve the liberty of the press.<sup>47</sup>

This right to protection of sources to journalists emanates from a journalist's professional code of ethics which have been protected extensively across nations.<sup>48</sup> Countries such as Russia, a few nations in South America and Africa, Australia have in fact provided for a law or a constitutional right for protection of the journalist's sources.<sup>49</sup> In regions where it has not been explicitly provided for, it has been read into the right to freedom of expression.<sup>50</sup>

The Privacy Protection Act of 1980 provides for protection of journalist from being required to turn over to law enforcement any work product and documentary materials, including sources in the U.S.A before it is disseminated to the general public.<sup>51</sup> Although there is no federal law in place, several states in the U.S.A have privileged their investigative scribes with a 'Shield law', which allows them to maintain the confidentiality of the sources from where they receive the information and not reveal them even in court but this is not an absolute privilege.<sup>52</sup> However, several media

46 *The journalists in Gambia have been subjected to severe impunity at the hands of the government for the last ten years; Mamadou Edrissa Njie*, Smiling Coast of Africa, Not Been Smiling Coast for Journalists, *THE DAILY IJ*, (Feb 2011), <http://inwent-ijj-lab.org/Weblog/2011/02/02/smiling-coast-of-africa-not-been-smiling-coast-for-journalists/> (last visited on 13<sup>th</sup> July 2011).

47 Dan Kubiske, *Intimidation and Shooting of Honduras Journalists continue*, ARCHIVE FOR CENTRAL AMERICA, JOURNALISM AND THE WORLD, The SPJ International Journalism Committee Blog, March 2011, <http://www.spj.org/ij.asp> (last visited on 13<sup>th</sup> July 2011).

48 *Goodwin v. United Kingdom*, 1966, the European Court of Human Rights held that "protection of journalistic sources is one of the basic conditions for press freedom." Also, the Council of Europe's committee of Ministers had also recommended to its member states this right. Further, the Council of States in its Concluding Document of the 1986 Vienna Meeting also asked its states to respect this right. The Inter-American Declaration of Principles on Freedom of Expression states the same in principle 8 and the Declaration of Principles on Freedom of Expression in Africa in principle 15. The Shield laws in the U.S. provide the same protection.

49 <http://www.privacyinternational.org/foi/sources-map.jpg>. (last visited on 12<sup>th</sup> July 2011)

50 Such as in India where it has been interpreted and read into Article 19 (a) of the Constitution of India.

51 Electronic Privacy Internet Centre, *Overview of the Privacy Protection Act, 1980*, Washington, DC, (2011), [http://epic.org/privacy/ppa/#Overview\\_of\\_the\\_Privacy\\_Protection\\_Act](http://epic.org/privacy/ppa/#Overview_of_the_Privacy_Protection_Act) (last visited on 13<sup>th</sup> July 2011).

52 36 States in the United States have Shield Laws in place for journalists; Shanshan Lu, *Protecting Sources in America*, CENTRE FOR JOURNALISM ETHICS, University of Wisconsin – Madison, (2008),

organizations<sup>53</sup> are pushing the federal government to propose the Free Flow of Information Act<sup>54</sup> which would make such a shield law applicable throughout the country. Some states in Canada and Australia have also guaranteed similar shield laws to their journalists. In United Kingdom, it is the Data Protection Act, 1998 which allows journalists to protect any data they possess which they do not want to disclose.<sup>55</sup>

#### IV. Suggestions to be Incorporated in the Legislation

As mentioned earlier, the attacks on journalists have become a common phenomenon all over the world which has angered the journalist fraternity for the lack of protection provided to them. The protection called for is not only in terms of their physical safety but also for safeguarding their professional ethics. Such ethics include the non-disclosure of the source of their information, which ought to be provided to them either by their state governments or by international law. In this respect however, it is credible to point out that only few States have given this issue a serious thought and passed rules or legislations in this regard. It is a well-recognized principle that without anonymity of sources, journalists and media persons would not be able to render news as they would not have the confidence of these sources to not reveal their identity. As enunciated upon previously, in a democratic society, where journalists play an important role in facilitating crucial information to the public, such confidentiality needs to be understood as an important ethic of the profession along with the protection of self, for any kind of credible dissemination of news.

This part shall be divided into two sections, to discuss the possible solutions for protecting the journalists against such assaults and preserve the right to freedom of expression guaranteed to them by the Indian

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[http://www.journalismethics.info/feature\\_articles/protecting\\_sources.html](http://www.journalismethics.info/feature_articles/protecting_sources.html) (last visited on 13<sup>th</sup> July 2011).

53 Anthony L. Fargo, *Analyzing Federal Shield Law Proposals: What Congress Can Learn From The States*, 11 Comm. L. & Pol'y 35–82 (2006); See also Committee for Protection of Journalists, *Struggling to Report: The Fight for a Federal Shield Law*, [www.cpj.org](http://www.cpj.org) (last visited 13<sup>th</sup> July 2011).

54 Hereinafter referred to as FFIA.

55 Phillip Sim, *U.K. Media Law for Journalists – The Data Protection Act*, Jan 2011, <http://www.suite101.com/content/uk-media-law-for-journalists---the-data-protection-act-a323845> (last visited on 14<sup>th</sup> July 2011).

Constitution: (a) protection of the journalist's sources and (b) making attacks against journalists a non-bailable offence.

### (a) Protection of Journalistic Sources

As elaborated upon in the previous part, protection of journalists source have either been provided for in the statutes in some countries or have been recognized under the freedom of expression as expounded through judicial decisions. However, it is common practice followed by several Courts in U.S.A. that unless absolutely necessary, journalists are not required to disclose their sources and thus are of the view that providing for such an express provision may be futile.<sup>56</sup> In India, on the other hand, such a privilege is not recognized even to a limited extent.<sup>57</sup> Ironically, even in situations when journalists are compelled by courts to disclose the confidential information, they often choose not to and get subsequently punished for Contempt of Court.<sup>58</sup>

It is interesting to note that the world view on safe keeping of journalistic sources is often similar, as wherever such law is so provided or suggested, it is without much variation based on the same lines as below:

*“No Court shall require a person to disclose the source of information contained in a publication for which he is responsible, where such information has been obtained by him on the express agreement or implied understanding that the source will be kept confidential.”*

*Explanation –*

*a) ‘Publication’ means any speech, writing, broadcast or other communication in whatever form, which is addressed to the public at large or any section of the public.*

*b) ‘Source’ means the person from whom, or the means through which, the information was obtained.”<sup>59</sup>*

While discussing the merits and demerits of having such a legislation in India, the authors shall not only look into the draft bill of the Maharashtra

56 Letter by the U.S. Department of Justice to the Honorable Patrick J. Leahy, Chairman, Committee of the Judiciary, U.S. Senate, (September 2007), p. 2, 3. (Hereinafter the letter)

57 Ninety Third Law Commission Report, *Disclosure of Sources of Information by Mass Media*, p. 6, ¶ 3.1, (1983) (Hereinafter 93<sup>rd</sup> Report).

58 Note, *Journalistic Privilege*, (1963) Vol. 1, No. 9, Supreme Court Appeals; Kaliprasanna Kavyabirshad case and Bipin Chandra Pal case as given in 93<sup>rd</sup> Report, supra note 57 p. 2, ¶ 3.1.

59 93<sup>rd</sup> Report, supra note 57; See also FFIA, supra note 54.

Journalists (Prevention of Violence and Damage to Property) Ordinance, 2010 but also the recommendations given in the 93<sup>rd</sup> Law Commission Report. The aspects that shall be closely examined with regard to protection of journalistic sources shall be: (i) the conditions attached to the right of protection of journalistic sources. and (ii) the definition of a “covered person”

**(i) The Limitations on Protection to Journalists:**

The point for consideration that arises is whether the covered persons need to be given an absolute blanket or general protection with certain qualifications, which can, upon deliberation by a Judge be overlooked only through a few set rules in place, to ensure arbitrariness is not prevalent. In this regard the Law commission of India is of the view that such an absolute right or privilege<sup>60</sup> would lead to rigidity in the law while certain discretions of use with set conditions and requirements would make the law more elastic.<sup>61</sup>

These restrictions on the protection of journalistic sources by the FFIA<sup>62</sup> in the U.S.A., before changes and substitutions in the Bill were made so as to protect journalists from being compelled to disclose their confidential sources, was that: unless a federal court determines by a “preponderance of evidence” that all reasonable alternative sources have been exhausted; the source is essential; and that non-disclosure would be contrary to public interest, the person would not be compelled to disclose his/her source.<sup>63</sup>

At present, however, it stands that the Court on a preponderance of evidence can compel the person to disclose the source if “all reasonable, alternative sources have been exhausted other than the covered person”, and in a “criminal investigation or prosecution based on information obtained from a person other than a covered person”, then the court will have to satisfy itself to compel disclosure, that “there are reasonable

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

61 93<sup>rd</sup> Report, supra note 57 p. 34, ¶ 9.5.

62 FFIA, supra note 54, section 1267. Also known as Shield Law in the United States of America.

63 Democratic Policy Committee, *Summary and Background*, Legislative Bulletin, July 30, 2008 [http://dpc.senate.gov/dpcdoc.cfm?doc\\_name=lb-110-2-127](http://dpc.senate.gov/dpcdoc.cfm?doc_name=lb-110-2-127). (last visited on 14<sup>th</sup> July 2011)

grounds to believe a crime has occurred” and that “the cooperation of the person is essential for the case”. Further, in a matter other than a criminal one, “the information sought must be essential for successful completion of the case”.<sup>64</sup> This new amendment to the Bill is certainly more detailed and comprehensive than the substituted section and provides clearly and non-arbitrarily when persons can be called or compelled to disclose their source for the benefit of society to maintain law and order and also for the successful discharge of justice. It must be borne in mind that though maintenance of confidentiality is of prime importance to the fourth estate when information imparted is on terms of confidentiality, however, when the society is or might be in turmoil, they must offer their services as citizens and newsmen who possess priceless information.

In comparison to the above, the proposal by the Law Commission does not delve so much into the topic of qualifications where the person may be compelled. What it does provide though is discretion in the hands of the Judge, so that in each case he can balance the need to protect confidentiality of the source against: (a) the interest of justice – a general consideration; and (b) the demands of national security, prevention of disorder and crime – considerations which may be relevant in special situations.<sup>65</sup> In the second requirement (b) one may broadly interpret the criminal and other crimes where the person may be compelled, as given under FFIA. However, leaving a large part to the discretion of the Judge/s keeps open a wide space with scope for arbitrariness through various interpretations. This proves that such a glitch for arbitrariness in the statute must be avoided and guidance be provided as much as possible.

Here, discussions of appropriate qualifications become relevant. For this, two considerations must be maintained: (a) the ethic of the journalist to maintain his source confidential to not lead to a breach of confidentiality<sup>66</sup>, and (b) for the wider interest of the public and nation where breach of confidentiality is out-weighed. Its balance implies that simply because a journalist has covered an event or reported on an activity,

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64 <http://fpc.state.gov/documents/organization/93478.pdf>. (last visited on 13<sup>th</sup> July 2011)

65 93<sup>rd</sup> Report, *supra* note 57, p. 33, ¶ 9.4.

66 It refers to the breach of trust or confidentiality when certain information has been passed on as a secret and to remain anonymous. Thus, when a journalist, or the technical personnel or the editor or managerial personnel leak such information (in this case the source), it amounts to a breach of confidentiality. To this, however, being compelled by a Court for such information is a defense.



it must neither imply that he be made a prime witness to depose evidence in a Court of law nor must it make him the only lead in a case without the police or the investigative authorities even trying. Thus, the journalist must not be the first resort, but the last. This helps point to a condition that “when all the alternative methods in a case have been exhausted, the journalist can be compelled to disclose the source”.

Next, we can take influence from the American law (FFIA) on issues of criminal or civil crimes. It provides that not in all criminal cases which the reporter might be somewhere connected, but only those cases and prosecutions where without the disclosure of the name of the source the case may not be concluded, having reasonable knowledge to believe that a crime has in fact occurred, may the journalist be compelled to disclose.<sup>67</sup> The same would apply to civil cases and disclosure should be necessary only for the successful completion of the case. Lastly, any information required to maintain national integrity and interest may form the subject matter of a compelled disclosure.<sup>68</sup>

**(ii) Covered Person:**

The Law Commission Report defines a “covered person” as not only a “professional journalists”, but also a casual, amateur journalist, the editors, senior management personnel to whom the information is conveyed in professional confidence, the technical personnel who accompany the newsmen..<sup>69</sup> A plain reading of this definition would instantly indicate the sweeping cover it provides to any person engaged in “publication” on a full or part time basis. The term “publication” in turn includes any speech, writing, broadcast or any other communication in whatever form, so long as it is addressed to the public or to a section of the public.<sup>70</sup> Thus, any person who engages in the activity of broadcasting information for the public in any manner on any forum, with matter collected through any means, shall be protected from disclosing his or her source.

By providing for such an absolute protection to any person in this category, the nuances and the fine differences among various such journalists would be overlooked, the consequence of which would be the defeasance of public interest and the complication of adjudication. Taking a

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67 FFIA, *supra* note 54 section 1267.

68 Such as leaks or unauthorized use of information.

69 93<sup>rd</sup> Report, *supra* note 57 p. 32, ¶ 9.1.

70 93<sup>rd</sup> Report, *supra* note 57.

leaf from the letter written by the Department of Justice to Honourable Justice Patrick Leahy while emphasizing its views on the FFIA,<sup>71</sup> such a wide cover does not leave out terrorist news agencies or journalists or online sites on which gang members may post their activities for everyone to see. It points out the problem that if a journalist or a news reporter gets the information or a video recorded message from a terrorist operative, that journalist would also get covered under the right and thus a matter of national importance would be difficult to unravel. This would necessarily exclude terrorist news channels and terrorist funded news channels.

Further, when a particular information is given out by a person not authorized to give it out, i.e., when there is a leak of protected and sensitive information of national importance or such information that falls under the Official Secrets Act<sup>72</sup>, or when such information would disturb public tranquility if leaked, then such a source should not be protected by the journalist. If the protection is, however, allowed, then the government or other authority would be required to prove satisfactorily to the Court why they must be the only party privy to such information. This would consequentially lead to a lot more sensitive information being out in the public domain, eventually letting more information out than required and doing more harm than good. This might indeed prove to be more problematic, especially if the judge is an “activist” one. Thus, there must be an internal mechanism to keep an administrative check for such problems without necessarily reaching the Courts. As such, journalists in possession of such confidential or sensitive information must be excluded from the ambit of “covered person” as well.<sup>73</sup> This could, in a sense, act as an “exception” to the right.

Thus, streamlining of this protection is required which can be achieved by giving this protection to only reliable and *bona fide* journalists, amateur newsmen, their support staff, managerial heads, *etc.* Since the field of media men is widespread and various kinds of scribes are prescribed in the

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71 The Letter, *supra* note 56. p. 5.

72 Certain Acts have been put outside the scope of journalists and newsmen to report or comment about and these have been mentioned in the Norms of Journalistic ethics given by the Press Council of India. Norms of Journalistic Conduct, Edition 2005, Press Council of India. Accessed on [www.presscouncil.nic](http://www.presscouncil.nic) (last visited on 13<sup>th</sup> July 2011)

73 This would include not only information from authorized persons but the dissemination of which is unauthorized, but also collecting data through unlawful means (such as the recent the News of the World scandal).

definition, it is definitely not an easy task to draw such a line. However, if we are to streamline it from the very obvious newsmen and then proceeding to the obscure ones, a solution can slowly but reliably, be established.

This would then lead us to including the registered news channels, papers and magazines to online blogs, journals, social networking sites without any restriction on nationality or occupation *per se*. Further, on narrowing down the ambit of “covered person”, the matter published can also be used to achieve the same.

As a point to be noted, this would not militate against any human rights provisions as the person, if there is reason for him to be believed an accused, would have protection under Article 20<sup>74</sup> of the Constitution of India and also under Section 161<sup>75</sup> of the Criminal Procedure Code, 1973. A further classification than this may lead to questions of arbitrariness which this paper shall not delve into.

The above exceptions have been formulated since the government or any other party seeking the information needs to prove: *first*, the importance of that information and *second*, why they must know it, to the satisfaction of the Court. Only then would the burden of proof shift to the journalist from the one who requires the information. This would either delay the whole process (of compelling the source from the journalist) or let word out as to what is being investigated or looked into, making the source and other groups alert; thereby proving to be against public and national interest.

Thus, it becomes important to note now that it would be a big hindrance in retaining peace and order in the society if such a wide and blanket protection to the community of journalists in protecting their sources is provided.

### **(b) Non-bailable Offence:**

The demand for making attacks against media men or their property a non-bailable offence is being made in light of (a) the recent attacks and

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74 Article 20(3) of the Constitution of India: No person accused of an offence shall be compelled to be a witness against himself.

75 Section 161(2) of The Code of Criminal Procedure: Such person shall be bound to answer truly all questions relating to such case put to him by such officer, other than questions the answers to which would have a tendency to expose him to a criminal charge or to a penalty or forfeiture.

their increase,<sup>76</sup> but also (b) the low rate of convictions against these accused persons.<sup>77</sup> This has naturally left the Fourth Estate with no effective grievance redressal mechanism worthwhile to ensure that, if not their safety, that appropriate action shall be taken against the culprits in most of the cases, may at least prevail. Thus, pro-change activists feel that with a provision making such attacks a non-bailable offence, the offenders would at least be put behind bars which would ultimately instil some fear in them.<sup>78</sup> Few others are of the view that the press must be considered as public servants to achieve this goal.<sup>79</sup> On the other hand, the people against this move point out that this problem will not be redressed with these obscure changes, but the problem at the heart of it is the implementation of existent provisions and the process of setting in motion the wheels of justice.<sup>80</sup> They further point out that this may lead to demands by various service-oriented occupations such as teachers, lawyers, etc. to extend this special protection to them as well.<sup>81</sup>

It is a well-known fact that the problem of justice in India is its failure of implementation and not the absence of required provisions as such. Eternal vigilance is the price of liberty and one cannot be expected to sit idle and watch the situation deteriorate without any solution being provided for, as waiting for implementation or proper investigation is not the key. The work of the press is tough, especially investigative journalism, and it is common knowledge that this entails a lot of danger, but they still fight against all odds to disseminate news so that people are aware of their surroundings and their crude realities. When it is in plain sight that this profession, which is so crucial to the democracy of the country and the rights of not only the journalists to impart news but of the citizens of the

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76 Velly Thevar, *Supra* note 6.

77 Only 5-6% of these cases actually result in some favourable judgment. Special Correspondent, *Different takes on law to protect journalists*, THE HINDU, (June, 2011). [www.hindu.com/news/national/article2113842.ece](http://www.hindu.com/news/national/article2113842.ece) (last visited on 14<sup>th</sup> July 2011).

78 Special Correspondent, *Make attacks on journalists a non-bailable offence*, THE HINDU, (November, 2009). <http://www.thehindu.com/news/national/article52675.ece>. (last visited 14<sup>th</sup> July 2011)

79 As per IPS Officer, YP Singh in Manoj Nair, *supra* note 41.

80 As per Pinki Anand, in Velly Thevar, *supra* note 6.

81 Seetha, *Media Ruminations, Too Special by Far*, FRIDAY, (June, 2011). <http://mediaruminations.blogspot.com/2011/06/too-special-by-far.html>. (last visited on 15<sup>th</sup> July 2011).

country to receive that news,<sup>82</sup> is under severe attack, it serves as a clear indication that reformatory steps need to be taken to ensure a protected environment for them.

While it stands true that once such a provision is passed, it would result in similar such requests from other services and professions, but what is to be seen is how much danger are they exposed to and how vitally that violation is going to affect the society and nation. Teachers for example: how many have been attacked? Does their occupation include an element of danger? Are forces working to stop them from imparting knowledge? The last question may provide an affirmative answer since research papers into sensitive issues such as Naxalites or the mafia or any other like matter may attract unfavourable elements. However, the attacks on journalists have been wide-spread and uncontrollable lately which has been spreading fear in their community and in that view require immediate attention.

When such laws are made one question that comes up for scrutiny is whether the law is arbitrary. As the jurisprudence of Article 14 of the Constitution of India suggests, one such angle for proving arbitrariness is the need for it to be shown that it is in the absence of reason and the classification made is discriminatory, i.e., there is no intelligible differentia and no nexus between the object of the Act and the classification.<sup>83</sup> The two can be answered together; *first*, as it has been proved that the Fourth Estate is vital for any democratic society, not that they are above the rest in society but that in providing such a classification, this section of society needs to be sufficiently safe-guarded. *Second*, the object is clearly to promote the spread and dissemination of news and information with as few hindrances which such a provision would certainly achieve. *Third*, with the recent increase in the interval and intensity of attacks, this profession is in need for protection.

Thus, keeping the above considerations in mind, it is the need of the hour to ensure that the accused persons are at least put behind bars to give out a message that serious action shall be taken. However, it cannot work all by itself without support from other institutions.

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82 It is not only the right of the press for freedom of speech and expression but also the right of the people to freedom to receive such information.

83 Anwar Ali Sarkar v. State of West Bengal, AIR 1952 SC 75, at 58.

In India, the Central Government through the Press Council of India Act, 1978<sup>84</sup> has given the PCI quasi-judicial powers to hear and dispose complaints against the press and also by the press in cases when there is a block on their freedom of expression.<sup>85</sup> This implies that cases of threats against journalists<sup>86</sup>, murder, damage to property, etc. which work to hinder the freedom of their expression can be heard before the Council. However, the Council does not have enough members to handle cases from all over the country as cases keep getting carried over to the next year.<sup>87</sup> Thus, it would seem efficient to have, if not State PCIs<sup>88</sup> then, a PCI branch in every state which is adequately equipped with personnel to hear these cases to ensure timely disposal of cases and justice.

Further, if the PCI is to effectively dispose cases then it must be given appropriate powers for the same. With the power to only censure, warn and admonish,<sup>89</sup> no accused person found guilty would take it seriously. This is the reason why for serious offences, the press approach the Courts, where the case drags on for years. Thus, by equipping them with the power to execute penal punishments and adequate man power, the PCI would become an effective quasi-judicial body for hearing press grievances on timely basis and satisfactorily addressing them.

However, the draft Maharashtra Journalists (Prevention of Violence and Damage to Property) Ordinance, 2010 provides the protection to altogether to another extent. It not only provides for making attacks on journalists a cognizable offence but also imposes a fine of up to Rs. 50, 000 or imprisonment for three years. In case of damage to property, then the accused can be made to pay twice the whole of the amount of the damaged property as compensation.<sup>90</sup> Such drastic measures in a one-off legislation would certainly call for protests throughout the country and the legislature

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84 The first Press Council of India (PCI) was established in the year 1965 but was dissolved in the year 1976 by the Indira Gandhi Government on the lines that it had failed to perform the function it was established to do.

85 Sections 14 and 15 of the PCI Act, 1978.

86 On such example: *Shri Rajesh Kumar & Anr. v. The Additional Deputy Commissioner Faridabad & SDM, Ballabgarh, Haryana*. Compendium of Adjudications (April 1, 2008 – March 31, 2009), PCI.

87 *Annual Report 2007-08*, Press Council of India, p. 12.

88 However, it is interesting to note that editors such as Shekhar Gupta, N. Ram, and Nikhil Wagle vehemently oppose the setting up of a State Press Council.

89 Section 15, PCI Act, 1978.

90 Geeta Seshu, *Supra* note 24.

should know when it is supposed to draw the line so that they do not exceed their powers.

Thus, an integrated system as provided above with penal provisions and specialized courts working together would provide a convincing solution.

## **V. Conclusion**

The need for a special law for the protection of journalists has cogently been enumerated throughout this paper. While making suggestions the paper does not purport any far-reaching, out of the ordinary, granting compete new privileges, to the media community. Instead, it focuses on those changes or expansions in the law which has either been internationally recognized or existent in its preliminary stages in India itself. Such as the recognized right to protection of journalistic sources and the already existent Press Council of India as a quasi-judicial body. Thus, by clearly defining the right and expanding the role of the PCI, respectively, the researchers maintain a balance to provide workable reforms to be made in the media sector.

The call for making offences against journalist's a cognizable one stems from the point that some relief in some form needs to be provided. In the way that at least some retribution may be received. This, however, should not be provided as a general provision in the criminal law of the country as it would lead to a stagnation of the jails and courts; proving counter-productive to justice for all. Hence, the object for an effective solution must be to provide reliefs which can be achieved by balancing the needs of the journalists with the needs of the society; which the authors through the paper have hoped to provide by not tilting to any one side but providing a much needed solution.





## **SECTION II**

**MEDIA ETHICS AND FREEDOM:**

# **THE PROBLEM OF PAID NEWS**

**A SPECIAL COMPILATION FOR NALSAR MEDIA LAW REVIEW**



## **CORRUPTION IN MASS MEDIA - “PAID NEWS”**

*Madabhushi Sridhar\**

### **I. Enforcing Ethics & Empowering Press Council Of India**

After the General Elections to the Lok Sabha and in some states, the news of unethical practice of paid news was exposed by several complaints and critical articles in the media. During his inaugural address at a seminar on “General Elections 2009 and Media Reporting” on May 13, 2009, that was organized by the Andhra Pradesh Union of Working Journalists at Hyderabad, Andhra Pradesh, three days before the results of the fifteenth general elections were declared, Hon’ble Chairman of the Press Council of India Justice G.N. Ray expressed grave concern about the covert emergence of the “paid news” syndrome and this issue was discussed threadbare during the seminar. Subsequently, representations against such malpractices were received from several veteran journalists (such as the late Shri Prabhash Joshi, Shri Ajit Bhattacharjea, Shri B.G. Verghese and Shri Kuldip Nayar). They alleged that sections of the media had received illegal payments for providing favourable coverage to candidates who had stood for the Lok Sabha elections.

On June 6, 2009, the Press Council of India noticed that the phenomenon of “paid news” doubly jeopardized not only functioning of independent media but also the working of our democracy by unduly influencing free and fair elections. As rightly noted by PCI the press provides a service that is akin to a public utility – it exercises its right to inform because the public has a right to know. The press thus functions as a repository of public trust and has the obligation to provide truthful and correct information to the best of its ability when such information is being presented as news content. Such news content is distinct from opinions that are conveyed through articles and editorials in which writers express their views. There is an urgent need to protect this precious right of the public to accurate information before the voters exercise their franchise in favour of a particular candidate in the electoral fray.

The Press Council of India felt that in pursuance of the mandate given to the Council by Parliament (through the enactment), it was incumbent upon this statutory authority to examine the issue in all its dimensions through detailed research and consultations. Such an exercise was deemed

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necessary to maintain the faith of the public in the media and also make appropriate recommendations to check such malpractices from recurring on a wide scale before the forthcoming rounds of elections at both the Union and state levels. The Press Council of India, through its Chairman and its members, participated in or initiated a number of discussions and debates on this issue between May 2009 and March 2010. On July 3, 2009, exercising the powers conferred on the Council under Sections 8(1) and 15 of the Press Council of India Act, 1978, a Sub-Committee of the Council comprising two members, namely, Shri Kalimekolan Sreenivas Reddy and Shri Paranjay Guha Thakurta was constituted. The two members, together with the Press Council of India Chairman Justice G.N. Ray, the Council's Secretary, Smt Vibha Bhargava and other members, met a wide cross-section of stake-holders in New Delhi, Mumbai and Hyderabad and also perused through many letters and representations that were sent to the Council.

## **II. Deception or Fraud called “Paid News”**

Corruption in the mass media in India and elsewhere is as old as the media itself. If there is corruption in society, it would be unrealistic to expect the media to be free of corruption. India is the world's largest democracy. A vibrant and diverse mass media is an important pillar of democracy in the country. The independence of the media facilitates adherence to democratic norms. Article 19 of the Constitution of India confers the right to freedom of speech and expression to all citizens of the country and to the media as well.

In recent years, corruption in the Indian media has gone way beyond the corruption of individual journalists and specific media organizations -- from “planting” information and views in lieu of favours received in cash or kind, to more institutionalized and organized forms of corruption wherein newspapers and television channels receive funds for publishing or broadcasting information in favour of particular individuals, corporate entities, representatives of political parties and candidates contesting elections, that is sought to be disguised as “news”.

News is meant to be objective, fair and neutral – this is what sets apart such information and opinion from advertisements that are paid for by corporate entities, governments, organizations or individuals. What happens when the distinction between news and advertisements start blurring, when advertisements double up as news that have been paid for,

or when “news” is published in favour of a particular politician by selling editorial spaces? In such situations, the reader or the viewer can hardly distinguish between news reports and advertisements/advertorials. This report tracks the blurring boundaries between news and advertisements/advertorials and highlights the efforts made by individuals and representatives of organizations who have painstakingly chronicled the selling of editorial space for money during elections.

Over the last few years, and since 2009 in particular, the phenomenon of “paid news” has acquired a new and even more pernicious dimension by entering the sphere of political “news” or “reporting” on candidates contesting elections. Numerous favourable or complimentary “news” reports and feature articles on representatives of political parties, including candidates who have been contesting elections, have appeared in newspapers across the country in the run-up to the Lok Sabha as well as state legislative assembly elections and similar kinds of information have been aired on television channels without disclosing the fact that monetary transactions have taken place between the concerned candidate or political party to which he or she belongs and the owners or representatives of particular media organizations.

The deception or fraud that such “paid news” entails takes place at three distinct levels. The reader or the viewer is deceived into believing that what is essentially an advertisement is in fact, independently produced news content. Then, candidates contesting elections do not disclose the true expenditure incurred on campaigning thereby violating the Conduct of Election Rules, 1961, which have been framed by, and are meant to be enforced by, the Election Commission of India under the Representation of the People Act, 1951. The concerned newspapers and television channels typically receive funds for “paid news” in cash and do not disclose such earnings in their company balance sheets or official statements of accounts. Thus, by not accounting for the money received from candidates, the concerned media company or its representatives are violating the provisions of the Companies Act, 1956 as well as the Income Tax Act, 1961, among other laws. The entire operation is clandestine. This malpractice has become widespread and now cuts across newspapers and television channels, small and large, in different languages and located in various parts of the country. What is worse, these illegal operations have become “organized” and involve advertising agencies and public relations firms, besides journalists, managers and owners of media companies.

Marketing executives use the services of journalists – willingly or otherwise – to gain access to political personalities. So-called “rate cards” or “packages” are distributed that often include “rates” for publication of “news” items that not merely praise particular candidates but also criticize their political opponents. Candidates who do not go along with such “extortionist” practices on the part of media organizations are denied coverage.

Sections of the media in India have willy-nilly become participants and players in such practices that contribute to the growing use of money power in politics which undermines democratic processes and norms – while hypocritically pretending to occupy a high moral ground. This has not merely undermined democracy in India but also tarnished the country’s reputation as foreign newspapers have started writing about, and commenting adversely on, such malpractices.

In addition, owners of media organizations have financial relationships, including share-holdings, with advertisers, resulting in only favourable information about such advertisers getting disseminated and unfavourable information against them getting blacked out. Such trends have been discernible in sections of the Indian media for some years now. The regulator of the country’s capital markets, the Securities and Exchange Board of India (SEBI), has written to the Press Council of India on the issue of “private treaties” between media companies and other corporate entities and suggested disclosure of financial holdings and mandatory enforcement of guidelines to ensure that the interests of investors are adequately safeguarded – these suggestions have been endorsed by the Press Council of India which, in 1996, drew up a set of guidelines that are particularly applicable to financial journalists.

### **III. Survey by AP Working Journalists**

The Andhra Pradesh Union of Working Journalists conducted a detailed sample survey to highlight the manner in which newspapers had published “paid news” items before the Lok Sabha elections and the state assembly elections that were conducted simultaneously in April-May 2009. Particular candidates who stood for elections in Andhra Pradesh named publications whose representatives had asked them for money to publish favourable news items about themselves. Once again, representatives of these media organizations flatly denied the allegations. One candidate (Shri Parcha Kodanda Ram Rao of the Loksatta Party in Andhra Pradesh)

formally represented to the Election Commission that he had paid a particular newspaper (Eenadu) to publish favourable "news" about himself and had included the payment in his official expenditure statement.

A number of senior journalists have formally complained about the phenomenon of "paid news" to the Press Council of India and the Election Commission of India, as has the Editors Guild of India. Various unions of journalists, including the Delhi Union of Journalists, have condemned such malpractices in the media. The National Alliance of People's Movements, Lucknow, Uttar Pradesh, also prepared a report highlighting instances of "paid news" appearing in newspapers before the 2009 general elections. Selling space for advertisement in the garb of news reflects greed and immoral practice and it can never be justified. However the Press Council thought probably one reason for the proliferation of the "paid news" phenomenon could be the limits on election campaign expenditure. The impractically low limit on expenditure must have forced the candidates to choose this alternative to publicize them. But that process poses a danger to the very conduct of free and fair elections. Pondering over the possible curbs some suggested the returning officers representing the Election Commission could use their powers to issue notices to the press persons to explain the basis of particular "news" reports and ascertain whether financial transactions had actually taken place between candidates and representatives of media companies. A similar notice also could be issued to the contesting candidates to explain the expenditure incurred on such clandestine campaign and verify whether that was included in the mandatory statement of expenditure.

#### **IV. Powers To Quasi-Judicial Press Council Of India**

A detailed discussion on the subject took place in the Rajya Sabha during which Information & Broadcasting Minister, Smt. Soni, stated that the government was actively considering the option of providing more powers to the Press Council of India to check this phenomenon which is undermining the credibility of the media and democratic processes. She said the media acts as a repository of public trust for conveying factual information to the people. However, when paid information is presented as independent news content, it misleads the public and hampers the ability of people to form correct opinions.

In the final analysis, the question arises as to what can be done to check such corrupt practices in the media that compromise democratic

processes. Can anything be done at all in this regard? The answers are not easy nor are they simple or clear-cut. Despite its quasi-judicial status, the Press Council of India has limited powers. The Council has the power to admonish, reprimand and pass strictures but cannot penalize the errant or those found guilty of malpractices. Besides, the Council's mandate does not extend beyond the print medium. A proposal to amend Section 15(4) of the Press Council Act, 1978, to make the directions of the Council binding on government authorities, has been pending for a long time and should be amended to provide the Council more "teeth".

### **V. Ombudsman: Self-Regulatory Measures**

Appointing ombudsmen in media organizations and better self-regulation are options to check the "paid news" phenomenon. However, self-regulation only offers partial solutions to the problem since there would always be offenders who would refuse to abide by voluntary codes of conduct and ethical norms that are not legally mandated. The owners of media companies need to realize that in the long term, such malpractices undermine not just democracy in the country but the credibility of the media as well. Civil society oversight can also deal with the problem, but only to an extent. New rules and guidelines can be introduced and extant ones modified or amended. For instance, there should be a debate among all concerned stakeholders as to whether a directive of the Supreme Court of India that enjoins television channels to stop broadcasting campaign-related information on candidates and political parties 48 hours before polling takes place can and should be extended to the print medium since such a restriction does not apply to this section of the media at present.

### **VI. Amend Representation of People Act**

A number of politicians cutting across party lines have suggested an amendment to Section 123 of the Representation of the People Act, 1951, to declare the exchange of money for "paid news" as a corrupt practice or an "electoral malpractice". It can be effectively argued that the existing laws of the land (including the provisions of the Indian Penal Code, the Criminal Procedure Code, the Representation of the People Act, the Income Tax Act) have the potential to check such malpractices provided the concerned authorities, including the Election Commission of India, are not just proactive but also act in an expeditious manner to apprehend those



indulging in practices that are tantamount to a corrupt practice (including an electoral malpractice) or committing a fraud.

### **VII. Observers from PCI**

An empowered Press Council of India should appoint observers who would assist the Election Commission of India to check the "paid news" phenomenon during election campaigns. These are among the conclusions and observations that have been laid down in greater detail at the end of the report. All these steps may not entirely stop such malpractices in the Indian media but could reduce their incidence to an extent.

### **VIII. Lack of Proof**

Though the phenomenon of widespread practice of "paid news" has been verbally confirmed and vindicated by politicians and campaign managers of political parties, there is no recorded documentation that would firmly establish that there has been exchange of money between media houses/advertisement agents/journalists and politicians/political parties. The problem in establishing the practice of "paid news" is simply one of obtaining hard proof or conclusive evidence. With one notable exception (Shri Parcha Kodanda Rama Rao of the Loksatta Party in Andhra Pradesh), no complainant has been able to provide the Press Council of India with documents as proof of money having been paid to carry positive news. Even the rate cards that had been formulated by media houses and had been passing around during elections were just typed sheets of paper which carried nothing on it to attribute it to a newspaper/television news channel that had put it together nor anything that could be attributed to a journalist/advertisement agent.

However, the huge amount of circumstantial evidence that has been painstakingly gathered by a few well-meaning journalists, unions of journalists, other individuals and organizations together with the testimonies of the politicians and journalists who have deposed before the Press Council of India, goes a very long way in establishing the fact that the pernicious practice of "paid news" has become widespread across media (both print and electronic, English and non-English languages) in different parts of the country. Interestingly, this phenomenon appears to be less pervasive in states (such as Kerala and Tamil Nadu) where the media is clearly divided along political lines.

The guidelines of the Press Council of India that news should be clearly demarcated from advertisements by printing disclaimers, should be strictly enforced by all publications. As far as news is concerned, it must always carry a credit line and should be set in a typeface that would distinguish it from advertisements. It should be mandatory for all candidates/political parties to fully disclose their equity stakes and/or financial interests in newspapers/television channels on which news about their candidates/parties as well as interviews with candidates and/or representatives of the political parties are published or broadcast. If a candidate is being interviewed or given positive publicity on a particular newspaper/television channel, the association (financial or otherwise) of the candidate with the newspaper/television channel if any must be disclosed to the reader/viewer.

Section 123 of the Representation of the People Act, 1951, should be amended by Parliament to make the practice of paying for news coverage in newspapers and television channels an “electoral malpractice” or an act of corruption and made a punishable offence.

The Election Commission of India should set up a special cell to receive complaints about “paid news” in the run-up to elections and initiate a process through which expeditious action could be taken on the basis of such complaints. In order to place a check on frivolous complaints being made a time limit of, say, one month from the date of publication or broadcast of the report should be imposed. The Election Commission of India should nominate independent journalists and/or public figures as observers in consultation with the Press Council of India who would accompany the election observers deputed by the Election Commission of India to various states and districts. Just as the deputed election observers are expected to report and keep a check on any malpractices in election campaign and the conduct of elections, these nominated journalists could report on instances of activities of practice of paid news to the Press Council of India and the Election Commission of India. The Press Council of India should constitute a body of media professionals with wide representation at the national/state/district levels to investigate (either suo moto or on receipt of complaints of) instances of “paid news” and the recommendations of such a body – after going through an appellate mechanism -- should be binding on the Election Commission of India and other government authorities.

The Press Council of India should be open to entertaining complaints about "paid news" from journalists while assuring them of secrecy if they act as whistle-blowers. Media organizations should refrain from the practice of engaging stringers and correspondents who double up as agents collecting advertisements for their organizations and receiving a commission on the revenue that accrues from advertisements instead of receiving stipends or retainers, if not, regular salaries. If working conditions and conditions of job security for journalists are improved and the autonomy of the editorial staff upheld in media companies, this would to an extent curb the phenomenon of "paid news". Despite its quasi-judicial status, the Press Council of India has limited powers. The Council has the power to admonish, reprimand and pass strictures but cannot penalize the errant or those found guilty of malpractices. Besides, the Council's mandate does not extend beyond the print medium. In the absence of an alternative body, the Press Council of India's mandate should be widened to receive complaints and grievances against and about the working of television channels, radio stations and internet websites. The Press Council should be given legal powers to not merely admonish or pass strictures but also impose penalties against errant individuals and organizations. A proposal to amend Section 15(4) of the Press Council Act, 1978, to make the directions of the Council binding on government authorities, has been pending for a long time and should be amended to provide the Council more "teeth".

The Election Commission of India should actively identify instances of "paid news" and if a *prima facie* case is established, the Commission should initiate action on its own against the errant and, if necessary, seek the assistance of those government authorities responsible for enforcing the provisions of the Indian Penal Code and other laws.

The editor or editor-in-chief of a publication should print a declaration in his or her newspaper stating that the news that is published has not been paid for by any political party or individual. Such disclaimers should be issued when the model code of conduct for elections comes into force and may morally bind the staffers of a media company to adhere to professional ethical standards while discouraging the management from pushing a particular political agenda. However, self-regulation only offers partial solutions to the problem since there would always be offenders who would refuse to abide by voluntary codes of conduct and ethical norms that are not legally mandated. The owners of media companies need to realize that in the long term, such malpractices undermine not just democracy in the

country but the credibility of the media as well. Civil society oversight can also deal with the problem, but only to an extent. There should be a debate among all concerned stakeholders on whether a directive of the Supreme Court of India that enjoins television channels to stop broadcasting campaign-related information on candidates and political parties 48 hours before elections take place can and should be extended to the print medium since such a restriction does not apply to this section of the media at present. It can be effectively argued that the existing laws of the land (including the provisions of the Indian Penal Code and the Representation of the People Act) have the potential to check the malpractice of “paid news” provided the concerned authorities, including the Election Commission of India, are not just proactive but also act in an expeditious manner to apprehend those indulging in practices that are tantamount to committing a fraud on the public.

Conferences, workshops, seminars and awareness-generating campaigns should be organized involving, among others, the Ministry of Information & Broadcasting, the Press Council of India, the Election Commission of India, representatives of editors, journalists associations and unions and political parties to deliberate on the issue and arrive at workable solutions to curb corruption in the media in general and the “paid news” phenomenon in particular. All these initiatives, if sincerely implemented, may not entirely stop such malpractices in the Indian media but could reduce their incidence to a considerable extent.

## **BLURRING BOUNDARIES BETWEEN NEWS AND ADVERTISEMENT**

*Paranjay Guha Thakurtha & K Srinivas Reddy\**

News reports that are printed in publications or broadcast on television channels are meant to provide information that is not only of interest to the public at large but information that is supposed to be truthful or factually correct and at the same time, balanced, objective, fair and neutral. This is what clearly sets apart such information described as news from either opinions expressed in editorial articles or, more importantly, advertisements or commercials that are paid for by corporate entities, governments, organizations or individuals. When the distinction between news and advertisements start blurring, when advertisements double up as news that have been paid for, or when “news” is published or broadcast in favour of a particular politician or a political party by selling editorial space, the reader or the viewer is misled or duped into believing that an advertisement or sponsored feature is a “news” story that is truthful, fair and objective.

This report on “paid news” prepared by a Sub-Committee of two members of the Press Council of India tracks the blurring boundaries between news and advertisements or “advertorials” and highlights the efforts made by certain individuals and representatives of organizations who have painstakingly chronicled the selling of editorial space for money, especially during the April-May 2009 general elections in the country and also during the September-October 2009 elections to the state assemblies of Maharashtra and Haryana.

This report also documents the denials that have been issued by representatives of media organizations and political personalities against whom specific allegations of corruption and malpractice have been levelled and against whom a considerable volume of circumstantial evidence has been acquired, collated, documented and presented before the Press Council of India. Moreover, this report summarizes the depositions that were made by over 50 individuals and representatives of various organizations (including media organizations, journalists’ unions and political parties) before the members of the Press Council in New Delhi,

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\* Members of Press Council of India, who were appointed as Subcommittee to enquire into the problem of Paid News and make recommendations.

Mumbai and Hyderabad and through written letters and representations and also through electronic mail.

The media industry in India and elsewhere has become increasingly difficult to regulate due to several reasons: technological developments, the globalisation of media conglomerates and the trend of certain suppliers and creators of news (public relations practitioners, advertisers and interest groups) getting closely involved with the working of media organisations. The dynamics of the media industry aside, the sheer extent of influence exercised by the media over the public at large is reason enough for subjecting the ethical practices and business activities of media organisations to critical scrutiny.

The concepts of democracy and of the market are both built on the principle of individual choice, but there is a danger that those who have accumulated wealth in the market will use it to exert influence over decisions that should be governed by democratic principles. Media institutions face particular dilemmas because these organisations represent a key element of an effective democracy while being, for the most part, commercial entities seeking success in the market by maximising profits. The commercial activities and market interests of media institutions might distort the role they play in the formation of public opinion and consequently in upholding principles and norms of democracy. Favourable coverage for those in positions of power and authority by the media, for commercial reasons, might influence the decisions made by these people.

A widespread problem is the attempt to influence public debate through the purchase of advertising space and the purchase of favourable editorial comment. Although some owners and editors of media companies try to erect a firewall – or a “Chinese Wall” – between journalists or content creators/producers, on the one hand, and buyers and sellers of advertising space, on the other, in some newspapers, magazines and television channels, this wall has too many convenient access doors. Most journalists are employees, increasingly, of large companies or organisations whose primary aim is to maximise profits and returns to shareholders. Insofar as journalists’ duties are in part defined by their role in corporate organisations, most of the ethical dilemmas they face begin with the inherent conflict between the individual’s role as a journalist providing independent information to the public and his or her employer’s quest for profit.

Corruption in the mass media in India and in other countries of the world is as old as the media itself. If there is corruption in society, it would be unrealistic to expect the media to be free of corruption. India is the world's largest democracy. A vibrant and diverse mass media is an important pillar of democracy in this country. The independence of the media facilitates adherence to democratic norms. Article 19 of the Constitution of India confers the right to freedom of speech and expression to all citizens of the country and to the media as well. In recent years, corruption in the Indian media has gone way beyond the corruption of individual journalists and media organizations: from "planting" information and views in lieu of favours received in cash or kind, to more institutionalized and organized forms of corruption wherein publishers of newspapers and owners of television channels receive funds for publishing or broadcasting information in favour of particular individuals or corporate entities that is disguised as "news".

### **I. How editorial space was compromised by political "Paid News"**

As already observed, news is meant to be objective, fair and neutral -- this is what sets apart such information and opinion from advertisements that are paid for. When "news" is published in favour of a particular politician or a political party by selling editorial space, the phenomenon of "paid news" becomes even more pernicious. Innumerable complimentary "news" reports and feature articles on representatives of political parties, including candidates who have been contesting elections, have appeared in newspapers and broadcast on television channels across the country in the run-up to the 2009 Lok Sabha elections as well as the state legislative assembly elections. No disclosure was made that before such "news" was printed or broadcast, that money had been exchanged between the concerned candidate or political party to which he or she belongs and the owners or representatives of media organizations.

Such malpractices enabled candidates contesting elections to not disclose their true expenditures on campaigning which, if made public, would have in certain cases violated the Conduct of Election Rules, 1961, which have been framed by, and are meant to be enforced by, the Election Commission of India under the Representation of the People Act, 1951. The concerned newspapers and television channels received money for "paid news" in cash and not in the form of cheques and did not disclose such earnings in their official company balance sheets. This malpractice has

become widespread and cuts across newspapers and television channels, small and large, in different languages and located in various parts of the country, and this is evident from the many examples provided subsequently in this report.

What is worse, these illegal operations have become “organized” and involve advertising agencies and public relations firms, besides journalists, managers and owners of media companies. Marketing executives use the services of journalists – willingly or otherwise – to gain access to political personalities. So-called “rate cards” or “packages” are distributed that often include “rates” for publication of “news” items that not merely praise particular candidates but also criticize their political opponents. Candidates who do not go along with such “extortionist” practices on the part of media organizations are denied coverage. Sections of the media in India have consciously chosen to become partners, participants and players in malpractices that contribute to the growing use of money power in politics that, in turn, undermine democratic processes and norms. At the same time, representatives of media organizations against whom allegations are levelled publicly condemn the practice of “paid news”. Some such individuals behave in a hypocritical manner and pretend to occupy a high moral ground.

Given the illegal and clandestine nature of such malpractices, it is not easy to find clinching evidence that pins responsibility for such malpractices on particular persons and organizations. There is, however, a huge volume of circumstantial evidence that points towards the growing use of the media for publishing “paid news” which is a form of an electoral malpractice. Identical articles with photographs and headlines have appeared in competing publications carrying bylines of different authors around the same time. On the same page of specific newspapers, articles have been printed praising competing candidates claiming both are likely to win the elections.

That “paid news” is a phenomenon that is deleterious to the credibility and independence of the media itself needs to be emphasized. Edelman, an independent public relations firm, in its 2010 Trust Barometer Survey (conducted in 22 countries worldwide, including India and six other countries in the Asia-Pacific region) stated that the Indian media has been losing its credibility and trust among the people. The study, which sampled 1,575 people in the 25-64 age group and 200 opinion leaders in India, noticed a sharp drop in trust over the past two years in television news in



India. However, newspapers are ranked higher than other media in terms of credible news with people trusting newspapers more than any other medium: 38 per cent of the Indians polled trusted radio and television, while 40 per cent trusted news in newspapers. Over the past two years, trust in television news dropped sharply from 61 per cent to 36 per cent, that of business magazines has gone down from 72 per cent to 47 per cent, and that of newspapers has gone down from 61 per cent to 40 per cent. Trust in the media in India as a whole declined by 7 per cent (from 65 per cent in 2009 to 58 per cent in 2010). On the other hand, China has seen the trust in media go up from 59 per cent in 2009 to 63 per cent in 2010. However, in terms of overall trusted institutions in India, media has performed better than the government as an institution. Sixty-seven per cent of Indians trust business as an institution, followed by the Indian media in the second position, with 58 per cent Indians trusting it. Non-government organizations (NGOs) and the government are placed in third and fourth positions, respectively. In another survey conducted by the Readers' Digest in March 2010, called the 'Trust Survey', 750 Indians were asked to rank the short-listed individuals belonging to different professions. Journalists were ranked 30 out of the 40 professionals listed and were placed next only to barbers and bus drivers.

Given the kind of blatantly dishonest practices being followed in sections of the mass media in India in recent times, the levels of credibility and trust in newspapers and television channels are bound to drop further, all of which would be harmful to building a vibrant and responsive democracy in the country. The publication or broadcast of "paid news" have not merely undermined democracy in India but also tarnished the country's reputation as foreign newspapers have already started writing about, and commenting adversely on, such malpractices. In recent months, articles about such malpractices have appeared in at least three newspapers, the Wall Street Journal (published from the United States), the Guardian (United Kingdom) and the Independent (Bangladesh), none of which edify either the media in India nor contribute to projecting a positive image of the world's largest democracy.

## **II. The 'Medianet' and 'Private Treaties' phenomenon**

In pursuing its quest for profits, it can be argued that certain media organizations have sacrificed good journalistic practices and ethical norms. Individual transgressions -- reporters and correspondents being offered

cash and other incentives, namely paid-for junkets at home or abroad in return for favourable reports on a company or an individual – were, until recently, considered more of an aberration than a norm. News that was published in such a manner was suspect because of the fawning manner in which events/persons were described while the reports gave an impression of being objective and fair. The byline of the journalist was stated upfront. Over the years such individual transgressions became institutionalized.

In the 1980s, after Sameer Jain became the executive head of Bennett, Coleman Company Limited (BCCL), publishers of the Times of India (TOI) group of publications, the rules of the Indian media game began to change. Besides initiating cut-throat cover-price competition, marketing was used creatively to make BCCL one of the most profitable media conglomerates in the country – it currently earns more profit than the rest of the publishing industries in the country put together though as a corporate group, the STAR group has in recent years recorded a higher annual turnover in particular years.

The media phenomenon that has caused considerable outrage of late has been BCCL's 2003 decision to start a "paid content" service called Medianet, which, for a price, openly offers to send journalists to cover product launches or personality-related events. When competing newspapers pointed out the blatant violation of journalistic ethics implicit in such a practice, BCCL's bosses argued that such "advertorials" were not appearing in newspapers like the TOI itself, but only in the city-specific colour supplements that highlight society trivia rather than hard news. There was another, more blatant justification of this practice not just by BCCL but other media companies that emulated such a practice after BCCL started it. If public relations (PR) firms are already "bribing" journalists to ensure that coverage of their clients is carried, what was wrong then with eliminating the intermediary – in this instance, the PR agency – it was argued.

Besides Medianet, BCCL devised another "innovative" marketing and PR strategy. In 2005, ten companies, including Videocon India and Kinetic Motors, allotted unknown amounts of equity shares to BCCL as part of a deal to enable these firms to receive advertising space in BCCL-owned media ventures. The success of the scheme turned BCCL into one of the largest private equity investors in India. At the end of 2007, the media company boasted of investments in 140 companies in aviation, media, retail and entertainment, among other sectors, valued at an estimated Rs 1,500

crore. According to an interview given by a senior BCCL representative (S. Sivakumar) to a website (medianama.com) in July 2008, the company had between 175 and 200 private treaty clients with an average deal size of between Rs 15 crore and Rs 20 crore implying an aggregate investment that could vary between Rs 2,600 crore and Rs 4,000 crore.

It is a separate matter that the fall in stock-market indices in 2008 robbed some of the sheen off the “private treaties” scheme for the BCCL management. While the value of BCCL’s holdings in partner companies came down, the media company had to meet its commitments to provide advertising space at old “inflated” valuations which also had to be shown as assessable taxable income for BCCL on which corporation tax is levied. Even as the private treaties scheme was apparently aimed at undermining competition to the TOI, a number of the newspaper’s competitors as well as television channels started similar schemes. The “private treaties” scheme pioneered in the Indian media by BCCL involves giving advertising space to private corporate entities/advertisers in exchange for equity investment – the company officially denies that it also provides favourable editorial coverage to its “private treaty” clients and/or blacks out adverse comment against its clients. While BCCL representatives denied receiving money for providing favourable editorial space, the integrity of news was compromised. In advertisements published in the Economic Times and the TOI celebrating the success of the group’s private treaties, on December 4, 2009, the Mumbai edition of the newspapers published a half-page colour advertisement titled “How to perform the Great Indian Rope Trick” and cited the case of Pantaloon. What was being referred was how Pantaloon’s strategic partnership with the TOI group had paid off. The advertisement read: “...with the added advantage of being a media house, Times Private Treaties, went beyond the usual role of an investor by not straining the partner’s cash flows. It was because of the unparalleled advertising muscle of India’s leading media conglomerate. As Pantaloon furiously expanded, Times Private Treaties (TPT) ensured that (it) was never short on demand. The TPT has a better phrase for it -- business sense.”

### **III. Advertorials**

In many media organizations, news is sought to be distinguished from material that is paid for, called advertisements or “advertorials”, by using different or distinctive fonts, font sizes, boundaries and/or disclaimers such as “sponsored feature” or even the letters “advrt” printed in a miniscule font

size in a corner of the advertisement – which may or may not escape the attention of the reader. However, in certain instances, even a fig-leaf of a disclaimer was done away with. For instance, a year-long series of articles on the skin-care product, Olay, in Delhi Times, the city supplement of the Times of India, would appear to have fallen into the category of “paid news” even if this was denied by the newspaper. Whereas BCCL representatives have often argued that the companies private treaties scheme is open to public scrutiny since the companies in which BCCL has picked up stakes is in the public domain and listed on its official website, the influence such companies wield on editorial content is a matter of contention and debate.

An advertising campaign by razor blade manufacturing company, Gillete, called “war against lazy stubble”, broadcast on the CNN-IBN television news channel, showcased features, interviews of celebrities, as well as panel discussions on the topic of whether a man should shave or not with a foregone conclusion: “Indian women prefer clean shaven men”. It was claimed that the Gillette-CNN-IBN “exclusive partnership” was a mutually beneficial alliance. These are among a few examples of “advertorials”, which contribute greatly to the malaise of paid news in India.

## MEDIA'S COVERT AGREEMENT WITH CANDIDATES

*Prabhash Joshi\**

[EDITORS NOTE: *In one of his last public speeches before he expired on November 5, 2009, at a seminar organised by the Foundation for Media Professionals in New Delhi on October 28, 2009, he named some of the politicians who had either refused to pay money or those who had complained to him about publications charging money for carrying news stories.*

*Among the several politicians who had spoken to him on paid news, Shri Joshi referred to Shri Atul Kumar Anjaan of the Communist Party of India (CPI) and said: "Shri Atul Anjaan of the Communist Party of India would often start his speech by drawing a parallel between a marriage celebration and an election campaign. He would say that when a marriage takes place, those who build pandals and tents, decorators and food caterers, quote higher than normal rates for their services. On specific days, when marriages take place, these service providers increase their rates taking advantage of the rise in demand and shortfall in supply. Newspaper owners acted in an identical manner when they demanded money from candidates in exchange for publishing news about them just before elections."*

*On that occasion, he made a scathing attack on sections of the media that had masqueraded advertisements as political news in the run-up to the general elections. He sharply criticized particular media organizations for entering into covert agreements with candidates of political parties and accepting illegal money from them for publicizing their activities and/or putting down their rivals. Such practices undermined and compromised the very basis of the role that an independent media is expected to play in a democracy. He listed various instances of impropriety followed by journalists and media organizations in Hindi-speaking states before the 2009 general elections. Barring a few, most newspapers in these states entered into deals with candidates of various political parties contesting in the general elections whereby they offered publicity packages to specific candidates and/or political parties to which they belonged for money.*

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\* One of India's most renowned journalists, late Prabhash Joshi was a crusader against "paid news". He approached the Press Council of India and the Election Commission of India on his own and urged these two bodies to do their best to curb such malpractices.

*“Packages” had been formulated by various media groups and the newspaper offering the “package” would publish no news whatsoever about the individual candidate and/or his or her party if the candidate/party did not accept the package. Shri Joshi mentioned accounts of various political leaders who had complained to him regarding the widespread practice of paid news in media houses in the states. He mentioned in particular about the cases narrated to him by Shri Lalji Tandon, Member of Parliament from Lucknow, Uttar Pradesh (UP), belonging to the Bharatiya Janata Party (BJP); Shri Mohan Singh of the Samajwadi Party, who fought the election from Deoria in UP; Shri Harmohan Dhawan, who was a Union Minister in the government headed by former Prime Minister, the late Shri Chandra Shekhar; and Haryana Chief Minister, Shri Bhupinder Singh Hooda. Here are translated excerpts from his speech delivered in Hindi.]*

“Most of the newspaper owners and a few editors as well believe that their brand of journalism is head and shoulders above public scrutiny. It seems some of them also believe that readers have, somewhere along the way, forfeited their rights to question the integrity of the press...the media primarily draws its freedom and independence from the fact that its readers are free citizens of this country. The notion of freedom of the press follows thereafter. And if newspapers or media organizations violate the rights of the citizens of India, the right of freedom of expression could be withdrawn from them.

During the 2009 general elections, I visited all the Hindi-speaking states ... most newspapers in these states entered into deals with candidates of various political parties contesting in the general elections whereby they offered publicity packages to specific candidates and/or political parties to which they belonged in lieu of money. A package generally comprised rates (sometimes, in column centimetres) for coverage of the political activities and campaign speeches of the candidate, printing an interview with the candidate or even to launch a tirade against a particular opponent or opponents of the concerned candidate. Rate cards were prepared and given to candidates together with a warning that the newspaper offering the package would publish no news whatsoever about the individual candidate and/or his or her party if the candidate/party did not accept the package.

I have been hearing about Shri A.K. Roy, former Member of Parliament from Dhanbad in Jharkhand, for a long time. In the last election that he contested, not even a single newspaper cared to publish a line about him. Shri A.K. Roy represents the workers and labourers of that area. His

inability (or unwillingness) to pay the huge sums of money demanded by newspapers for providing publicity is understandable.

Take another example, namely, that of Shri Lalji Tandon, who helped Shri Atal Behari Vajpayee get elected each time from Lucknow. He said that there was not a single newspaper in Lucknow that had not tried to strike a deal with him. In the last election, a Lucknow-based newspaper asked him to pay a certain amount for getting news about himself published. A shocked Shri Tandon asked the newspaper owners as to why money was being demanded from him despite the fact that he had been in public service for a long time. The newspaper owners replied that no news would be published about him unless he paid money. Even newspapers that had accepted favours from him in the past refused to publish any news about him unless he paid them. Eventually Shri Lalji Tandon decided against paying money and went ahead with his decision to contest the elections without accepting any publicity package from any newspaper. During his election campaign, Shri Lalji Tandon would tell the public gathered at his political rallies to ignore what was written in those newspapers to which he had refused to pay any money. He said he would rather want those listening to him to read other newspapers. In the same election, an opponent of Lalji Tandon bought three packages: one that would ensure that negative news was published about him; another package for doing the same against Smt Rita Bahuguna Joshi, Uttar Pradesh Congress party chief; and the third package was for his own publicity. He paid the newspaper a sum of Rs one crore for carrying positive reports about him in the hope that it would ensure his victory. When Shri Lalji Tandon was declared the winner in the Lok Sabha elections, he again exhorted the public in his rallies to avoid reading certain newspapers and pointed out that despite the negative coverage given to him, he had still been able to win the elections. He is the same Shri Lalji Tandon, who had earlier ensured that a prominent newspaper owner was able to obtain a seat in the Rajya Sabha.

Similarly, Shri Mohan Singh of the Samajwadi Party who fought the election from Deoria in Uttar Pradesh, was asked to purchase a publicity package if he wanted news about himself to be published. When nothing was eventually published about him, he openly asked questions as to why he should be paying any money to the same newspaper owner to have news about himself to be published when the owner of the newspaper did not have to pay a single paisa to get elected to the Rajya Sabha.

Shri Harmohan Dhawan, who was a minister in the government of former Prime Minister, the late Shri Chandra Shekhar, contested the general elections of 2009 on a Bahujan Samaj Party (BSP) ticket from Chandigarh. Normally, BSP candidates spend large amounts of money in contesting elections, but Shri Dhawan refused to part with any money that was asked of him by newspaper owners. In a diary, he has written down the names of all those newspapers that demanded money from him. While addressing several press conferences as well as public rallies, he urged people not to believe what newspapers wrote because owners of these publications were corrupt.

The most interesting episode concerns the Haryana Chief Minister, Shri Bhupinder Singh Hooda. He once chanced upon a newspaper that was carrying on its front page, a detailed report of one of his meetings that had taken place three days earlier. Together with the report that had been printed in a box, a big picture of the Chief Minister had been published. A surprised Shri Hooda then called the newspaper's office to know the reason why this report had been published after a delay of three days. The owner of the newspaper then said he would make necessary enquiries and get back to him. The owner then called Shri Hooda and told him that what had been published was not a report, but an advertisement. An angry Shri Hooda asked the newspaper owner as to why he had published such an advertisement on the front page. The newspaper owner informed him that they did provide such services for a fee. Shri Hooda then told the owner to publish an advertisement in the following day's edition that would state: 'This newspaper lies and takes money to print news'. Petrified over the Chief Minister's terse and unexpected reaction, the newspaper owner thereafter provided free publicity to Hooda's son.

Every newspaper has made a calculation as to how much it would lose financially if it ever invited the ire of a chief minister. Some time ago I had been to Patna and happened to meet a newspaper owner during my visit there. He asked me to persuade (Bihar Chief Minister) Shri Nitish Kumar to help him by placing state government advertisements in his newspaper that had incurred a loss of Rs 73 lakh that month.

A friend of mine who had gone to campaign for a candidate in Maharashtra reported that this particular candidate had spent Rs 18 crore during the election. Friends, I recount these stories not merely for the sake of it, but because I had been a witness to some of these conversations...I understand that these days particular candidates spend between Rs 1 crore



and Rs 2 crore on payments to the media during elections. Each candidate hires on an average, two employees to write news stories about him which are printed without editing and sought to be passed off as independent editorial content.

I would like to conclude my speech with a suggestion that a law needs to be enacted, whereby, if one publishes an article after being paid a certain sum of money, it needs to be mentioned very clearly along with the article that the content has been paid for and therefore, happens to be an advertisement. Newspaper owners generally put forth an argument that what they bring out are products. But then they conveniently forget to mention the contents of their products. For example, every medicine that one buys carries information about its contents as well as its manufacturing, packaging and expiry dates. The day newspapers start giving out details of the sponsor of an editorial or a report, they would realise it is impossible carry on with the kind of fraud that is being perpetrated on readers. Secondly, before elections, the Election Commission should consider every political news story as an advertisement and should calculate the cost that must have been incurred by the candidate to publish the advertisement. This amount should then be added to the official expenditure of the candidate and if the candidate is found to have exceeded the expenditure limits specified by the Election Commission, he should be disqualified from contesting the elections. This would help break the nexus that exists between politics and many sections of the media.”

## EDITORIAL DEPARTMENT BYPASSED

*Mrinal Pande\**

Many recent steps redefining news and its dissemination in the newspapers were taken hastily after bypassing the editorial department. They may have introduced lethal and invisible viruses within the system that may corrode and finally kill the newspaper. The vernacular media may be feeling cocky, having pulled themselves out of physical poverty under their own steam, but they have yet to learn how to deal firmly and decisively with another kind of poverty — that of the professional, ethical kind.

One is not being paranoid here. Not too long ago, some major dailies introduced a devilishly cunning scheme of offering what was innocently labelled ‘Ad for Equity’. This met with loud applause from many managerial bosses all over. But before long the realty, aviation and automobile sectors went into a tailspin, and the scheme left the companies that had adopted it red-faced and holding bags of air tickets, empty flats, unsold cars and so on.

A little later, during some of the Assembly elections in 2008, the local editions of several multi-edition Hindi dailies started displaying laudatory and frequently contradictory news items on their front pages about specific candidates contesting from the respective areas. With zero news value, none of these items merited such display, but through the election period the front pages and op-ed pages of some dailies continued to carry the mug-shots of particular candidates, even predicting a record win for him or her.

The dailies may or may not have collected some Rs 200 crore with this little duplicitous exercise in psephology, but a new idea of what has now come to be called ‘political advertising’ was planted across the country, triggering a trend. And soon one heard that the marketing and media marketing managers at several media houses were getting ‘creatives’ prepared about what was on offer, in time for the general elections. Several party functionaries who manned party ‘war rooms’ during the period, when quizzed, confessed to having been shown ‘impressive’ PowerPoint

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\* Mrinal Pande (born 1946) is an Indian television personality, journalist and author, and till recently chief editor of Hindi Daily, *Hindustan*. She is appointed chairperson of Prasar Bharati, the apex body of official Indian Broadcast Media on Jan 23, 2010.

presentations by major newspapers, and in turn professing an interest in the offerings.

The hard copy version of one such offering made on behalf of one Hindi daily published from a rich western Indian State blatantly delineates the phenomenon. The script claims that some 36 Lok Sabha seats in two major cities in the State, including the State capital and the surrounding areas, were 'fed' by the daily. The proposal then lays down a clear sequential map of activities it can spearhead to promote the party or individual candidates, quoting prices. At the local level it addresses the candidate, his or her supporters and well-wishers, the district-level party office, the local MLA or MLC or corporator, other local political leaders, the local advertising agency and the guardian Minister of the ruling party. At the State level it is the State political party office, Cabinet Minister and State-level political leaders, businessmen and industrialists and a State-level advertising agency. At the national level it addresses the central offices of political parties (media cells), national-level political leaders and Central Ministers from the State.

The working modalities include putting in place dedicated teams each day, comprising political or city reporters and correspondents, sub-editors, area advertisement managers and area sales managers, to do the needful. Fifteen days' general coverage is priced at Rs 20 lakh, while seven days of exclusive coverage is pegged at Rs 25 lakh. Along with this, exclusive interviews, 'only positive coverage' and 'no negative publicity of opposition candidate or party,' and extra copies of the newspaper on payment basis, are on offer -- at a price, of course. There is flexibility in making the payment: 50 per cent can be paid in cash and 50 per cent by cheque. The last frame in the presentation, ironically titled *The Way Ahead*, suggests that the daily would be willing to offer publicity on 'other occasions' also, apart from the election-time offer. How can a media hawking inviolable editorial space to politicians and their parties for personal use during elections, capture this reality for its readers and analyse it with any degree of sensitivity or honesty?

Why have the hugely successful Hindi print media that have always been in private hands and quite free professionally, begun to trivialize their own base and con their readership for piffling short-term gains? If this trend continues, the readers will react, and the next round of closures will have more serious implications, not just for those who will lose their jobs but also for the readers' understanding of where they live and how their

reality is inviolable and a part of the nation's reality. Hindi newspapers inspired by the capitulation of their big brothers in the media business may dent the case for India's vernacular press, but cannot demolish it. When it does its job, a professionally run vernacular paper, funded jointly by advertising and paid-for-circulation, remains the best bet as a scrutineer of democracy and the best guard for the inviolable reality of our public spaces.<sup>1</sup>

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1 Excerpts from article published in *The Hindu*, March 18-19, 2010.

## **SELLING NEWS – SELECTED ANECDOTES (EXCERPTS FROM PCI REPORT ON PAID NEWS)**

### **I. Hindi Press**

Here is a selection of examples from the Hindi language press that could be construed as examples of “paid news”:

The Ranchi edition of Dainik Jagran published a “news package” on page 3 of its April 15, 2009 edition, in favour of a candidate belonging to the Jharkhand Mukti Morcha (JMM) Shri Kameshwar Baitha. This news item stated that Shri Baitha was “getting the support of each and every section of society” and that he would win elections from the Palamau Lok Sabha constituency. There is no credit line to this news item and the font used for this news item was different from the font used in other news items in the publication. On the same page, the newspaper had published another news item stating that there would be a triangular contest between three candidates belonging to the JMM, the Jharkhand Vikas Morcha and an independent candidate. This report has been credited to a reporter of the newspaper.

On April 13, 2009, the Ranchi edition of Dainik Jagran published two “news” items on page 7, both relating to the Chatra Lok Sabha constituency. The first item was in favour of the Rashtriya Janata Dal (RJD) candidate Shri Nagmani (one name) with the headline stating: “Nagmani is getting support from every class and section” virtually declaring that he would become the undisputed winner. The same page had another “news” item claiming that Shri Arun Kumar Yadav, a candidate belonging to Janata Dal (United), who contested from the same constituency, would emerge a “clear winner”. Both the items do not carry any by line although the font used is different from the font used for other news articles in the publication. Two other newspapers published from Ranchi, Prabhat Khabar and Hindustan, also published articles praising various candidates before the Parliamentary elections but the former placed the following line on top of each such item “PK Media Marketing Initiative” while the latter publication added “HT Media Marketing Initiative” at the bottom of such items.

Former Civil Aviation Minister Shri Harmohan Dhawan was quoted in Pratham Pravakta magazine (in its edition dated July 16, 2009) stating: *“I was contesting the 2009 elections on a ticket of the BSP from Chandigarh. Representatives of the print medium came to me and asked for money. They said their newspapers will give me coverage if I paid them money. They offered a ‘package’ to me*

*and in one such 'package' I was told editorials would be written in my favour. I have been contesting elections since 1974 but not a single newspaper asked me for money before this. Among the newspapers that offered a 'package' to me was Punjab Kesri. A representative of Dainik Jagran came to me 20 days before the election and clearly told me: 'If you want coverage in this election, you have to buy a 'package'. These packages were worth lakhs of rupees. After that, a representative of Dainik Bhaskar visited me in my home. He too offered me a "package". I turned down all these offers. I felt that newspapers would cover large election rallies where many people are present but the rallies that were conducted on my behalf were not mentioned in these newspapers whereas the rallies of other candidates were covered in considerable detail. When I raised this issue with representatives of the managements of these newspapers, they told me that nothing could be done unless I paid for a 'package'. On April 28, 2009, I spoke about this 'paid news' business publicly in the presence of (Kumari) Mayawati (Chief Minister of Uttar Pradesh and leader of the BSP). On April 30, a general manager of Dainik Bhaskar came to me and said that he was personally of the view that the pre-election activities of the BSP and its candidates should get full coverage in his newspaper but that he was helpless in this regard because his newspaper's management had taken a decision not to publish any news about any party or candidate that would not pay the newspaper. He offered me a 'package' worth Rs 5 lakh but I refused to pay. Certain reporters also told me that reports that they had written about my election campaign were not published. I realized that newspaper owners were using reporters as their tools."*

The Congress candidate from Azamgarh in Uttar Pradesh Dr Santosh Singh stated the following in an interview to Pratham Pravakta (July 16, 2009): *"After I had filed my nomination paper, a representative of the Varanasi edition of Dainik Jagran contacted me and asked me to buy one of two 'packages' worth Rs 5 lakh and Rs 10 lakh respectively, for which I was offered comprehensive coverage of my election campaign. Another newspaper, Aaj, asked for an amount varying between Rs 50,000 and Rs 5 lakh. The representatives of these newspapers who met me said they were merely following orders given to them by their managements... These representatives told me that they are just following the order of management. I did not pay any money."*

Shri Ramakant Yadav of the BJP who contested and won the Lok Sabha election from Azamgarh stated the following in an interview in Pratham Pravakta (July 16, 2009): *"Hindustan newspaper asked me to pay Rs 10 lakh for publishing 'news' about my election campaign. I refused to pay any money. In an article, the newspaper claimed I would lose the election. But, now that the results have been declared, you know that I won."*

Here are excerpts from what three contestants from the Ghosi Lok Sabha constituency in Uttar Pradesh told Pratham Pravakta (July 16,

2009): Samajwadi Party candidate Shri Arshad Jamal said: *“Newspapers such as Dainik Jagran, Hindustan, Amar Ujala, Aaj and Urdu Sahara asked me for money and offered ‘packages’ varying between Rs 2 lakh and Rs 10 lakh.”* Communist Party of India candidate Shri Atul Kumar Anjaan said: *“I have received phone calls from representatives of two of the largest newspapers in north India, Dainik Jagran and Hindustan. They asked me for Rs 15 lakh each for coverage of my campaign in their publications. When I rejected these offers, Dainik Jagran did not published anything about my activities between March 22 and April 16, the newspaper did not even publish any report about the rally that was addressed by the CPI General Secretary Shri A.B. Bardhan. When I contacted reporters and correspondents based in the Mau bureau of Dainik Jagran and Hindustan, they said they have to follow instructions issued to them from their offices in Varanasi and Delhi. When I complained to representatives of these newspapers based in Varanasi and Delhi, they slashed the rates of their ‘packages’ and I was asked to pay Rs 12 lakh.”*

BJP candidate Shri Ramiqbal Singh said the following in an interview to Pratham Pravakta reporter Shri Rupesh Pandey in Lucknow on February 5, 2010: *“During the election campaign in 2009, the bureau chief of Dainik Jagran came to me and asked me to pay money for coverage. He said that members of his bureau were just following instructions given to them by their head office. He demanded Rs 15 lakh from me. During those days, his newspaper had published a few lines about me. But much more space, in fact, two full pages, was devoted to reports about the activities of Smt Sudha Rai, the Congress party’s candidate from the constituency. I believe the publication of ‘paid news’ items resulted in between 50,000 and 60,000 voters shifting their allegiance in favour of the Congress candidate. No other newspaper asked me for money.”*

Shri Sanjeev Pandey, a freelance journalist based in Chandigarh, provided the Press Council of India, with over 70 clippings from different newspapers that were published from Haryana. All the clippings were from newspaper editions printed in the run-up to the assembly elections in Haryana and appeared to be “paid news” items. The Rohtak edition of Haribhoomi published a news item on October 8, 2009 in favour of Congress candidate Shri Birendra Singh. Shri Singh was contesting assembly elections from Uchana constituency. However, this news item carried no byline. This news item claimed that Shri Singh had been getting support from all and sundry in society. Detailed descriptions of the plans of his election campaign were also mentioned. Using the same format, Haribhoomi published a news item in favour of BJP candidate Shri Meva Singh the following day, that is, on October 9, 2009. Giving an account of

BJP National President Shri Rajnath Singh's rally, this news item claimed that *"after this rally Meva has got support from each and every section of society"*.

The Panipat edition of Dainik Jagran published a news item on page 9 of its edition dated October 8, 2009, that was in favour of the electoral prospects of the Congress. The news item did not carry any byline. The headline of the news item stated that the "good work" done by the Congress had marginalised the electoral prospects of the leader of the Opposition in the state. Each and every sentence of this news item is in favour of the Congress party. This news item criticises leaders of non-Congress parties and says that they would not be able to make a mark in the elections because the Congress had done very good work for every section of society. This news item added that candidates of the Haryana Janhit Congress (HJC) led by Shri Bhajan Lal would not be able to harm the electoral prospects of candidates belonging to the Congress.

By way of contrast, the Ludhiana edition of the same newspaper published a news item in favour of the HJC on October 11, 2009, with a headline that stated that the HJC would play the role of king or king-maker after the elections. Each line of this news item sings paeans of praise in favour of the HJC and prophesised that the party would play a very important role in forming the government after the poll results are declared. Surprisingly, on the very next day, that is, on October 12, 2010, the Ludhiana edition of the same newspaper again published a news item that was apparently paid for in favour of Shri Om Prakash Chautala's Indian National Lok Dal (INLD) in Haryana and is credited to "a reporter". The headline of this news item states that INLD would obtain electoral benefits against the incumbent ruling party, that is, the Congress.

In stark contrast to the post-poll projections of the earlier news items, each line of the last-mentioned news item clearly favours the INLD. This news item reported that there was a "wave" in favour of the INLD in Haryana and went on to predict a clear victory for Shri Chautala and the INLD. The news story claimed that the INLD would be able to easily win the magical number of 46 constituencies that would be required to obtain a majority in the state assembly in order to form a government. This news item states that the Congress party was "struggling" because of internal feuds and that this would benefit the INLD. The story did not end there.

On the next day, that is, on October 13, 2009, the Ludhiana edition of the Dainik Jagran reverted to praising the Congress in another news item.



There is no credit line given to this news story, the headline of which claimed that the Congress was ready to “repeat the history” that was made during the Lok Sabha elections when the Congress won handsomely in the state. Every single line of this particular news story praises the Congress party and the Chief Minister of Haryana Shri Bhupinder Singh Hooda. The news item claimed that non-Congress parties would perform poorly in the elections, that their candidates would forfeit their deposits and went on to make a prediction that the Congress would win 75 out of the 90 seats in the state assembly.

In a letter to the Press Council of India dated December 02, 2009, Shri Om Prakash Chautala, National President of the Indian National Lok Dal, expressed his “disgust” at the phenomenon of “paid news” and cited the example of the front page of the Haryana edition of the Dainik Bhaskar dated October 13, 2009, the day of polling for the state assembly elections, “which carried only the Congress party’s advertisement”. He added that half of the second page of this edition of the newspaper again carried an advertisement “along with a few news items that were obviously paid” (for) with headlines claiming that the Congress was “about to create history” in the state. Shri Chautala was of the view that if the power of the media was misused in such a blatant manner and used to drown dissenting voices, people of the country would lose their faith in the Constitution of India which guarantees free and fair elections.

On December 23, 2009, the Uttar Pradesh Journalists’ Association, Faizabad, sent a letter to the Press Council of India, condemning the practice of “paid news” adding that such malpractices would destroy the independence of journalism and thereby, democracy in the country. A Lucknow-based non-government organization, the National Alliance of People’s Movements, analysed issues of four Hindi language daily newspapers that were published between April 01, 2009 and April 30, 2009 from Lucknow and Gorakhpur. These newspapers were Dainik Jagran, Dainik Hindustan, Rashtriya Sahara and Voice of Lucknow and documented a number of instances of “paid news” articles. The organization was of the view that these articles violated the Conduct of Election Rules. It suggested that the Registrar of Newspapers of India should cancel the registration of the concerned publications. It was pointed out by the NGO that many of the so-called “paid news” articles were in favour of Shri Akhilesh Das Gupta, the candidate of the Bahujan Samaj Party who contested from the Lucknow Lok Sabha constituency (and who,

ironically, stood in third position after Shri Lalji Tandon of the BJP and Smt Rita Bahuguna Joshi of the Congress after the results of the election were declared). Shri Akhilesh Das Gupta was quoted in Outlook weekly (December 21, 2009) saying: *“I don’t blame my party if it pays for news in its favour; there is a general media bias against my party.”*

There are many more examples of “paid news” that were brought to the attention of the Press Council of India from newspapers published from, among other states, Andhra Pradesh and Maharashtra. Before enumerating these instances and providing examples of how representatives of newspapers denied having asked candidates to pay money for publishing news articles about their activities despite considerable circumstantial evidence to the contrary, it would be instructive to first provide an overview of the laws of the country as they stand in this regard.

## **II. Andhra Pradesh and the sale of Editorial space**

In a letter to the Press Council of India dated January 23, 2010, Shri Vijay Darda of the Lokmat group of newspapers wrote: “at the outset, it would not be out of place to mention that the Press Council has ‘woken up’ to this issue pretty late in the day. Media organisations have been officially selling their news space for quite a long time and the Press Council of India has been a mute spectator. As the number one Marathi newspaper group in the country, we have a firm commitment to maintaining credibility and the faith of our readers. We adhere to the highest standards of professional excellence of our volition, it is our chosen path and shall remain so.”

Yet another Hindi language newspaper, Hindustan, published by HT Media, had prominently carried advertisements of a politician, without identifying him as such, in its Varanasi edition – the text size and the font were designed to give it the look of a news item. On April 30, 2009, the day when elections took place, the Varanasi edition of Hindustan carried an item that deceptively looked like a news story on top of its front page with a headline that suggested that there was a “wave in favour of the Congress”. The following day, the newspaper later apologised to its readers for the mistake and said that it made a distinction between news and advertisements. The representatives of Hindustan told the Press Council of India that when they realised their mistake they were quick to point this out to readers.

The representatives of HT Media provided the Council a letter that had been published in Outlook weekly (January 18, 2010) wherein Shri Rajiv Verma, Chief Executive Officer, HT Media Limited wrote: “We do not pass off sponsored news in the garb of editorial content. To the specific instance related to the Varanasi edition of Hindustan..., the articles were published under the advertiser sponsored content tag. Owing to a mistake by an overzealous advertising manager, the style and look turned out to be similar to the main paper. To remove any confusion among our readers, a clarification was issued the very next day on the front page of Hindustan’s Varanasi edition. The erring manager was also suitably reprimanded. We have had no instance of any editorial transgression other than the unfortunate incident stated above....For all our publications, we have clear guidelines for ‘sponsored’ features that get carried with a clear notation or marking and in a look and style that is visibly different from our editorial content.”

HT Media also denied that the former editor of Hindustan Smt Mrinal Pande had resigned owing to the incident in the paper’s Varanasi edition, among other things. “Nothing could be farther from the truth as the said incident took place in April 2009, while the editor resigned five months later in September 2009 due to entirely different reasons...”

Speaking to the Press Council of India, a representative of Punjab Kesri too denied of ever having sold editorial space for money. When the Council specifically asked him what he had to say about a senior manager’s comment to Outlook that the same newspaper had earned anywhere between Rs 10 crore and Rs 12 crore for carrying “paid news” items during the 2009 Lok Sabha elections, the representative said that it was not his prerogative to comment on the internal matter of another family-held publication. (Punjab Kesri’s editions are published from Delhi and Jalandhar but under different managements.)

That the malaise had spread through the country, infiltrating big and small newspapers alike is evident from what Haryana Chief Minister Shri Bhupinder Hooda’s admission that he was so disturbed by a series of negative reports in a leading multi-edition Hindi daily in his state that he offered to pay in order to ensure that the reports were factually correct! In fact, Shri Hooda was also questioned by the press for the expenditure incurred on advertisements that praised his government in the run-up to the assembly elections of Haryana in 2009.

Newspapers continue to deny that editorial space was put up for sale during elections. But reports coming from Gujarat, Karnataka and Chhattisgarh showed how editorials of various newspapers were pressurised by their respective managements to stop asking questions. Shri Hooda went as far to state that news reporters were not at fault for the malaise of paid news. "The journalists are not at fault here because fact-finding journalism has now become a commercialised activity with the present owners having turned newspapers into a business proposition," said Shri Hooda to Outlook.

Several politicians have blamed the media, on record, of trying to extort money from them by either subscribing to their rate cards devised especially for the elections or by paying a certain sum in lieu of substantial positive coverage.

In a letter to the Press Council of India, Shri K. Ramasubramanian, state secretary of the Bahujan Samaj Party in Tamil Nadu said how he was assured of positive publicity by the media during the election campaign provided he shelled out money in the range of Rs 4-5 lakh for a period of 15-20 days under a special scheme designed by the newspaper management. *"Further I was also enlightened by a publication's management that if I released advertisements soliciting votes in newspapers I was accountable to the Election Commission which was monitoring the election expenses of candidates contesting in elections. Whereas, when the message appeared as an editorial piece, it would help the candidate conceal the expenses incurred"*, said Shri Ramasubramanian.

Congress Member of Parliament from the East Delhi Lok Sabha constituency in Delhi, Shri Sandeep Dikshit narrated as to how he was asked by newspapers and television channels to pay up if he wanted his favourable editorial coverage. "I refused to pay up when reporters (under pressures from their management) came up to me asking whether I wanted to get into an arrangement with their newspapers if I wanted news in my favour," he said. Shri Atul Anjaan of the Communist Party of India named television channels Aaj Tak and newspapers Dainik Jagran and Punjab Kesari for demanding money to publish positive news about him. When he refused to pay, the newspapers responded by blacking out any news about him altogether from its pages. His election campaign went unreported.

Shri Parcha Kodanda Rama Rao of the Loksatta Party, in a letter to the Chairman of the Press Council of India dated February 10, 2010 and his subsequent deposition before Press Council of India members on

February 10, 2010, stated: “I made (a) representation to the Returning Officer of my constituency to include the expenditure on paid news in respective candidates expenditure account, all in vain. I enclosed copies of all the paid news items of three candidates namely, K. Daya Sagar Rao of Congress, M. Ravindra Reddy of PRP (Praja Rajyam Party) and Vinay Bhaskar of TRS (Telegana Rashtra Samithi) from March 16, 2009 to March 28, 2009 and also calculated the amount of total paid news for the said period based on the prevailing market rates as approved by the state government department of public relations and information. Further as the Telugu newspapers were completely ignoring my campaign and my expenditure, in their coverage, I called up the Eenadu advertorial executive on April 10, 2009 to cover my campaign. For the remaining days he demanded Rs 1 lakh but I agreed to pay Rs 50,000 and paid it there and then in cash. He neither gave me any receipt nor acknowledgement for the said amount. The result of my payment was evident in the news coverage given to me on April 13, 14 and 15, 2009 as compared to inconsequential coverage given to me from March 28, 2009 to April 12, 2009.

*“What is happening between the candidates and the newspaper managements is known only to both of them and it is a perfect cash transfer scheme from one to the other. It cannot be proved unless a secret detective operation is carried out with video cameras. However, I have established circumstantial evidence for the whole shady transaction in an election petition in the High Court of Andhra Pradesh.”*

Shri K. P. Reddaiah Yadav, former Member of Parliament and Vice President, Praja Rajyam Party, Andhra Pradesh, wrote to the Press Council of India on August 21, 2009, alleging that Sri Ramoji Rao, who heads the Eenadu group of publications, had “hatched a plan with other newspaper managements” to charge money from candidates for “election packages” for each Parliamentary and assembly constituency. The “package” envisaged that each candidate should pay Rs 10 lakh to each newspaper for 15 days for favourable coverage about himself or herself. Shri Yadav alleged that a number of publications such as Eenadu, Andhra Jyothi, Sakshi, Vartha and Andhra Bhoomi and television news channels like TV9, ETV-2, TV-5, HMTV News had received money for publishing or broadcasting “paid news”.

Among other publications, Eenadu, quite predictably, denied accepting any money. Shri Ramoji Rao, who heads the Eenadu group of publications stated that the problem of “paid news” was part of a larger

malaise afflicting the media in the country. He, however, claimed that Eenadu maintains a strict distinction between advertisements and news. In a letter to the Press Council of India dated February 1, 2010, Shri Ramoji Rao wrote that the “the politician of the old days enjoyed popularity and people’s love,” adding: “His involvement in the freedom movement, his activism in various social reform movements and his service to the public earned him great respect in the society. But the latter day politician, the one from the ranks of moneyed and muscled sections needed positive coverage to earn name and fame. With the money power at his command the new entrant manipulated the local media person to gain popularity and public acceptance.

“Gradually, favourable coverage in the press and the capacity to spend big money in poll campaign became the sole eligibility on the basis of which political parties chose their candidates. Money thus acted as a ladder to gain political power. Quite naturally, those who spent money also began expecting returns. Thus was formed the vicious cycle of corruption. Elected candidates justified their corruption by citing the amount they spent for getting elected. The so-called paid favourable coverage by the press is one of the off-shoots of this tendency,” Shri Rao stated.

On the other hand, campaign managers of the Congress openly admitted that television channels were open to accepting money from any political party if it wanted to improve its fortunes in the opinion polls and surveys telecast over their channels. Still others, like Shri Sudhakar Reddy of the Communist Party of India from Andhra Pradesh said that his party was assured of news space only after it had committed itself to some advertisements. “We were told that if we placed advertisements, news could be published,” said Shri Reddy.

Member of the Andhra Pradesh Legislative Council, Dr K. Nageshwar, told the Press Council of India in Hyderabad on February 10, 2010, that as attempts were made by the Election Commission of India to control money power in politics and as this effort intensified, so did the phenomenon of “paid news” which became a “new and creative channel” for illegally funding election campaigns. “After the candidate of a political party pays money to a particular newspaper, he starts treating journalists working for the newspaper as his servant or slave,” he said, adding that the phenomenon of “paid publicity” had degenerated further to become “paid mud-slinging”.

He provided an example based on his personal experience: “On February 6, 2009, the day elections to the Andhra Pradesh Legislative Council took place, Sakshi quoted the Mehboobnagar district president of the BJP virtually describing me as a traitor. What was worse, the newspaper defamed me by claiming that I was visually challenged because I had ignored the advice given by scientists and stared at a solar eclipse. This was a complete cock-and-bull story. I wrote to the newspaper and also represented to the Election Commission but nothing happened thereafter.”

Independent analyses of newspapers like the Gujarat Samachar, done by a non-government organization, People’s Media Initiative, indicates that in one particular edition the newspaper carried reports of all three candidates winning from two assembly constituencies in Maharashtra, Magathane and Malad. This naturally raises the question as whether the reports were paid for to be published. Gujarat Samachar, however, vehemently denied the charges. “We will conduct an enquiry into this and check whether it is for a fact,” a representative of Gujarat Samachar told Outlook.

Shri Jatin Desai of People’s Media Initiative told the Press Council of India in Mumbai on January 28, 2010: “So arbitrary is the paid news phenomenon that sometimes two conflicting news items appear on the same page because the paper would have reached an understanding both with a politician as well as his rival. The paper ‘reported’ that candidates belonging to the Maharashtra Navnirman Sena (MNS) and the Nationalist Congress Party were both going to win from the same assembly constituency of Magathane in Borivli. On October 13, 2009, the second page of the Gujarat Samachar carried an article without a byline that stated that Gujaratis of Magathane should vote for Shri Prakash Surve of the NCP. The same page carried another article stating that because of the support of Gujaratis, the MNC candidate Shri Pravin Darekar would win.

“The management of Gujarat Samachar (which claims a readership of 46.2 lakh) has predictably denied having sold its editorial space despite being confronted with two issues of its paper from Mumbai where conflicting reports on the fortunes of a single

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Shri Parcha Kodanda Rama Rao of the Loksatta Party, in a letter to the Chairman of the Press Council of India dated February 10, 2010 and his subsequent deposition before Press Council of India members on February 10, 2010, stated: “I made (a) representation to the Returning Officer of my constituency to include the expenditure on paid news in respective candidates expenditure account, all in vain. I enclosed copies of



all the paid news items of three candidates namely, K. Daya Sagar Rao of Congress, M. Ravindra Reddy of PRP (Praja Rajyam Party) and Vinay Bhaskar of TRS (Telugana Rashtra Samithi) from March 16, 2009 to March 28, 2009 and also calculated the amount of total paid news for the said period based on the prevailing market rates as approved by the state government department of public relations and information. Further as the Telugu newspapers were completely ignoring my campaign and my expenditure, in their coverage, I called up the Eenadu advertorial executive on April 10, 2009 to cover my campaign. For the remaining days he demanded Rs 1 lakh but I agreed to pay Rs 50,000 and paid it there and then in cash. He neither gave me any receipt nor acknowledgement for the said amount. The result of my payment was evident in the news coverage given to me on April 13, 14 and 15, 2009 as compared to inconsequential coverage given to me from March 28, 2009 to April 12, 2009.

“What is happening between the candidates and the newspaper managements is known only to both of them and it is a perfect cash transfer scheme from one to the other. It cannot be proved unless a secret detective operation is carried out with video cameras. However, I have established circumstantial evidence for the whole shady transaction in an election petition in the High Court of Andhra Pradesh.”

Shri K. P. Reddaiah Yadav, former Member of Parliament and Vice President, Praja Rajyam Party, Andhra Pradesh, wrote to the Press Council of India on August 21, 2009, alleging that Sri Ramoji Rao, who heads the Eenadu group of publications, had “hatched a plan with other newspaper managements” to charge money from candidates for “election packages” for each Parliamentary and assembly constituency. The “package” envisaged that each candidate should pay Rs 10 lakh to each newspaper for 15 days for favourable coverage about himself or herself. Shri Yadav alleged that a number of publications such as Eenadu, Andhra Jyothi, Sakshi, Vartha and Andhra Bhoomi and television news channels like TV9, ETV-2, TV-5, HMTV News had received money for publishing or broadcasting “paid news”.

Among other publications, Eenadu, quite predictably, denied accepting any money. Shri Ramoji Rao, who heads the Eenadu group of Publications stated that the problem of “paid news” was part of a larger malaise afflicting the media in the country. He, however, claimed that Eenadu maintains a strict distinction between advertisements and news. In a letter to the Press Council of India dated February 1, 2010,

Shri Ramoji Rao wrote that the “the politician of the old days enjoyed popularity and people’s love,” adding: “His involvement in the freedom movement, his activism in various social reform movements and his service to the public earned him great respect in the society. But the latter day politician, the one from the ranks of moneyed and muscled sections needed positive coverage to earn name and fame. With the money power at his command the new entrant manipulated the local media person to gain popularity and public acceptance.

“Gradually, favourable coverage in the press and the capacity to spend big money in poll campaign became the sole eligibility on the basis of which political parties chose their candidates. Money thus acted as a ladder to gain political power. Quite naturally, those who spent money also began expecting returns. Thus was formed the vicious cycle of corruption. Elected candidates justified their corruption by citing the amount they spent for getting elected. The so-called paid favourable coverage by the press is one of the off-shoots of this tendency,” Shri Rao stated.

On the other hand, campaign managers of the Congress openly admitted that television channels were open to accepting money from any political party if it wanted to improve its fortunes in the opinion polls and surveys telecast over their channels. Still others, like Shri Sudhakar Reddy of the Communist Party of India from Andhra Pradesh said that his party was assured of news space only after it had committed itself to some advertisements. “We were told that if we placed advertisements, news could be published,” said Shri Reddy.

Member of the Andhra Pradesh Legislative Council, Dr K. Nageshwar, told the Press Council of India in Hyderabad on February 10, 2010, that as attempts were made by the Election Commission of India to control money power in politics and as this effort intensified, so did the phenomenon of “paid news” which became a “new and creative channel” for illegally funding election campaigns. “After the candidate of a political party pays money to a particular newspaper, he starts treating journalists working for the newspaper as his servant or slave,” he said, adding that the phenomenon of “paid publicity” had degenerated further to become “paid mud-slinging”.

He provided an example based on his personal experience: “On February 6, 2009, the day elections to the Andhra Pradesh Legislative Council took place, Sakshi quoted the Mehboobnagar district president of

the BJP virtually describing me as a traitor. What was worse, the newspaper defamed me by claiming that I was visually challenged because I had ignored the advice given by scientists and stared at a solar eclipse. This was a complete cock-and-bull story. I wrote to the newspaper and also represented to the Election Commission but nothing happened thereafter.”

Independent analyses of newspapers like the Gujarat Samachar, done by a non-government organization, People’s Media Initiative, indicates that in one particular edition the newspaper carried reports of all three candidates winning from two assembly constituencies in Maharashtra, Magathane and Malad. This naturally raises the question as whether the reports were paid for to be published. Gujarat Samachar, however, vehemently denied the charges. “We will conduct an enquiry into this and check whether it is for a fact,” a representative of Gujarat Samachar told Outlook.

Shri Jatin Desai of People’s Media Initiative told the Press Council of India in Mumbai on January 28, 2010: “So arbitrary is the paid news phenomenon that sometimes two conflicting news items appear on the same page because the paper would have reached an understanding both with a politician as well as his rival. The paper ‘reported’ that candidates belonging to the Maharashtra Navnirman Sena (MNS) and the Nationalist Congress Party were both going to win from the same assembly constituency of Magathane in Borivli. On October 13, 2009, the second page of the Gujarat Samachar carried an article without a byline that stated that Gujaratis of Magathane should vote for Shri Prakash Surve of the NCP. The same page carried another article stating that because of the support of Gujaratis, the MNC candidate Shri Pravin Darekar would win.

*“The management of Gujarat Samachar (which claims a readership of 46.2 lakh) has predictably denied having sold its editorial space despite being confronted with two issues of its paper from Mumbai where conflicting reports on the fortunes of a single party were published. The Congress candidate in the Malad constituency of Mumbai was shown as trailing and winning on the same day! The same page of the newspaper on the same day published an article stating that the Gujaratis of Malad are supporting the candidature of Shri Aslam Sheikh of the Congress and also carried a photograph of Shri R.U. Singh, the BJP candidate from the same constituency, with a caption that stated that the Congress was losing ground.”*

### **III. Evidence Provided by the Andhra Pradesh Union of Working Journalists**

The Andhra Pradesh Union of Working Journalists (APUWJ), the first union of journalists to raise its voice against paid news and, in fact, the first body to have coined the phrase “paid news”, in its memorandum submitted to the Press Council of India on February 9, 2010, said that “the genesis of paid news started (during the) general elections (of) 2004 when small and local newspapers in mofussil towns and district headquarters in some parts of Andhra Pradesh and Gujarat started this practise in an organised way. These small newspapers owned and edited by the same person assisted by a few others entered into agreements with the local leaders of prominent parties or candidates and started publishing propaganda material of these parties or candidates as news for a fee in the run up to the elections.”

The union observed that during 2009, when the 15th general elections to country and the legislative elections to the state of Andhra Pradesh were held simultaneously, advertising copy appeared as “paid news” along with a credit line of a staffer of a newspaper in order to mislead readers into believing that the article had in fact been written by a reporter of the newspaper. Newspaper managements collected money for “paid news” items according to their advertisement tariffs without acknowledging that these were advertisements.

The APUWJ raised the issue of “paid news” during the campaign for the general elections of 2009 before the Chief Electoral Officer of Andhra Pradesh on April 10, 2009. The union pointed out that “paid news” items were leading to a subversion of the democratic election process as well as the institution of a free press. The union compiled a considerable volume of circumstantial evidence, the highlights of which included the following:

The Andhra Jyothi daily in a tabloid attached to its West Godavari district edition dated April 23, 2009, carried an article on the front party claiming that the Telugu Desam Party (TDP) candidate from Narasapuram Parliamentary constituency, Smt Thota Sitarama Lakshmi, would emerge victorious from the election battle. The article carried a headline claiming that a “huge victory” was awaiting the candidate. The same edition of the newspaper, on its back page, carried a story saying the Congress candidate from the same Narasapuram constituency, Bapi Raju was going to win the seat, with a headline that read “victory, victory”. The union observed that it was indeed unusual that the same paper was endorsing two rival candidates

from the same constituency on the same day and alleged that the stories appeared to have been written not the newspaper's journalists but by the publicists of the candidates.

A similar set of stories appeared the same day, April 23, 2009, in the West Godavari district edition of the Eenadu daily. The newspaper published on its front page an article from Bhimavaram predicting the victory of TDP candidate from Narasapuram, Smt Sitaram Lakshmi. The story carried a headline stating that she was "on her way to victory with a huge majority" On the back page of the same edition of the newspaper the same day, another story was published claiming that Congress candidate Shri Bapi Raju would win. The story's headline read: "everybody says Bapi Raju will win".

The APUWJ said that "a common phenomenon" that was witnessed in the run-up to the 2009 elections was newspapers would issue receipts claiming that an amount of Rs 3 per square centimetre was received whereas the actual amounts that were received were much higher.

The union stated that the pernicious practice of "paid news" not only exposed the greed of managements of media companies in their endeavour to maximize their profits but also posed a danger to the independence of the media, the process of elections and democratic institutions. "It is immoral, unethical and unprofessional to publish 'paid news'...to mislead the reader that (such stories are the product of the) independent and unvarnished observation of professional journalists," the APUWJ stated, adding that this phenomenon "also raises ethical and legal questions regarding the responsibility of the media towards the people in a democratic society...Those who have money power get publicity and those who have less resources will be left behind and blacked out. At times, those who do not pay money would attract negative reporting... (This is against) the concept of (a) level playing field for all candidates which is essential in an election. In addition, the candidates do not need to show this expenditure in their election expenditure. It leads to violation of election law and encourages the use of black money. Thus the democratic process of elections is subverted."

The APUWJ made a detailed study of newspapers in the West Godavari district of Andhra Pradesh for 27 days between March 28, 2009 and April 23, 2009. The study found that Eenadu published 94 political advertisements and 92 "paid news" stories, while the Andhra Jyothi published 87 political advertisements and 163 paid news stories in this

period. Other publications like Sakshi, Vaarta, Andhra Bhoomi and Surya were also found to have carried similar advertisements and “paid news” stories. One particular trend noticed by the union in the newspapers that they perused was the fact that there were a number of reports appearing in the same edition of a newspaper that would simultaneously predict the victory of two or more rival candidates contesting the same constituency. “It is all right for the candidates and their parties to claim victory and the claims can be published as news stories attributing the stories to their party leaders or their spokespersons,” the APUWJ observed, adding: “But the correspondent of the concerned newspaper cannot file two stories on the same day predicting two different candidates winning from the same constituency.”

The Telugu daily Sakshi in its letter to Press Council of India, dated February 10, 2010, on the issue of “paid news” claimed that “we are way off the target while addressing the problem. It is more like ‘barking upon the wrong tree’. As per the Election Commission guidelines, the expenditure limit in major states like Andhra Pradesh, Uttar Pradesh, Bihar and Madhya Pradesh is Rs 25 lakh for a Lok Sabha candidate and Rs 10 lakh for an Assembly candidate. In smaller Lok Sabha constituencies like Lakshwadeep, the expenditure limit is Rs 10 lakh.

“It is no secret that in the days of inflation and the ever increasing cost of living, Rs 10 lakh expenditure for Assembly candidates is ridiculously low. So is the limit for Lok Sabha constituencies. At the same time we know that Assembly candidates end up spending not less than Rs 2 crore and the figure goes up in case of Lok Sabha candidates. Even the Election Commission knows it pretty well that no candidate would reveal true expenditure nor they spend within the specified limits. In the process, the candidates invented several ways of concealing the expenditure and one of them is paid news.”

### **Use the RP Act to curb “paid news”: *Suggestions by Prof. Madabhushi Sridhar***

Speaking to the Press Council of India on February 10, 2010, in Hyderabad, Director of the Centre for Media Law and Policy, Hyderabad, of the National Academy of Legal Studies and Research (NALSAR), Dr Madabhushi Sridhar, said the “paid news” phenomenon represents a “fatal

combination” of three “Ms”, namely, the media, money and mafia, that has subverted free and fair elections. He said that earlier, politicians used to hire musclemen with huge amounts of money and train them in booth rigging. “Now...candidates are training media pens instead of mafia guns to ‘rig’ the minds of people with constant opinion bombarding,” he stated.

Dr Sridhar stated that news items misguide readers about particular candidates by reporting that they are forging ahead in elections. “They use expressions which are most of the time absolutely false. The lack of truth in such statements can be easily verified as the same page of the same newspaper also publishes a similar story about a rival candidate. It is also reported that some pages of district edition tabloids were changed twice or thrice every day to accommodate the ‘success trail’ of different candidates in the same constituency.”

Dr Sridhar says that the “Election Commission has prohibited exit polls and opinion polls and surveys by any media before the polling process is completed. This is based on the principle that news about one party’s candidate winning from one constituency should not influence voters in different parts of the state or country to favour the winning party. If the media takes money to say a particular candidate is receiving unprecedented support from the people, it could send a signal to others influencing them to vote for him. A frenzied campaign based on fabricated stories about people supporting one candidate or the other is a misuse of freedom of expression both by candidates and by the media.”

Dr Sridhar argues that the trend of publishing news for money is on par with criminalisation of elections. “It is not just a breach of media ethics or impropriety and not just the concern of the Press Council of India. It is a crime against democracy, punishable under law...the syndrome is just not the concern of the Press Council of India but a real challenge to the Election Commission of India, whose sole aim is to conduct free and fair polls....”

Dr Sridhar added: “Under Section 123 of the Representation of People Act 1951, bribery, undue influence, appeal on the ground of religion, caste, etc., publication of false statement relating to a candidate, free conveyance of voters, incurring of election expenditure in excess of the prescribed limit and seeking assistance of government servants are all considered corrupt practices. In 1989, booth capturing was added as another ‘corrupt practice’ in the law. In the present context, the media sold space and time to perpetrate undue influence and by the publication of

false statements relating to winning chances of a candidate. In the process, the candidates spent huge amounts of money for coverage ‘packages’ which is a corrupt practice. These aspects have to be considered, investigated and prevented by the machinery of the Election Commission of India, as and when such things are happening. The Commission should not leave it to be decided at the time of hearing of election petitions, which means that the state would allow perpetration of corrupt practices and then wait for ‘proof’ of the same before election tribunals...

“When the Press Council of India asked Maharashtra Chief Minister Shri Ashok Chavan to answer allegations relating to ‘paid news’ items that were published about him, he reportedly stated that the ‘appropriate forum’ to respond to is a court of law where election petitions are heard. This implies that unless the allegations are meticulously proved, it is almost impossible to handle ‘paid news’ offenders, who might by that time, reap the benefits of getting into positions of ‘power’...In Andhra Pradesh, the election tribunal (or the High Court) admitted an election petition by a candidate who contested and lost the election alleging that massive media opinion rigging was cause of his defeat.

“After declaring candidates elected, the only remedy before a losing candidate is to challenge the validity of the election... But, this legal procedure is time consuming. By the time, the court’s verdict reaches a final stage and assuming that the allegations of the complainant are upheld and conviction is confirmed, the winning candidate would have served much of his term before ‘justice’ is delivered to losing candidate. If losing candidates do not choose to get involved in a prolonged legal battle, the elected candidate may amass wealth during his term as an elected representative...Thus, the Election Commission has to become more responsible in preventing this unfair information war which favours paying candidates and is heavily against the interests of voters of this country.”

Dr Sridhar argues that “undue influence” by the media to curb free exercise of electoral rights is an election crime under Section 171C of Indian Penal Code as well as the Representation of the People Act, 1951. While the Act explains “undue influence” in general terms and supplemented the explanation with an example that threatening a candidate or elector with injury, or consequence of divine displeasure if not favoured would constitute the undue influence. Section 171C of the IPC also refers to similar language used in Section 123 and states that this is tantamount to



interference or attempt to interfere with the free exercise of an electoral right.

The punishment for the offence of undue influence is prescribed under Section 171F of IPC, which says punishment of imprisonment up to one year or fine or both could be imposed. In both laws, whereas the first part is a general definition which could include any attempt to unduly influence, the subsections in both laws provide examples of undue influence but these are not limited to these examples only. Subsection (2) of Section 171F of the IPC starts by stating “without prejudice to the generality of the provisions of subsection (1)” and this means that any undue influence not contemplated by this law might also be offensive. This could include the media’s interference through “paid news”, argues Dr Sridhar. Voters can be influenced with statements of the good deeds of the candidates and their achievements, but these should not be “undue” and become tantamount to “abuse of influence” (*Bachan Singh versus Prithvi Singh*, AIR, 1975, SC 926). The Supreme Court said (*Shiv Kripal Singh versus V.V. Giri*, AIR, 1970, SC 2097) that “what amounts to interference with the exercise of an electoral right is ‘tyranny over the mind’”.

Dr Sridhar argues that under both laws (the Representation of the People Act and the Indian Penal Code), not only any interference, but also an attempt to interfere with free exercise is defined as an electoral offence. He says that if the content of each “paid news” item is examined, the possibility of direct or indirect interference or attempt to interfere on behalf of a candidate with the free exercise of electoral right would be discovered if the reporter or the publisher were acting on behalf of the candidate as either of them took money to write such a news item during the election campaign. Dr Sridhar cited two examples of newspaper headlines, one which suggested that a candidate had “divine blessings” while the other claimed on behalf of a candidate that “though others distributed money, votes will be polled in favour of candidate Abbayigari Abbayi”. While the first headline seeks to influence votes using a divine reference, the second alleges that candidates distributed money. According to him, these two claims could be construed as criminal offences committed by the concerned newspaper under both the laws.

Publication of a false statement is both corrupt practice and electoral offence, Dr Sridhar adds. To be precise, the circulation of falsity during an election is a clear offence, he says, arguing that there is a need to investigate campaign advertising camouflaged as news during elections and prosecute

offenders, whether these be poll agents or media personnel, because such “paid news” items contained false statements that may have violated the provisions of Section 123(4) of the Representation of the People Act, 1951.

Section 123(4) of the Act defines a corrupt practice as: “The publication by a candidate or his agent or by any other person with the consent of a candidate or his election agent of any statement of fact which is false, and which he either believes to be false or does not believe to be true, in relation to the personal character or conduct of any candidate or in relation to the candidature, or withdrawal, of any candidate, being a statement reasonably calculated to prejudice the prospects of the candidate’s election”. Dr Sridhar says this definition could include the media which publishes or broadcasts statements after taking money which amounts to receiving the consent of a candidate or his agent.

Critical remarks about the personal character or the conduct of a rival candidate or propagating false information about other candidates would squarely fall within the ambit of a corrupt practice, argues Dr Sridhar. He says that if a statement published or broadcast is proved to be false, the concerned newspaper publisher or owner of a television channel could be prosecuted under section 171G of the IPC which reads: “Whoever with intent to affect the result of an election makes or publishes any statement purporting to be a statement of fact which is false and which he either knows or believes to be false or does not believe to be true, in relation to the personal character or conduct of any candidate shall be punished with (imposition of a) fine.” He contends that this interpretation of the word ‘falsity’ decides the criminality of the publication or broadcast.

Dr Sridhar says that if newspapers become akin to pamphlets of politicians during election campaigns, they should be treated as such. Section 127A of the Representation of the People Act, 1951, states that every pamphlet has to print the names and addresses of the printer and publisher and that every publisher shall send one copy of such publication to the Chief Electoral officer in the capital or to the District Magistrate and that any person who contravenes this provision shall be punishable with imprisonment for a term which may extend to six months or with a fine which may extend to Rs 2,000 or both. The concerned newspapers might have not violated Section 127A (1) as they generally publish the name of the printer and publisher every day but by not sending a copy to the Chief Electoral Officer or District Magistrate clearly marking which part of their

newspaper is in the nature of a pamphlet or advertisement, the newspaper may have committed a crime under Section 127A (2) (b) of the Act.

In case the expenditure on “paid news” together with other expenditures incurred by a candidate exceeds the prescribed limits laid down in the Conduct of Election Rules, Section 77 of the Representation of the People Act would have been violated. Dr Sridhar points out that every District Magistrate in his capacity as Returning officer or District Election Officer has the power to issue a notice to each newspaper and candidate to furnish details relating to the “sale” or “purchase” of news columns and also submit copies of the publication to verify whether the reports therein are false or not or cause undue influence that could materially affect the outcome of the election.

Dr Sridhar adds that the Income Tax authorities have enough power to demand details of such financial transactions and impose a tax if necessary on the concerned media companies. If “paid news” items are found to have materially affected the prospects of a candidate or adversely affected the prospects of his or her rival candidate, it could become a ground for the Election Commission of India declaring the election of the winner as void under Section 100 of the Representation of the People Act, he argues. If it is proved that a candidate is guilty of having indulged in a corrupt practice, then he can be disqualified from contesting elections, according to the provisions of Section 8A of the Act. Along with him, those who committed this corrupt practice would also forfeit their right to vote under Section 11A of the Act. The Election Commission is empowered to enforce these provisions of the law. Dr Sridhar points out that if what has been published is presumed to be an advertisement, then too the newspaper may be held liable for breach of the advertising code of conduct. The Cable Television Networks Rules, 1994, prescribe a number of guidelines for advertisements broadcast by television channels. Rule 7 says that advertising carried shall be so designed as to conform to the laws of the country and should not offend the morality, decency and religious susceptibilities of the subscriber. No advertisement shall be permitted which:

- derides any race, caste, colour, creed and nationality;
- is against any provision of the Constitution of India;
- tends to incite people to crime, cause disorder or violence or breach of law or glorifies violence or obscenity in any way; etc.

The rules also specify that no advertisement shall be permitted the objects whereof are wholly or mainly of a religious or political nature and that advertisements must not be directed towards any religious or political end.

Dr Sridhar points out that during elections, the Election Commission of India is immune from judicial, legislative and executive interference and has to ensure that candidates do not spend more than the limits prescribed, spread false information or exert undue influence. Even after elections are over, the Election Commission can continue to direct officers through the governments concerned to prosecute offenders in courts of law. He suggests that the Press Council of India should constitute a special task force in each district during the elections to receive complaints, make preliminary studies and report to Election Commission of India to initiate action against specific candidates, publications or television channels, if necessary. Initiation of proceedings for prosecution against media personnel and media companies could prove to be more effective than the Press Council of India issuing strictures and admonishments against errant media personnel and giving these wide publicity, Dr Sridhar opines.

He believes that while existing legal provisions are adequate to punish offenders, the provisions of the IPC could be amended to enhance the quantum of punishment and fine for electoral offences. After a complaint is received and a press clipping provided alleging publication of “paid news”, it should be presumed that the company or individual against whom such an allegation has been made is guilty and the burden should shift to the accused to prove his or her innocence. If the content of the “paid news” item is excessively tendentious or exaggerated, the presumption of liability should go up. Dr Sridhar argues, adding that over and above the suggestions outlined, the Press Council of India should shape public opinion and make more people aware of the implications of the pernicious practice of “paid news”.

In the opinion of the Press Council of India, Dr Sridhar’s recommendations are extremely comprehensive and cogently presented and deserve serious consideration.

### **“Paid News” Debate in Parliament**

**(Editor’s Note:** There is an interesting and intense debate on this unethical issue of paid news in Lok Sabha during March 2010, which reflects the opinion of the politicians from various parties. It is presented in brief here.)

The Leader of the Opposition and senior BJP leader Shri L.K. Advani said election campaigns should be publicly funded while expressing concern about the phenomenon of “paid news” which he described as a “very serious issue”. He said publications and television channels should be made to account for the revenue generated from “paid news”. The Rajya Sabha took up a discussion on “paid news” on the basis of a calling attention motion moved by Shri Sitaram Yechuri of the Communist Party of India –Marxist, in which the Union Minister of Information and Broadcasting Ambika Soni and the Leader of the Opposition in the Rajya Sabha, Shri Arun Jaitley of the BJP participated.

(Here are excerpts from their speeches.)

Smt Soni stated: “The government is committed to ensuring the right to freedom of speech and expression guaranteed under the Constitution of India. In pursuance of this objective of preserving the freedom of press and maintaining and improving the standard of newspapers in India and to inculcate the principles of self-regulation among the press, the Press Council of India, an autonomous body was set up under the Press Council Act, 1978. The Press Council of India has developed norms of journalistic conduct that cover the principles and ethics regarding journalism. The Press Council of India has also laid down guidelines on reporting of specific issues of public and national importance. In 1996, it drew up a set of guidelines that are particularly applicable to financial journalism. The Press Council of India has also issued guidelines on reporting of elections.

“In recent months, however, there have been a number of media reports that sections of the electronic and print media have received monetary considerations for publishing or broadcasting news in favour of particular individuals or organizations or corporate entities, what is essentially ‘advertisements’ disguised as ‘news’. This has been commonly referred to as the ‘paid news syndrome’. While this is not a new phenomenon, it has attracted greater public attention of late, and is being widely discussed and debated across the country. It has been reported that the owners of some media organizations have financial relationships, including share-holdings, with advertisers. Further, cases have been reported wherein identical articles with photographs and headlines have appeared in competing publications carrying bylines of different authors or sometimes even without bylines, around the same time. On the same page of specific newspapers, articles have been printed during elections, projecting rival candidates, both as winning candidates! While it is widely

agreed that it is not easy to find proof for such malpractices, there exists strong circumstantial evidence.

“It is, however, very commendable that this issue of ‘paid news’ has been vigorously raised by some sections of the media itself. The Editors Guild of India has in its press note on this issue dated December 23, 2009, condemned this unethical practice and called upon all editors of the country to desist from publishing any form of advertisements which masquerade as news. They went on to say that it is imperative upon news organizations to clearly distinguish between news and advertisements with full and proper disclosure norms, so that no reader or viewer is tricked by any subterfuge of advertisements published and broadcast in the same format, language and style of news. The Indian Women’s Press Corps, a body of working women journalists from print, television and online media are also highlighting this issue in a seminar...in order to build an opinion against this malpractice. The Andhra Pradesh Union of Working Journalists (APUWJ) conducted a detailed sample survey to highlight the manner in which newspapers had published ‘paid news’ items. A number of senior journalists have formally complained about the phenomenon of ‘paid news’ to the Press Council of India and the Election Commission of India.... The representatives of APUWJ named six newspapers, carrying numerous paid news stories.

“This phenomenon of ‘paid news’ is therefore, a serious matter as it influences the functioning of a free press. The media acts as a repository of public trust for conveying correct and true information to the people. However, when paid information is presented as news content, it could mislead the public and thereby hamper their judgement to form a correct opinion. Thus, there is no denying the fact that there is an urgent need to protect the right of citizens to correct and unbiased information. It is important that all sections of society should introspect on this issue as it has wide-ranging implications for our democratic structure.

Shri Yechuri stated that “paid news” was “not merely a serious matter influencing the functioning of a free press, but it is an issue that also concerns the future of parliamentary democracy in India”. He added: “The health of our democratic system rests on the inviolable principle of sovereignty being vested with the people. The people’s representatives, through the legislative bodies, exercise vigilance on the government or the executive thereby making it accountable to the people. The sovereignty of the people, therefore, is established through this system and this

inviolability is crucially dependent upon unbiased information and the proper news that the people receive. So, the role of the Fourth Estate or the media has always been very crucial in disseminating unbiased information to the people and helps them understand the policies that are involved in governance as also to decide as to who would be capable of effective governance in the country. So, this is an issue that not only affects the media or the Fourth Estate but it also affects the future of parliamentary democracy in our country....providing access to unbiased, unfiltered and objective news or information is the role that media is supposed to play. This comes under very severe strain with the emergence of the 'paid news' syndrome.

"The Hon'ble Minister has said that the phenomenon of 'paid news' is not a new phenomenon. But it is a completely new phenomenon in terms of the staggering proportion it has reached and the corporatization of media houses has actually led to a situation whereby this sort of paid news is no longer confined to any one print medium or electronic media. There are instances where large media houses not only own print media but also own electronic media and radio waves. These media houses offer packages for the projection of certain individuals in all the forms of media that they own and control. This distorts parliamentary democracy in multiple ways: (a) (the) media ceases to be objective and, therefore, distorts public perception; (b) it distorts the electoral political choices of the people by providing undue advantage to those candidates/political parties who are able to afford these packages, (c) it manipulates democracy, negating it completely by denying or by not providing equal access to those who cannot afford to indulge in such malpractices thereby breaching the provisions of the Constitution of India, and (d) it demeans the idea and essence of journalism itself.

*"There are of course well-meaning and good journalists, who have actually played a stellar role in shaping public policy in our country and in guiding political parties into directions that are better for the country and its people. Such journalists have been completely weeded out of this sort of system. In order to protect journalism from getting into this abyss, it is necessary to prevent journalism from being muscled by corporate powers. All the good work done by journalists does not find expression in the print or electronic media mostly, because the choice of what needs to be reported is directed or dictated by the money power that emerges from behind the scene. The Press Council of India, the Editors' Guild of India and the Vice-President of*

*India, have at least, on three occasions in the recent past, referred to this ugly syndrome of 'paid news'.*

“...vibrant journalism has to be restored. If this has to be restored, the undue influence of money power in journalism has to be eliminated. The Election Commission of India has listed various restrictions to ensure the conduct of free and fair elections. As per the rules of the Election Commission of India, political parties are prohibited either to paint advertisements or to stick posters on walls. Candidates are also prohibited to deliver speeches after 10 pm. However, 24-hour news channels are allowed to broadcast the campaign of a candidate or party all through the night. This is tantamount to distortion of democracy. The syndrome of ‘paid news’, actually, negates India’s system of parliamentary democracy and undermines the very essence of journalism. Corporatization of media houses is leading to such a situation and if not checked immediately, it would completely negate parliamentary democracy in our country. Therefore, I draw the attention of the Hon’ble Minister and the government to the fact that it is not enough to deliver morally sanctimonious lectures. A serious effort needs to be made to ensure probity and accountability on the part of media houses. As per reports, the size of the ‘paid news’ market in Andhra Pradesh in the elections in 2009 alone was over Rs 1,000 crore (this is a very gross underestimation). In Maharashtra, which is the cradle of ‘paid news’, the size of the market has reached a figure of some thousands of crores. It was for this reason that I said on some other occasion that elections in India are the single largest stimulus for the economy.

“Huge amounts of money are being spent on ‘paid news’ and this completely distorts news. I, therefore, suggest that there needs to be accountability on the part of media houses and journalists. I cannot, however, specify how this accountability is to be ensured. But, one method is to institute an enquiry wherever such complaints come up. If it is established that any newspaper or news channel has been indulging in this practice, the government must stop doling out its advertisements in that newspaper or news channel. Unless some deterrents of this sort are thought out, it will not be possible, at least, to control this phenomenon which is a very serious malady affecting our parliamentary democracy. Apart from putting in place such deterrent action, a consciousness against ‘paid news’ needs to be generated in society.”



Shri Jaitley stated: "... I completely share the spirit and substance of what my friend, Shri Yechury, said. I only disagree with him partly on his suggestion of possible solutions. The menace has assumed such large proportions that a solution cannot be to just deny them government advertisements. I have read the statement of the Hon'ble Minister, which is actually based on two premises – first, that this constitutes free speech; second, that the Press Council of India, which I would state is a toothless wonder, is already looking into the matter. And, therefore, both these premises, that the Press Council of India is capable of finding a solution to this, and that this is an expression of free speech, are fundamentally erroneous. If you look at the menace of money power in elections over the last few years, it has grown disproportionately. It is directly linked to the collection of funds for elections by candidates and political parties and by state governments. This leads to increase of political corruption. It pollutes the very stream of administration and public life in this country. The volumes have grown.

"Therefore, if we are to suggest a solution, as Shri Yechury has suggested of not releasing advertisements from governments in those newspapers, the magnitude of the problem, which is so large, is to be kept in mind and the solution suggested has to be proportionate to the problem and the evil that is sought to be curbed. And, what is the problem? The problem is that about a decade ago we noticed that during elections some strange media organizations would ask for money over and above the money paid for advertisements. In the last two years, the phenomenon has grown disproportionately in the sense that there has been the evolution of paid packages which are news packages. Whatever the Hon'ble Minister has highlighted in the statement is all evidence of that. Not only this, political parties and candidates are being compelled to pay to prevent blackout of their campaigns by media houses and to prevent disproportionate coverage to rival candidates.

"This problem also exists, besides elections, in the sphere called business journalism. In fact, one of the outgoing chairpersons of the Securities and Exchange Board of India, in his farewell speech, referred to the existence of the anchor investor. Therefore, this problem, in a different sense, though it cannot be termed as 'paid news', also existed in the sphere of business journalism. But, here, we are predominantly concerned with the manner in which the practice is polluting the whole electoral process. Some respectable media organizations, as I witnessed in the last general elections,

legitimized this practice. It was legitimized by the former organization of broadcasters, saying to its members that all of you must, now, form a cartel and increase your rates over and above commercial advertising for political advertisement. This was called 'election premium'. And, when candidates and political parties protested as to why they were being charged more, they were told that they would be compensated by way of live coverage of rallies and of press conferences. Therefore, coverage of rallies and press conferences got linked to those who paid this extra election premium. This is where the problem stands.

"So, the first issue the Hon'ble Information and Broadcasting Minister will have to address: Is this an expression of free speech? Unquestionably, this is not an expression of free speech. Free speech is intended to be a right guaranteed to people to express their views. What seems to pollute the very political system and the electoral system is that we all came up with a conservative notion that news must be fair and views are free. There is freedom to express your views, but as far as news coverage is concerned, it is sacred. Whatever the newspapers write and the television channels broadcast is secondary. The primary rights of free speech belong to a viewer or a reader. It is the right to knowledge; it is a right to information. He is entitled to unadulterated information, as far as news is concerned.

"Today, 'paid news' is passed on to the viewer/reader without even mentioning that this is just another form of 'advertisement' and is nothing more than propaganda; and if the gullible viewer or reader is asked to absolve that, that affects the human mind. When we grow in terms of economy, let us not forget that while industries can shape the economy of the country, media will shape the human mind. Therefore those who are in a position to pay more for this adulterated information are shaping the human minds in this country accordingly. No student of constitutional law will ever tell you that 'paid news' is free speech. At best, it could be trade, it could be business, and, therefore, the government has to take this out of the arena of free speech and put it in the arena of business or trade, all in public interest, rather than leaving it in the hands of the toothless wonder called the Press Council of India.

"Therefore, if the government has a will to stand up and find a solution, it would be possible to find solutions. Once 'paid news' is sent to the arena of business, it would be clear to establish that it is nothing more than trade and that too a trade with an unlawful objective. It is unlawful because there is violation of the Income Tax Act. You are taking money in

a colour which is not permitted. You are inciting people and involving people by wholesale violation of electoral laws. You are subverting one of the basic features of India's Constitution which is the conduct of free and fair elections, and, therefore, the entire exercise that is being done is a complete corruption of the electoral process and is a trade or a business with an unlawful purpose.

"Therefore, does the government of the day have the ability to stand up and say that this business or trade which threatens Indian democracy is going to be prohibited or not prohibited? When market malpractices come up in terms of business, you have anti-trust law, you have market regulators to try and stop this. The kind of evidence that the minister has given in the statement itself saying that a simple solution, a remedy is possible, and I am requesting the Hon'ble Minister; and that is going to be my query. Once it gets into the area of unlawful trade or trade with an unlawful purpose, you prohibit it through legislation, you create a regulator. A regulator must be a judicial authority and therefore the easiest thing to do is: (once) the Election Commissioner, on receipt of a report from the Returning Officer or even otherwise from any other person, (is) ... satisfied that there is some case made out, (he) refers it to the tribunal headed by a judge. Then, the candidate concerned, the political party concerned, the media organization concerned, must face that.

"The world over, regulators have now started a new system. Prosecutions take years and years and nobody is scared of them and so the regulators hear these matters and deterrent penalties are imposed. Look at the competition law. If somebody is accused of cartelization, the penalty will be ten times the volume of business. So, it may be Rs 50 crore or Rs 100 crore. In the case of media organizations, you need not be so harsh; it could be lesser. But certainly, it has to be a deterrent penalty. In the case of (a) candidate, it has to be an offence under election laws of the world.... (The phrase) 'corrupt practice' must be amended in the Representation of the People Act and this should be a ground for setting aside the election and disqualifying the candidate and if parties indulge in this...there must be action against this. My question therefore to the Hon'ble Minister is, (whether) the government is willing to accept (the) position that this is a trade and business with an unlawful purpose which has started...It threatens Indian democracy. Are you merely going to ask the Press Council to look into this matter or are you going to take some precipitate action as far as this is concerned?"

## DISAPPOINTING DEVELOPMENTS AFTER THE REPORT

*Paranjoy Guha Thakurtha\**

Over the last few years and since 2009 in particular, the phenomenon of ‘paid news’ has acquired an even more pernicious dimension by entering the political sphere or in reporting on candidates contesting elections. Numerous favourable or complimentary ‘news’ reports on candidates appeared in newspapers and were broadcast on TV channels across the country in the run-up to the Lok Sabha as well as state legislative assembly elections in Maharashtra and Haryana that year, obviously without disclosing the fact that monetary transactions had taken place between media houses and the candidates concerned.

The entire clandestine operation has become widespread and now cuts across newspapers and TV channels, small and large, in different languages and located in various parts of the country. Worse, these illegal operations have become organised, involving ad agencies and PR firms besides journalists, managers and owners of media companies. Marketing executives use the services of journalists—willingly or otherwise—to gain access to political personalities. So-called ‘rate cards’ or ‘packages’ are distributed that often include rates for publication of ‘news’ items that not merely praise particular candidates but also criticize their political opponents. Candidates who do not go along with such extortionist practices are denied coverage. To use BJP leader Arun Jaitley’s words, it became a relationship between the blackmailer and the blackmailed.

The deception or fraud takes place at three distinct levels. The reader or the viewer is deceived into believing that what is essentially an advertisement is, in fact, independently produced news content. Then, candidates contesting elections do not disclose the true expenditure incurred on campaigning, thereby violating the Conduct of Election Rules, 1961, which have been framed and are meant to be enforced by the Election Commission under the Representation of the People Act, 1951. The newspapers and TV channels concerned typically receive funds in cash and do not disclose such earnings in their company balance-sheets or official statements of accounts. Thus, by not accounting for the money received from candidates, the media company concerned or its

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representatives are violating the provisions of the Companies Act, 1956, as well as the Income Tax Act, 1961, among other laws.

Substantial sections of the media have become participants and players in practices that contribute to this growing use of money power in politics. This in turn undermines democratic processes and norms while hypocritically pretending to occupy a high moral ground. It has also tarnished the country's reputation as foreign newspapers have started writing about, and commenting adversely on, such malpractices. Media companies that put out 'paid news' damage—if not destroy—their own credibility. Whereas such malpractices were confined to individual transgressions and to a few newspapers and TV channels till the recent past, the sheer scale of what is taking place now is alarming and frightening. Indeed, it strikes at the very core of democracy, turning the media from being the fourth estate and a watchdog of society into a 'first estate' of sorts by influencing democratic processes.

In July 2009, a two-member subcommittee of the Press Council of India, comprising K. Sreenivas Reddy and myself, was constituted to examine the phenomenon of paid news. The subcommittee, after meeting people in different parts of the country and receiving written and oral representations, submitted a detailed report running to over 36,000-words to the Council in April. A 12-member drafting committee of the PCI was thereafter constituted. On July 31, the Council decided by a narrow majority (by a show of hands as no formal voting was recorded nor dissenting notes allowed) not to annex the full report of the subcommittee to the 3,600-word report of the drafting committee before submitting it to the government. The subcommittee's detailed report was consigned to a mere footnote. The publishers' lobby eventually won. But, in the process, the sub-committee's 71-page report became 'forbidden fruit' attracting more readers than it otherwise may have.

I was deeply disappointed at the Council's decision. Some of my colleagues too were keen on the subcommittee's report being made official as we believed it may have shamed some of those named. The full report of the subcommittee has been leaked and finds place on a number of websites (including [www.outlookindia.com](http://www.outlookindia.com)). The curious situation that currently prevails is that the detailed report of the PCI subcommittee on how corruption in the Indian media undermines democracy is not official but is nevertheless in the public domain.

Each and every allegation in the subcommittee's report was attributed. Every effort was made to get back to those against whom allegations had been levelled. P. Sainath, rural affairs editor of the I, reported extensively on the widespread practice of paid news in the run-up to the assembly elections in Maharashtra—for instance, 15 editions of three competing newspapers (Lokmat, Pudhari and Maharashtra Times) carried an identical article showering praises on incumbent chief minister Ashok Chavan. Though the articles matched one another word for word, each paper carried a different byline. The CM dismissed the allegations saying he or his associates had not paid any money to any publication and suggested that a few “lazy” journalists may have been responsible for reproducing press releases verbatim. Sainath pointed out that on polling day, Vidarbha Plus (a supplement of The Times of India) carried an advertisement disguised as news on the Congress candidate, Raosaheb Shekhawat, son of President Pratibha Patil, from Amravati assembly constituency.

During the course of our investigations, we received representations from around 100 people from across India. There were many complaints against Hindi daily Dainik Jagran, the largest circulated daily newspaper in India and among the five most widely circulated dailies in the world. We also received complaints against Dainik Bhaskar, the second highest circulated daily; Lokmat, the most widely circulated Marathi daily; Hindustan, Punjab Kesari, Eenadu, Sakshi and also against the largest circulated English daily in the country, The Times of India, among others. It used to be claimed that the ‘leader guards the reader’ but in this instance, the leaders themselves took the lead in cheating the reader and lowering ethical standards.

Two examples are noteworthy. On April 30, 2009, Election Day, the Varanasi edition of Hindustan carried a story that deceptively looked like a news item on top of its front page with a headline that suggested that there was a “wave in favour of the Congress”. The following day, the newspaper apologised to its readers for the mistake. The representatives of Hindustan told the PCI that when they realised their mistake they were ‘quick’ to point this out to readers—by when polling was, of course, over. This was the only instance of a publication acknowledging that it had made an error. The rest chose to brazen it out.

Corruption in the media has been fictionalized across the world for many years. In 1941, Orson Welles scripted and directed the classic Citizen Kane about the rise and fall of a newspaper tycoon. The film was a thinly

disguised biography of William Randolph Hearst, the US newspaper publisher whose introduction of screaming headlines and sensational reporting changed American journalism forever. On its release, Hearst banned his newspapers from reviewing the film. *Citizen Kane* traced the life of a man whose career in publishing was first motivated by ideals of public service but who eventually became a ruthless businessman willing to go to any length—including organising a murder—to be the first to report the ‘news’. In Ram Gopal Verma’s recent film *Rann*, a media tycoon (Amitabh Bachchan) committed to the principles of ethical journalism fights against his own son to bring out the truth. *Peepli [Live]* graphically highlights the venality of the media and how journalists use and abuse not just the underprivileged but their own comrades as well.

Indeed, corruption in the mass media in India and elsewhere is as old as the media itself. If there is corruption in society, it would be unrealistic to expect the media to be free of this affliction. In recent times, however, corruption in the Indian media has gone way beyond individuals and specific media organisations—from ‘planting’ information and spinning views in lieu of favours received in cash or kind—to institutionalised and organised forms of corruption wherein newspapers and TV channels receive funds for publishing or broadcasting information that is sought to be disguised as ‘news’—but are actually designed to favour particular individuals, corporate entities, representatives of political parties or cash-rich candidates contesting elections.

News is meant to be objective, fair, unbiased and neutral—this is what sets apart such information and opinion from advertisements that are paid for. In recent years in India, the distinction between news and advertisements has been sought to be deliberately blurred if not obliterated altogether. The rot really set in with the ‘Medianet’ initiative of Bennett, Coleman & Co Ltd (BCCL), which publishes *The Times of India*, *The Economic Times* and so on. BCCL charges film producers, fashion designers, actors, celebrities, sportspersons, corporate captains and socialites for featuring them in some of its newspaper supplements—the so-called Page 3 phenomenon.

Later, the BCCL group initiated a ‘private treaties’ scheme whereby it entered into financial or shareholding arrangements with various companies. Simply put, instead of receiving money for advertising, BCCL would receive unknown quantities of equity shares in companies that were existing advertisers or potential advertisers. In return, these firms were to

receive advertising space in BCCL-owned media ventures. The scheme's success turned BCCL into one of the largest private equity investors in India.

By 2008, BCCL had nearly 200 companies as its private treaty clients. If favourable news is published about a client and adverse news is not reported, both the publishing company and the advertising company stand to gain—the conflict of interest was clear even if company spokespersons sought to defend the move as a pure marketing initiative. The fall in stock market indices in 2008-09 and the decision of the income tax authorities to value the transactions at old 'inflated' valuations (that is, at the share prices prevailing at the time a company entered into a private treaty agreement with BCCL), which had to be shown as assessable taxable income, robbed the scheme of some of its sheen.

As in the case of Medianet, while the private treaties scheme was started by BCCL, others were quick to follow. On August 27, the Securities and Exchange Board of India (SEBI) issued guidelines that made it 'mandatory' for all media companies to disclose their interests in companies about whom articles were published or TV programmes broadcast.

### **SEBI Guidelines**

- Media outfits covering companies in which they have stake should disclose this in news report/article/editorial on them.
- Media groups are required to disclose on their websites the percentage of stake they hold in companies with which they have entered into 'private treaties.'
- Mandatory for media companies to disclose if nominees under Private Treaties are on the board of directors of client companies or if they enjoy management control over them.

Time will tell whether these guidelines are properly implemented. (Author's article in Outlook, Weekly Magazine, used with author's permission, Ed.)



### **Living our Values: Code of Editorial Values**

*This Code of Editorial Values has been adopted by the Board of Directors of Kasturi & Sons Ltd. on April 18, 2011.*

1. The greatest asset of The Hindu, founded in September 1878, is trust. Everything we do as a company revolves, and should continue to revolve, round this hard-earned and inestimable long-term asset. The objective of codification of editorial values is to protect and foster the bond of trust between our newspapers and their readers.
2. The Company must continue to protect the integrity of the newspapers it publishes, their editorial content, and the business operations that sustain and help grow the newspapers.
3. Our editorial values are rooted in the guiding principles The Hindu set out with and communicated to its readers in ‘Ourselves,’ the editorial published in its inaugural issue of September 20, 1878. The world has changed but the principles remain vital for us: fairness and justice. The founding editorial also announces the aim of promoting ‘harmony’ and ‘union’ (unity) among the people of India and a secular editorial policy of maintaining the ‘strictest neutrality’ in matters relating to religion while offering fair criticism and comment ‘when religious questions involve interests of a political and social character.’
4. The core editorial values, universally accepted today by all trustworthy newspapers and newspaper-owning companies, are truth-telling, freedom and independence, fairness and justice, good responsible citizenship, humaneness, and commitment to the social good. Practicing these values requires, among other things, the Company’s journalists excelling in the professional disciplines, and especially the discipline of verifying everything that is published. It requires our journalists to maintain independence from those they cover, be fair and just in their news coverage, and avoid conflicts of interest. It means being interesting and innovative, and learning and mastering new ways and techniques of storytelling and presentation of editorial content in this digital age so as to engage readers and promote a lively and mutually beneficial conversation with them. Above all, it means the uncompromising practice of editorial integrity. The Company must endeavour to provide in its publications a fair and balanced coverage of competing interests,

and to offer the readers diverse, reasonable viewpoints, subject to its editorial judgment.

5. The Company is fully committed to these values, so that the business and editorial departments and actions, while operating by their own distinctive rules, are on the same page. The two sides must work together closely on the basis of mutual respect and cooperation and in the spirit of living these values in a contemporary sense.
6. The Company recognises that good journalism cannot survive, develop, and flourish unless it is viable and commercially successful.
7. Any potential conflict of interest within the Company will be resolved keeping in mind these values. Among other things, this involves raising the standards of transparency and disclosure in accordance with the best contemporary norms and practices in the field.
8. It is necessary to set and communicate internally and to the public clear standards of journalistic integrity and performance, corporate governance, and business practice.
9. There is no wall but there is a firm line between the business operations of the Company and editorial operations and content. Pursuant to the above-mentioned values and objectives, it is necessary to create professionalism in the editorial functioning independent of Shareholder interference so as to maintain an impartiality, fairness, and objectivity in editorial and journalistic functioning.

(Source: [www.hinduonnet.com](http://www.hinduonnet.com))

### **Suggestions by Securities and Exchange Board of India to Press Council of India:**

On July 15, 2009, Shri S. Ramann, Officer on Special Duty, Integrated Surveillance Department of the Securities and Exchange Board of India (SEBI) wrote to the Chairman, Press Council of India, Justice G.N. Ray observing that many media companies were entering into agreements called “private treaties” with companies whose equity shares are listed on stock exchanges or companies that were coming out with a public offer of their shares. The media companies were picking up stakes in such companies and in return, were proving coverage through advertisements, news reports and editorials. The SEBI, which has been set up under the Securities and Exchange Board of India Act, 1992, and is mandated to protect the interests of investors, felt that such promotional and brand building

strategies in exchange for shares, “may give rise to conflict of interest and may, therefore, result in dilution of the independence of (the) press vis-à-vis the nature and content of the news/editorials relating to such companies”.

The SEBI pointed out that “private treaties” may “lead to commercialization of news reports since the same would be based on the subscription and advertising agreement entered into between the media group and the company”. Furthermore, “biased and imbalanced reporting may lead to inaccurate perceptions of the companies which are the beneficiaries of such private treaties”. Hence, the SEBI “felt that such brand building strategies of media groups, without appropriate and adequate disclosures, may not be in the interest of investors and financial markets as the same would impede in them taking a fair and well-informed decision. The SEBI suggested the following:

1. Disclosures regarding the stake held by the media company may be made mandatory in the news report/article/editorial in newspapers/television channels relating to the company in which the media group holds such a stake.
2. Disclosure on percentage of stake held by media groups in various companies under such “private treaties” on the website of media groups may be made mandatory.
3. Any such disclosures relating to such agreements such as any nominee of the media group on the board of directors of the company, any management control or other details which may be required to be disclosed and which may be a potential conflict of interest for the media group, may also be made mandatory.

The SEBI communication to the Press Council of India pointed out that a “free and unbiased press is crucial for the development of the securities market, particularly with respect to aiding small investors to take a well informed decision” and urged the Council to address this issue at the earliest.

In this context, the Council referred to the existing guidelines for financial journalists that had been framed in 1996, which include the following:

1. Financial journalists should not accept gifts, loans, trips, discounts, preferential shares or other considerations which compromise or are likely to compromise his position.

2. It should be mentioned prominently in a report about a company that the report has been based on information provided by the company or its financial sponsors.
3. When trips are sponsored for visiting establishments of a company and hospitality extended, the author of the report who has availed of such facilities must invariably state these in his report.
4. A reporter who exposes a scam or brings out a report for promotion of a good project should be encouraged and awarded.
5. A journalist who has a financial interest in a company (including holding of shares) should not report on that company.
6. The journalist should not use for his personal benefit or for the benefit of his relations or friends, information received by him in advance for publication.
7. No newspaper owner, editor or anybody connected with a newspaper should use his relationship with the newspaper to promote his other business interests.
8. Whenever there is an indictment of a particular advertising agency or advertiser by the Advertising Standards Council of India, the newspaper in which the advertisement was published must publish news of the indictment prominently.

After deliberating on the issue, the Press Council of India endorsed the views expressed by the SEBI and stated that the relevant guidelines should be made applicable and mandatory not only to financial journalists but to owners of media companies as well. This would be in the interests of transparency and fairness and would reduce the incidences of biased news about companies being published that is inimical to the interests of investors.

### **The Mint code of journalistic conduct**

The Mint, a daily newspaper published from the Hindustan Times stable in New Delhi (owned by HT Media), has devised a comprehensive code of journalistic conduct and provides all its employees with guidelines for appropriate professional conduct. The code is available on the newspaper's website. The newspaper claims that the code is intended not as a statement of new beliefs or a codification of new rules of conduct, but as a reaffirmation of enduring values and practices. As per the code of conduct, the newspaper does not pay newsmakers for interviews, nor does

it pay them for taking their photographs or to film or record them. The code of conduct also enjoins upon its employees to prepare and place stories, graphics, and interactive features based solely on their editorial merits with an intention to treat companies that advertise with the newspaper in exactly the same manner as those that do not advertise. It asks its employees not to favour any company, or the subject of a story, nor to discriminate against any, for whatever reasons.

The newspaper also claims that editors and editorial imperatives dictate the design of their products and that the management makes allowance for the presentation of revenue-generating elements. However, the strong emphasis given to design elements ensures that the design always makes clear the distinction between editorial and commercial material. In the spirit of that rule, for example, the newspaper claims, it does not link, for any reason other than editorial purposes, from within the text of electronic versions of their stories to an advertiser's website.

In order to ensure that these principles are honoured, the newspaper places emphasis on the fact that there is no contact (beyond social conversations) between the vast majority of the Mint's editorial staffers and those who work in its business department. It authorises the Managing Editor or a designated surrogate to grant exceptions as necessary for the running of the business. The code of conduct further lays down that if any of its journalists or other employees ever feel any pressure from outside, or from the business departments of Mint itself, to compromise editorial material, including pressure to violate the code of conduct, they must immediately bring it to the notice of the Managing Editor and/or Deputy Managing Editor.

Here are a few excerpts from the code of conduct laid down by Mint for the professional conduct of its employees:

"Every judgment we make as journalists must be free of conflicts of interest – free even of the appearance of conflicts. Therefore, we must observe the following rules:

(1) Share ownership and trading:

In making personal investments, all employees must avoid speculation or the appearance of speculation. No employee of Mint may engage in short selling of shares, including futures and options, such as a put option.

(a) Shares you own:

You may not report, write, or edit a story about a company in which you or members of your immediate family own shares--nor about other companies in the same industry, unless it has been cleared in advance by the Managing Editor. For instance, if you own shares in Reliance, you may not report, write, or edit a story about the company or its key rivals. Nor may you mention such a company on a broadcast or cable show or Web video except in passing (as in reading a list of closing market prices). Immediate family means spouse or significant other and children 18 or younger. You may, however, invest in diversified mutual funds, diversified exchange traded funds.

In any instance where a conflict seems likely, you might have to reclude yourself from participating in the story. Again, when in doubt, ask.

(b) Shares you plan to buy:

If your job is such that you write about or edit stories on a wide variety of companies intermittently, do not invest in those companies.

You may, however, trade the shares of companies you don't cover, in industries you don't cover, provided you don't act on any information prior to being published in Mint.

You may not engage in day trading or so-called active trading, or short selling. Nor may you accept "friends and family" shares from companies that are about to go public. Nor may you knowingly participate in unethical market-timing schemes that any mutual fund may engage in. The three-month rule does not apply to publicly available mutual funds.

Additionally, you may not trade in any share or financial instrument based on information gathered by anyone at Mint before a story is published. If an article on the information is not published by Mint but the information becomes public information the above restriction does not apply. Be aware that we may report suspected insider trading to the appropriate authorities and will cooperate fully in any subsequent legal actions. Remember, as well, that people who are caught engaging in insider trading often spend time in jail.

Employees are encouraged to be long-term investors in Mint stock.

(c) Special situations:

There may be instances in which an editorial employee inherits stock from a non-spousal relative, or in which a newly hired employee or a person who is under contract to Mint arrives with stock holdings. In such cases, you have these options:

You can divest your holdings.

You can ask the Managing Editor to let you keep your holdings with the understanding that.

You must recuse yourself from covering companies (and their industries) in which you own securities.

Be aware, though, that even if you get such permission, recusing yourself extensively could limit your assignments and your ability to perform your job.

(2) Reporting share ownership:

You must disclose in a confidential memo to the Managing Editor your ownership of shares in individual corporations and also such holdings of your spouse, significant other, and other members of your immediate family. Your shareholdings memo does not have to disclose the number of shares you own, just the company names.

You must submit this memo on your holdings to the Managing Editor every six months using a form that will be provided to you. New editorial employees must sign this code when they are hired -- and immediately thereafter submit the required share-disclosure statement.

(3) Reporting other conflicts:

You must include with your financial disclosure memo a description of any other potential conflict of interest, including your other financial holdings plus any personal conflict that might arise from family connections or employment. If your spouse works at, for example, Reliance or The Economic Times, please disclose this information.

(4) Other conflicts:

During the discussion of a potential assignment, you must also disclose other business activities that may conflict with your Mint work, or that may appear to. Such activities include but aren't limited to: Holding a

part-time job, working as a consultant, engaging in any form of public relations in any capacity, accepting speaking fees, ghost writing material for anyone other than an independent author, accepting compensation in any form for anything other than journalistic work, writing for publications that Mint considers to be competitors, and doing commercial photography or design work for the subject of a story or a broadcast segment you'll be helping Mint prepare."

Mint further lays down guidelines on the financial dealings with sources and subjects of stories; restrictions on accepting gifts, meals and entertainment and travel advisories for its journalists.

"...In situations where a company with whom Mint has an editorial partnership offers you favours, you must comply with the Mint Code of Business Ethics, which states in part: "No gift having more than nominal value and no loan (other than a normal bank loan) may be accepted from any person or firm having current or prospective dealings with the corporation."

In relation to political and civic activities, Mint lays down the following guidelines.

"Many companies, for a variety of reasons, participate in the partisan political process, at various levels of government. As a publisher, Mint will have a different tradition. Mint does not contribute, directly or indirectly, to political campaigns or to political parties or groups seeking to raise money for political campaigns or parties. All news employees and members of senior management with any responsibility for news should refrain from partisan political activity judged newsworthy by their senior editor or in the case of senior management, the Managing Editor. Other political activities (including "issue oriented" activity) are permitted, but should not be inconsistent with this code."

It should be noted that very few publications have codified ethical norms of conduct and behaviour of its staffers in the manner the Mint has. The Press Council of India would encourage all media organizations to not merely emulate such an example but, more importantly, also ensure that all staffers adhere to the ethical norms and principles laid down in letter and spirit.







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