SUMMARY AND CONCLUSION

In this thesis, the researcher has summed up the multifarious aspects of the freedom of speech and expression after doing an elaborate doctrinaire and non doctrinaire study. The present study is not merely an overview of freedom of speech and expression rather it has covered a spectrum of subjects ranging from the constitutional mandate of freedom of speech and expression to the much debated issues of censorship, hate speech, privacy rights, reputation, contempt of Court, media trial, copyrights, taxation, broadcasting, commercial speech and right to information. The aim of the researcher was to decipher whether the legal framework is adequate to deal with the expanding horizon of freedom of speech and expression in the present scenario and its possible abuse. The cumulative conclusion is that the legal framework is not adequate and lots of improvements are needed at various points to make the system suitable for the needs of the present times in the context of freedom of speech and expression. The researcher has attempted to provide a closely reasoned critique of the various aspects of freedom of speech and expression alongwith certain fruitful suggestions. The present study has been a rewarding exercise for the researcher who wants to unravel the socio-legal dimensions that govern or sometimes fail to govern the subject and it is a collection of information received after an incisive study of the law so that the work becomes useful for the readers and researchers in the field of freedom of speech & expression.

7.1 Final Submissions

Freedom of speech and expression is often regarded as an integral and universal concept in modern liberal democracies. The print and electronic media plays an important role in the functioning of democracy.
Freedom of speech and expression is frequently seen as the most important right as it provides the basis for other human rights.¹

It is important to mention here that the Preamble to the Constitution of India resolves to secure for the citizens of India, liberty of thought, expression, belief, faith and worship.² Further, Article 19(1)(a) of the Constitution guarantees to every citizen of India, the fundamental right to freedom of speech and expression.³

The exceptions to the right guaranteed under Article 19(1)(a) are contained in Article (19)(2) which reads:⁴

Nothing in sub-clause (a) of Clause (1) shall affect the operation of any existing law, or prevent the State from making any law, in so far as such law imposes reasonable restrictions on the exercise of the right conferred by the said sub-clause in the interests of the sovereignty and integrity of India, the security of the State, friendly relations with foreign States, public order, decency or morality, or in relation to contempt of Court, defamation or incitement to an offence.

It is worthy to mention that the press derives its rights from the right to freedom of speech and expression available to the citizen. Thus, the

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¹ For details see Supra Chapter 2.
³ Fundamental rights under the Constitution of India (Part III of the Constitution) are those basic rights that are recognised and guaranteed as the natural rights inherent in the status of a citizen of a free country. These rights cannot be infringed or taken away from the citizen by governmental action or statute except to the extent permitted by the ‘reasonable restrictions’ enumerated in Clauses (2) to (6) of Article 19. While statutory rights other than fundamental rights can be taken away by legislation, fundamental rights cannot be taken away by legislation. Legislation can only impose reasonable restrictions on the exercise of the right. Dharam Dutt v. Union of India (2004) 1 SCC 712 at 738-739, (para 36).
⁴ Supra note 2, Clause 2 of Article 19.
media has the same rights—no more and no less than any individual to write, publish, circulate or broadcast.\(^5\)

In the present era, with respect to freedom of speech and expression, several issues confront us viz. an individual’s right to free speech resulting in invading another’s privacy (personal, bodily, mental, and informational), hurting another’s sentiments, marring another’s reputation, causing threat to national security, disturbing public order, interfering with the administration of justice, degrading public policy and, ultimately, clashing with the corresponding rights of others. Particularly, in the context of freedom of print and electronic media (and now the new media),\(^6\) the problem gets conceptualized in the form of issues like media trial, hate speech, copyright, paid news, privacy, defamation, pornography and the like.

The legal machinery has tried to keep pace with the growing challenges faced by the ever expanding scope of the freedom of speech in the 21\(^{st}\) century, but the present study throws light on the fact that the legal framework is still inadequate to adapt itself with the abuse of this freedom in today’s era of Information and Communication technology.

The Indian Judiciary has done a mammoth task by creatively interpreting the freedom of speech so as to include in its ambit the right to publish, the right to circulate one’s views, the right to inform and be informed by all available means of communication, the right to broadcast, the right to reply, the right to criticise and the like. The result is an unprecedented expansion in the scope of freedom of speech and expression.\(^7\) Besides, wherever the laws were found wanting, the judiciary has tried to fill in the gaps by a liberal and constructive interpretation of the existing legal provisions. In fact, all this has magically come out in the process of balancing the individual liberties with social interest, i.e.

\(^5\) Romesh Thappar (1950), Brij Bhushan (1950), Express Newspapers (1958), Sakal Papers (1962), Bennett Coleman (1973), Indian Express Newspapers (1986) etc.; For details see Supra Chapter 5.

\(^6\) For details see Supra Chapter 5.

\(^7\) Ibid.
touching the validity of legislations infringing the said freedom on the touchstone of reasonable restrictions. As a result, an individual finds himself empowered today in the age of Right to Information.

The Supreme Court stood erect as a consoling presence to the little Indian, as a pillar of strength against executive excesses, as a watchdog of democracy and rule of law and as an ombudsman ensuring accountability of all functionaries in the governance of this great country signifying its role as the sentinel on the *qui vive*. It has a clean record. Its image remains clear and glowing. Its unblemished record of service to the people makes it stronger day by day making unjustified criticisms irrelevant.

It is further submitted that the Courts do not merely construe the law and mechanically churn out the outcomes; they also mediate and make outcomes acceptable. They negotiate the space between the legislative mandate and empirical reality. The Supreme Court of India, in its decisions regarding freedom of speech, has derived valuable assistance from the decisions of Courts from other jurisdictions, especially those of U.S., UK, Europe etc. No country has a monopoly on democracy or freedom of expression. No Court has a monopoly on truth or wisdom. Each has to make its individual contribution to the quest and attainment of a just and decent society in which freedom of expression is cherished as an indispensable value. Nevertheless, it is too early to say that we have achieved the aim of a successful civilization; rather there are miles to go before we sleep.

### 7.2 Pitfalls in the Existing Framework

The existing system is not free from lacunas and the researcher has identified the following problem areas which need to be tackled for the smooth functioning of our democratic framework.

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8 For details see *Supra* Chapter 4.
7.2.1 No Provision Dealing with Protection of Individual Privacy

Privacy is that sphere of the life of an individual into which the Government cannot interfere. It may at times be a pure right i.e. the right literally to be left alone in the confines of one’s house, so long as no unlawful activity is carried out. It may also be the right to an unhindered exercise of some or the other constitutional right, so long as the right is exercised in a private or personal arena. It is a protection of the basic inviolable nature of the human personality.\(^{10}\)

In the Indian context, it embodies a freedom from unwarranted, arbitrary and unnecessary surveillance, search and seizure. It signifies the power to decide what kind of personal information may be disclosed, and the choice of whom the disclosure may be made to. It is a safeguard of the exercise of choice in matters fundamental to our existence. It is not merely an informational right, but a truly substantive right.\(^{11}\) However, there is no specific legislation in India that affords to an individual protection of his individual privacy.

The exponential growth of the media, particularly the electronic media in recent years, has brought into focus issues of privacy. The media has made it possible to bring the private life of an individual into the public domain, exposing him to the risk of an invasion of his space and his privacy. At a time when information was not so easily accessible to the public, the risk of such an invasion was relatively remote. In India, newspapers were, for many years, the primary source of information to the public. Even then, newspapers had a relatively limited impact given that the vast majority of the population was illiterate. This has changed today with a growth in public consciousness, a rise in literacy and perhaps most


\(^{11}\) Ibid.
importantly, an explosion of visual and electronic media which have facilitated an unprecedented information revolution.¹²

This is not a hidden fact that media reporting often results in the invasion of individual privacy.¹³ In an age of revolutionized communications and aggressive voyeurism, the individual’s privacy is under siege. But the law makers in India have shown scarce concern on the issue. While in many other countries, there are now a variety of statutes in place¹⁴ that seeks to protect these rights, Indian laws on the subject lag far behind. The Indian Supreme Court has already made much headway in giving constitutional protection to privacy by including it within the penumbra of personal liberty as guaranteed by Article 21 and by inserting the wedge of judicial review to test the reasonableness of penal laws authorized by Article 21. Of course, this aspect of privacy concerns an individual’s relation with the State but not with the media.

Investigative journalism is based on recognition of right to know. The ‘Age of Information’ is a ground reality today and a lot of power rises with the electronic media. Issues like pornography and sleaze, and the ‘right to air’ have emerged. In this context it is useful to recall that a number of thinkers have cautioned against over-use of the right to know. Mahatma Gandhi discouraged the publishing of too many books since quality could not be ensured. Granting that the right to know may provide an appropriate framework, yet rights adhere in an ethical groundwork which has never been sufficiently recognized. As there are limits to the right to expression, so also there should be limits to the right to know. At present, public institutions can continuously collect information for the surveillance and control of individuals. The right to privacy is infringed upon. In this context, should the right to know take precedence over the Right to Secrecy? Constitutional safeguards already exist for this. But the problem is

¹³ See *Supra* Chapter 6.
¹⁴ Such as the Privacy Act, 1988 (Commonwealth) and the Data Protection Act, 1988 in the UK.
one of ethics and rational cooperation, which are not seen much today and in the absence of which no solution is possible.\textsuperscript{15}

Today, unlike yesterday, personal confidentiality is the subject of state-run robbery and, therefore, the nation needs national privacy policy to protect individual rights in the instant and automated information-communication age.\textsuperscript{16}

\subsection*{7.2.2 No Specific Definition of “Decency or Morality”}

The terms ‘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.\textsuperscript{17}

The Constitution permits the enactment of laws in the interest of morality and decency, but the present laws fail to achieve this objective, because they are uncertain, frequently oppressive and are prone to curb the legitimate expression of literary, artistic and cultural ideas. The various laws and codes aimed at censoring pornography are most unsatisfactory. The laws are mostly administered by executive officers who are not familiar with literary and aesthetic values, and are not aware of modern trends in creative art, and the psychological impact of erotic matter on the majority of people.

From time and again, starting from the Hicklin test to the preponderating social purpose test, the Apex Court has devised a number of tests to judge whether a work is obscene or not. There is so much that is vague, uncertain and undefined that it is impossible to the objective about what is to be declared obscene and what should be held unobjectionable. An even greater flaw in the law is that the evidence of experts cannot be admitted to support the defence of public good. Therefore, all that an accused person can say in his defence is that the material he has published

\begin{itemize}
\item Dr. Shiva Sharma, \textit{Right to Know Versus Governmental Secrecy}, 31-32, (2009).
\item For details see \textit{Supra} Chapter 5.
\end{itemize}
was good literature or good science, and it is left to the judge, who may know very little of literature or science, to come to the conclusion whether the defence plea is good or not.

Undoubtedly, there are several legislations which put a check on the obscene element in speech. There are laws which embody restrictions on the right to free speech in the interest of decency and morality.\textsuperscript{18}

However, on a closer look, some loopholes appear to the forefront. For example- there is no definite and clear definition of ‘obscenity’ in law and it is required that the legislature must remove this anomaly by giving a proper definition of ‘obscenity’. Secondly, in no legislations has anywhere the men or women been categorized as the perpetrators of such offences and hence no punishments prescribed. Further, the exceptions of law of indecent representation permit such a depiction on good faith, however, good faith, again has not been defined in any statute. Thus, many such anomalies make their presence and they need to be attended by proper solutions. For example- the terms like ‘decency’ and ‘morality’ can be given a wide connotation in the interest of the society. Similarly, any indecent representation, if permitted for advancing the cause of art, literature, science etc., must be looked at and interpreted by the judiciary very strictly. Moreover, a National level Regulatory body is the requirement of the day which shall oversee the public and private broadcasting of issues in order to sieve from them what is indecent, and present before the public, a decent expression of one’s freedom of speech. Finally, the media fraternity is itself required to take a serious look of the issue and do self-regulation and self-monitoring with extreme care and caution. The system of reward and punishment may be introduced by way of policies by The Press Council of India whereby reward may be given to those who are able to portray women in a decent manner; and likewise, punitive action may be taken against those who defy the norm.

\textsuperscript{18} See Supra Chapter 4.
Derived from Article 19 (2), constitutional morality\textsuperscript{19} 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). It is also to be pointed out that the phrase “decency or morality” has been, generally, interpreted in terms of the phrase “obscenity”,\textsuperscript{20} whereas there may be certain expressions which have nothing to do with inculcating prurient interests; nevertheless, they need to be prevented in the interest of “decency or morality”. For example, subtle expressions preaching falsehoods, corruption, disregard for marginalized Sections etc. Further, the latest version of obscenity is hard core pornography and no provision covers the phrase and the problem gets aggravated in the internet age. Thus, immediate steps are needed to tackle this issue.

7.2.3 Too Broad a Definition of Official Secrets

It is pitiable that certain Secrecy laws are still continuing in the age of Right to Information.\textsuperscript{21} It is a reality that punitive processes are sometimes unleashed even against truthful publications including privacy of official secrets, defamation of persons, spreading of disharmony or violation of censorship laws plus more severe penalties under penal laws relating to national security, breach of privileges of the Legislature, contempt of the Court and the like. Apart from the statutory secrecy provisions, the state has other tactics to thwart the free flow information by gagging the press and also by supplying false or half-true information through its electronic media i.e. Doordarshan and Akashvani. The state power attempts to gag the press by putting economic pressure and professional interference and thereby obstruct the free flow of information.\textsuperscript{22}

\textsuperscript{19} The Delhi High Court in Naz Foundation v. Govt. of NCT and Ors. (2010) Cri. L.J. 94, has opined that constitutional morality which has been derived from constitutional values is different from popular morality, which is based on shifting, subjective notions of right and wrong. For details, see Supra Chapter 4 and 5.
\textsuperscript{20} For details see Supra Chapter 4.
\textsuperscript{21} See Supra Chapter 5.
\textsuperscript{22} Supra note 15 at 57.
The citizens have a right to know but the government sometimes wishes to be secretive. The object of Right to Information, 2005 is to balance people’s right to know and interests of Government to preserve the confidentiality of sensitive information. However, what information is “sensitive” is the prerogative of the government to decide. While commenting on the Official Secrets Act, 1923, Ms. Rani Advani had once said that “in its application and interpretation the executive and judiciary have allowed the interest of the State to be read as the interest of the Government currently in power”. Thus, the phrases like official secrets, sensitive information etc. give considerable room to the government to be secretive under the garb of protecting the national interest. What constitute ‘public interest disclosures’ need to be clearly defined. The legal protection should apply to specific disclosures only involving an illegality, criminality, and breach of regulatory law, miscarriage of justice, danger to public health or safety and damage to environment, including attempts to cover up such malpractices. It is submitted that this issue needs to be addressed at all levels at the earliest so that “gagging orders” by the government or even by the Courts do not become a rule but an exception for truthful publications in public interest.

The fifth pay Commission in its report in 1997 advocated amendment in Official Secrets Act to ensure transparency in Government functioning. The United Front government constituted a committee to look into the matter and give necessary recommendations. However, nothing concrete came out of it. There is lack of will power coming in the way of concrete action. Analysts believe that the government must not delay repealing Official Secrets Act particularly when there is right to information available now.

Recently there was a report in the Indian Express Newspaper wherein it was published that two military units began moving towards Delhi without notifying to the government of India raised a considerable alarm at

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highest levels in government and highlighted issues about top level politico-military relation. The entire establishment tried to keep this report under wraps; nevertheless, the same got published. The army called it a routine fog time exercise but so many questions revolved around the movement. Given the sensitive nature of the news, the vital question that arose was whether the alleged leak of the report and its subsequent publication is covered within the free speech protection or should it have been restricted on the grounds of security of state? Further, should media have exercised some restraint while reporting the news?

In this regard, a public interest litigation was filed by a social activist and a freelance journalist Nutan Thakur seeking a direction to the Prime Minister’s Office to conduct an inquiry to ascertain the veracity of the report and if the report was false, action should be taken against those responsible for the publication of a false report on a sensitive matter dealing with national security. The Indian Express Newspaper, on the other hand, in a statement said that it stands by the report.

The Allahabad High Court noted that the petitioner had expressed grave concern that reporting on the subject, “if permitted to continue may seriously interfere with the handling of security matters by the army, particularly the movement of troops from the strategic point of view in the field as well as peace areas”. As a result, the High Court passed an order banning the reporting of any “news item by the print as well as electronic media” regarding the movement of army troops. The Court held that this is “not a matter of the kind which should require public discussion at the cost of defence, official secrecy and the security of the country”. The Court, however, dismissed the Public interest litigation saying that it was issuing directions “without interfering with the independence of media and keeping in view the fact that the news items relating to movement of troops has

26 “HC Gags Reporting on Troop Movements”, The Indian Express, 1, 2 (April 11, 2012).
already engaged attention at the highest level in the defence as well as government”. 27

As a result, the Ministry of Information and Broadcasting issued an advisory to all private satellite TV Channels to “strictly follow” the High Court’s order. However, the Press Council of India Chairman Justice Markandey Katju said that the Council would challenge the High Court’s gag order in the Supreme Court holding that:

With respect to the High Court, I am of the opinion that the orders of the High Court are not correct. The media has a fundamental right under Article 19(1)(a) of the Constitution to make such publications, as it did not endanger national security. I may add that the Indian army is not a colonial army, but the army of the Indian people who pay the taxes for the entire defence budget. Hence, the people of India have a right to know about army affairs, except where that may compromise national security. The media did an excellent job in exposing the Adarsh and Sukhna scams in which senior army officers were involved, and they were well within their right under Article 19(1)(a) to do so. The PCI is a statutory body set up to preserve the freedom of press and for maintaining and improving the standard of newspapers and news agencies. 28

Justice Katju defended the Indian Express Newspaper saying that the newspaper is a responsible one which took eleven weeks to complete the investigation of the reported troop investigation before deciding to publish the report. Thus, he rejected the blanket ban on reporting troop movement citing national security and observed:

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27 Ibid.
I am of the opinion that reporting troop movements near the Indian border or during war time should be prohibited as that may aid the enemy and cause harm to our armed forces by compromising national security. However, there can be no general prohibition of reporting of all troop movements.\textsuperscript{29}

It is submitted that the prohibition by the High Court was in the nature of a “gag order” and the prohibition order was warranted only “by going into the question whether the news reporting was factually correct or not”.\textsuperscript{30}

7.2.4 Media’s Interference with 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.\textsuperscript{31}

The power and reach of the media, both print as well as electronic is tremendous. It has to be exercised in the interest of the public good. A free press is one of very important pillar on which the foundation of Rule of Law and democracy rests. At the same time, it is also necessary that freedom must be exercised with utmost responsibility. It must not be abused. It should not be treated as a licence to denigrate other institutions. Sensationalism is not unknown. Any attempt to make news out of nothing just for the sake of sensationalisation has to be deprecated. When there is temptation to sensationalize particularly at the expense of those institutions or persons who from the nature of the office cannot reply, such temptation

\textsuperscript{29} Ibid.
\textsuperscript{30} Ibid.
\textsuperscript{31} Rajeev Dhavan, “Publish and be damned– Censorship and Intolerance in India”, available at \url{http://www.thehindu.com/opinion/Readers-Editor/Article431603.ece}, visited on July 14, 2011.
has to be resisted and if not it would be the task of the law to give clear guidance as to what is and what is not permitted.\textsuperscript{32}

The judgments of Courts are public documents and can be commented upon, analyzed and criticized, but it has to be in dignified manner without attributing motives. Before placing before public, whether on print or electronic media, all concerned have to see whether any such criticism has crossed the limits as aforesaid and if it has, then resist every temptation to make it public. In every case, it would be no answer to plead that publication, publisher, editor or other concerned did not know or it was done in haste. Some mechanism may have to be devised to check the publication which has the tendency to undermine the institution of judiciary.\textsuperscript{33}

It is imperative that Courts bear in mind that even judicial injunctions ought not to breach constitutional guarantees. There is a public interest in the dissemination of information. Information and opinions, however improbable they sound, are entitled to be published. In cases where the subject matter of publication deals with issues of governance, corruption, maladministration or issues of misconduct, a judicial gag order ought never to be granted. Except in the rarest of rare cases, judicial “gag orders are as abhorrent as executive restraints on the media”.\textsuperscript{34}

However, there is another viewpoint also to it according to which neither does media reporting influences judges nor does it lead to miscarriage of justice.\textsuperscript{35} 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. It is no secret that the content presented to the public is often inextricably laced with opinions, bias and subjective

\textsuperscript{32} Rajendra Sail v. Madhya Pradesh High Court Bar Association and Ors., MANU/SC/0310/2005 at 14 (Para 37).
\textsuperscript{33} Id., at 13, (Para 33).
\textsuperscript{34} Arun Jaitley, “The Censor Bench”, The Indian Express, 10 (April 23, 2012).
\textsuperscript{35} For details, see Supra Chapter 5 and 6.
notions of justice. Every effort should, therefore, be made by media to maintain the distinction between trial by media and information media. 36

7.2.5 Lack of Control on the Objectionable Contents on the Internet

Internet communications cross national territorial boundaries. Their global character is one of their principal characteristics, so much so that, in the view of some commentators, effective regulation by state authorities is impossible. 37 Moreover, it is arguably undesirable to attempt it. Website operators and ISPs might not know which legal systems they will become subject to. As a result they might be prosecuted under the obscenity or hate speech laws of, say, France or Germany, for communications intended for computer users in the United States or England. Communicators in cyberspace, it has been argued, would have to be aware of the libel laws in every country from Afghanistan to Zimbabwe, if the Courts in any state where a defamatory message was accessible could claim jurisdiction and apply its law. 38 Attempts by one jurisdiction to regulate communication on the Net would inevitably chill the exercise of free speech rights in others, particularly in the United States where speech is very strongly protected. Conflicts may occur, arising from the inconsistency between the decision of a Court in one country regulating speech on the Net and that of a Court in another state refusing to enforce that judgment. 39

When the Constitution of India was written, the outer space was safe and secure because highly sophisticated equipments were not invented to encroach upon the culture of our country. High-tech communication satellites in the outer space have invaded most of our homes. Everyone knows that pornography is made available at a very cheap rate. Nudity, sex, vulgarity and violence have gone abnormal, extreme and beyond imagination. As a result, eve-teasing rape, house-breaking, pick-pocketing,

36 Sidhartha Vashisht (Manu Sharma) v. State (NCT of Delhi), AIR 2010 SC 2352.
39 Dr Sukanta K. Nanda “Information technology Act and applicability of intellectual property right with special reference to law of copyrights”, (2002) 2 SCJ 44-48 at 44.
stabbing, killing and mass-massacre have become a part of daily news in our country. The viewers are increasing and there is no possibility of their return. They print everything they wish to poison our minds. Enemy countries vomit out poisonous propaganda through their satellite channels. Our country is at a gross disadvantage because we do not have any provision of law to stop them doing wrong, notorious, nefarious, illegal and anti-national activities. This cannot be tolerated under the name of any international treaty or universal brotherhood or humanity.\footnote{Dr. Umar Sama, \textit{Law of Electronic Media}, 260 (2007).}

To add to the problem, the identity of bloggers or persons posting comments on the internet is protected, some people feel free to abuse, attack, defame, hate, hurt and harm others without fear of being held accountable. The question arises is this the purported “free speech” which Google is protecting?\footnote{Poorvi Kamani, “Who is gagging Google?”, \textit{The Indian Express}, 11 (July 11, 2012).}

Recently, a meeting of the officials from Google, Microsoft, Facebook and Yahoo was held with the Telecom Minister Mr. Kapil Sibal wherein, Mr. Sibal asked these internet companies to screen from the web some derogatory, defamatory and inflammatory content about religious figures and Indian leaders such as Prime Minister Manmohan Singh and Congress President Sonia Gandhi. However, the executives showed their inability to control the user generated content coming from India. The internet companies argued that given the volume of user-generated content coming forming the people, they cannot be held responsible for determining what is and isn’t defamatory as disparaging. Nevertheless, they assured the minister of looking into any specific complaint which may be brought to their notice.\footnote{D.K. Singh, “Screen Offensive Content about PM, Sonia, Sibal tells Facebook & Co”, \textit{The Indian Express}, 1 (December 6, 2011).}

It is submitted that our country should take a lead as the developing country and find out a proper forum where the objectionable matters are heard. Otherwise what will happen to the coming generation who do not respect moral, ethical, cultural, social and human values? That is why there
is a dire need to amend the Constitution abolishing the distinction of inner space jurisdiction and outer space jurisdiction.\footnote{Supra note 40.}

7.2.6 Government’s Unwarranted Control over the Media

Control of the media by government does not make any sense in times when we have been overwhelmed by satellite television and the information revolution. The internet brings all the newspapers of the world to our personal computer. The information monopoly of the State violates the basics of the open society to which many of the developing countries seem to be attuned with. The right to know actually becomes real for the citizens when the media informs the public about what the government is doing. People now look to satellite channels for information and entertainment and conveniently sidetrack the state-run electronic media, which manipulates the news and views to a great extent. Our press lacks maturity and needs training. Simultaneously we need to work on the media ethics. Guidelines for journalists should be developed and published, even circulated to the government and non-government organizations. Right to know is too important to be entrusted to the media alone. The media must rise above the personal interest and must cater to the larger national interest.

Recently, on the occasion of the launch of Kashmir Tribune, the Jammu and Kashmir Governor Mr. N.N. Vohra observed:

The role of media has increased manifold over the years and the impact of media reports has acquired enhanced significance. It is a responsibility of media to maintain visible impartiality through unbiased reporting. The media impacts governance, society and the course of events. An objective and a balanced media coverage of varied important issues relating to socio-economic development, governance and democracy would make an important

\footnote{Supra note 40.}
contribution in protecting and enlarging the public interest. An excessive zeal to praise or blame cannot be the basis of good reporting.\footnote{“Media must maintain visible impartiality”, \textit{The Tribune}, 6 (August 10, 2012).}

On the same occasion, the Jammu and Kashmir Chief Minister Mr. Omar Abdullah opined:

If there is too much harmony between the media and the politicians than either we are not doing our job or you aren’t doing your job or perhaps both of us aren’t doing what is expected of us. Competition is good in government, in the private sector and even in the media and I hope that it will allow an honest reportage. I have always believed that critical coverage is in fact far more beneficial than coverage that is based purely on praise. My aversion comes to not critical coverage but unnecessarily or unfairly critical coverage.\footnote{“Not averse to critical coverage: Omar”, \textit{The Tribune}, 6 (August, 10, 2012).}

However, it is also true that the Government, sometimes, has to adopt the tool of censorship to control expression which is against good taste and causes annoyance. An example is the very recent announcement by the Union Human Resource Development Minister Kapil Sibal of removal of a cartoon made back in 1949 by legendary political cartoonist K. Shankar Pillai from an NCERT Book, “Indian Constitution at Work”. The cartoon showed Ambedkar sitting on a snail with the word “Constitution” written on it, holding a whip. Behind the snail stood Jawaharlal Nehru, apparently trying to goad the snail on. The cartoon was meant to be comment on the slow pace of the framing of the Constitution. The cartoon created uproar in the Parliament and was termed “insulting” to Dr. Bhimrao Ambedkar. As a result, the minister assured the members that the cartoon shall be removed
from the NCERT textbooks. A similar incident happened also during the days of Emergency when the famous cartoonist Abu Abraham made a cartoon depicting the censorship regime of Indira Gandhi and the same was banned by the Indira Gandhi government.

All of over 50 cartoons liberally sprinkled through the pages of political science and social science textbooks for classes IX to XII that have invited the ire of Parliament target politicians, in particular former prime ministers Jawaharlal Nehru and Indira Gandhi.

Politicians are the subject of satire over pleading for votes to ticket distribution to relatives, the possible criminal-politician nexus to walkouts in Parliament, being evicted from the House by the Speaker and toppling of State Governments, to haggling over a particular portfolio and supporting and opposing Bills and so on. As many as 13 cartoons, the sharpest in the book target Indira Gandhi. They show her presiding over and overpowering an emaciated Cabinet, depict the Emergency, her picking state chief ministers of her choice and crowning Sheikh Abdullah J&K chief minister, her pushing V.V. Giri as president, and make a note of her literally sweeping polls post the Janta Party rule, her discomfiture just before Emergency as well as her tiffs with the Syndicate.

The 14 cartoons on Nehru make a reference to the China war, which was a big blow to the former PM, the tiny opposition he faced, as well as the issue of states’ reorganisation. Compared to the cartoons on Indira Gandhi, these are more good-natured. There are at least two-three cartoons on Prime Minister Manmohan Singh, his steering of the new economic policy along with Narsimha Rao, on the dialogue with former Pakistan president Pervez Musharraf, the policy on East-Asian nations and so on. Former PM Atal Behari Vajpayee, L.K. Advani, Jagjivan Ram, Charan Singh, Sardar Vallabhbhai Patel, Morarji Desai, Lal Bahadur Shastri, V.P.

46 “Government Panics as Cartoon from 1949 Halts House”, *The Indian Express*, 1 (May 12, 2012).
47 “37 Years Ago”, *The Indian Express*, 1 (May 13, 2012).
48 Anubhuti Vishnoi, “In textbook cartoons, favourite punching bag is Indira”, *The Indian Express*, 16 (May 16, 2012).
Singh, M. Karunanidhi and Rajiv Gandhi also find space amongst cartoons.\textsuperscript{49}

Following MP’s objections to political cartoons in the NCERT textbooks of social science and political science, the government set up a committee in May, 2012 headed by ICSSR Chairman, S.K. Thorat. The Committee finally recommended the deletion of 21 cartoons and replacement of around 22 captions/notes. Further, it suggested several modifications to be made in the text of the books from next year. E.g. it proposed that the word “Dalit” should be replaced with “SC”, and “apartheid” with “untouchability” or “caste discrimination”. The Committee noted that while cartoons are meant to provide visual relief and to improve teaching and learning, sensitivity with respect to various groups, too, has to be taken into account.\textsuperscript{50}

However, it is submitted that there should be some rigorous research-based method to guide the decision-making process, as opposed to rejecting cartoons on the anaemic grounds of “political sensitivity” and “ambiguity”. Then the discussion can turn away from narrow considerations of personal interests and sensitivities, and towards a rational debate that can serve as a vivid example of politics at its best.\textsuperscript{51}

The censorship regime in India, besides being state controlled is also, many a times, influenced by social pressure. Though laws are there to govern and guide those in charge of executing the legal censorship, but once the masses resort to protests, attacks, verbal and physical, on those making the expression then the rule of law gives up. Often, either the State buckles to public pressure to impose some sort of ban on the expression, or those making the expression themselves step down. In rare circumstances, the expression is allowed to prevail.\textsuperscript{52} Thus, in this area of extra-legal

\textsuperscript{49} Ibid.
\textsuperscript{50} Anubhuti Vishnoi, “Here are some of the cartoons deemed unsuitable for school”, \textit{The Indian Express}, 9 (July 4, 2012).
\textsuperscript{51} Rohit Shetty, “Whose line is it anyway?”, \textit{The Indian Express}, 10 (July 11, 2012).
\textsuperscript{52} Harini Sundershan, “Religion and Censorship in the Indian Media- Legal and Extra-Legal”, 1 \textit{MLR} 2010, 113-138 at 129.
censorship, strict policies and regulations are required, so that censorship is governed by reason and not by popular sentiments.

7.2.7 Lack of Codification of Parliamentary Privilege

The very concept of Parliamentary and legislative privilege is outdated in an age of information and accountability. The public’s right to full knowledge about the performance of their elected representatives in Parliament or in the assemblies is a matter of larger public interest and must override unwarranted privileges and immunities. Unfettered immunity yields opacity, not transparency, and is, therefore, clearly anathema to the spirit of a modern democracy.\(^{53}\)

The authors of the Constitution intended that Parliament would define its privileges. This is clear from the words of Article 105(3). It is time that privileges are precisely defined and limited to the minimum that is necessary for protecting free debate in the House.\(^{54}\) There is a need for codification of the privileges of the members of Parliament and legislators and appropriate amendments to the Official Secrets Act to enable the press to function properly and effectively.\(^{55}\)

7.2.8 Unfair and Unethical Media Behaviour

With a view to create sensationalism in the era of TRP’S, the media often indulges in unethical behaviour, sometimes crossing the limits of decency.\(^{56}\) There is no dearth of data to suggest that these kinds of reporting generate a lot of revenue for the media.\(^{57}\) Be it circulation figures for the papers or TRP ratings for the TV channels, all of them take a hike.

\(^{53}\) Since December 2004, the entire proceedings of the Lok Sabha and the Rajya Sabha are telecast live on Doordarshan. Under Gazette Notification issued by Prasar Bharati vide No. 16(1) Cable/2005 E III dated 25\(^{th}\) February, 2005, it is mandatory for cable operators in all States and Union Territories of India to retransmit DD Lok Sabha channel and DD Rajya Sabha channel on their cable network.

\(^{54}\) Supra note 12 at 229.

\(^{55}\) Jon M. Garon, “The Implications of Informatics on Data Policy”, 1 MLR 2010,14-61 at 61.

\(^{56}\) See Supra Chapter 6.

The centrality of the issue is often lost in the way the media sometimes treats certain incidents. There is no law which can compel a media outlet to give full and fair information or prevent suppression, varnishing, garbling and distortion of facts, or motivated reportage or mixing comments with facts. Only journalistic ethics may be invoked against such misconduct.\textsuperscript{58} However, there is another side to it also. Freedom of the press stems from the right of the public, in a democracy, to be informed on the issues of the day, which affect the public.\textsuperscript{59}

However, the impact of media is not always positive especially on young minds.

In a programme on Star Plus “Satyamev Jayate”, the host Aamir Khan teaches the children how to protect themselves against sexual abuse. Same day, Sony premieres the Kareena Kapoor-Imran Khan starrer “Ekk Main Aur Ekk Tu”. Without any warning from the censor bosses or the TV channel, one watches in a party scene at the film’s beginning, a matronly lady touch Imran’s derriere in the most improper manner, while winking lewdly. Surfing channels, one finds Zee TV’s reality show Dance India Dance, featuring child artistes. A five-year old girl shakes her hips, spreads her arms to do belly dance while shaking something that was absent in the anatomy of a child of her age, and winks suggestively. The important question that arises is what kinds of values is a child inheriting from the popular media?\textsuperscript{60}

Very recently, a cartoon of a famous Italian football striker Mario Balotelly published in the Italian daily newspaper \textit{Gazzetta dello sport} received a lot of criticism from the readers. The cartoon of the black Italy striker portrayed him as King Kong on top of London’s Bigben swatting away footballs, showing the striker who had conquered England in the quarter final football match of Euro Cup 2012. The incident raised a lot of

\textsuperscript{59} \textit{A.G. v. Times Newspaper}, (1973) 3 All ER 54 at 77.
\textsuperscript{60} Randeep Wadhehra, “Does truth really triumph- Children today are inheriting contradictory values from the popular media”, \textit{The Sunday Tribune}, 8 (May 27, 2012).
hue and cry in Europe as it was considered a racist comment on the Italian player. However, the newspaper later published an apology for the same.61

It is submitted that once the damage is already done, whether publishing an apology can undo the harm. Further, is there any mechanism whereby the media could be prevented from committing such a blunder rather than taking a corrective measure later on? Thus, the regulatory framework on the media needs to be evaluated. There is definitely a need of self regulation in the media, besides framing the code of ethics to be observed by it. Moreover, failure to observe the code should result in penal sanctions.

Recently in India, the Maharashtra Home Minister R.R. Patil took cognizance of media coverage of rave parties busted by the police. It was alleged that police officials themselves tip off the media before conducting such raids, and often people not involved in such parties are also filmed as they happen to be in the vicinity. The sensationalising of such events has triggered fear in the minds of the general public and the Home Minister assured that guidelines would be issued to the media regarding reporting about such events.62

The media industry has established tribunals that affect to regulate media ethics through adjudicating complaints by members of the public who claim to have been unfairly treated by journalists and editors. Complaints about newspapers and journals may be made to the Press Complaints Commission, a private body funded by newspaper proprietors. The Press Complaints Commission has formulated a Code of Practice to be followed by the press. It has no legal powers, but its adjudications will be published by the paper complained against, albeit usually in small print and without prominence. The Press Complaints Commission has been regarded as public relations operation, funded by media industries to give the impression to


62 “Norms for media on covering busted rave parties soon, Patil tells House”, The Indian Express, 6 (July 19, 2012).
Parliament that the media organizations can really put their houses in ethical order without the need for legislation. Similarly the National Union of Journalists has a code for its members, which they are all expected to follow. However, the code is seldom enforced.\textsuperscript{63}

Movies today seem to explore explicit themes of sex and violence unabashedly, and not surprisingly, attract an audience too. But how these are advertised in the public space needs to be examined. Gun holding and scruffy hooliganism have become sexy, cool and commonplace in our movies. And randomly shooting at people is seen as fun. It is, undoubtedly, true that one can decide on not watching or taking one’s children to watch such movies. But when newspapers, traditionally seen as family reading give pride of place to such ads and posters, it makes it much harder to explain why being rowdy and using guns is not right.\textsuperscript{64}

The trend of media houses reporting murders, rapes and burglaries accompanied by graphic descriptions that outshadow much of the other news. An unfamiliar reader might even believe that we are a nation of bad governance punctuated by perverted and violent actions. And one shudders to think what children who read these newspapers might be thinking. It is, no doubt, difficult to raise one’s children totally sheltered from the negative influences of the world; but to be forced into believing that violence is a natural way of life is undesirable and wrong.

The film industry and media need to review this with more responsible intentions. Sensational headlines that insinuate excessive sex and violence are irresponsible attempts to garner readership or viewership, and influence impressionable minds. Surely, there is a lucrative market for such content. But there must be a way so as not to bring it so openly into the public sphere and to stop glorifying it. Should media too start getting ratings of A, U/A and U? Or can we introduce some regulations for how headlines and movie posters and advertisements appear in newspapers? The

\textsuperscript{63} Supra note 32 at 13, (Para 34).

\textsuperscript{64} Charulata Ravi Kumar, “Staring Down the Barrel”, The Sunday Express ‘eye’, 13 (June 10-16, 2012).
Indian Broadcasting federation has made a positive attempt to address public opinion on the objectionable content. Can the print media dare to follow a self-regulated code of ethics?\(^\text{65}\)

The integrity of electronic media was questioned very recently when a Pakistan’s TV Channel “Dunya” telecasted a two-hour interview of a real estate tycoon Malik Riaz Hussain who, on an earlier occasion, had alleged having paid to Chief Justice Iftikhar Chaudhary’s son Arsalan Iftikhar, Rs. 342.5 million to influence cases in the Supreme Court. A two-judge bench of Pakistan Supreme Court had asked the Attorney General to take strict action under the law against the Chief Justice’s son, the tycoon and his son-in-law. Meanwhile, an interview was aired between Hussain and two top TV anchors Mubashir Lucman and Meher Bukhari regarding this episode. However, the said interview was trapped in a controversy when certain videos got leaked and emerged on YouTube and other social media, appearing to have been shot during advertisement breaks in the interview. The videos showed the TV anchors discussing questions and rehearsing answers with Hussain. The anchors were seen coaching Hussain, so much so that the videos gave the impression that the entire video with Hussain, who is known to be close to political parties and security establishment was scripted. There had also been rumours regarding Hussain paying off several top TV anchors for years to ensure positive coverage for himself. All this episode has, infact, raised serious issues regarding lack of accountability in the electronic media.\(^\text{66}\)

Reacting sharply to the aforementioned incident, the full Court of 16 judges of the Pakistan Supreme Court formed a two-member committee to investigate the controversial off-air clips during a two-hour interview with Riaz aired by a private television apparently designed to further malign the Chief Justice and the Court. The controversial clips brought to the surface inner rivalries of media men and barons and indicated that the interview was a fix in which Riaz was found feeding anti-Chief Justice questions to

\(^{65}\) Ibid.

\(^{66}\) “Leaked videos show Pak TV anchors coaching reality tycoon”, The Indian Express, 12 (June 16, 2012).
two anchors and receiving calls from the management and government figures prompting the anchors. The registrar of the Apex Court said the intention of the programme was to defame the judiciary as planted questions were asked from Riaz in the interview. The Apex Court directed Pakistan Electronic Media Regulatory Authority (PEMRA) to present a complete report on the issue to the Supreme Court’s Registrar.67

Again, one Pakistani channel Ary Digital TV incurred a lot of criticism from the public for showing live on the television the conversion ceremony of a Pakistani Hindu to Islam. The incident raised questions about media ethics as allegations were casted on the channel for showing such a live coverage of an individual’s personal matter for TRP’s. The Lahore Hindu Sabha felt hurt because of the telecast and alleged that such an incident has created a lot of pressure on it. It was argued that religious conversion is a very personal matter and the electronic media should refrain from the telecast of such like incidents.68

Another recent incident involving the sexual assault of a woman on the streets of Assam Capital brought into focus NewsLive, an Assamese television channel, for the role it played in reporting the said incident. In fact, there were allegations that one of its reporters orchestrated the molestation. As a result, the reporter and the editor-in-chief resigned from their posts. The whole incident raised a lot of questions regarding media ethics, sensationalizing of trivial incidents, dichotomy between print and electronic media etc. The Assam channels beamed graphic images of the slaughter, assault and stripping and the question was whether such incidents really need to be shown in such graphic detail? Further, who is to take responsibility for the mental trauma suffered by the victim whose images

68 The news was telecasted on Hindi news channel ‘Aaj Tak’ on July 27, 2012 at 10.00 p.m.
were shown, time and again, on the channels? And, how is it always the camera crew that gets the news in open public spaces and not the police?\textsuperscript{69}

It is further submitted that while reporting any incident of national importance, nobody can hijack the spirit of national interest under the guise of news, interview or opinion through the media. The Cable Television Network Act should be modified for public good. The government must have powers at first-hand to stop any type of anti-Indian propaganda with beautiful and misleading coverage.

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 election, that is sought to be disguised as “news”.\textsuperscript{70}

Such like incidents raise concerns about how media is flouting ethics in the race of becoming big power houses. Thus, there is a need to ensure that the right of freedom of media is exercised responsibly. It is for media itself and other concerned to consider as how to achieve it.\textsuperscript{71}

\textbf{7.2.9 Lack of an Effective Media Policy}

The increasingly complex and elusive media landscape has thrown fresh challenges to an unsettled ecosystem of media policy in India. Advanced communications technologies have fundamentally altered the ways in which information and meanings are delivered, organized and received. These new advancements call into question the efficacy of existing policy approaches to media, including the still-dominant conventional media. The multiple bills introduced in the last decade reveal

\textsuperscript{69} Samudra Gupta Kashyap, “Under fire for the way they treat newslive”, \textit{The Indian Express}, 9 (July 18, 2012).

\textsuperscript{70} Madabhushi Sridhar, “Corruption in Mass Media- “Paid News”, 2 NMLR 2011, 143-152 at 144. For details, see Supra Chapter 5.

\textsuperscript{71} Supra note 32 at 13, (Para 35).
a fragmented framework shaped as much by the Indian state’s staggered acquiescence to corporate interests as by the entrenched colonial structures of governance aimed at “reining in” the media, or using the technologies for targeted surveillance. Regulatory authority is currently divided between several government departments, even as the Communication Convergence Bill (2001) and Broadcasting Service Regulation Bill (2007) are still far from realizing their stated objective of introducing a comprehensive and coherent policy framework. It is thus one of the most crucial moments for media policy discussions to funnel their energy towards a meaningful debate, since the unsettled character of today’s advanced communication systems is not our burden; it is our chance to act.72

The Press Council of India (PCI) Chairman Markandey Katju, very strongly argues that an independent body is needed to monitor Indian media, because self-regulation bodies (like the News Broadcasters Association and Indian Broadcasting Foundation) don’t work. Media people often talk of self-regulation. But media houses are owned by businessmen who want profit. There is nothing wrong in making profits, but this must be coupled with social responsibilities. The way much of the media has been behaving is often irresponsible, reckless and callous. Yellow journalism, cheap sensationalism, highlighting frivolous issues (like lives of film stars and cricketers) and superstitions and damaging people and reputations, while neglecting or underplaying serious socio-economic issues like massive poverty, unemployment, malnourishment, farmers’ suicides, health care, education, dowry deaths, female foeticide, etc., are hallmarks of much of the media today. Astrology, cricket (the opium of the Indian masses), babas befouling the public, etc., are a common sight on Television channels. Therefore, Katju suggests:73

If the electronic media also comes under the Press Council (which can be renamed the Media Council), representatives of the electronic media will also be on this body, which will be totally democratic.

He further, observed that if the broadcast media claims self-regulation, then on the same logic everyone should be allowed self-regulation. Why then have laws at all, why have a law against theft, rape or murder? Why not abolish the Indian Penal Code and ask everyone to practise self-regulation? The very fact that there are laws proves that self-regulation is not sufficient; there must also be some external regulation and fear of punishment. At the same time, he clarified that he wants regulation of the media, not control. The difference between the two is that in control there is no freedom, in regulation there is freedom but subject to reasonable restrictions in the public interest. The media has become very powerful in India and can strongly impact people’s lives. Hence it must be regulated in the public interest.74

It is true that currently Press Council of India (PCI) has no control over electronic or digital media though of late a high demand is being raised for the same particularly by present PCI Chairman, Markandey Katju. Undoubtedly, in the contemporary times, we do need an integrated National Media Council which has adequate control over every aspect of news dissemination whether by press, news broadcasters or news websites.75

7.3 Important Developments So far

Many important developments have taken place so far in the field of freedom of speech and expression. For example- The Information and Broadcasting Ministry has recently relaxed the empanelment norms of the Directorate of Advertising and Visual Publicity which handles the advertisement activities for the government. As a result of that, a large

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number of regional news and general entertainment channels would get empanelled with the Directorate and would be given a greater share in the government’s annual advertisement pie.76

As freedom of speech includes the right to reply, thus, an initiative has been taken by the Indian Express wherein it provides a column known as “@ Write Back”, in which an opportunity is afforded to individuals to publish their replies against any report pertaining to them.77 There is a need for a legal framework to check complaints and criticism against judges. The public cannot scrutinize each and every decision given by every Court, thus, an agency should be there to monitor this.78

Another important development is The Judges (Inquiry) Bill, 2006 which seeks to establish a National Judicial Council. The proposed Council would investigate complaints by any person or upon receiving a reference from Parliament based on a motion. A major drawback of the proposed Bill is that the Council would consist solely of the members of the judiciary (CJI, two Supreme Court judges and two High Court Chief Justices). Thus, the dream of an independent monitoring agency seemed far-fetched.79

In present Bill, there is attempt only on accountability wherein, too, a prolonged all-Judge affair renders it unfair. If a common man cannot chose the Court for his own trial then how Judges can be allowed to choose the forum of their own choice for their own scrutiny? Committee after committee, the Bill has made it extensively an all-Judge affair knowing well the fact that a Judge hardly ever punishes a Judge. The ghost of “impeachment” not only survives and exists but made more laborious, uncertain and expensive. There is not even a provision that errant Judge under inquiry will be placed under suspension and that after having found guilty will be compulsorily retired.

76 “Regional channels to get bigger govt ad pie”, The Indian Express, 2 (May 12, 2012).
77 “@ Write Back”, The Indian Express, 2 (May 12, 2012).
79 Ibid.
Certain suggestions in this regard are welcome:\textsuperscript{80}

The “possibly injurious” scrutiny panel needs to be scrapped when investigation committee is there. Provision for suspension of Judge under inquiry is a must if dignity of jury and of the nation is to be maintained. Role of MPs be certainly excluded which can sabotage entire remedial exercise just by raising the hands for no justifiable ground. Impeachment provision should be by passed and deleted from the Bill. In the present form, the Bill deserves to be withdrawn for redrafting, accordingly.

Similarly, The Cinematograph Bill, 2010 has been lying in Parliament for quite some time now. It is a timely exercise and an extremely relevant one. 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.\textsuperscript{81}

Further, there is a growing acceptance of the phenomenon of whistleblower. A whistleblower is a person who raises a concern about wrongdoing occurring in an organization or body of people. Usually this person would be from that same organization. The revealed misconduct may be classified in many ways; for example, a violation of a law, rule, regulation and/or a direct threat to public interest, such as fraud, health/safety violations and corruption. Whistleblowers may make their allegations internally (for example, to other people within the accused organization) or externally (to regulators, law enforcement agencies, to the media or to groups concerned with the issues). The whistleblower is considered a hero or a traitor, a do-gooder or a crank, a role model or a non-conformist troublemaker — depending on one’s point of view. Whistle

\textsuperscript{80} Prof. N. S. Poonia, “Judges Standards and Accountability Bill 2010 is Misconceived and Imaginative which is more Obstructive than Inquiry (Judges) Act, 1968”, August 2011, \textit{AIR (Jour)} 157-160 at 157.

\textsuperscript{81} \textit{Supra} note 17 at 83-84.
blowing is a universal phenomenon. India has also had its share of prominent whistleblowers from V. P. Singh to Manoj Prabhakar to P. Dinakar.\(^{82}\)

It is true that under normal circumstances, an organisation is entitled to total loyalty and confidentiality from its employees. But when there is serious malpractice or when people’s lives are at stake — as in corruption and fraud in defence procurement; deaths in ‘encounter’ of innocent persons; toxic leaks from a chemical factory; non-adherence to flight safety standards by an airline; creative accounting and false declarations by a company; cheating and plagiarism in scientific research, for example — the overriding public interest may lie in protecting the public’s right to be told, and the whistleblower’s right not to be punished for doing so. Whistleblower protection in India refers to provisions put in place in order to protect someone who exposes alleged wrongdoing. The wrongdoing might take the form of fraud, corruption or mismanagement. Initially, India did not have a law to protect whistleblowers; however, the Public Interest Disclosure and Protection to Persons Making the Disclosure Bill, 2010 was approved by the Cabinet of India as part of a drive to eliminate corruption in the country’s bureaucracy.\(^{83}\)

As far as the issue of trial by media is concerned, recently\(^{84}\) the Supreme Court has begun to frame guidelines for reporting of cases in Media and it has taken up hearing in this matter before a Constitution Bench from March 27, 2012 onwards. In this case, an eminent senior counsel Fali S. Nariman appearing for Sahara India complained to the Apex Court Bench regarding telecast of a news on a leading business news channel concerning the above two parties. The channel allegedly aired the contents of a proposal sent by two real estate companies of the Sahara group through their counsel to Securities and Exchange Board of India

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\(^{83}\) For details on The Anti-Corruption, Grievance Redressal and Whistleblower Protection Bill, 2011, see Supra Chapter 5.

\(^{84}\) Sahara India Real Estate Corporation Ltd. & Others.etc. v. Securities and Exchange Board of India & Anr., Civil Appeal no. 9813/2011 and Civil Appeal no. 9833/2011.
(SEBI) although the same was at a very nascent or preliminary stage. The Court expressed its distress over increase of such unfortunate incidents where sub-judice matters are improperly (mis)reported in the media thus affecting both the business sentiments as well as interfering with the administration of justice.  

Unfortunately, we have no system wherein judicial proceedings before a Court of law are duly video-recorded much less than live coverage of Court proceedings as is the practice in certain western countries like the U.S. If at least, there is an official recording of a day’s proceeding, it to present a day’s proceeding, it to present a clear and unambiguous picture of what actually transpired in the Court during a particular period and the instances of misreporting (not biased reporting) would be wiped out to a large extent. Noteworthy that the media has also received a pat from the higher judiciary where it has done a yeoman’s service in bringing the real truth before the Court by way of sting operations or investigative journalism and thus facilitating in the conviction of real culprits. Having said that, as it is wisely said that there is always a room for improvement; hence suitable corrective measures are surely needed in cases where the media goes berserk either for sensationalism or other reasons. After all, the role of media is to “supplement” and not “supplant” an ongoing trial pending adjudication before an appropriate Court of justice.

The final verdict of the Court is awaited and, truly, it shall be a benchmark for everybody to follow. Till any specific legislation, these guidelines would be the law on this subject. The Hon’ble Chief Justice has also directed that any party, who desires to make submissions in the matter, may do so by way of intervention. Further, this information has been put on the website for the notice of everyone.

As far as internet censorship is concerned, recently the Indian government asked the U.S. to ensure that India-specific objectionable content are removed from the social networking such as Facebook, Google

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85 **Supra** note 75 at 17.
86 *Id.*, at 17, 18.
and YouTube. The government also wanted these service providers to set up servers in India to order to regulate the content locally. The government had previously also made attempts to get access to Yahoo and Gmail chatting/e-mails. However, such attempts by the government to regulate the internet often failed because of failure to fix liability, jurisdictional issues, clashes in public policies among different nations, anonymity on the web etc. For example, it is not easy to sue a foreign company with an address abroad in our Courts, similarly the issue of lack of jurisdiction of Indian Courts also arise when a suit is to be filed against a foreign website.

As far as the electronic media is concerned, the Indian Broadcasting Foundation (IBF) has adopted with suitable modifications the Ministry of Information Broadcasting Self Regulation Guidelines for Broadcasting Sector draft version of 2008, which has been formulated after a comprehensive consultative process by over 40 stakeholders from across the Government, civil society, NGO’s, Industry. These Self Regulation Guidelines (Guidelines), Content Code & certification rules sets out principles, guidelines and ethical practices, which shall guide the Broadcasting Service Provider (BSP) in offering their programming services in India so as to conform to the Programme Code prescribed under the Cable Television Networks (Regulations) Act, 1995, irrespective of the medium/platform used for broadcasting of the programme. These Guidelines have been drafted to introduce greater specificity and detail with a view to facilitate self regulation by the broadcasting industry and minimize scope for subjective decision by regulatory authorities or the broadcasting service providers. The basic underlying principle of these Guidelines is that the responsibility of complying with the provisions of the Certification Rules vests with the BSP. The principles in these Guidelines

88 For details see Supra Chapter 5.
89 Supra note 41.
are sought to be implemented at the first instance through a self-regulatory mechanism of the BSP. Regulation by “forbearance”, as present in the telecommunications industry, shall guide the Broadcasting Content Complaints Council (BCCC) whilst enforcing adherence by the BSP, with the guidelines. Such self-regulatory mechanism shall be subject to a credible and time bound default/grievance redressal mechanism, which shall function under the guidance of the BCCC.90

The BCCC, a self regulatory mechanism of the broadcasting industry claimed to have received 3,441 complaints in six months since its inception in June 2011, with maximum against a Rakhi Sawant hosted programme and appearance of porn star Sunny Leone in reality show ‘Big Boss’ and that it had disposed of a majority of the complaints.91

It is submitted that as far as television censorship is concerned, some concrete steps need to be taken. As uniform guidelines cannot be formulated for every channel, a system should be evolved where viewership segments are segregated. Additionally, the public should be made aware as to what kind of programming could be expected on each channel. Of course, some information must be provided with regard to what would be suitable for children etc. A rating system could be very beneficial. Moreover, there should be a strictly prescribed time slot for more adult programming.92

7.4 Suggestions

Given the inadequacies in the present legal framework, the researcher proposes the following suggestions in this regard-

7.4.1 Reconciliation between Free Press and Independent Judiciary

For the furtherance of Rule of Law and orderly society, a free press and independent judiciary are both indispensable. It is a big challenge to

90 See Supra Chapter 5.
ensure independence of both of these crucial pillars of democracy. The media should exercise self imposed restraints and remain a sentinel of democratic freedom and journalists as vigilant watchdog of civil liberties. Activities like ‘Media Trial’ can be put on hold until such time the Indian media and people exhibit sufficiently their commitment to democratic principles and the maturity, enough to be allowed to intrude into the judicial process. The Law Commission of India has very rightly concluded in it 200th Report that no one can be allowed to prejudge or prejudice a case till the time it achieve finality in the Court of law. This is necessary to protect the atmosphere of judicial calm and build a society based upon Justice, Equity and Fair Play.\textsuperscript{93}

While the media can, in the public interest, resort to reasonable criticism of a judicial act or the judgment of a Court for public good or report any such statements; it should refrain from casting scurrilous aspersions on, or impute improper motives or personal bias to the judge. Nor should they scandalize the Court or the judiciary as a whole, or make personal allegations of lack of ability or integrity against a judge. It should be kept in mind that Judges do not defend their decisions in public and if citizens disrespect the persons laying down the law, they cannot be expected to respect the law laid down by them. The only way the Judge can defend a decision is by the reasoning in the decision itself and it is certainly open to being criticized by anyone who thinks that it is erroneous.\textsuperscript{94}

It is important for the betterment of judiciary that judges must take the criticism in a healthy manner. Justice Singhvi and Justice Ganguly of the Supreme Court have been stressing that the Courts should exercise restraint while punishing for contempt. They observed, “Contempt power has to be exercised with utmost caution and in appropriate cases”. According to Justice Krishna Iyer, there are two methods by which judges can handle criticism. One is by considering it contempt of Court and the


\textsuperscript{94} Supra note 32, (Para 38).
other is by their fine performance.\textsuperscript{95} It is submitted that in certain cases, the contempt proceedings are necessary but they should not be used to conceal the shortcomings of the judges. The judges, by their fine performances can obliterate criticism thereby reducing the cases of contempt.\textsuperscript{96}

A significant observation was made by Justice Gurbir Singh, while delivering judgment in the \textit{Ruchika} case in which he observed that Courts are only bound by law and its own judicial conscience. Till today, media cannot influence the decision making process. Indian Courts and Indian judicial system is very strong. If media is able to influence the judgments of the Indian Courts, then there cannot be independence of judiciary. The Courts work on the basis of legal evidence available on record. Nobody should apprehend that media trial can influence the decision of the Courts.\textsuperscript{97}

The law relating to contempt of Courts has been designed to protect the functional independence of the Courts, so that they are able to maintain the rule of law, which is the very basis of the democratic system of government.\textsuperscript{98} However, this does not make the judges and their Courts absolute, arbitrary, or completely immune from criticism. Their doings and their decisions are admittedly open to public scrutiny through the powerful medium of press.\textsuperscript{99} Though, both the press and the judiciary are independent and have their respective functional autonomy, and yet both are required to fulfill the same constitutional objective; namely, to secure to all its citizens “Justice” in its full comprehensive sense, including social, economic and political.

Such a conflict is sought to be resolved by emphasizing that so long as the criticism is constructive; i.e., directed to protect and promote the

\textsuperscript{95} “Contempt of Court”, available at www.indialawyers.wordpress.com/category/contempt-of-Court, visited on April 3, 2012.
\textsuperscript{97} “It was a battle of unequals: Court”, \textit{The Tribune}, May 26, 2010, p. 22. The news was about a 20 year old legal battle in which justice was finally delivered. It was a case of molestation of a teenage girl Ruchika Girhotra in 1990 by former Haryana DGP, S.P.S. Rathore.
\textsuperscript{98} \textit{Supra} note 32, (para 37).
\textsuperscript{99} \textit{Ibid.}
public interest, the same criticism, however vigorous it may be, should not be construed as contempt of Courts, or destructive of the institution of judiciary.

Further, the right to cover sub-judice matters by print and electronic media emanates from citizens’ right to know and freedom of expression. It has to co-exist with suspects’ right to fair trial which is an absolute right flowing from the right to life guaranteed under Article 21 of the Constitution. The right to fair trial should not be allowed to be subservient to the right to freedom of expression which is subjected to ‘reasonable restrictions’ under Article 19(2) of the Constitution in the interest of public morals, decency, public order and national security.

The right to report being one side of the coin has on its other side, the duty to report fairly, objectively and accurately. The need of the hour is to stress on accuracy rather than selling the news. Media is required to keep itself in some of the universally recognized norms of conduct which are worth mentioning here:

1. Honesty and fairness in reporting the facts.
2. To avoid the publication of confessions.\(^{100}\)
3. Not to publish Articles which comment or reflect upon the merits of the case.\(^{101}\)
4. Duty to respect privacy.
5. Duty to distinguish between facts and opinions.
6. Not to publish Photographs\(^{102}\) and character statement\(^{103}\) of the accused.
7. Duty not to mention the race, religion or nationality of the subjects of news stories unless relevant to the story.

\(^{100}\) AV (NSW) v. Dean, (1990) 20 NSWLR 650.
\(^{103}\) AG (NSW) v. Willisee, (1980) (2) NSWLR 143.
8. Imputation of innocence should not be there.

9. Duty not to use dishonest means to obtain information unless it is in Public interest.

10. To avoid premature publication of evidence.

11. To avoid publications of interviews with witnesses.

An important question discussed in the 200th Report of the Law Commission relates to the ambiguity in the Contempt of Courts Act, 1971 over the stage at which a matter can be considered sub judice, for using the power of contempt.

Under the existing law, the starting point of the pendency of the case is only from the state where the Court actually gets involved i.e. when a charge-sheet or challan is filed under Section 173 of the Code of Criminal Procedure. However, any prejudicial publication before such stage does not come within the purview of the power to punish for contempt. Some clarification is required as to what the expression “pending” really means. It is submitted that under the existing framework of the Contempt of Court Act, 1971, media reportage is granted immunity despite the grave threat such publications pose to the administration of justice. Such publications may go unchecked if there is no legislative intervention, by way of redefining the word ‘pending’ to expand to include ‘from the time the arrest is made’ in the Contempt of Court Act, 1971. Backbone legislation with a constitutional sanction will effectively deal with the menace of media trial.

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Section 3 of the Contempt of Courts Act, 1971 restricts the freedom of speech and expression which includes freedom of the media, both print 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”. Furthermore, 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. 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. The amendment proposed by the Law Commission suggests that the word “pending” requires clarification and it is suggested that under Section 3(1) of the Act the word “pending” should be substituted by the word “active”. For details see *Supra* Chapter 4.
Besides the long term solution in this respect lies in self-regulation by both the media and the judiciary.\textsuperscript{105}

To conclude, it is necessary to state that fair, accurate and objective reporting by media brings out true facts to light. It will further enhance the credibility of media and facilitate the judiciary to render fair decisions. The media should cherish its independence but at the same time it must also recognize that it should be enjoyed with responsibility towards the society.\textsuperscript{106}

Similarly, the public has an interest in the administration of justice.\textsuperscript{107} When, therefore, any reasonable argument is offered against any judicial decision as contrary to law or the public good, it would enlighten not only the public but also the judges themselves, so that they may be better informed.\textsuperscript{108} It would also be conducive as to the advancement of the science of law.

It is submitted that on the law as it stands, the offence of scandalizing has to be reconciled reasonably with the freedom of speech, which is “lifeblood of democracy”. Where the offence alleged is the scandalizing of Court or lowering of the authority of the Court by words spoken or written, the reasonableness of the law can be tested. In so testing reasonableness, the width or scope of “scandalizing” in the present day and age and in a large democracy as ours would have to be read narrowly to ensure that the offence is reasonably confined to limits so as not to unduly restrict the freedom of speech. If the judges will not regard the freedom of speech in this largest of democracies with the respect it deserves, Article 19(1)(a) will be robbed of its content because it is the judiciary alone which is duty-bound to uphold the rights of the public and of the press. It would indeed be sad if the judiciary is found to be wanting in the high task of upholding the right to comment on and criticize the conduct of judges who

\textsuperscript{105} Esha Goel and Aonkan Ghosh, “Trial by Media: A Threat to the Right to a Fair Trial”, 2 NMLR 2011, 18-33 at 33.
\textsuperscript{106} For details see \textit{Supra} Chapter 5.
\textsuperscript{107} \textit{Perspective Pubs. v. State of Maharashtra}, AIR 1971 SC 221, (Para 17).
are, in the ultimate analysis, accountable to the people. Their “independence” is secured so that citizens’ rights can be fearlessly upheld. We cannot countenance a situation where citizens live in fear of the Court’s arbitrary power to punish for contempt for words of criticism on the conduct of judges, in or out of Court. 109

7.4.2 Right to Privacy

Privacy, though not an absolute right, must not be treated as immaterial. The right balance must be found and the right to one’s privacy should always be respected. Whenever the right to privacy is taken away or restricted, it must be done so for valid and good reasons and not otherwise. In the light of e-governance, the actions of the executive and administrative authorities need to be monitored and checked in order to ensure that they are not abusing their authority.

Furthermore, tribunals and commissions must be established to regulate and maintain standards in electronic transactions and to act as watchdogs to ensure that the government (or any other private entity) keep within the bounds of their authority and do not encroach on the privacy of people.

There is a need to amend Section 66E of the Information Technology Act, 2000 by increasing the punishment for violation of privacy from 3 years to 10 years and awarding exemplary compensation. Further, the offence needs to be made non-bailable. In developing economies like India, everything rests on trade, and business in the twenty-first century places much reliance on electronic Communication. Therefore, having laws facilitating electronic transactions will only be beneficial if those who use the new technology can do so with confidence. Information privacy is of great importance for building confidence amongst traders, consumers and the public. Privacy indeed is a right that is to be treasured.

109 Vinod A. Bobde, “Scandalizing the Court”, (2003) 8 SCC (Jour) 32-41 at 32.
Further, in the absence of any public issue, the media should not be allowed to make commercial use of materials obtained by invading the privacy of any individual.\textsuperscript{110}

It is noteworthy here that during the Constituent Assembly debates, the sub-committee in its report had also suggested the inclusion of “secrecy of correspondence” as a fundamental right. However, the proposal was never incorporated.\textsuperscript{111} It is submitted that given the fact that today is the era of electronic surveillance, there is a dire need to reconsider the matter and to accord protection to individual correspondence unrelated with any public activity. The onus must be on the authority to prove that disclosure is required in public interest.

\subsection*{7.4.3 Data Protection}

Advances in computer technology and telecommunications have exponentially increased the amount of information that can be stored, retrieved, accessed and collated almost instantaneously. An enormous amount of personal information is held by various bodies, both public and private- the police, the income tax department, banks, insurance agencies, credit rating agencies, stock brokers, employers, doctors, lawyers, marriage bureaus, detectives, airlines, hotels and so on. Till recently, this information was held on paper; the sheer volume and a lack of centralization made it hard to collate, with the result that it was very difficult for one body or person to use this information effectively. In the internet age, information is so centralized and so easily accessible that one tap on a button could throw up startling amounts of personal information about an individual.\textsuperscript{112} There is a need to provide adequate safeguards regarding protection of personal information about an individual.

As far as data protection on the internet is concerned, the first step requires that regulators in the U.S., Europe, Asia and throughout the world recognize the interconnected nature of the data. Understanding that safety

\begin{footnotesize}
\begin{enumerate}
\item See \textit{Supra} Chapter 5.
\item See \textit{Supra} Chapter 2.
\item \textit{Supra} note 12 at 114.
\end{enumerate}
\end{footnotesize}
and security issues, data privacy, and copyright protection all flow from the same data management strategy will assist in the understanding of how best to manage the increasing amount of information available. The time to create such a system is upon us. International cooperation must continue around the globe to provide for comprehensive and standardized protections both for personal data and from the misuse of that data.\(^{113}\)

### 7.4.3.1 Data Protection Principles

An individual’s data received manually or in e-form must be protected. The following are the “Data Protection Principles” which must be kept in mind by the private individuals, private organisations, government or its agencies while receiving the data: \(^{114}\)

- (a) The data should be processed fairly and lawfully,
- (b) The data should be obtained for specific and lawful purpose,
- (c) The data should be adequate, relevant and not excessive,
- (d) The data should not be kept for longer than necessary,
- (e) The data should be processed in accordance with the rights of data subjects, and
- (f) Measures should be taken against unauthorized or unlawful processing.

### 7.4.3.2 Need for Specific Legislation

Besides this, the Indian legal system requires various new legislations like Privacy Act, 1988 (Commonwealth) and Data protection Act, and 1988 (U.K.). Further, it must be ensured that the Communications Commission of India may be formed as soon as may be as a regulatory body on convergence issues. The legal provisions should be effective enough to tackle the unauthorised disclosure and illegal access to the private information. Further, the effective implementation of laws is the need of the

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\(^{113}\) Supra note 55 at 61.

hour. Besides all this, the judiciary can also keep an eye on the matter and interpret the laws to meet the just claims.

7.4.4 Obscenity

As far as obscenity is concerned, society must lean in favour of free speech and expression and Courts must be very cautious while upholding restrictions imposed on notions such as decency or morality. The internet age and the breakdown of traditional barriers is rendering censorship increasingly futile. To imagine that one can foster better morals in society by keeping out depictions of the immoral or indecent is as naïve as thinking, in Milton’s analogy, that one can keep out the crows by shutting the park gate. Let it be stated at once that there is nothing unconstitutional or outrageous about censorship, provided it achieves its professed objective of raising the moral standards of the people, instead of imposing unnecessary and galling restrictions on creative art or on the bonafide expression and dissemination of ideas which have human and aesthetic value.\textsuperscript{115}

It is submitted that the test for judging a work should be that of an ordinary man of common sense and prudence and not an ‘out of the ordinary or hypersensitive man’.\textsuperscript{116}

Similarly, the standard to be applied by the Censor Board or Courts for judging a film should be that of an ordinary man of common sense and prudence and not that of an out of the ordinary or hypersensitive man. The Board should exercise considerable circumspection on movies affecting the morality or decency of our people and cultural heritage of the country. The moral values in particular, should not be allowed to be sacrificed in the guise of social change or cultural assimilation.\textsuperscript{117} However, the expression has to be seen in its totality. For example, the Apex Court in a recent case\textsuperscript{118} has held that even though the constitutional freedom of speech and

\begin{footnotes}
\textsuperscript{115} Supra note 12 at 52.
\textsuperscript{118} S. Khushboo v. Kanniammal & Another, AIR 2010 SC 3196.
\end{footnotes}
expression is not absolute and can be subjected to reasonable restrictions on grounds such as ‘decency and morality’ among others, there is a need to tolerate unpopular views in the socio-cultural space. The framers of our Constitution recognised the importance of safeguarding this right since the free flow of opinions and ideas is essential to sustain the collective life of the citizenry. While an informed citizenry is a pre-condition for meaningful governance in the political sense, we must also promote a culture of open dialogue when it comes to societal attitudes. The Court observed that in the instant case, the appellant’s remarks did provoke a controversy since the acceptance of pre-marital sex and live-in relationships is viewed by some as an attack on the centrality of marriage. While there can be no doubt that in India, marriage is an important social institution, but there are certain individuals or groups who do not hold the same view. Even in the societal mainstream, there are a significant number of people who see nothing wrong in engaging in pre-marital sex. Notions of social morality are inherently subjective and the criminal law cannot be used as a means to unduly interfere with the domain of personal autonomy. Morality and criminality are not co-extensive. If the complainants vehemently disagreed with the appellant’s views, then they should have contested her views through the news media or any other public platform. The law should not be used in a manner that has chilling effects on the ‘freedom of speech and expression’.  

An important suggestion could be that The Cinematograph Act should be modified to accommodate one more Category called “X” in the case of Porn or Semi-Porn Programmes because Category “X” explains at first hand that the programme/feature film contains certain mixed reactions.

It is also submitted that the National Crimes Record Bureau compiles data annually under 22 categories of crimes on a state-wise basis, including four categories of crimes against women. It is suggested that in order to maintain the data, there is a need to introduce cyber gender crime as a

119 Id., at 3208, (para 29).
separate category of crime. The reason is the growing trend of transmission of porn clips of unsuspecting women through multi-media services on mobile phones which is fast emerging as another form of gender based violence and cyber crime in India.\textsuperscript{120}

7.4.5 Internet Regulation

For any objectionable content published and circulated on the internet, the responsibility needs to be fixed. It is submitted that the Network Service provider should be held responsible if there is a dangerous threat to the social and cultural values. It is known to the world that all the equipments are easily available which spoil the teenagers to the limit from where there is no point of return. There are network sites displaying pornography or obscenity at their worst. There are sites of news portal whose prime motto is to defame India by hook or crook. There are sites of different terrorist organisations who want to split India geographically, politically, communally and what not. There are sites whose job is to spread anti-Indian virus among the common folks. There are sites which pollute the minds of children, teenagers and youths. Naturally, the social structure gets corrupted. It is submitted that the subscriber should also be held responsible for that matter for fair implementation of law.\textsuperscript{121}

However, this is also true that an absolute ban on the internet on the lines of China would not be a healthy solution. In fact, China believes that its online censorship policies are aimed at maintaining social stability, and that it will help stop the spread of false rumours and inappropriate material. However, many technically-savvy Internet users are often able to bypass the firewall and access foreign websites using a virtual private network, or VPN, which redirects Internet traffic through an external server and helps keeps browsing history private.\textsuperscript{122} This shows that an absolute ban on the internet is not a viable solution. Nevertheless, its regulation is required.

\textsuperscript{120} Tripti Nath, “Let’s Respect her Privacy”, \textit{The Tribune Spectrum}, 3 (May 1, 2011).
\textsuperscript{121} \textit{Supra} note 40 at 262.
\textsuperscript{122} “China’s ban on Face book”, Available at http://www.voanews.com/content/china-facebook-2012apr24-148630875/370521.html, visited on April 23, 2012.
Recently, there was a discussion on a news channel that 50 countries of the world have submitted a proposal to the United Nations at Geneva, and the same is backed by India also, whereby a mechanism may be worked out to regulate the internet on the global level.\textsuperscript{123}

The speakers in this discussion were Mr. Madhu Goud Yashki Member of Parliament (Congress), Mr. Pawan Duggal (Cyber field expert), Ms. Shoma Chaudhary (Managing Editor, Tehelka), Mr. Subramaniam Swamy (President, Janta Party), Mr. Rajeev Chandra Shekhar (Member of Parliament, Rajya Sabha). The speakers had their different viewpoints pertaining to the issue. Some of the excerpts may be given as follows-

- Mr. Madhu Goud Yashki opined that there must be accountability on the web. The inciting, malicious content on social media need to be regulated. The problem gets worsened due to jurisdictional issues involved in it. \textsuperscript{124}

- Ms. Shoma Chaudhary lamented the fact that the civil society including the media was merely been given an advisory role in the regulatory body. She stated that the government must not have draconian or a blanket ban on expression. She said that reasonable restrictions are acceptable by people but not arbitrariness. She further opined that the government is somewhere ushering into an era of “soft emergency” since in a recent event, it had been censored and deleted cartoons from the NCERT textbooks. The government probably was trying to shoot an art with a machine gun. \textsuperscript{125}

- Mr. Rajeev Chandrashekhar stated that India’s position should not be viewed as an attempt to regulate internet. It has to be

\textsuperscript{123} A panel discussion, “Centre Stage”, was aired on \textit{Headlines Today} on May 16, 2012 at 6.24 pm, where several important personalities discussed the pros and cons of the draconian “hyper net nanny” plan whereby the governments would police the internet.

\textsuperscript{124} \textit{Ibid}.

\textsuperscript{125} \textit{Ibid}.
insured that the internet is governed in an open, democratic and participative manner.  

- Mr. Subramaniam Swamy believed that gagging of the social media is a bad idea and in a democracy, one should not trust the government. A democracy works on the principle of checks and balances but the aforesaid draconian plan had no checks on it.  

- Mr. Pawan Duggal maintained that any draconian step, whatsoever, could not regulate content on the internet at the global level. On the contrary, certain technical solution like blocking websites at the national levels may be workable.

Further, it is submitted that just as the print, radio, television and other public performances are subject to the laws of the land and reasonable restrictions, in the same way the internet should also be regulated. Similarly, just like the newspapers in India have to carry imprint lines in every issue which identify the editor, printer, publisher and owner of the newspaper. In an event where a newspaper decides to protect a source or an anonymous informant, then the paper, its owner, its editor and publisher hold themselves responsible. In the same way, if a particular websites protects the identity of a blogger or a person posting some objectionable content, or when there is a failure to remove the objectionable content from the website, then it must specify who is to take responsibility for the illegal and objectionable content.

Thus, there is a dire need to revamp laws regulating the freedom of speech and of the media, as well as the Journalistic fraternity to resolve to maintain a high standard of responsibility and integrity in reporting.

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126 Ibid.
127 Ibid.
128 Ibid.
129 Supra note 41.
7.4.6 Broadcasting Regulations

Recently, a private member bill was moved for regulating the print and electronic media in order to put restrictions on media reporting especially when there is a threat to the national security. The Bill\textsuperscript{130} seeks to provide for the constitution of the Print and Electronic Media Regulation Authority with a view to lay down standards to be followed by the print and electronic media and to establish credible and expedient mechanism for investigating suo moto or into complaints by individuals against print and electronic media, and for matters connected therewith or incidental thereto. However, it is disturbing to note that the bill has not seen the light of the day.

Further, it is pertinent to point out that there have been proposals that the Broadcasting Council of India be constituted through a legislation amending the relevant Sections in the Prasar Bharati Act, which should be entrusted with the functions of licensing, monitoring of programmes and quality rating.\textsuperscript{131} However, the establishment of a national level autonomous broadcasting authority is still a far-fetched dream. It is suggested that legislation be enacted to provide for the establishment of an autonomous Broadcasting Regulatory Authority to exercise regulation of the licensing and monitoring of the broadcasting channels and the matters connected therewith or incidental thereto.

7.4.7 The Law of Defamation should be Modified

Defamation is an injury to a man’s reputation, which is regarded as his property. While insult is an injury’ to one’s self-respect, defamation is injury to the esteem or regard in which one is held by others. Hence, the publication of a defamatory statement respecting another person is, under different circumstances may be both a civil as well as a criminal offence. Defamation has been defined as ‘the publication or a statement which tends

\textsuperscript{130} For details on The Print and Electronic Media Standards and Regulation Bill, 2012, see \textit{Supra} Chapter 5.

\textsuperscript{131} For recommendations of Vardan Committee on broadcasting regulations, see \textit{Supra} Chapter 5.
to lower a person in the estimation of right-thinking members of society generally.\textsuperscript{132}

The unbridled power of the media can become dangerous if checks and balances are not inherent in it. The role of the media is to provide to the readers and the public in general with information views tested and found as true and correct. This power must be carefully regulated and must reconcile with a person’s fundamental right to privacy. Any wrong or biased information that is put forth can potentially damage the otherwise clean and good reputation of the person or institution against whom something adverse is reported. Pre-judging the issues and rushing to conclusions must be avoided. Further, the unholy spirit of personal vilification seems to have affected not only politicians but also the press. Allegations are made by one Section of the press against another and by journalists of repute against other eminent journalists, which undermine the credibility of the press, which is its best asset. Thus, there is a need that the press serves larger public interest and it must not be imaginative journalism or invective journalism for maligning any individual, institution or organisation with ulterior motives.\textsuperscript{133}

Defamatory statements have to be communicated to a third person so that the good name of a person may be obliterated. Defamation becomes fairly easy in cyberspace because of the cloak of anonymity. A person who sends an anonymous e-mail or posts a message could send it to an anonymous re-mailer which would strip the message of the identity and digital address of the original sender and then ‘re-mail’ it to the location specified by the sender.\textsuperscript{134} In a number of cases, Internet Service Providers (ISPs) have been sued for defamation on the basis that they are ‘publishers’ of the defamation.\textsuperscript{135}

\begin{footnotesize}
\textsuperscript{135} In \textit{Cubby inc. v. CompuServe inc.}, 1776 F. Supp 135 (S.D.N.Y. 1991) ‘false, defamatory’ statements had appeared on an online forum of the defendants. The
\end{footnotesize}
In the U.S., statutory provisions under the Communications Decency Act, 1996, rule out liability of the service provider by not treating them as publishers of information provided by another information provider. The Information Technology Act in India provides that an ISP is not liable for publication by a third party if it can show that the offence was committed without its knowledge and that due diligence had been exercised to prevent the commission of the offence.

Given the present scenario, it is submitted, that there are no adequate legal provisions to deal with the problem of online defamation. Further, suitable modifications are needed even in cases of criminal defamation. For example, in the criminal defamation cases, the onus should lie on the electronic media to prove that they are not guilty. This will lead to a kind of open-mindedness or transparency in reporting. Moreover, specific provisions must be designed to contain the problem of online defamation. To achieve this aim, a common initiative involving different groups, i.e. law enforcement agencies, international bodies, ISP’s and the public at large which uses internet, need to be taken to check this growing menace.

7.5 Conclusions Drawn from the Empirical Survey

The researcher has drawn the following conclusions from the empirical survey:

- The respondents of the empirical survey of this study had shown a very positive response in answering the questions related to the “Expanding Horizons of Freedom of Speech and Expression and the Judicial Response”. They were well aware of the general concept of fundamental rights i.e. 95.4% of the

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136 In *Noah v. AOL, Time Warner Inc.*, [261 F Supp. 2d 532. (E.D.Va.) 2003], the ISP was held not liable for blasphemous statements appearing on a website.

137 Section 79, Information Technology Act, 2000.

138 See *Supra* Chapter 6.
respondents, and freedom of speech and expression in particular i.e. 89.0% of the respondents.

- As far as the awareness regarding the grounds of restrictions on freedom of speech and expression was concerned, the percentage dropped i.e. 77.8%. Nevertheless, the drop is not a drastic one but just an indication that people need to be made more aware about the fact that “no right is absolute”.

- Further, there is a need to create more and more awareness in society regarding the grounds of reasonable restrictions on freedom of speech and the press.

- A significant portion of the respondents believe that freedom of press should be included as an independent fundamental right.
  - It is submitted that the First Amendment of the U.S. Constitution guarantees freedom of press as an independent right besides freedom of speech.
  - Secondly, if the judiciary can read into Article 19(1)(a), freedom of press then it is quite possible that it might also be declared as an independent right by the Parliament subject to reasonable restrictions.
  - This may also hold true given the fact that the press enjoys a very important place in a democracy so much so that it is called “the fourth estate”.
  - Further, an analogy can be drawn here with Article 21-A which guarantees right to education as an independent of right owing to judicial creative interpretation which in many cases has been emphasizing the importance of right to education.

139 Ibid.
The NCRWC\textsuperscript{140} had also suggested in its report that freedom of press can be introduced as an independent fundamental right.

- There is an indication in the response of the subjects that somewhere curbs are required so that the incidents of media’s invasion of an individual’s private life be nailed.

- Further, on the pretext of reporting news, the media must not infringe the privacy of the individuals. It must respect other people’s right to be let alone”.

- However, in the light of the survey,\textsuperscript{141} it is quite clear that the general public represented by 86.6% respondents is not in favour of an unwarranted publicity of an individual’s private left by the media be it a common man or a celebrity.

- Further, the phenomenon of the media depicting indecent and obscene matter needs to be effectively checked.

The new media i.e. the internet is the latest platform of communicating information and ideas and at times, it becomes a perpetrator of obscene and pornographic literature, images and video.

An adequate legal framework is needed to put an effective control on it.

\textsuperscript{140} The National Commission to Review the working of the Constitution (also referred to as the constitution commission or NCRWC) was appointed by the President on 23 February, 2000. Completion of fifty years of the working of the Constitution was considered an appropriate occasion to take stock of the situation- of its successes and failures. As its name indicated, the brief of NCRWC was to review the working of the Constitution. To assess whether the objectives of the great founding fathers, as enshrined in the constitution, had been fulfilled during the half century (1950-2000) the Commission was expected to act independently and objectively, without fear or favour and in the spirit of serving the best interests of the country and thereby helping the Government and Parliament to consider desirable reforms. After more than two years’ deliberations, the Commission submitted its final Report to the Government on 31 March, 2002. It contained nearly 250 recommendations- some of them of vital importance for the survival of democratic polity and free institutions and for ushering in an era of good citizen-friendly governance. Some of the positive and welcome recommendations in regard to Fundamental Rights were for the inclusion of freedom of the press and other media and of information.

\textsuperscript{141} See Supra Chapter 6.
• The response of the subjects towards media trial is worth consideration. Undoubtedly, there are certain advantages as well as disadvantages hidden in the reporting of Court proceedings. The Apex Court has in a number of cases made it amply clear that anything which tends to obstruct the administration of justice shall be considered as “contempt of Court”. The basic premise of our criminal law is “presumption of innocence till guilt is proved”.

• When the media reports Court proceedings, a kind of sensationalism gets created. This has, in certain cases, helped in the administration of justice because public opinion gets created and due to intense media pressure, the case often gets a timely disposal. E.g. Jessica Lall case, Aarushi murder, Rita Golmes rape case etc.

• However, there is another side to it also. Since no human mind is a blank piece of paper, thus, adverse reporting at times makes the accused guilty in the media trial, even before the actual trial in the Courts gets conducted. Further, the accuracy of the media reports can’t be verified by the general public.

• The media reporting may also have a subconscious effect on the mind of the judges also which might bring in the element of bias or prejudice, and ultimately might result in the miscarriage of justice.

• It is true that the public must be well informed. It is equally a fat that the media reporting has helped in the administration of justice, but it is equally important in the interest of natural justice that the media must apply some “self-restraint” in certain sensitive case, and should avoid indulging in sensationalism but only report true facts.

• It may be said that the media may influence the judicial decisions both in the positive as well as negative way. It may
lead to the timely hearing and disposal of the cases or it may create bias against the accused leading to miscarriage of justice. Nevertheless, this brings out lacunae in the legal system also because had justice been delivered in time, there is no need for the media to intervene. Thus, the inadequacies in the legal framework need to be removed.

- Another aspect of freedom of speech is that if uncontrolled, it might lead to injuring another person’s reputation. Defamation as civil and criminal wrong can be dealt under law of torts as well as the Indian Penal Code, 1860 respectively. However, the issue which is fast gaining attention and is a cause of concern is how to control online defamation. The vital question is can it be controlled?

- Further, freedom of speech can be reasonably restricted on the grounds of decency or morality. Yet, many a times there appears in the newspapers and televising certain content not suitable for unrestricted viewing. Images of semi-clad women are often used in advertisements of deodorants, condoms, and alcoholic drinks etc., which are not suitable to be viewed by children. There is no check on the same except parental control. The problem gets worsened given that the vast population has an access to the internet and it harbors a lot of unregulated and explicit content including hardcore pornography.

One wonders, whether freedom of speech and expression means going to the extent of being vulgar and obscene. Since the public policy of one country differs from another, regulating content on the internet coming from a foreign country raises several jurisdictional issues.

Another point which is worthy of consideration is that amidst all this, the dignity of women is at stake. But who is to be blamed? Is it the unrestricted and all pervasive media, inadequacy of laws, loopholes in
existing legal framework or the women themselves who are indecently represented in the media? The problem needs to be effectively dealt with by way of reasonable censorship, self-restraint and an effective legal framework.

- Further, it is submitted that the freedom of speech does not give an unbridled licence to an individual to cause hate speech. Media has been reporting certain speeches by Raj Thackeray, Narendra Modi and the like which have stirred violence amongst people in the recent past. Such phenomena are extremely pathetic and need to be curbed effectively.

It is argued that the list of reasonable restrictions does not specifically contain “hate speech” as a ground of restriction. It is submitted that hate speech may be included as an independent ground of restriction.

- It is observed that the freedom to protest peacefully is in league with our history which is replete with incidents of Satyagraha, civil disobedience and non-co-operation movements. Part III of our constitution specifically provides for freedom to assemble peacefully. However, the Apex Court has in a number of cases made it clear that freedom of speech does not include right to strike. The Court has made a distinction between dharnas and Bandhs, whereas dharnas are regarded as legal, strike/bandhs have been declared illegal.\textsuperscript{142} The recent example is of pilots of Air India who went on strike. The Delhi High Court declared the strike as “illegal”. Justice Khetrapal issued a notice to the Indian Pilots Guild restraining its members and office-bearers from illegal strike. The pilots were also restrained from reporting sick, holding dharnas, staging demonstrations or resorting to any other

modes of strike in and outside the company’s offices in Delhi and other regional offices. The judge said, allowing such strikes to continue would cause irreparable loss to the company as well as huge inconvenience to passengers travelling by the national carrier. The Court further ruled that a public service entity could not be held to ransom by protests.

- It is, further, submitted that our constitution operates on the principle of checks and balances and the rule of law requires that every institution should be accountable to the people of India, be it judiciary. However, freedom of speech does not mean making unfounded allegations against the judiciary. But fair criticism of judicial decisions is justified. Infact “truth in public interest” has been added as a defence in an action for contempt of Court by way of Amendment.

- There is a strong need that adequate safeguards should be there to afford protection to the speakers and writers but it is equally desirable that the judicial reporting must be fair, true and in the public interest.

- Besides all these, there is a strong need for creating more and more awareness in society regarding the various laws as well as the various amendments introduced from time to time in the existing laws.

- During the survey, it was noted that the respondents have found a great favour in the concept of investigative

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144 “HC declares strike illegal, AI sacks 10 more pilots”, The Indian Express, 1 (May 10, 2012).
145 Section 13 of the Contempt of Courts Act, 1971 was amended in 2006. It now reads as:

“Notwithstanding anything contained in any law for the time being in force. The Court may permit, in any proceedings for contempt of Court, justification by truth as a valid defence if it is satisfied that it is in public interest and the request for invoking the said defence is bonafide”.

146 See Supra Chapter 6.
journalism. Today when corruption is rampant and has paralyzed the system, people pose a lot of faith in sting operations which expose the criminalization and corruption in public life. There have been important instances where corruption has been nailed owing to the sting operation like operation Duryadhana involving defence deal exposed by Tehleka.com. Similarly, very recently, a senior BJP leader Bangaru Laxman has been imprisoned as a result of a sting operation conducted on him. Eleven years after he was caught on camera allegedly accepting cash in a sting operation, former BJP President Bangaru Laxman was held guilty by a trial Court. He is the first to be convicted in the cases registered following Operation Westend, a series of sting operation conducted by Tehelka.com journalists in 2001, pretending to be suppliers of defence products.147

- More and more respondents were in favour of media reporting of legislative and judicial proceedings and wanted lesser censorship of freedom of speech.

- The law has not kept pace with the expanding scope of freedom of speech and expression. Specific legislations are required to protect individual privacy rights. Stricter laws are needed to control hate speech and pornography. Suitable guidelines are needed for media reporting of legislative and judicial proceedings to maintain rule of law. Reasonable censorship is welcome in the interest of national security and maintaining public order. Regulations are desired to check online content. Openness and transparency in the public life must be the rule and secrecy, an exception. All this would help maintain a balance between individual liberties and social

147 Jayant Sriram, “Cash on Camera: Bangaru found guilty 11 years later”, The Indian Express, 1 (28 April, 2012).
interest and provide an impetus to freedom of speech which is the lifeline of an ideal democracy.

- First of all, there is a dearth of specific laws and the already existing laws are not free of loopholes. The complicated and tedious procedures add fuel to the fire and the majority of the people are not fully aware of the legal and technical nuances of the concept of freedom of speech and expressing and the challenges that have emerged in it.

- There is a need for the authorities to review the question whether protection of freedom of speech and expression be separately available to the companies and corporations in the light of the report of the law commission of India. Moreover, if they get covered under Article 19(1)(a), they can also be made accountable under the list of reasonable restrictions given under Article 19(2).

- Hitherto, the judicial response has been one of safeguarding this fundamental right and laying down rules as and when necessary to check the abuse of the freedom by highlighting always the importance of reasonable restrictions. However, given the ever growing scope of the freedom as well as the challenges posed by the technological advancements, the need for a sound and effective legal framework needs to be emphasized.

- Whatever pitfalls are there, an effective legal mechanism of specific laws, better implementation of laws, stricter accountability principles, more transparency and self-restraint would be the golden rules to check the abuse of freedom of speech and expression, together with a constructive and positive judicial response so as to accommodate the expanding horizon of freedom of speech with the larger public interest in the new era.
7.6 Proposals

Article 19(1)(a) provides for freedom of speech and expression. It is proposed that by way of a Constitutional amendment, a separate Article 19(1)(aa) must be added which should provide for the freedom of print and electronic media.

Explanation- The term “electronic media” connotes television, radio and all forms of communication and broadcasting mediums including the new media.

Further, Clause (2a) be added to Article 19 to provide for the list of reasonable restrictions on the freedom of print and electronic media. Besides, the restrictions provided for under Article 19 (2), the following grounds may be additionally added to Clause (2a) as reasonable restrictions on the freedom of print and electronic media, i.e., public interest, individual privacy and administration of justice.

- “Public Interest” As An Additional Ground of Reasonable Restriction

Just as clauses (5) and (6) of Article 19 contain the reasonable restriction “in the interest of the general public” on fundamental rights contained in Article 19 (d), (e) and (g), in the same way Clause (2) of Article 19 may also contain an additional restriction i.e. “in general public interest”. The benefit of such an amendment shall be manifold- firstly, the cases of hate propaganda based on religion, caste etc. may be curtailed, secondly, the incidents of strikes and bandhs in the name of freedom of speech could also be controlled, thirdly, the media would abstain from sensationalism and unethical behaviour because the public interest does not warrant all this and fourthly any objectionable content spread through any communication medium shall also be broadly covered within the phrase “public interest” and could, thus, be prevented.

Further, for incorporating “public interest” as a ground of restriction, an analogy here may be drawn with the observation of the Apex Court in re...
Arundhati Roy, wherein the Court held that the criticism of the conduct of a judge, the institution of judiciary, and its functioning may not amount to contempt if it is made in ‘good faith’ and in ‘public interest’. It is submitted here that just as “public interest” may provide a useful reason for the furtherance of free speech, in the same manner, “public interest” may also provide a useful ground on the basis of which an individual’s freedom of speech may be reasonably restricted. However, for deciphering the presence of “public interest”, the Courts dealing with the issue should consider all the surrounding circumstances, including (a) the person responsible for comments; (b) his knowledge in the field regarding which the comments are made; and (c) the intended purpose sought to be achieved.

Another supporting argument may be the observations of the Press Council of India (PCI) Chairman Markandey Katju, who suggested that media regulation is necessary. However, he clarified that what he wants is regulation of the media and not control. The difference between the two is that in control there is no freedom, in regulation there is freedom but subject to reasonable restrictions in the public interest. The media has become very powerful in India and can strongly impact people’s lives. Hence it must be regulated in the public interest.

Thus, “public interest” can be safely added as a ground of reasonable restriction on the freedom of print and electronic media.

- “Individual Privacy” as a Ground of Reasonable Restriction

In this context, D.D. Basu has highlighted an interesting distinction between public figure and private individuals. According to him, a private individual’s personal privacy should not be violated at any cost, whereas a celebrity who has chosen to be a public figure should not complain when publicity is given to him, who may at times, be positive and

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148 AIR 2002 SC 1375.
may even be negative. A person who has a public life cannot claim privacy to the same extent as a person, who has no public status.

It has been observed:

Those who seek and welcome publicity of every kind bearing on their private lives so long as it shows them in a favorable light are in no position to complain of an invasion of their privacy by publicity which shows them in an unfavorable light.\(^{151}\)

However, the researcher submits that the personal privacy of an individual must not be infringed at any cost, with the only exception of “public interest”. Just like a private individual or a common man, a public figure or a celebrity is also equally entitled to the protection of his or her privacy, and the only exception for infringement of one’s personal privacy should be the existence of “Public Interest”.

- **“Administration of Justice” as a Ground of Reasonable Restriction**

The 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 Article 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.\(^{152}\)

\(^{151}\) Woodward v. Hutchins, (1977) 2 All ER 751 (755), Bridge L., J.

\(^{152}\) Supra note 105. For details see Supra Chapter 5.
• **Freedom of Media to be Restricted so as to Prevent “Hate Speech”**

Though, as a secular State, the government in India is not concerned with the faiths of the people and would not take sides with any particular religion, it is obligated not merely to protect the society against actual breaches of the peace, but also to create conditions where the sentiments and feelings of people of diverse or opposing beliefs are not so molested by offensive publications as to provoke groups into possible violent action.\(^{153}\)

It is submitted that even during the discussions; Alladi Krishnaswami Ayyar also had emphasized the need for including the phrase “class hatred” in the proviso to sub-clause (a). He argued that since the words “defamation”, “sedition” etc., used in the proviso did not cover “class hatred”, the inclusion of the phrase was essential to stifle any tendency on the part of the people to promote it. He was supported by Rajagopalachari who emphasized that the fundamental peace and orderly progress of the country depended upon communal peace and harmony and therefore speeches and utterances which were likely to foster communal hatred must of necessity to be prevented.\(^{154}\)

• **The term “obscenity” to be Properly Defined**

Freedom of speech and expression is a fundamental right and the foundation of the democracy. The reasonableness of the restriction of this right should be considered by taking a liberal and wider view. While laying down the test of obscenity and morality, Indian conditions should be taken into consideration.

It is submitted that a new ‘test of obscenity’, suitable to the Indian socio-ethical framework is required.

“Obscenity is that, which is, according to expert opinion, intentionally antithetical to the values of society and is evidently and obviously published solely

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\(^{154}\) For details see *Supra* Chapter 2 and 5.
for the purpose of material profit, without having any artistic message". ⑩⁵⁵

The first aim of the test is achieved since it allows only those publications to be deemed as obscene which have been published for the sole purpose of profit, without having any artistic message at all (e.g. hard-core pornography, which exists only for the purpose of material profit). ⑩⁵⁶

The creator’s only motive in such a case is monetary gain. It is for this reason that it is proposed that such works be deemed obscene. However, even for such works, an exception has been provided by the test – if the expert opinion on such a work is that it has some artistic merit, such a work may not be deemed obscene. ⑩⁵⁷

The second aim of this test is achieved since it punishes only intentional offenders. It takes into account the mens rea of the alleged offender and only then passes judgment on him this is in accordance with one of the primary aims of criminal law, which is to punish the guilty mind and not merely the guilty act. ⑩⁵⁸

The third aim of this test is achieved because it does not base itself on sexually charged phrases such as “lascivious” or “Prurient interest”. This shifts the focus of obscenity from sexual immorality and places it on more dangerous acts such as hate speech, inciting violence against a certain Section of the community and glorifying damaging practices such as child marriage. This test thus allows the Court to convict offenders who have published matter inciting not only sexual offences but also those who publish material inciting or glorifying any act that is detrimental to harmony and equality in society. In conclusion, it is hoped that the Courts in India shall inquire into the objective merits of tests proposed and either adopt them or evolve new, objective standards of their own to judge

⑩⁵⁵ Rahul Saha and Tirthankar Datta, “The Average Person and His Prurient Interests: The Supreme Court on Obscenity”, 2005(7) SCJ 13-18 at 17.
⑩⁵⁶ Ibid.
⑩⁵⁷ Id., at 17-18.
⑩⁵⁸ Id., at 18.
obscenity, without taking away the fundamental freedoms guaranteed to us by the Constitution of India.\textsuperscript{159}

\textbf{7.7 Concluding Remarks}

Our Constitution is based on the principle of checks and balances. The preamble expresses two ideas which complement each other, namely,

1. Rights of the individual which correspond to the duties of the state towards the individual, and

2. Duties of the individual towards the state which correspond to the rights of the society against the individual.

The state is under obligation not to infringe upon the rights of the individual. Similarly, the individual is obliged to contribute to the social welfare.\textsuperscript{160} So every attempt needs to be made so that this reasonable means does not get disturbed. We are given the freedom of speech, we can express ourselves. But, the beauty of the freedom lies in its limits in the interest of the society.

It is submitted that when an individual is able to use his freedom for the betterment of another besides self, that would be a state of ultimate ecstasy. Therefore, when the media, besides enjoying so much of freedom also enjoys an individual’s confidence, its role 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. 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.\textsuperscript{161}

It is further submitted that change is the law of society, and thus laws also need change. In this regard, citing Justice Holmes, Dr. Surat Singh has beautifully remarked:

\begin{flushright}
\textit{Ibid.}\textsuperscript{159}
\end{flushright}

V.S. Deshpande, “Right and Duties under the Constitution”, 15 \textit{JILI} (1973), 94-108 at 95.\textsuperscript{160}

Markandey Katju, “Freedom of the Press and Journalistic Ethics”, 2 \textit{NMLR 2011}, 1-7 at 6.\textsuperscript{161}
Life of law is not logic but experience, therefore life of law is not precedents but a progressive tradition evolved as per the changing needs of our time in the light of overall integrity of our Constitutional system and goals.\textsuperscript{162}

In the ultimate analysis, the researcher hopes that the study proves helpful to those who believe in individual self-fulfillment in a transparent and an accountable democratic polity.

\textsuperscript{162} Cited in \textit{Supra} note 75 at 17.