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**G. N. Ray**

*Tabloidization and page 3 syndrome: Unethical practices in media*

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*The Implications of Informatics on Data Policy*

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*The Mind-rigging by Media : Electoral Offences and Corrupt Practices*

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*Public Interest in Broadcasting in India : Judicial Trends*

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*Trial-by-media : Derailing Judicial Process in India*

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*Religion and Censorship in the Indian Media : Legal and Extra-legal*

**Lalitha Gadepally**

*Juvenile Justice and Media Perspectives in the US and India*

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### **Message from the Patron**

The National Academy of Legal Studies and Research University of Law aims at excelling in inter-disciplinary research in subjects such as media and law. Any democratic country with Rule of Law as its core value principle must guarantee freedom of speech and expression. It is considered the mother of all freedoms. At times, the right to ask is more important than the right to life. Unless we express, we cannot live. Man as a social being is linked to society through communication in a variety of ways. Human Society is incomplete without communication.

NALSAR considers it very important to work on the legal aspects of communication freedom. It has a Center for Media Law and Public Policy, under the leadership of Professor Madabhushi Sridhar, a well known academician and journalist. Media law is currently offered as a seminar course at NALSAR, and as a special P.G. Diploma Course through NALSAR's proximate education program. This journal is an expression and extension of the work carried out at the Centre for Media Law and Public Policy.

It is the social responsibility of any educational institution to further the understanding of democratic governance. It is in this context that a journal like Media Law Review assumes added importance and relevance. NALSAR hopes that this journal would go a long way in reaching out to people across various fields in order to enhance the spread and efficacy of freedom of speech and expression as the most powerful tool in the hands of all citizens and institutions of a civil society.

**Veer Singh**  
*Vice-Chancellor*

## Editorial

Today widely proliferated print and electronic media is operating as a most effective watchdog of all democratic systems of governance world over. Its far reaching effect is wonderful. With addition of new media to news media, such as internet, blog writing etc the field of media is now open to any one. It generated millions of citizen journalists. Thanks to information technology, the freedom of speech and expression is really available to every one who can use it. For an author the need of publisher is inevitable and that in fact dictated the freedom of expression. Without printing a book or article, any author can publish his views and invite comments from viewers on it. The technology also made watching media possible and effective.

Growing volumes of law in tune with advancing technology accommodated the media law too. Though media persons are subject to general legal regulation, the 'media law' is emerging, because of its peculiar specialization. However the media's spread being beyond boundaries of any nation, the media law assumed international proposition. Because of same reason it also became difficult to control, really making it a 'freedom'. It is very interesting to note that technology has come to the aid of 'expression freedom' generating unlimited space for building opinion to impact the decision makers wherever they are.

The interface between media and law is an interesting arena and a fascinating area of research. The National Academy of Legal Studies and Research (NALSAR) University of Law has launched through its NALSAR Proximate Education program a unique course called PG Diploma in Media Law, which is being taken by students of law, advocates practicing media law related matters, journalists, public relation professionals, advertisement managers, etc. NALSAR also offers media law as optional seminar course for students of 4<sup>th</sup> or 5<sup>th</sup> year, wherein they focus on any aspect of media and law interface and submit a research report. The report presented before the class as a seminar, take suggestions and field the questions and prepare final report after improvements. In fact, contributors to this first issue Lalitha, Lakshmi Kruttika, Zehra Khan and Harini Sudarsan are students of media law and these articles are based on their research. There is a center for Media Law and Public Policy in NALSAR



University taking up various research projects and spreading the media law related knowledge among various schools of journalism.

Based on this foundation of study and research the Center for Media Law and Public Policy launches this journal to document important views and significant studies for further advanced research into the growing field.

The first issue of Media Law Review dealt with aspects of Juvenile Justice, Tabloidization of Media, emerging Data policy, the media's clandestine role in electoral campaign through unethical practice of 'paid news', public interest issues in broadcast media, controversial 'trial by media' and growing religious censorship on media expression. These are all the vital issues that either threaten expansion of expression freedom or increase the conflict between the free exchange of ideas and the other interests of different public and private institutions.

Lalitha analyzed the effect of media reporting on life of juveniles, their growth and socialization. While performing the duty of mirroring truth about youth, the media is expected to protect interests of every child that is being commented upon, which in aggregate make or mar the future of a next generation.

G. N. Ray in his capacity as Chairman of Press Council of India expressed serious concern for interests of society and system which are under the attack of comments made with less care and caution. Page 3 syndrome and tabloidization of media are those worry the society mostly. Ray rightly expounded the need for emancipation of readers to criticize 'criticizing media'.

Dealing with Intellectual Property aspects of data, digitalization and data protection, Jon M. Garon has presented the global scenario and advocated for protection of subjects of the data as well as the data itself. His article emphasized the need for international cooperation to provide for comprehensive and standardized protections to both for data and from the misuse of that data.

In my article I have tried to analyze the unethical practice of packing news as advertisement. While the candidates contesting election propagate everything aiming at securing majority votes, the media is now indulging in falsity to help them do so for a price. This article also suggests how the election law could be used to curb this paid news practice.

Lakshmi Kruttika Vijay has examined the effect of public interest on broadcasting rights, particularly in cases where a party possesses some

variety of monopoly. She has provided perspective, and has looked at the existing statutory framework as well as judicial pronouncements.

Zehra Khan in “Trial-by-Media” has looked at how the Indian judiciary has been under the media’s microscope, particularly with reference to the Aarushi murder case. She has given us a holistic perspective of the media’s impact by looking at various case laws.

Harini Sudershan has examined censorship in the media, particularly in the context of the Indian Media. She has looked at the legal framework of censorship, as well as extra-legal dimensions of the same.

**Madabhushi Sridhar**

*Editor-in-Chief*

## TABLOIDIZATION AND PAGE 3 SYNDROME: UNETHICAL PRACTICES IN MEDIA

G.N.Ray\*

### *Abstract*

*The media is regarded as the fourth estate and freedom of the media is an essential feature of all democratic states. The Press Council of India works to regulate the ethics of the print media and to protect freedom of the press. The first part of this article discusses the standards set by the press council on the recording of court proceedings. The latter part of the article examines the growing trend of tabloidization in journalism.*

Freedom of the media is indeed an integral part of the freedom of expression and is an essential requisite of a democratic set up. The Indian Constitution has granted this freedom by way of Fundamental Rights.<sup>3</sup> The media, which is obligated to respect the rights of individuals, is also obligated to work within the framework of legal principles and statutes.<sup>4</sup> These principles/statutes have been framed by way of minimum standards and do not intend to detract from higher standards of protection to the freedom of expression.

The media is the Fourth limb of a democratic system, the legislature, executive and judiciary being the other three. While legislature prepares the law for the society and the executive takes steps for implementing them, the third stepping-stone is the judiciary, which has to ensure legality of all actions and decisions. The Fourth Estate i.e. the press has to operate within the framework of these statutes and constitutional provision to act in public and national interest. This is indicative of the fact that nobody is above law. When the Constitution of India guaranteed freedom of expression and speech to its citizens, it ensured that the freedom was not absolute and any expression, by way of words, speech or visual medium, did not violate any statutory provisions enacted by legislature and executed by the executive. If the media, electronic or print, exceeded its jurisdiction,

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\* *Chairman, Press Council of India, New Delhi.*

1 Article 19(1)(a) of Constitution of India which guarantees freedom of speech and expressions

2 Article 19(2) of Constitution of India, permits only “reasonable restrictions” in the interests of, *inter alia*, contempt of court.

the courts came forward to ensure that violation of the Fundamental rights by the media does not go unchecked.

The Press Council of India, which I represent, being its Chairman, was born out of the anxiety of our constitutional fathers to ensure that democracy can flourish only where its citizens enjoy full freedom of speech and expression subject only to reasonable restrictions. The press is rightly covered within the ambit of Article 19 (1) (a) even without an express mention. However, once the freedom struggle was over it was recognized that a new kind of press was emerging in the post independence era whose aims and objects were undergoing fast change. The First Press Commission set up in 1954 examined the issue in depth and proposed the establishment of a Press Council as a peer body by regulate the conduct of their own brethren without any outside or governmental interference.<sup>5</sup> Similar bodies were functional in several other democracies, but these were primarily voluntary organisations. In India, it was deemed more appropriate to give the Council the statutory backing affording due weightage of its adjudications and pronouncements. The Press Council of India has since functioned as a Court of Honour, guiding the print media along the path of ethical conduct and at the same time protecting it from any onslaught on its freedom.

The Press Council also functions as an advisory body to the government on matters affecting press freedom and has rendered valuable advice on several legislations.<sup>6</sup> These cover the areas of libel, invasion of privacy, right to information, parliamentary privileges, Prevention of Terrorist Activities, Official Secrets, among others. Recently, the Press Council had advised the Parliament on 'Truth' being accepted as a defence in contempt of court proceedings and the enactment incorporating these provisions in Contempt of Court Act has been passed.<sup>7</sup> Similarly, the Council has drawn up a set of norms on media reporting on court proceedings.

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3 See objectives of Press Council Act, 1978.

4 Section 14, Press Council Act, 1978.

5 Contempt of Court (Amendment) Bill, 2004 passed by Lok Sabha on 21st February 2006, amending Section 13 by introducing 13B to provide truth as defence.

## I. Caution in Criticizing Judicial Act

Excepting where the court sits 'in-camera' or directs otherwise, it is open to a newspaper to report pending judicial proceedings, in a fair, accurate and reasonable manner. But it shall not publish anything which, in its direct and immediate effect, creates a substantial risk of obstructing, impeding or prejudicing seriously the due administration of justice; or is in the nature of a running commentary or debate, or records the paper's own findings conjectures, reflection or comments on issues, sub judice and which may amount to abrogation to the newspaper the functions of the court; or is regarding the personal character of the accused standing trial on a charge of committing a crime.<sup>8</sup>

The newspaper shall not as a matter of caution, publish or comment on evidence collected as a result of investigative journalism, when, after the accused is arrested and charged, the court seizes the case, nor should they reveal, comment upon or evaluate a confession allegedly made by the accused. While newspapers may, in the public interest, make reasonable criticism of a judicial act or the judgment of a court for public good; they shall not cast scurrilous aspersions on, or impute improper motives, or personal bias to the judge. Nor shall they scandalize the court or the judiciary as a whole, or make personal allegations of lack of ability or integrity against a judge.<sup>9</sup>

Newspapers shall, as a matter of caution, avoid unfair and unwarranted criticism which, by innuendo, attributes to a judge extraneous consideration for performing an act in due course of his/her judicial functions, even if such criticism does not strictly amount to criminal Contempt of Court.<sup>10</sup>

## Reporting news pertaining to court proceedings

Before publishing a news item about court proceedings, it would be appropriate for the correspondent and editor to ascertain its authenticity

6 See definition of criminal contempt under Contempt of Court Act 1971.

7 *Ibid.*

8 In common law jurisdictions, perhaps the most significant role of contempt of court law is the application of the *sub judice* rule: no one should interfere with legal proceedings which are pending. In practice, this rule is usually used to prohibit publication of matters which are likely to prejudice the right of a fair trial when legal proceedings are pending, or in a more colloquial sense, to prevent "trial by media". The term *sub judice* is derived from the Latin phrase *adhuc sub judice li est*, which means "the matter is still under consideration". see also Rajeev Dhavan: Contempt of Court and the Press 70-72.

and, correctness from the records so that the concerned person can be held guilty and accountable for furnishing incorrect facts or wrong information about the court proceedings.’

A lot remains to be done to ensure that two of the strongest pillars of our democracy i.e. the judiciary and the media work in tandem to promote the democratic secular principles enshrined in our constitution.

## **II. International Efforts**

In 1994, a group of 39 distinguished legal experts and media representatives, convened by the International Commission of Jurists, its Centre for the Independence of Judges and Lawyers, and the Spanish Committee of UNICEF, met for three days in Madrid, Spain. The objectives of the meeting were: to examine the relationship between the media and judicial independence and to formulate principles to help the media and the judiciary develop a relationship that serves both freedom of the expression and the judicial independence. The participants came from Brazil, Sri Lanka, United Kingdom, Sweden, Jordan, Australia, Ghana, France, India, Spain, Germany, Austria, Netherlands, Norway, Poland, Portugal, Switzerland, Senegal, Palestine, Bulgaria, Croatia, and Slovakia. The following are the principles drawn up at the meet:

1. The Madrid Principles on the Relationship between the Media and Judicial Independence.
2. Freedom of the media, which is an integral part of freedom of expression, is essential in a democratic society. It is the responsibility of judges to recognise and give effect to freedom of the media by applying a basic presumption in their favour and by permitting only such restrictions on freedom of the media as are authorised by the International Covenant in Civil and Political Rights ("International Covenant") and are specified in precise laws.

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9 Section 4 of Contempt of Court says: ‘Subject to the provisions contained in section 7, a person shall not be guilty of contempt of court for publishing a fair and accurate report of a judicial proceeding or any stage thereof’. Section 5 of Contempt of Court, says “A person shall not be guilty of contempt of court for publishing any fair comment on the merits of any case which has been heard and finally decided”.

3. The media have an obligation to respect the rights of individuals, protected by the International Covenant, and the independence of the judiciary.

These principles are drafted as minimum standards and may not be used to detract from existing higher standards of protection of the freedom of expression.

### **The Basic Principle**

1. Freedom of expression (including freedom of the media) constitutes one of the essential foundations of every society which claims to be democratic. It is the function and right of the media to gather and convey information to the public and to comment on the administration of justice, including cases before, during and after trial, without violating the presumption of innocence.
2. This principle can only be departed from in the circumstances envisaged in the International Covenant in Civil and Political Rights, as interpreted by the 1984 Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights.<sup>32</sup>
3. The right to comment on the administration of justice shall not be subject to any special restrictions.
4. The basic principle does not exclude the preservation by law of secrecy during the investigation of crime even where investigation forms part of the judicial process. Secrecy in such circumstances must be regarded as being mainly for the benefit of persons who are suspected or accused and to preserve the presumption of innocence. It shall not restrict the right of any such person to communicate information to the Press about the investigation of the circumstances being investigated.
5. The basic principle does not exclude the holding in camera of proceedings intended to achieve conciliation or settlement of private cause.

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10 UN Document E/CN.4/1984/4.

6. The basic principle does not require a right to broadcast live or recorded court proceedings. Where this is permitted, the basic principle shall remain applicable.

### **Restrictions**

7. Any restriction to the basic principle must be strictly prescribed by law. Where any such law confers a discretion or power, that discretion or power must be exercised only by a judge.
8. Where a judge has the power to restrict the basic principle and is contemplating the exercise of that power, the media (as well as any other person affected) shall have the right to be heard for the purpose of objecting to the exercise of that power and, if exercised, a right of appeal.
9. Laws may authorise restrictions of the basic principle to that extent necessary in a democratic society for the protection of the minors and of members of other groups in need of special protection.
10. Laws may restrict the basic principle in relation to criminal proceedings in the interest of the administration of justice to the extent necessary in a democratic society for the prevention of serious prejudice to a defendant, and for the prevention of serious harm to or improper pressure being placed upon a witness, a member of a jury, or a victim.
11. Where a restriction of the basic principle is sought on the ground of national security, this should not jeopardise the right of the parties, including the rights of the defence. The defence and the media shall have the right, to the greatest extent possible, to know the grounds on which the restriction is sought (subject, if necessary, to a duty of confidentiality if the restriction is imposed) and shall have the right to contest this restriction.
12. In civil proceedings, restrictions of the basic principle may be imposed if authorised by law to the extent necessary in a democratic society to prevent serious harm to the legitimate interest of a private party.
13. No restriction shall be imposed in any arbitrary or discriminatory manner.
14. No restriction shall be imposed except strictly to the minimum extent and for the minimum time necessary to achieve its purpose, and no



restriction shall be imposed if a more limited restriction would be likely to achieve that purpose. The burden of proof shall rest on the party requesting the restriction.

### III. Tabloidization and page 3 Syndrome

Mr. F. S. Nariman,<sup>33</sup> the noted jurist, had once observed, “A responsible Press is the handmaiden of effective judicial administration. The Press does not simply publish information about cases and trials but, subjects the entire Justice – hierarchy (police, prosecutors, lawyers, Judges, Courts), as well as the judicial processes, to public scrutiny. Free and robust reporting, criticism and debate contribute to public understanding of the rule of law, and to a better comprehension of the entire Justice – system. It also helps improve the quality of that system by subjecting it to the cleansing effect of exposure and public accountability.” The need is that the courts be criticized but there is just as great a need that courts be allowed to do their duty fearlessly.

C.P. Scott, the founder editor of the Manchester Guardian, once said: “Comment is free but facts are sacred”.<sup>34</sup> In India, news in a written format had always been considered the truth and has been more powerful than the spoken word. But such position is not in existence anymore. The media is an integral and imperative component of democratic polity and is rightly called fourth limb of democracy. It is not merely what the media does in a democracy, but what it is, that defines the latter. Its practice, its maturity, and the level of ethics it professes and practices in its working are as definitive of the quality of a democracy as are the functions of the other limbs. With tremendous growth and expansion, prospects of mass media are today viewed as more powerful than ever before.

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11 See also the article of Fali S Nariman, ‘Only a Fair Press can be Free Press’, <http://osdir.com/ml/culture.region.india.zestmedia/2005-11/msg00016.html>.

12 In a famous 1921 essay marking the *Manchester Guardian's* centenary (at which time he had served nearly fifty years as editor), Scott put down his opinions on the role of the newspaper. He argued that the “primary office” of a newspaper is accurate news reporting; in his now-clichéd words, “comment is free, but facts are sacred”. Even editorial comment has its responsibilities: “It is well to be frank; it is even better to be fair”. A newspaper should have a “soul of its own”, with staff motivated by a “common ideal”: although the business side of a newspaper must be competent, if it becomes dominant the paper will face “distressing consequences”. ([http://en.wikipedia.org/wiki/C.\\_P.\\_Scott](http://en.wikipedia.org/wiki/C._P._Scott) last accessed on 19th July 2010).

However some feel that the media has gone too far ahead of itself, and today media has become more of a show than a medium. The media has created its own world of glamour, gossip, sex and sensation which has played a major role in distracting attention from the real issues of our times.

Former Chief Vigilance Commissioner N. Vittal who said in his article in Bhavan's journal, "Journalism is losing....." has indicated that special problem faced by journalists these days relates to journalism itself. The page 3 culture can make people live in a make-believe world and as a result, instead of journalism connecting people, it may result in the people losing touch with reality. He has noted that in the media, print or electronic, glamour has become a part of day-to-day life and that has led to the development of the Page 3 culture. It was the crystallisation of the concept articulated by Andy Warhol that in future "everyone will be famous for 15 minutes".

The combination of television and Page 3 culture has also made a very curious impact on public persons many of whom do not enjoy the public esteem in real sense and need to be seen to be remembered. In the past to become a public celebrity, a lot of groundwork was involved including physically meeting people and connecting with them, their needs and their aspirations. But thanks to the electronic media and the print media, it has become possible to reach a wider audience quite often and thus attain the status of celebrity without having to undergo the drudgery of traveling along the dusty roads.

The word tabloid originally meant "small tablet of medicine", then it was used figuratively to mean a compressed form or dose of anything, hence tabloid journalism (1901), and newspapers that typified it (1918), that has small pages, short articles, and lots of photographs. Tabloids are often considered to be less serious than other newspapers printed on large sized paper (broadsheets), and qualified to be called entertainment journalism.

The term 'Page three' originates from entertainment news in daily newspapers supplements appearing usually on the third page that chronicle parties and gossip of the glitterati – the country's equivalent of tabloid journalism. Page 3 features colour photo spreads of celebrities and the *nouvea riche* at parties and of course, captured indulging in activities far removed from life of the general public. There are lots of people who only read Page 3 sheets and discard the main newspaper, especially the youth. Today, the flashy supplements are a mix of celebrity news, party pictures,

movie gossip and juicy stories on private lives of celebrities. Page 3 has become a phenomenon and is believed to have arisen out of sensationalism. People may love to love it or love to hate it, but cannot ignore it.

Observers say that India's runaway Page 3 culture reflects two distinct levels of an aspirational society. One is the need for leisurely passing time without any serious reflection on issues of national importance. The second is the desire to be seen to be famous by featuring on Page 3. One Page 3 sheet claimed in a recent self-congratulatory article that everyone wanted to be in it but nobody wanted to admit it. In a way, Page 3 reflects the interdependence of media and celebrity.

Tabloidization is a shift by the media away from national and international issues of importance to a more entertainment or gossipy style of journalism that focuses on "Lifestyle, celebrity, entertainment crime and scandal". This shift is really a matter of concern because it gives rise to fear for the future of the media and the role and responsibility attached to it.

The fear behind this shift towards tabloidization lies in its implications. The effect of this shift to a more entertainment based journalism style is that the important issues such as health care education and issues relating socio political reforms which require to be addressed with seriousness have been given the back seat. The nation is deprived of information vital to reaching sound policy decisions. Our perception of society can vary greatly depending on the source of news and that bad information will inevitably lead to bad public policies.

There are some persons with lot of confidence in media who argue that Tabloidization has, in fact, not occurred and that the media is the same today as it was thirty years ago, but, there are some facts, which tell a different story: A survey reported on the net showed that in 1977 less than 1% of the stories covered in network news were about scandal; by 1987 they were 17%, and straight news declined from 51% in 1977 to 34% in 1997. During the same time period 'Time Magazines' stories about government declined from 15% to 4% while entertainment stories rose from 8% to 15%. Even though this survey covers a decade that is already two decades back and the magnitude of the shift may be arguable, but clearly a shift has been taking place in the manner in which the media present the news. It is not unreasonable to think that the position today has changed by leaps and bounds extending the horizon of tabloidization. The question needs to be addressed is what then has caused or led the media to move in this direction.

## **Manipulation of Information**

One view is that the corporations that own the satellite channels are responsible. The other view is that competition between networks is responsible. Another view is that public persons only interested in their glamorous image have encouraged the whole process to draw away the attention of the public from serious issues.

The news journalists “follow orders” from the corporate owners and shape the news accordingly. The result is news media, which “manipulates information” to push the agenda of the corporations which is based on marketing themselves and their products. The covering up of the news that may be detrimental to the economic health and/or reputation of the company guides such marketing. This is where tabloidization comes into play. In order to push their interests or to draw the attention away from the news that may in fact ‘hurt’ them, the corporations have created a news media that concentrate on attracting audiences through stories about sleaze, scandal and personal lives.

## **Erosion of ‘Editors’**

Another lamentable feature is the erosion of the importance of the office of Editor. In the olden days, the editor used to enjoy a special position in a newspaper. Even if a particular newspaper had leaned towards a particular socio-political ideology, the editor had always enjoyed enough freedom to articulate his view and comments on contemporary events. Some newspapers, as a matter of fact, used to be known by the excellence of their editors. In this age of tabloidization and pursuit of extreme commercial interest, advertisement or commercial directors of a newspaper enjoy a special position and often decide to what extent general news will be covered.

Has corrosive competition lead to the Tabloidization of the news? The major fear of the media having this speed – based mentality is that it is at the cost of accuracy and that the attitude has become “never let the facts stand in the way of a good story”. Corporate ownership also has played a role in the process of Tabloidization. Marketing has become a large part of both television and print media. Tabloidization is much less expensive than traditional reporting. It costs less to run a news clip than to send a reporter to the scene. The technological factors have also played major role in the process of Tabloidization. Improvements in technology and editing technologies made the “packaging” possible.

The dominance of Page 3 personalities in the news content of newspaper and its ever increasing horizon especially in national level newspapers, is a negative trend, visible in the media as a whole irrespective of being print or electronic. In fact, on the electronic media, cinema trivia control the prime time bulletin. Regional media has by and large exhibited till now greater restraint in carrying trivialized material in their news content.

The colour picture supplements with “Page 3” meet the requirement of both the patrons and clients. They can bring in everything – Publicity for products – without even raising an eyebrow. Exaggerated pressures from the television and satellite channels are used as a pretext by print media for supposed felt need propelled by competition for further trivialization of news columns which, in turn, encourage crasser commercialisation. Indeed, this vicious circle though highly reprehensible, rules the field.

### **Focus on trivia**

Insensitivity to the content and focus on trivia are rampant today with media focusing more and more on illness and accidents of the famous at the cost of developmental issues. The coverage of personal life of celebrities more than needed only leaves the message that nothing else is happening in the country, which deserves its place in the coverage of news. Yet it is worth nothing that young viewers polled by Mid-Day agreed that the Volcker Committee report<sup>35</sup> was more important. This indicates the divide between what people want and what the media thinks that people want. They would do well to recognize the pulse of the people.

Criticising trivialisation and sensationalisation of news recently Shri Jaipal Reddy, former Minister for Information & Broadcasting pointed out that Media scene in the country had undergone not only a “dramatic” change but also a ‘traumatic’ one.<sup>36</sup> Page 3 people are increasingly trying to get into page one by joining politics. Further he emphasized that

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13 The **Paul Volcker Committee** (Independent Inquiry Committee) was formed to investigate alleged corruption and fraud in the United Nations Oil-for-Food Programme, appointed by UN Secretary General Kofi Annan during April 2004. it submitted interim report in February 2005 and Final Report on October 27, 2005.

14 Address by Mr. Jaipal Reddy, Union Minister for Information & Broadcasting inaugurating the seminar on “Should there be Lakshman Rekha for News Media” on 2<sup>nd</sup> June 2005, at Hyderabad, see Indian Affairs Annual Report 2006, also see <http://www.televisionpoint.com/news/print.php?id=1117708851> accessed on 20<sup>th</sup> July 2010.

entertainment should be distinct from information. Instead of discussing the dressing sense or appeal, the media should focus on their work. He advised media to do “collective and cool, introspection” besides building up its credibility and urged print media not to compete with electronic media glamorisation. The comments of Reddyji deserve a serious thought.

#### **IV. Conclusion**

In the media scenario, which had emerged today, there is growing practice of masquerading paid publicity as genuine news. A large amount of the media’s contemporary problems flow from the greed of a section of it. Surprisingly, the established ones with decisive market domination are very often alleged, indulge in this pernicious practice of selling news columns. In this era of economic owning up, lobbyist or even foreign powers, can fill news columns with inspired stories. If the present trend catches on, there will be no way to stop it. We need to be alive to the danger before it is too late. The threat has to be met, not by trivialisation, but by more in depth and public interest stories and background on which the print media is on a stronger wicket. Market surveys create cherished myths such as, that the ‘Generation Now’ is disinterested in serious political and economic news and everyone will casually glance the colour advertisements. But the popularity of the “competition” pages and intelligent quiz programmes tell a different story.

It is not the free market competition but competitive marketisation of the media that creates a generation of false notion. Mindless marketisation by interested sections can be countered only by better understanding of what the public want. Media should not forget that its main aim is to provide information to create a sound citizenry.

Instead of an imagined “generation now” mindset, newspapers will have to spread horizontally – like consumer producers exploring the vast rural market. Newspapers will have to sell the news to the readers, the ultimate consumer of news for whose benefits the whole task is undertaken.

This shift from journalism to the market is not a good or healthy sign. In the United States, where marketing was invented, journalism and television and the Internet have had the same pulls and pressures of the market. Still they have the ‘New York Times’ and ‘Washington Post’ and several other magazines doing extremely well. In India also there are few papers which can boast of their quality of contents.

In our country we seem to have somehow deviated from the core mandate of journalist. We have commercialised, we have trivialised, we have indulged in pernicious attempt to make all the pages as Page 3. Such state of affair is to be noted with anxiety and grave concern. To say the least, this trend is not good because journalism is one of the continuing thought processes of civilisation. The redeeming feature is that by and large the regional media, or the regional language media, which is also called the vernacular media, has not yet fallen to a reasonable extent to this trend of trivialisation. But anxiety is how long this last pasture will remain comparatively green.

Following the commercialisation of the media, the adage ‘mirror of society’ associated with journalism is perhaps no longer relevant. Therefore the immediate task is to grapple with an ethical question: Is there a “this far and no further” in commercialisation of news? It is no secret that the columns of newspapers are handed out on a platter to suit personal interests by planting favourable stories and killing negative ones. In the process, objectivity has taken a holiday.

The time perhaps has come for the P.R. man to rise to use his skills for an image makeover for the newspaper industry and I do not mean just a cosmetic make over but that which will have depth and touch the society at large.

Last but not the least, the role of readers, assumes great importance in combating the malaise being discussed. The readers, in my view, have important role to play. If they remain callous and meekly accept whatever is given to them by the media without any protest or critical estimate of the role of media, this unfortunate trend would continue unabated and perhaps with greater ferocity ultimately leading the readers to be insensitive to the real role required to be played by the media in building up a vibrant and progressive society. Eternal vigilance is not only the price of democracy but also the price for effective role of the media. I appeal to all right thinking citizen to raise voice of protest against the malady of tabloidization and the page three syndrome as effectively as practicable. I am confident that such protest and constructive criticism of the role of media cannot go unheeded.

# THE IMPLICATIONS OF INFORMATICS ON DATA POLICY

*Jon M. Garon\**

## *Abstract*

Because of the increasing ease of digitization, all information is becoming part of a single, incomprehensively large, multinational, multicultural data system. The resulting data ecosystem is subject to local regulation by state and national laws which have often been drafted to address a conflicting set of jurisdictional rules and normative expectations regarding the creation, ownership, collection, storage and dissemination of information. The laws vary from country to country, resisting efforts at attaining international harmony because of deeply rooted historical differences in the power of the state, the influence of governmental censorship, and the legal of personal dignity protection afforded by national laws.

Medical records and health information; individual financial records; aggregated financial trend data; copyrighted music; public domain art; sports scores; scientific research findings; personal and professional correspondence; police surveillance videos; choreographic notations; architectural designs; discount or loyalty shopping cards; military deployment statistics; metadata in e-mails and tweets; encryption and decryption keys; - these and many more categories of information are subject to often conflicting laws of copyright, privacy law, data protection regulations and competing legal regimes drafted to focus on particular types of information. Moreover, information has moved out of the computer. Using RFID<sup>3</sup> chips, physical items increasingly broadcast information about their whereabouts.

This article tracks examples of informatics projects in the public and private sector to determine the primary public

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1 Radio-Frequency Identification.



policy priorities to be fostered by the regulatory regime, including copyright, privacy interests, data ownership rules and data integrity policies to foster reliability, integrity and accuracy.

All media are extensions of some human faculty – psychic or physical.

-Marshall McLuhan

With the advent of digitization, it is now possible to replace all previous information storage forms with one meta-bottle: complex-and highly liquid-patterns of ones and zeros.

Even the physical/digital bottles to which we've become accustomed, floppy disks, CD-ROM's, and other discrete, shrink-wrappable bit-packages, will disappear as all computers jack in to the global Net. While the Internet may never include every single CPU on the planet, it is more than doubling every year and can be expected to become the principal medium of information conveyance if, eventually, the only one.

Once that has happened, all the goods of the Information Age-all of expressions once contained in books or film strips or records or newsletters-will exist either as pure thought or something very much like thought: voltage conditions darting around the Net at the speed of light, in conditions which one might behold in effect, as glowing pixels or transmitted sounds, but never touch or claim to "own" in the old sense of the word.

- John Perry Barlow, *The Economy of Ideas*\*

## I. Introduction

From the golden age of television to its not too distant past, audience viewership was measured with audience diaries.<sup>2</sup> Before a television show ever made it onto the airwaves, test audiences were invited to view the shows in private screening rooms, pushing buttons to indicate strong positive or negative reactions to each moment of the episode. Negative responses to a particular cast member could result in a rewrite or re-casting

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\* John Perry Barlow, *The Economy of Ideas, Selling Wine without Bottles on the Global Net*, available at <http://homes.eff.org/~barlow/EconomyOfIdeas.html> (last visited November 8, 2009).

2 Philip M. Napoli, *Audience Measurement and Media Policy: Audience Economics, the Diversity Principle, and the Local People Meter*, 10 COMM. L. & POLY 349, 351 (2005) (hereinafter Napoli-LPM).

of the show.<sup>3</sup> With the advent of the digital age, new techniques have become available to gauge audience reaction. In 2005, Nielsen Media Research began replacing its diaries with the local people meter (“LPM”), a set-top device much more precise at measuring the television’s usage (though, of course, it cannot guarantee a person is awake and attentive).<sup>4</sup> Not to be outdone, Arbitron, the largest U.S. company measuring radio audience, launched the portable people meter (“PPM”) in 2007.<sup>5</sup> The PPM is “a small, pager-sized device that automatically captures the audio signals to which the carrier of the device is exposed, and translates that information into the ratings data that are fundamental to the buying and selling of radio audiences.”<sup>6</sup>

These new devices are complemented by analytic tools that enable ISPs and website hosts to track the movement and consumption of information quite readily on the web. The implication of the PPM, moreover, can extend the tracking ability to all media for a person. Mounted in public places, similar devices could correlate all media being consumed at a location or series of locations. Media consumption is just one form of informatics modeling that has grown exponentially in the past decade, with little or no comment or regulation.<sup>7</sup>

Informatics has been described as “the art and science of information,”<sup>8</sup> but this definition is both too broad and too open-ended. John Perry Barlow’s conception of “something very much like thought” may be a closer approximation but it still lacks a framework. Wikipedia suggests that informatics can be defined as “the science of information, the practice of information processing, and the engineering of information systems. Informatics studies the structure, algorithms, behavior, and

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3 For example, on the television series *Home Improvement*, Frances Fisher was originally cast as Jill Taylor but poor audience response caused the producers to re-cast the part with Patricia Richardson “four days before the pilot episode was taped.” IMDB, *Home Improvement*, <http://www.imdb.com/title/tt0101120/trivia>.

4 See Napoli-LPM at 351-52.

5 Philip M. Napoli, *Audience Measurement, the Diversity Principle, and the First Amendment Right to Construct the Audience*, 24 ST. JOHN’S J.L. COMM. 359 (2009) (hereinafter Napoli-PPM).

6 *Id.* at 360.

7 In the U.S., media rating organizations such as Nielson or Arbitron participate in a voluntary, self-regulatory regime operated by the Media Rating Council (<http://www.mediaratingcouncil.org/>). See section II, *infra*, regarding the Media Rating Council.

8 John Gammack, *Valerie Hobbs and Diarmuid Pigott*, *THE BOOK OF INFORMATICS* 3 (2007) (hereinafter GAMMACK).

interactions of natural and artificial systems that store, process, access and communicate information.”<sup>9</sup> This may prove a more accurate definition though a variety of such competing definitions point to the evolving nature of the field.<sup>10</sup>

At UCLA, students are encouraged to see informatics in its meta-connectivity context:

Informatics is the emerging discipline that envisions information technology design and use in terms that include its larger institutional, social, cultural, and cognitive dimensions. As information technology is applied to an ever-widening variety of contexts, including work, home, shopping, and public spaces, these new applications require a corresponding shift in the ability of information professionals to design, manage and evaluate information services.

Informatics is premised on the observation that successful design and integration of information technologies into society requires a sophisticated understanding of information seeking and use, metadata, user-centered design, electronic information genres, and how information technologies function as vehicles of power and social action.<sup>11</sup>

Rather than provide a technical definition, perhaps an example will provide a more helpful framework. In 1996, Stanford University graduate students Larry Page and Sergey Brin created a web search crawler named BackRub to index and prioritize the Internet.<sup>12</sup> While there, they patented their Page Rank technology for Stanford University which holds the Page Rank patent, which expires in 2017.<sup>13</sup> What makes the Page Rank

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9 Wikipedia, Informatics (academic field), <http://en.wikipedia.org/wiki/Informatics> (academic field) (last visited Dec. 9, 2009) (ironically, the citation has no sources and requires “cleaning up”).

10 See Michael Fourman, Informatics, Informatics Research Report EDI-INF-RR-0139 (July 2002) (available [www.inf.ed.ac.uk/publications/online/0139.pdf](http://www.inf.ed.ac.uk/publications/online/0139.pdf)) (e.g. “Informatics ... studies the representation, processing, and communication of information in natural and artificial systems. Since computers, individuals and organizations all process information, informatics has computational, cognitive and social aspects.”) (last visited Jan. 3, 2010).

11 UCLA Graduate School of Education and Information Studies, Scope Statements for MLIS Specializations, Informatics Specialization, available at <http://is.gseis.ucla.edu/academics/degrees/specializations.htm#informatics> (last visited July 3, 2010).

12 Google Investor Relations, Google Code of Conduct, available at <http://www.google.com/intl/en/corporate/history.html> (last visited Aug. 10, 2009).

13 Google 2009 10-K at 15 (Intellectual Property).

technology patentable is not the ability to index the Internet or to identify the most relevant sites based on its term, but the methodology of the rankings.

Page and Brin recognized that the then-existing search engines based the rankings on the greatest number of matches to the terms being searched. At the time, the logic was as follows: If “cat” was used more in a document, that document was more relevant than another document that used the term less frequently. This system, in turn, allowed clever website designers to bury the most likely search terms in the website in order to maximize the potential for higher ratings while not providing relevant content.<sup>14</sup> The Page Rank innovation was to assume that the usability of a website was more likely based on the number of other websites that linked or referred to that site instead of focusing on the volume of content in the site’s page. By using the external links – and by extension the editorial behavior of other website editors – Page and Brin integrated the information on the page with the human interactions with the data. From this insight Google has become the largest Internet advertising company. The information for these external links, in turn, can be coded as the metadata of the page – information about the presented information.<sup>15</sup>

The understanding that the value of data and metadata is informed by the use to which humans put that data will shape the evolution of informatics systems. The field of informatics looks beyond the science of information systems to embrace the information ecosystem regarding data within its environmental context, particularly the potential use and abuse of the information. Moreover, because data is created by the very study of data, informatics must provide methodologies to embrace a highly dynamic environment.<sup>16</sup>

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14 Website designers could place additional terms in the metadata or non-visible coding for the web page; they could use font colors that matched the background colors (rendering the text invisible); or take other steps to add text designed merely to fool the ranking mechanisms. See Ira S. Nathenson, *Internet Infoglut and Invisible Ink: Spamdexing Search Engines with Meta Tags*, 12 HARV. J. LAW & TEC. 43, 60-62 (1998).

15 See *Latimer v. Roaring Toys, Inc.*, 601 F.3d 1224 1230 n. 4 (11th Cir. 2010) (“Metadata, commonly described as ‘data about data,’ is defined as “[s]econdary data that organize, manage, and facilitate the use and understanding of primary data. Black’s Law Dictionary 1080 (9<sup>th</sup> ed. 2009)””).

16 Without overstating the comparison, the Heisenberg Uncertainty Principle (“it is not possible, even in principle, to know the momentum and the position of a particle simultaneously and with perfect accuracy”) provides a useful analogy to the study of informatics. The study of

In the United States, the term informatics has not developed the same cachet as in the rest of the world. The term was initially trademarked in the United States, discouraging its use.<sup>17</sup> In contrast, in France, for example, the term was incorporated into the language and adopted by L'Academie Francaise as an official French term.<sup>18</sup> Although the word has since lost its trademark status in the U.S.,<sup>19</sup> the term has had less impact than in Europe and other parts of the world.<sup>20</sup>

The concept underlying informatics has a profound meaning for the future of disparate legal regimes. With the increasing ease of digitization, *all information has the potential to be digitized* and as such, all information is becoming part of a single, incomprehensively large, multinational, multicultural data system. Informatics stands for the proposition that all information is part of the same knowledge system, despite the many attributes by which a single datum may be identified. This data ecosystem – or infosystem – is subject to local regulation by state and national laws which have been designed to address a variety of jurisdictional rules and expectations regarding the creation, ownership, collection, storage and dissemination of often competing aspects of the information. Moreover, the laws vary from country to country, resisting efforts at bringing international harmony because of deeply rooted historical differences in the power of the state, the influence of governmental censorship, and the legal of personal dignity protection afforded by national laws.

Medical records and health information; individual financial records; aggregated financial trend data; media consumption; copyrighted music; public domain art; sports scores; scientific research findings; police surveillance videos; choreographic notations; architectural designs; discount or loyalty shopping cards; military deployment statistics; metadata in e-mails

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information and information systems necessarily creates information that both changes the data – if not the system – and requires additional study. Benjamin Crowell, *THE MODERN REVOLUTION IN PHYSICS* 96 (3<sup>rd</sup> Ed. 2005); see generally R. George Wright, *Should the Law Reflect the World: Lessons for Legal Theory from Quantum Mechanics*, 18 FLA. ST. U. L. REV. 855 (1991).

17 Walter F. Bauer, *Informatics and (et) Informatique*, ANNALS OF THE HISTORY OF COMPUTING, 18(2) (1996) available at <http://www.softwarehistory.org/history/Bauer1.html> (Informatics was a trademarked term which “through the years [Informatics – the company] stopped many organizations from using the name on the advice of our patent attorneys”).

18 *Id.*

19 See Trademark Reg. Nos. 0939115, 1027818 (REGISTRANT) INFORMATICS, INC. (expired mark).

20 GAMMACK, *supra* note 8, at 3.

and tweets; encryption and decryption keys; - these and many more categories of information are subject to laws of privacy, copyright, trademark, patent, property, contract and criminal law. A child's photograph may be protected by copyright held by the photographer, posted to a website with the permission of the parent, under a non-exclusive (and entirely digital) contract with the ISP. The posting of the same photograph on the student's elementary school website may violate the student's privacy rights. Information about the photograph, including the date and time taken, the equipment used, the photographic enhancements and cropping are included in the information provided to the ISPs without the photographer's knowledge. The ISP, in turn, can aggregate the information about photographs posted to its system and sell that data to camera manufacturers and photography software companies so that these businesses may better understand the actual customer behaviors. Tags on the picture (either at the ISP or the school) may identify the student by name, enabling further responses by the businesses purchasing that information.

Moreover, information has moved out of the building. Using RFID chips, products increasingly broadcast information about their whereabouts. The data can tell a retailer when to restock each item in the store. Similar technology informs toll booths when to charge drivers for use of the toll roads. The same data can tell civil litigants and criminal prosecutors when vehicles have moved through toll booths. GPS-enabled cell phones and laptop computers may provide similar information regarding the physical movements of their owners.

This article does not propose a sweeping legal regime to incorporate the entire ecology of data into a comprehensive, global legal regime. Instead it provides a much more modest goal of identifying some key principles that should drive the development of laws, norms and technology.<sup>21</sup> If informatics is the ecological study of information, then this effort will provide some observations of the key landmarks and causal relations inherent in the infosystem.

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21 See generally Kristen Osenga, *Information may want to be Free, but Information Products do not: Protecting and Facilitating Transactions in Information Products*, 30 CARDOZO L. REV. 2099, 2127 (2009).

## II. Informatics and Analytics Models

The central implications of informatics are still in their infancy. Yet the potential of informatics-driven design is already starting to show its impact in the marketplace. The typical informatics schema is structurally populated with data and metadata from a discrete body of information. A survey of different approach paradigms provides context for the regulatory issues raised by these tools.

Under a voluntary, cooperative data sharing model, for example, science can harness and coordinate related projects in a more seamless continuum. During the past decade international organizations have been collaborating to create an “information commons” for biodiversity information.<sup>22</sup> In the biodiversity commons, the science can be use to predict ecological distribution of plants, animals and infectious diseases, track the environmental impact of climate change and monitor the movement of invasive species.<sup>23</sup>

While the scientific information available for tracking is gathered on a voluntary basis by research institutions and scientists around the globe,<sup>24</sup> there is still a requirement that standards are established and rigidly followed so that the data and metadata can be aggregated. “To integrate

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22 See Gladys A. Cotter and Barbara T. Bauldock, *Biodiversity Informatics Infrastructure: An Information Commons for the Biodiversity Community*, Proceedings of the 26<sup>th</sup> International Conference on Very Large Databases, Cairo, Egypt, 2000 (available at <http://citeseerx.ist.psu.edu/viewdoc/download?doi=10.1.1.1.4239&rep=rep1&type=pdf>) (last visited July 5, 2010).

23 V. P. Canhos, S. Souza, R. Giovanni and D. A. L. Canhos, *Global Biodiversity Informatics: Setting the Scene for a “New World” of Ecological Modeling*, in S 1 (2004).

The existence of biodiversity data resources from different fields of knowledge, available to all interested, and the strong demand to integrate, synthesize, and visualize this information for different purposes and by different end users is leading to the development of a new field of research that can be termed biodiversity informatics. This emerging field represents the conjunction of efficient use and management of biodiversity information with new tools for its analysis and understanding.

24 United Nations efforts have been central to this effort:

The set of agreements signed at the 1992 Rio de Janeiro “Earth Summit” included two binding conventions, the United Nations Framework Convention on Climate Change (UNFCCC) and the Convention on Biological Diversity (CBD). While the CBD aims at conservation and sustainable use of biological diversity, ensuring benefit-sharing, UNFCCC targets stabilization of atmospheric concentrations of greenhouse gases, primarily through negotiation of global agreements such as the Kyoto Protocol.

data from distributed sources in real time, not only is technology necessary, but standards and protocols are essential.<sup>25</sup>

Knowledge organization requires tools to facilitate information discovery and retrieval. Controlled vocabularies in general, and standard taxonomies in particular, allow information seekers to “speak the same language” - literally - as information providers, which increases retrieval precision. Much work remains to be done, however, in the area of thesauri development to agree on a set of terms to describe the various parameters central to discussions of biodiversity and to provide multi-lingual access to those terms.

Standard taxonomies, including scientific names, synonyms, common names in various languages, and information about the authorities on which the standard taxonomies are based, are central to the identification and retrieval of biodiversity information by species.<sup>26</sup>

Even in the highly structured and venerable fields of biology and ecology, challenges over taxonomy standards, technical standards, coding consistency and data integration remain significant concerns to be addressed as the field of bioinformatics develops.

Internet-based technologies enable not only the scientific community but the global public at large, sometimes a mixed blessing. Open access is a fundamental principle in most biodiversity networking initiatives; however, in many areas, some agreement must be made concerning the level of detail of information which will be generally available through our networks. Locations of endangered species is an obvious example.<sup>27</sup>

There are many competing and complementary projects embracing bioinformatics. Unless they agree to a common set of protocols for their information (or can map one set onto another through relational linkages), the benefit of the international collaboration is lost and the data set reduced in scope. Only by creating such agreement can the system achieve its full potential. Common norms like data sharing must be balanced with national interests and conservation goals.

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25 *Id.* at 6.

26 Cotter and Bauldock, *supra* note 22, at 703.

27 *Id.*



The biodiversity work is supported by many international organizations and UN treaty support, reflecting a model in which large public datasets are fostered through international cooperation.

The second model focuses on datasets created by order of positive law or treaty. The European Union has commissioned a large, mandatory project employing taxonomy-based metadata for geographic and spatial information throughout the European Union. Named the INSPIRE Directive, it first came into force in 2007, with implementation expected to take through 2019.<sup>28</sup>

The INSPIRE directive aims to create a European Union (EU) spatial data infrastructure. This will enable the sharing of environmental spatial information among public sector organisations and better facilitate public access to spatial information across Europe. A European Spatial Data Infrastructure will assist in policy-making across boundaries. Therefore the spatial information considered under the directive is extensive and includes a great variety of topical and technical themes.

INSPIRE is based on a number of common principles:

- Data should be collected only once and kept where it can be maintained most effectively.
- It should be possible to combine seamless spatial information from different sources across Europe and share it with many users and applications.
- It should be possible for information collected at one level/scale to be shared with all levels/scales; detailed for thorough investigations, general for strategic purposes.
- Geographic information needed for good governance at all levels should be readily and transparently available.
- Easy to find what geographic information is available, how it can be used to meet a particular need, and under which conditions it can be acquired and used.<sup>29</sup>

Spatial or geographic data can be defined as “any data with a direct or indirect reference to a specific location or geographical area,”<sup>30</sup> or “data

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28 Directive 2007/2/EC of the European Parliament and of the Council of 14 March 2007 establishing an Infrastructure for Spatial Information in the European Community (INSPIRE).

29 European Commission, INSPIRE Directive Portal, About Inspire, <http://inspire.jrc.ec.europa.eu/index.cfm/pageid/48>.

concerned with the size, area or position of any location, event or phenomenon.””<sup>31</sup> Although the European spatial data directive has few of the difficulties faced by voluntary coordination and competing organizational interests, the implementation – scheduled to take place in stages for more than a decade – has a great deal of standardization required. In 2008, the EU adopted Implementing Rules to assure ongoing progress on their key goals:

To ensure that the spatial data infrastructures of the Member States are compatible and usable in a Community and transboundary context, the Directive requires that common Implementing Rules (IR) are adopted in a number of specific areas (Metadata, Data Specifications, [Network] Services, Data and Service Sharing and Monitoring and Reporting). These IRs are adopted as Commission Decisions, and are binding in their entirety. The Commission is assisted in the process of adopting such rules by a regulatory committee composed by representatives of the Member States and chaired by a representative of the Commission (this is known as the Comitology procedure).<sup>32</sup>

The details of the adoption for Europe’s spatial mapping project help illustrate the level of complexity that exists even when the project can be mandated by law or directive and implemented more-or-less unilaterally. Metadata and data specifications are critical to interactivity of these models. Decisions to include or exclude categories of data can redefine areas or practice or science.

A third model focuses on massive data analysis rather than an *ex ante* agreement or standardization. To overcome the problems of hierarchal structure and develop informatics systems beyond the capability of human or computer-based design, a different approach is now being explored. Instead of creating a taxonomy of metadata based on agreed-upon standards and intensive data annotation, data mapping of user response to information can provide significant, real time metadata tools. This new

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30 Katleen Janssen and Jos Dumortier, *The Protection of Maps and Spatial Databases in Europe and the United States by Copyright and the Sui Generis Right*, 24 J. MARSHALL J. COMPUTER & INFO. L. 195, 196 (2006) *quoting* Commission of the European Communities, Proposal for a Directive of the European Parliament and of the Council Establishing an Infrastructure for Spatial Information in the Community (INSPIRE), <http://www.ec-gis.org/inspire/proposal/EN.pdf>.

31 *Id.* *quoting* Douglas D. Nebert, *Developing Spatial Data Infrastructures: THE SDI COOKBOOK*, <http://www.gsdi.org/docs2004/Cookbook/cookbookV2.0.pdf> (Jan. 25, 2004).

32 INSPIRE Metadata Regulation 03.12.2008, <http://inspire.jrc.ec.europa.eu/index.cfm/pageid/4>.

model can be viewed as an extrapolation of Google's use of external websites to predict relevance – the use of external responses to predict accuracy. In his blog, *The Google Way of Science*, Kevin Kelley explained how Google can use the vast relational data in its networks to outpace the exploration of traditional science.

It may turn out that tremendously large volumes of data are sufficient to skip the theory part in order to make a predicted observation. Google was one of the first to notice this. ... When you misspell a word when googling, Google suggests the proper spelling. ... Google operates a very large dataset of observations which show that for any given spelling of a word,  $x$  number of people say “yes” when asked if they meant to spell word “y.” Google's spelling engine consists entirely of these datapoints, rather than any notion of what correct English spelling is. That is why the same system can correct spelling in any language.

In fact, Google uses the same philosophy of learning via massive data for their translation programs. They can translate from English to French, or German to Chinese by matching up huge datasets of humanly translated material. For instance, Google trained their French/English translation engine by feeding it Canadian documents which are often released in both English and French versions. The Googlers have no theory of language, especially of French, no AI translator. Instead they have zillions of datapoints which in aggregate link “this to that” from one language to another.<sup>33</sup>

From this methodology, for example, one can suddenly understand how Google's investment of millions of dollars in the Google Book Search, its book digitization project, has a powerful commercial upside. By scanning 15 million books housed in academic universities in the U.S. and other countries, the database can identify correlations between various words and phrases. In many instances, particular words go together so that far less perfect speech recognition software, hand writing recognition software, and cell phone/tablet typing software may all be better able to approximate what a user meant to say or type – even correcting grammar as an artifact of the process. The information can then be translated automatically using the same brute force algorithms.

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33 Kevin Kelley *The Google Way of Science*, [http://www.kk.org/thetechnium/archives/2008/06/the\\_google\\_way.php](http://www.kk.org/thetechnium/archives/2008/06/the_google_way.php) (last visited July 3, 2010).

Yet another beneficial artifact of the process is that it can be idiomatically correct to the extent that regional differences are further incorporated into the metadata. Castilian Spanish will be translated somewhat differently than Mexican Spanish, provided the user identifies the output dialect. If the user provides the input dialect, through background information or GPS coordinates, then the common inaccuracies attributable to the person's regional background or geographic home can be used to adjust the translation. So without ever teaching a computer to recognize language, the brute force metadata approach can produce science fiction's long-sought universal translator.

IBM has been touting the data mining approach in its ad campaign "Building a Smarter Planet." As it explains:

The biggest leaps forward in the next several decades – in business, science and society at large – will come from insights gleaned through perpetual, real-time analysis of data. The new science of analytics must be core to every leader's thinking. Because while data is growing exponentially today in volume and complexity, time is not.

There are three keys to moving from "big data" to *smarter* data: organize your information, in all its diversity; understand its context; and manage its continual evolution in real time. Through smarter data, we can make sense of information in all its forms – structured and unstructured, text and multimedia. ... Nearly useless by itself, a data point can now be put in context, and that context can be analyzed in real time.<sup>34</sup>

The fourth model is represented by the LPM and PPM, voluntary data studies. They are sample sets used to predict more general activity. These tools utilize hybrids of hierarchical data sets and massive real-time behavior to integrate the information. But they rely on statistical models of the actual usage data. Only a small portion of the public actually wears the PPM device. Arbitron came under fire that the population comprising the device pool underrepresented African American and Hispanic male adults, particularly among the ages of 18-34.<sup>35</sup> If every radio and television were equipped with a usage transponder, for example, then such measurements would undoubtedly be more accurate than reliance on sample sets.

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34 IBM, *On a smarter planet, answers are hidden in the data*, WIRED, June 2010 at 3.

35 See Erik Sass, *Radio Wars: MRC Asserts Authority in PPM Controversy*, MEDIADAILYNEWS, July 1, 2009 at [http://www.mediapost.com/publications/index.cfm?fa=Articles.showArticle&art\\_aid=109064](http://www.mediapost.com/publications/index.cfm?fa=Articles.showArticle&art_aid=109064).

The data collected from the LPM and PPM have a direct market impact on the media. The results calculate the market size and demographic make-up for broadcast content. This determines the advertising rates each station can charge and may influence the content broadcast. In fact, “Arbitron has contended that many minority-targeted stations that initially experienced ratings declines have subsequently rebounded after making changes to their programming and promotion practices....”<sup>36</sup> It is difficult to know whether the improved technology eliminated an artifact of diary-based ratings – that supporters of ethnic stations over-reported their actual listenership out of loyalty – or if the method of selecting the population sample underrepresented the actual audience for the content. But these problems of reliability, like the challenges to the other studies, require that a set of standards be promulgated to improve the accuracy and reliability of informatics modeling.

### **III. Data Standards - Reliability, Resilience and Security**

The four models outlined above represent only a small sample of the many types of informatics tools in use today. Nonetheless, the four models outline the paradigm sufficiently to highlight the concerns regarding the data that research institutions, corporations, regulatory agencies and governments might have regarding the information system.

To make any data system effective, it must have good data. This is the corollary of the axiom “garbage-in, garbage-out.” The EU/U.S. data directive safe harbor regarding the movement of protected private data requires U.S. companies to meet certain minimum standards to comply with the EU Privacy Directive.<sup>37</sup> Key among those requirements are

36 *Napoli-PPM* at 364.

37 See U.S. Dep’t of Commerce, Safe Harbor Privacy Principles, July 21, 2000, available at [http://www.export.gov/safeharbor/eu/eg\\_main\\_018476.asp](http://www.export.gov/safeharbor/eu/eg_main_018476.asp); U.S. Dep’t of Commerce, Safe Harbor, <http://www.export.gov/safeharbor/index.asp> (last visited Dec. 27, 2009).

Organizations must comply with the seven safe harbor principles. The principles require the following:

**Notice**

Organizations must notify individuals about the purposes for which they collect and use information about them. They must provide information about how individuals can contact the organization with any inquiries or complaints, the types of third parties to which it discloses the information and the choices and means the organization offers for limiting its use and disclosure.

expectations for appropriate resiliency of the data: “An organization should take reasonable steps to ensure that data is reliable for its intended use, accurate, complete, and current.”<sup>38</sup>

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### **Choice**

Organizations must give individuals the opportunity to choose (opt out) whether their personal information will be disclosed to a third party or used for a purpose incompatible with the purpose for which it was originally collected or subsequently authorized by the individual. For sensitive information, affirmative or explicit (opt in) choice must be given if the information is to be disclosed to a third party or used for a purpose other than its original purpose or the purpose authorized subsequently by the individual.

### **Onward Transfer (Transfers to Third Parties)**

To disclose information to a third party, organizations must apply the notice and choice principles. Where an organization wishes to transfer information to a third party that is acting as an agent, it may do so if it makes sure that the third party subscribes to the safe harbor principles or is subject to the Directive or another adequacy finding. As an alternative, the organization can enter into a written agreement with such third party requiring that the third party provide at least the same level of privacy protection as is required by the relevant principles.

### **Access**

Individuals must have access to personal information about them that an organization holds and be able to correct, amend, or delete that information where it is inaccurate, except where the burden or expense of providing access would be disproportionate to the risks to the individual's privacy in the case in question, or where the rights of persons other than the individual would be violated.

### **Security**

Organizations must take reasonable precautions to protect personal information from loss, misuse and unauthorized access, disclosure, alteration and destruction.

### **Data integrity**

Personal information must be relevant for the purposes for which it is to be used. An organization should take reasonable steps to ensure that data is reliable for its intended use, accurate, complete, and current.

### **Enforcement**

In order to ensure compliance with the safe harbor principles, there must be (a) readily available and affordable independent recourse mechanisms so that each individual's complaints and disputes can be investigated and resolved and damages awarded where the applicable law or private sector initiatives so provide; (b) procedures for verifying that the commitments companies make to adhere to the safe harbor principles have been implemented; and (c) obligations to remedy problems arising out of a failure to comply with the principles. Sanctions must be sufficiently rigorous to ensure compliance by the organization. Organizations that fail to provide annual self certification letters will no longer appear in the list of participants and safe harbor benefits will no longer be assured.

*Id.* See also U.S. DEPT. OF COMM., U.S. E.U. SAFE HARBOR FRAMEWORK, GUIDE TO SELF-CERTIFICATION 4-6 (2009) available at [http://www.export.gov/static/sh\\_selfcert\\_guide\\_Latest\\_eg\\_main\\_018879.pdf](http://www.export.gov/static/sh_selfcert_guide_Latest_eg_main_018879.pdf) (last visited Dec. 27, 2009).

### (i) Accuracy and reliability

Accuracy or reliability assures the data and metadata is correct. Reliability is a measure of the trustworthiness of the source of information. For scientific information, the academic industry relies upon the peer-review process to review and verify the information before publishing findings. This process of verification assures scientific journal readers that the published information is reliable. Retractions, or other challenges to published data, undermine both the reliability of the data and the entire verification process. Reliability may come from the independence of the verifying source or from the proximity of the source.<sup>39</sup>

For projects such as the bioinfosystem, any errors in the collection or cataloging of the specimens will undermine the reliability of the ultimate conclusions. Poorly trained research assistants, political bias or other influences that make the data inaccurate can threaten the system. The diaries used by Neilson and Arbitron were inaccurate to the extent that the individual participants failed to report every moment of channel surfing or they replaced the program they were watching with one that they *should have* been watching. The spatial project in the EU will aggregate the historical geographical information, incorporating every mistake in property title and boundary line that has been recorded as a result of human error and the disruption of two world wars. Even real-time website analysis may be under-inclusive as search engines become content aggregators and web page content is browsed directly from Bing.com or similar sites that republish the content from source sites.<sup>40</sup>

### (ii) Resilience of source and durability of information

Resilience of source means the source of the content will remain available for a reasonable period of time. Given the large numbers of websites that are created and forgotten until the URL become invalid, or web pages that are deleted as the architecture and content of websites are updated, it seems that much of the information on the Internet is almost ephemeral. In contrast, libraries provide an expensive, but critical, service of adding permanence to knowledge. They achieve this by building and

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39 Jon M. Garon, *Own It – The Law & Business Guide to Launching a New Business through Innovation, Exclusivity, and Relevance* 152 (2007) (hereinafter Garon, *Own It*).

40 See Ian Lurie, *Aggregation Aggravation: Part I*, CONVERSATION MARKETING, <http://www.conversationmarketing.com/2009/06/aggregation-aggravation-part-1.htm>.

cataloging a collection of materials and serving as conservators of the physical manuscripts on which the content is stored. Libraries and academics require permanence of information. The Internet poses a serious problem for academic libraries and institutions that require permanence rather than transitory existence.

Resilience and reliability are also tied together because information that disappears from the Internet can no longer be verified and is no longer deemed reliable. Business, consumer and student users of the Internet require at least resilient storage of the content provided through the Internet. Ephemeral sites can do more harm than good, leading readers to unsupportable conclusions and down blind alleys.<sup>41</sup>

For scientific research, resilience may mean that a particular study can be replicated under similar conditions. For data gathering, the metadata may never be “gathered” in any structural sense. To the extent information is transitory or ephemeral in nature, the conclusions drawn from such data cannot be replicated. The extent to which this matters will vary with discipline, but unverifiable data will undoubtedly be a source of frustration and informatics limitations.

### **(iii) Security of data and information**

Much of the focus in recent years has been the push to improve the protection of data security and integrity. For example, the state of Minnesota has legislation to protect personally identifiable information.<sup>42</sup> The law requires that the ISP “take reasonable steps to maintain the security and privacy of a consumer’s personally identifiable information.”<sup>43</sup> Other states have taken similar steps and 49 U.S. jurisdictions have laws requiring consumer notification of security breaches.<sup>44</sup>

Similar action has been taken to update the European Privacy Directive regarding data security. Directive 2002/58/EC of the European Parliament and of the Council concerning the processing of personal data and the

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41 GARON, OWN IT, *supra* note 39, at 152-53.

42 MINN. STAT. § 325M (2009).

43 *Id.* at § 325M subd. 05.

44 National Conference of State Legislatures, State Security Breach Notification Laws, <http://www.ncsl.org/IssuesResearch/TelecommunicationsInformationTechnology/SecurityBreachNotificationLaws/tabid/13489/Default.aspx>. (“As of April 12, 2010, Forty-six states, the District of Columbia, Puerto Rico and the Virgin Islands have enacted legislation requiring notification of security breaches involving personal information”).



protection of privacy has recently been cleared for adoption. In the years since the initial EC Privacy Directive has been in operation, concerns have grown regarding the theft of private data and the intrusions suffered as a result of unwanted e-mail or spam. Directive 2002/58/EC addresses these concerns as well as others.<sup>45</sup>

[F]or the first time in the EU, a framework for mandatory notification of personal data breaches. Any communications provider or Internet service provider (ISP) involved in individuals' personal data being compromised must inform them if the breach is likely to adversely affect them. Examples of such circumstances would include those where the loss could result in identity theft, fraud, humiliation or damage to reputation. The notification will include recommended measures to avoid or reduce the risks. The data breach notification framework builds on the enhanced provisions on security measures to be implemented by operators, and should stem the increasing flood of data breaches.<sup>46</sup>

Security breaches may go well beyond loss of personal information stored on a laptop computer or financial information stolen by computer hackers. Data security requires a comprehensive process both inside and outside the data repository.

Security for data means that the integrity of the information cannot be readily compromised, creating a presumption of accuracy. Whether or not actual breaches in security have occurred, there is an inevitable loss of confidence in data that is at risk of security breakdowns.

Lapses in security can come from hackers, software malfunctions that inaccurately index data, human error, human misconduct, or other external forces that alter, destroy, corrupt or improperly disclose the data. The most common security focus is on hackers, spyware and attacks on the integrity of information from the outside. These are significant threats that must be taken seriously. Software, hardware and other countermeasures should be deployed to protect the integrity of information and data from outside threats.

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45 Directive 2002/58/EC of the European Parliament and of the Council, July 12, 2002.

46 European Data Protection Supervisor, ePrivacy Directive close to enactment: improvements on security breach, cookies and enforcement, and more to come, (Press Release) Nov. 9, 2009 available at [http://www.edps.europa.eu/EDPSWEB/webdav/site/mySite/shared/Documents/EDPS/PressNews/Press/2009/EDPS-2009-13\\_Adoption\\_ePrivacy\\_Directive\\_EN.pdf](http://www.edps.europa.eu/EDPSWEB/webdav/site/mySite/shared/Documents/EDPS/PressNews/Press/2009/EDPS-2009-13_Adoption_ePrivacy_Directive_EN.pdf).

Security lapses, however, are just as likely to come from within an entity. Security problems may be caused by the owners of the information. This can occur when confidential and proprietary data is stolen or left on unsecured equipment. Security problems may be caused by the businesses which manage data when personnel have access to content that they are not trained to handle and have no reason to access. Security problems may be caused from insufficient attention to equipment, software and environmental factors.

Enterprises have an obligation to diligently review and assess their procedures, personnel and equipment to protect the integrity of their information. The failure to do so can compromise the validity of the organization's entire data pool. Since many companies no longer have independent paper records as independent sources of validity, the destruction of the data pool can mean the destruction of the business itself.<sup>47</sup>

Though not controversial, the attributes of data reliability, integrity and security remain essential to any data infosystem. Failure to maintain adequate safeguards can undermine the efficacy of these systems and call the research outcomes into question. At every stage in the process, both the compilers of the data and the state agents (or private regulators) must be diligent to review the standards and practices involved in the data management.

One of the "ethical and operational standards" of the Media Rating Council provides that "[q]uality control shall be applied to ... sample selection, sample implementation, data collection, data editing, data input, tabulation and data delivery in printed and electronic formats. It shall include (where relevant) periodic independent internal verification of fieldwork and periodic accuracy checks of meter performance and computer accumulations of base data."<sup>48</sup> By recognizing that data integrity applies to every step in the identification, collection, storage, and use of the data as an ethical as well as operational standard, the provision serves to institutionalize appropriate practices for information aggregators. At the same time, however, such statements leave the practical implementation to the organization collecting the information.

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47 GARON, OWN IT, *supra* note 39, at 153-54.

48 Media Rating Council, Minimum Standards for Media Rating Research §A. 2.

Another problem faced by informatics systems comes from vandalism, attacks on information databases, wikis and web pages.<sup>49</sup> Wikis, for example, tend to suffer from a number of forms of vandalism and other damage. “Most wikis will generate content that needs to be deleted. On public wikis, junk, spam, test edits, and vandalism are obvious candidates for deletion . . .”<sup>50</sup> Vandalism can take a number of forms, the most obvious being malicious edits.<sup>51</sup> In addition to various forms of vandalism, publishers must remain vigilant against “illegal content including copyright violations and libel . . .”<sup>52</sup> In a wiki system where any user is allowed to make editorial changes, wiki communities and publishers must actively monitor the material to assure a quick response to such vandalism and other inappropriate content.

To avoid vandalism, manipulation and self-aggrandizement, some systems require editors or “curators” to control the flow of information into the wiki. In these wikis, the publisher provides only select users the right to approve page changes, assuring that each editorial change has been reviewed by the community of editors. Critics of the curator model, however, suggest that such approaches change the fundamentally egalitarian

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49 See Jon M. Garon, *Wiki Authorship, Social Media, and the Curatorial Audience*, 1 HARV. J. SPORTS & ENT. L. 96, 122 (2010).

50 JANE KLOBAS, WIKIS: TOOLS FOR INFORMATION WORK AND COLLABORATION 200-01 (2006).

51 Fernanda B. Viégas *et al.*, *Studying Cooperation and Conflict between Authors with History Flow Visualizations*, 6 CONF. HUM. FACTORS COMPUTING SYS. 575, 578-79 (2004) (available at [http://alumni.media.mit.edu/~fviegas/papers/history\\_flow.pdf](http://alumni.media.mit.edu/~fviegas/papers/history_flow.pdf)).

1. **Mass deletion[:]** deletion of all contents on a page.

2. **Offensive copy:** insertion of vulgarities or slurs.

3. **Phony copy:** insertion of text unrelated to the page topic. E.g. on the Chemistry page, a user inserted the full text from the “Windows 98 readme” file.

4. **Phony redirection:** Often pages contain only a redirect link to a more precise term (e.g. “IBM” redirects to “International Business Machines”), but redirects can also be malicious, linking to an unrelated or offensive term. “Israel” was at one point redirected to “feces.” Note that a phony redirect implies familiarity with Wikipedia’s editing mechanisms.

5. **Idiosyncratic copy [or trolling]:** adding text that is related to the topic of the page but which is clearly one-sided, not of general interest, or inflammatory; these may be long pieces of text. Examples range from “Islam” where a visitor pasted long prayer passages from the Koran, to “Cat” where a reader posted a lengthy diatribe on the Unix cat command.

*Id.* (using Wikipedia as the source and for the examples).

52 KLOBAS, *supra* note 50, at 202.

culture of the wiki. Nonetheless, wiki communities must take steps to discourage vandalism and maintain the integrity of their content.<sup>53</sup>

Whether the information host uses curators or relies on a public editorial force, the quality of the information and the ability to integrate that information into a larger system rest on the integrity of the information.

#### IV. Data Standards – Ownership, Privacy and Access

##### (i) Copyright and Intellectual Property Rights

Copyright protects “literary and artistic works”<sup>54</sup> or “original works of authorship fixed in any tangible medium of expression ... [which] can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device.”<sup>55</sup> U.S. copyright does not extend to facts, short phrases, titles, names or slogans.<sup>56</sup>

For a literary work like a book, motion picture, television episode or radio program, copyright is appropriate to protect the underlying work. The metadata associated with such a work would at least be protected by copyright to the extent that the information incorporates the copyrighted work, but if the metadata could exist independently of the literary work, then that metadata might be treated as mere facts. Nonetheless, throughout most of the Twentieth Century, U.S. courts were amenable to protecting databases. To explain the inconsistency in the law, “courts developed a new theory to justify the protection of factual compilations. Known alternatively as “sweat of the brow” or “industrious collection,” the underlying notion

53 Jon M. Garon, *Wiki Authorship*, *supra* note 49, at 123 *citing* Juan Mateos-Garcia & W. Edward Steinmueller, *Open, But How Much? Growth, Conflict, and Institutional Evolution in Open-Source Communities*, in COMMUNITY, ECONOMIC CREATIVITY, AND ORGANIZATION 269-72 (Ash Amin & Joanne Roberts eds., 2008).

Examples of curators include Physcome Project and cosmo.org Wiki, Annotation Guidelines [https://www.cosmo.org/physcome\\_project/wiki/Annotation\\_guidelines](https://www.cosmo.org/physcome_project/wiki/Annotation_guidelines) (last visited Mar. 9, 2010) (wiki focused on the *Physcomitrella patens* genome) (“Curators can force changes, oversee use annotations, and work on future annotation releases.”); Stack Overflow, <http://stackoverflow.com> (last visited Mar. 9, 2010). Examples of approval-based sites include Digital Universe, <http://www.digitaluniverse.net/> (last visited Mar. 9, 2010); Encyclopedia of Life, <http://eol.org/> (last visited Mar. 9, 2010) (requires that “curators” or editors be professional scientists).

54 Berne Convention for the Protection of Literary and Artistic Works, Art. 2, July 24, 1971, 25 U.S.T. 1341, 828 U.N.T.S. 221. [hereinafter Berne].

55 17 U.S.C. §102 (2010).

56 37 C.F.R. 202.1(a) (2010). *See* Feist Publ'ns, Inc. v. Rural Tel. Serv. Co., 499 U.S. 340, 348 (1991).

was that copyright was a reward for the hard work that went into compiling facts.”<sup>57</sup>

In 1991, the U.S. Supreme Court revisited the issue of what level of creativity is necessary to receive copyright and repudiated the “sweat of the brow” doctrine. In *Feist Publ'ns, Inc. v. Rural Tel. Serv. Co.*,<sup>58</sup> the Court explained the constitutional threshold needed to be protected by copyright. “The “sweat of the brow” doctrine had numerous flaws, the most glaring being that it extended copyright protection in a compilation beyond selection and arrangement – the compiler's original contributions-to the facts themselves.”<sup>59</sup>

U.S. copyright law does not bar database protection any more than it automatically protects it, though it does bar any claim to copyright in underlying facts, processes or ideas.<sup>60</sup> The statute specifically provides copyright protection in the compilation of a work, including a database, “as distinguished from the preexisting material employed in the work....”<sup>61</sup>

The statute identifies three distinct elements and requires each to be met for a work to qualify as a copyrightable compilation: (1) the collection and assembly of pre-existing material, facts, or data; (2) the selection, coordination, or arrangement of those materials; and (3) the creation, by virtue of the particular selection, coordination, or arrangement, of an “original” work of authorship.<sup>62</sup>

As explained by the Court, “[t]he sine qua non of copyright is originality”<sup>63</sup> but “the originality requirement is not particularly stringent.”<sup>64</sup> “Novelty is not required”<sup>65</sup> but only that the selection and arrangement was independently created rather than being copied from another author or

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57 *Id.* at 352.

58 499 U.S. 340 (1991).

59 *Id.* at 353.

60 17 U.S.C. §102(b).

61 *Id.* at 103(b). The limitation is very explicit:

The copyright in a compilation or derivative work extends only to the material contributed by the author of such work, as distinguished from the preexisting material employed in the work, and does not imply any exclusive right in the preexisting material. The copyright in such work is independent of, and does not affect or enlarge the scope, duration, ownership, or subsistence of, any copyright protection in the preexisting material.

62 *Feist*, 499 U.S. 340 at 357.

63 *Id.* at 348.

64 *Id.* at 358.

65 *Id.*

source. “[T]he requisite level of creativity is extremely low; even a slight amount will suffice.”<sup>66</sup> Nonetheless, the mere collection of alphabetical phone directory data falls below the threshold,<sup>67</sup> as has a database of products parts numbers<sup>68</sup> or the publication arrangement of U.S. law reporters.<sup>69</sup>

Unfortunately, the exact understanding of the line below which copyright is unavailable for data selection, order and arrangement remains uncertain under U.S. law.<sup>70</sup> At a minimum, the Google Book Search does not result in any copyrightable work. The act of digitizing the books reflects the “sweat of the brow” repudiated by *Feist*. The selection of books appears to be driven either by the *one of each* methodology that falls below the *Feist* threshold or is left to the institutional libraries based on collection, condition and other operational factors that do not support Google as the “author” of the choices or “authorship” as the methodology.<sup>71</sup> The scientific information in a comprehensive bioinformatics database would have the same limitation.

On the other hand, the selection, order and arrangement of the data from either large database could be sufficient to provide a copyrighted compilation. But this protection, though it may exist and it may prohibit exact duplication, would do little or nothing to protect a party interested in proprietary ownership of the data or database. Even with copyright protection, any party would be free to extract the facts and data to use as they wished. U.S. copyright, therefore, provides little or no effective protection for massive informatics systems.

By contrast, European countries reflected a number of different models. Common law countries such as the United Kingdom and Ireland protected the “sweat of the brow” doctrine.<sup>72</sup> Other countries, such as Iceland and Norway had non-copyright or *sui generis* laws protecting

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66 *Id.* at 345.

67 *Id.* at 361-62.

68 *Southco, Inc. v. Kanebridge Corp.*, 390 F.3d 276, 284 (3d Cir. 2001).

69 *Matthew Bender & Co. v. West Publ. Co.*, 158 F.3d 693 (2d Cir. 1998).

70 See Philip J. Cardinale, *Sui Generis Database Protection: Second Thoughts in the European Union and what it Means for the United States*, 6 CHI.-KENT J. INTELL. PROP. 157, 160 (2007).

71 *Accord L. Batlin Son, Inc. v. Snyder*, 536 F.2d 486 (2d Cir. 1976) (trivial variations created to reduce costs of shipping insufficient to establish authorship).

72 See Miriam Bitton, *Exploring European Union Copyright Policy through the Lens of the Database Directive*, 23 BERKELEY TECH. L.J. 1411, 1420-21 (2008).

compilations while some Scandinavian countries used a “catalogue rule” to protect the labor and effort.<sup>73</sup> Still others adhered to an originality requirement similar to that of the U.S.<sup>74</sup>

## (ii) *Sui Generis* Database Protection

The European Union struggled with the wide range of copyright regimes and determined that it was necessary to adopt a single, comprehensive directive regarding database protection. In 1996 it passed Directive 96/6/EC (the “Database Directive”).<sup>75</sup> The EU needed to harmonize the existing laws<sup>76</sup> and “prevent the unauthorized extraction and/or re-utilization of the contents of a database.”<sup>77</sup>

To affect the goal of harmonization, the Database Directive preempts copyright laws to the extent that they protect “sweat of the brow” or other authorship regimes that rely merely on effort and investment.<sup>78</sup> In place of the various state laws, the Database Directive provides a *sui generis* right if the party seeking protection can show “that there has been qualitatively and/or quantitatively a substantial investment in either the obtaining, verification or presentation of the contents....”<sup>79</sup> If the database meets the threshold requirement of substantial investment, the Database Directive prohibits the extraction of data and/or the re-utilization of that data, in whole or substantial part.<sup>80</sup>

The Database Directive protects against copying of the database but not the use of information or data that may be gathered in the database. Though the Database Directive has been the subject of significant criticism,<sup>81</sup> it continues to be followed to address the concerns of database theft.<sup>82</sup>

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73 Cardinale, *supra* note 70, at 169.

74 *Id.* See also Bitton, *supra* note 72, at 1421-22.

75 Directive 96/9/EC of the European Parliament and of the Council of the European Union of 11 March 1996 on the legal protection of databases, 1996 O.J. (L 77/20) (hereinafter “Database Directive”) (<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:31996L0009:EN:HTML>).

76 Database Directive at (1).

77 *Id.* at (3).

78 *Id.* at Art. 3.

79 *Id.* at Art. 7.1.

80 *Id.*

81 See, e.g., Sherif El-Kassas, Study on the Protection of Unoriginal Databases, World Intellectual Property Organization, Standing Committee on Copyright and Related Rights, Seventh Session

A 2002 study prepared on behalf of WIPO listed five predominant concerns of the *sui generis* approach to database protection:

The main concerns echoed in this paper are that *sui generis* protection of data bases:

1. will detract from the public domain and thus significantly reduce the availability of free information and data;
2. may create counterproductive perpetual monopolies by allowing owners of databases to indefinitely extend the period of protection;
3. will be harmful for the free flow of information in the scientific communities of the world;
4. will be harmful for the development of the Internet and the software industry because many component of software systems will become protected and hence will no longer be available for free use and utilization; and
5. will hamper many aspects of development in the developing and under developed world.

Moreover, it is asserted that the legitimate concerns of database compilers can either be met within the framework of the existing IP laws and systems and/or by using technical measures....<sup>83</sup>

Another study was conducted in 2005 as required by the Database Directive.<sup>84</sup> The study proved largely inconclusive based on limited empirical data, but outlined four policy options.

It concludes, based on European Court of Justice case law, that the *sui generis* right is not easy to understand and that the protection it provides is

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(2002). See also Osenga *supra* note 21, at 2126; Bitton, *supra* note 72, at 1447-49; Cardinale, *supra* note 70, at 175-78.

82 *Id.* at 49. See, e.g., Apis-Hristovich EOOD v Lakorda AD, C-545/07, 5 March 2009.

[I]f the contents or a substantial part of the contents of a database protected by the *sui generis* right was transferred, without the permission of its maker, to a medium owned by another person so as to be made available to the public subsequently by that person, for example in the form of another, possibly modified, database, that fact would show, in addition to the existence of extraction, the existence of re-utilisation within the meaning of Article 7 of Directive 96/9, re-utilisation being the making available to the public of all or a substantial part of the contents of a protected database.

83 El-Kassas, *supra* note 81, at 10.

84 See Comm'n of the European Communities, DG Internal Market and Services Working Paper, First Evaluation of Directive 96/9/EC on the Legal Protection of Databases 11 (2005) (hereinafter 2005 Directive Study).



close to providing a property right in data. Furthermore, based on the economic analysis discussed above, it concludes that “the economic impact of the *sui generis* right is unproven.” The [2005 Directive Study] then moves on to discuss four policy options: repealing the Directive, withdrawal of the *sui generis* right provisions, amending the *sui generis* provisions, and maintaining the status quo.<sup>85</sup>

One can infer from the nature of the 2005 Directive Study the tone of frustration by analysts of the Database Directive. These concerns may have led the U.S. to back off on its efforts to match the Database Directive with similar legislation.<sup>86</sup> Nonetheless, the Database Directive continues to be the law of Europe and will undoubtedly shape the regulation of large informatics systems.

For many types of information, there is a strong public interest in allowing unfettered public participation and access to transnational repositories of data. Biodiversity information, geographic information, population and ethnographic information, and world public health information all maximize their benefit when world-wide access is unlimited. International treaties or domestic law that provide ownership as a consequence of collection of this data are inconsistent with the public efforts at building an information infrastructure. As such, the critics of the Database Directive are correct regarding the concern about its normative implications.

The defining trait of this information is that it is non-personal. None of the information contains disclosures that could implicate an individual’s interest in privacy or non-disclosure. Even a project such as the Google Book Search, though it has vast quantities of textual information, the information is published content already publicly available at public libraries. Used as a database for book sales or as a data set to create words-and-phrases algorithms, it has little content that could be used to invade one’s privacy interests.

Where a data set has no direct privacy implication, the holders of the data should be free to utilize the data without concerns regarding privacy. To the extent that regulators are developing default rules for informatics

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85 Bitton, *supra* note 72, at 1456 *quoting* the 2005 Directive Study at 23-27.

86 Osenga *supra* note 21, at 2125-26.

systems, the policy developers must take into account that all information is not the same as it implicates privacy.

### (iii) Rights of Access and Correction

Outside of copyright or *sui generis* protection emerges a third ownership concern. The underlying data in the informatics database must be accurate and reliable. As discussed above, this is important to the value of the database for its owners and users. But unlike the interests of the data aggregators, when information relates to individuals or entities, those parties have an interest that the information not be misleading or incorrect.

Europe has had a much stronger recognition of privacy and data protection than that of the United States. The European data protection laws derive from the tradition of valuing privacy as a fundamental human right.<sup>87</sup> On the heels of these expansions of privacy laws came the development of data protection as a form of individual privacy protection. The first extension of these protections of interstate transfers of data began in Sweden in 1973.<sup>88</sup> The Swedish system included the creation of a Data Inspection Board which had the authority to review and approve the transfer of any personal file.<sup>89</sup> Germany followed suit in 1977.<sup>90</sup> Shortly thereafter, the issue became the subject of a heated battle over the scope of the mandatory census run by the West German Federal Statistical Office. Two years following the judicial proceedings, the new legislation was enacted to assure that voluntary, rather than mandatory, participation would be required.<sup>91</sup>

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87 See Georg Nolte, EUROPEAN AND US CONSTITUTIONALISM 121 (2005).

88 Data Act, No. 289, 1973 Svensk Forfattnings Samling [SFS] 518 (Swed.), as amended by Act of June 12, 1979, No. 334, 1979 [SFS] 727 (Swed.), effective July 1, 1979, reprinted in 5 COMPUTER L. SERV. app. 9-5.2a, No. 2. See Jane A. Zimmerman, *Transborder Data Flow: Problems with the Council of Europe Convention, or Protecting States from Protectionism*, 4 J. INT'L L. & BUS. 601, 609 (1982).

89 *Id.*

90 Federal Data Protection Act, 1977 (Gesetz zum Schutz vor Missbrauch personenbezogener Daten bei der Datenverarbeitung (Bundesdatenschutzgesetz)) Bundesgesetzblatt I 201 (Ger.) (Jan. 27, 1977), reprinted in 5 COMPUTER L. SERV. app. 9-5.2a, No. 3; See Spiros Simitis, *Reviewing Privacy In An Information Society*, 135 U. PA. L. REV. 707, 730 (1987) (hereinafter Simitis).

91 Simitis, *supra* note 90, at 738-38 citing Volkszahlungsurteil, 65 BVerfGE 1, 55-56 (1983); BUNDESTAGS-DRUCKSACHE 10/3328, at 3 (May 14, 1985).

For U.S. law, the protections of those who are the subject of database law derives primarily from criminal procedure laws aimed at providing protections from illegal searches and seizures.<sup>92</sup> These were drafted to address limits in constitutional protections such as the Fourth Amendment to the U.S. Constitution, which provides limited protection from unreasonable governmental searches and seizures.<sup>93</sup>

Early statutory efforts did not anticipate the growth of technology.<sup>94</sup> Instead, among the most critical early data privacy laws was the U.S. Privacy Act of 1974,<sup>95</sup> which was enacted at roughly the same time as the first data

92 E.g., Wiretap Act of 1968, Omnibus Crime Control and Safe Streets Act of 1968, Pub. L. No. 90-351, Title III, 82 Stat. 212 (codified as amended at 18 U.S.C. § 2510-2522 (2002)).

93 U.S. CONST. AMEND. IV (“The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.”).

94 See generally Susan Freiwald, *Online Surveillance: Remembering the Lessons of the Wiretap Act*, 56 ALA. L. REV. 9, 14 (2004). Note that even television camera surveillance was not included in the deliberations. See *U.S. v. Torres*, 751 F.2d 875, 880-81 (7th Cir. 1984) (“Television surveillance (with no soundtrack) just is not within the statute’s domain. The legislative history does not refer to it, probably because television cameras in 1968 were too bulky and noisy to be installed and operated surreptitiously.”).

95 See Privacy Act of 1974, Pub. L. No. 93-579 § 2(b), 88 Stat. 1896, 1896 (1974).

SEC. 2. (a) The Congress finds that-

- (1) the privacy of an individual is directly affected by the collection, maintenance, use, and dissemination of personal information by Federal agencies;
  - (2) the increasing use of computers and sophisticated information technology, while essential to the efficient operations of the Government, has greatly magnified the harm to individual privacy that can occur from any collection, maintenance, use, or dissemination of personal information;
  - (3) the opportunities for an individual to secure employment, insurance, and credit, and his right to due process, and other legal protections are endangered by the misuse of certain information systems;
  - (4) the right to privacy is a personal and fundamental right protected by the Constitution of the United States; and
  - (5) in order to protect the privacy of individuals identified in information systems maintained by Federal agencies, it is necessary and proper for the Congress to regulate the collection, maintenance, use, and dissemination of information by such agencies.
- (b) The purpose of this Act is to provide certain safeguards for an individual against an invasion of personal privacy by requiring Federal agencies, except as otherwise provided by law, to-
- (1) permit an individual to determine what records pertaining to him are collected, maintained, used, or disseminated by such agencies;
  - (2) permit an individual to prevent records pertaining to him obtained by such agencies for a particular purpose from being used or made available for another purpose without his consent;

laws in Sweden. Notable for the Privacy Act was the recognition of privacy as a “personal and fundamental right” which could endanger a person’s opportunities “to secure employment, insurance, and credit, and his right to due process.”<sup>96</sup> Equally notable, however, is that the early movement by Congress under the Wiretap Act and Privacy Act to provide protections did not move in concert with their European counterparts.

Congress has also protected other types of data collection and usage, including drivers’ license information,<sup>97</sup> student information,<sup>98</sup> media subscriber information,<sup>99</sup> financial services data,<sup>100</sup> credit reporting records,<sup>101</sup> and health care records.<sup>102</sup> These protections are sometimes enhanced and sometimes limited by the federal laws affecting access to computer data.<sup>103</sup>

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- (3) permit an individual to gain access to information pertaining to him in Federal agency records, to have a copy made of all or any portion thereof, and to correct or amend such records;
  - (4) collect, maintain, use, or disseminate any record of identifiable personal information in a manner that assures that such action is for a necessary and lawful purpose, that the information is current and accurate for its intended use, and that adequate safeguards are provided to prevent misuse of such information;
  - (5) permit exemptions from the requirements with respect to records provided in this Act only in those cases where there is an important public policy need for such exemption as has been determined by specific statutory authority; and (6) be subject to civil suit for any damages which occurs as a result of willful or intentional action which violates any individual’s rights under this Act.

96 *Id.*

97 Driver’s Privacy Protection Act of 1994, 18 U.S.C. §§ 2721-2725 (1994).

98 Family Educational Rights and Privacy Act (FERPA), 20 U.S.C. § 1232(g) (2007).

99 *See* Cable Privacy Protection Act of 1984, Pub. L. No. 98-549, 98 Stat. 2779 (1984) (codified as amended in various sections of 47 U.S.C.); Video Privacy Protection Act of 1988, 18 U.S.C. §§ 2710-2711 (2009).

100 Graham-Leach-Bliley Act, Pub. L. No. 106-102, Title V, §§ 501-527, 113 Stat. 1338 (1999) (financial services).

101 Fair Credit Reporting Act, 15 U.S.C. § 1681 (2009).

102 Health Insurance Portability and Accountability Act of 1996 (HIPAA), Pub. L. No. 104-191, 110 Stat. 1936 (codified at 29 U.S.C. §§ 1181-1182 (Supp. III 1997)); *see also* U.S. Dep’t of Health & Human Servs., Standards for Electronic Transaction, Final Rule 65 Fed. Reg. 50312-72 (codified at 45 C.F.R. Pts. 160 & 162 (privacy regulations adopted by the Secretary of Health and Human Services)).

103 *See e.g.*, Wire and Electronic Communications Interception and Interception of Oral Communications, ch 119, Pub. L. 90-351, 82 Stat. 197 (1968) (codified as amended at 18 U.S.C. § 2511 (2000)); Communications Assistance for Law Enforcement Act, ch. 9, Pub. L. No. 103-414, 108 Stat. 4279 (1994) (codified as amended at 18 U.S.C. §§ 2510-2511; 47 U.S.C. § 1001 (2000)); Electronic Communications Privacy Act of 1986, ch. 119, Pub. L. 99-508, 100 Stat. 1848 (1986) (codified as amended at 18 U.S.C. § 2510); Stored Communications Act, 18 U.S.C.

The U.S. federal law, therefore, has two quite distinct sets of parameters. From its early inception it has limited the ability of the government to collect data, and has restricted how that data is used. Only later did it begin to also provide safeguards regarding the integrity, security and use of computer data by third parties. Moreover, if the data is not within one of the enumerated categories, then there is no federal law regarding the data at all.

Despite this hodge-podge approach, the U.S. law is moving slowly closer to the European model. Under Section 264 of the Health Insurance Portability and Accountability Act of 1996 (“HIPAA”),<sup>104</sup> both the covered health providers and their business associates<sup>105</sup> are subject to the most stringent set of U.S. data privacy, security and integrity regulations.<sup>106</sup> Admittedly, the Department of Health and Human Services is not the federal data security office and may lack effective measures to enforce these provisions,<sup>107</sup> but the obligations still mark another step forward.

#### (iv) Competing Default Norms of Privacy and Autonomy

In both continental law and American law, the importance of data protection and security has emerged as a central fixture of national law. The earliest of these international efforts<sup>108</sup> can be traced to the Organisation for Economic Co-operation and Development (OECD) Guidelines on the Protection of Privacy and Transborder Flows of Personal Data in 1980.<sup>109</sup> The guidelines provide many of the fundamentals that define the nature of

§ 2701 (2000); Foreign Intelligence Surveillance Act of 1978, Pub. L. 95-511, 92 Stat. 1783 (1978) (codified as amended at 50 U.S.C. § 1801 (2000)).

104 29 U.S.C. §§ 1181-1182.

105 See U.S. Dep’t of Health & Human Servs., Standards for Electronic Transaction, Final Rule 65 Fed. Reg. 50312-72, *codified* 45 C.F.R. § 164.504(e) (defining business associate).

106 45 C.F.R. § 164.504(e) (requiring the business associates to meet the covered entities obligations through contract with the covered health care entity).

107 See Sharona Hoffman and Andy Podgurski, *In Sickness, Health, and Cyberspace: Protecting the Security of Electronic Private Health Information*, 48 B.C. L. REV. 331, 348-49 (2007).

108 See Sunni Yuen, *Exporting Trust with Data: Audited Self-Regulation as a Solution to Cross-Border Data Transfer Protection Concerns in the Offshore Outsourcing Industry*, 9 COLUM. SCI. & TECH. L. REV. 41, 61 (2007-08) (hereinafter Sunni Yuen).

109 Organisation for Economic Co-Operation and Development [OECD], Council Recommendations Concerning Guidelines Governing the Protection of Privacy and Transborder Flows of Personal Data, OECD Doc. C(80) 58 Final (Oct. 1, 1980), reprinted in 20 I.L.M. 422 (1981), available at [http://www.oecd.org/document/18/0,3343,en\\_2649\\_34255\\_1815186\\_1\\_1\\_1\\_1,00.html](http://www.oecd.org/document/18/0,3343,en_2649_34255_1815186_1_1_1_1,00.html) [Hereinafter “OECD Privacy Guidelines”].

informatics, including limits on data collection, retention, and disclosure as well as safeguards regarding the storage and maintenance of the data.<sup>110</sup> The OECD Guidelines, in turn, have had profound international influence in Europe, America and Asia.<sup>111</sup>

Notable for their simplicity and comprehensiveness, the OECD Privacy Guidelines define personal data as “any information relating to an identified or identifiable individual (data subject).”<sup>112</sup> They encourage member countries to adopt the principles of the guidelines in domestic legislation, a process which is still ongoing.

### (v) EC Data Privacy Directive

The OECD Privacy Guidelines anticipate the efforts made by the European Union through EC directive 95/46, (the EC Privacy Directive). The EC Privacy Directive has become the international default standard because of its inclusiveness and the aggressive enforcement of the European Union.<sup>113</sup>

The EC Privacy Directive both the protection of “the fundamental rights ... to privacy” and “the free flow of personal data” are values to be balanced and protected.<sup>114</sup> The EC Privacy Directive covers “personal data,” which term includes a broad array of information that could personally identify an individual.<sup>115</sup>

110 *Id.*

111 See Yuen, *supra* note 108, at 61-62; Global Internet Policy Initiative, *The International Legal Framework for Data Protection and its Transposition to Developing and Transitional Countries* 1-2 (Dec. 28, 2004), available at <http://www.internetpolicy.net/privacy/20041228privacy.pdf>.

112 OECD Privacy Guidelines at § 1(b).

113 See Yuen, *supra* note 108, at 68. (“The [EC Privacy Directive] is rapidly emerging as the global standard. Non-member countries are vying to meet the Directive’s “adequacy” stipulation in order to transact in information arising from EU citizens”).

114 See Data Protection Directive 95/46, art. 1, 1995 O.J. (L 281) (Hereinafter *EC Privacy Directive*) (Article 1 “1. In accordance with this Directive, Member States shall protect the fundamental rights and freedoms of natural persons, and in particular their right to privacy with respect to the processing of personal data. 2. Member States shall neither restrict nor prohibit the free flow of personal data between Member States for reasons connected with the protection afforded under paragraph 1”).

115 *Id.* at Art. 2 (“(a) ‘personal data’ shall mean any information relating to an identified or identifiable natural person (‘data subject’); an identifiable person is one who can be identified, directly or indirectly, in particular by reference to an identification number or to one or more factors specific to his physical, physiological, mental, economic, cultural or social identity”).

The key aspects of the EC Privacy Directive protect personal data, very broadly defined.<sup>116</sup> They establish quality controls over the data, requiring that reasonable steps are taken to keep the information accurate and current.<sup>117</sup> The retention of the data is for only as long as is necessary and the person identified must give unambiguous consent to the collection and use of the data.<sup>118</sup> Moreover, the identified individual has the right to know what information is mandatory and what information is voluntary, how to object to the collection and use of the data, and how to correct the data.<sup>119</sup>

As part of the balancing between the public's right to public information and the control of private data, the Directive provides for member states to accommodate journalism and free expression "solely for journalistic purposes or the purpose of artistic or literary expression only if they are necessary to reconcile the right to privacy with the rules governing freedom of expression."<sup>120</sup> The Directive does not apply to public security and defense.<sup>121</sup>

The Directive provides the most complete set of affirmative duties on organizations collecting and analyzing data, generating customer metadata, and using collected information for behavioral advertising and customer tracking.

As comprehensive as the EC Privacy Directive is, however, it is focused on the processing of data, not the use of information. As a result, use of the personal data "by a natural person in the course of a purely personal or household activity" is beyond the scope of the Directive.<sup>122</sup> This best illustrates the regulatory dichotomy between privacy rights and data protection. Directive 2002/58/EC adds protections against the data processors and adds the new protection that third party theft of data stored by the data processors injures the persons who are the subject of the data. These laws, however, do not really address how persons relate to each other

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116 EC Privacy Directive at Art. 1, § 2 (a) ("personal data" shall mean any information relating to an identified or identifiable natural person ("data subject"); an identifiable person is one who can be identified, directly or indirectly, in particular by reference to an identification number or to one or more factors specific to his physical, physiological, mental, economic, cultural or social identity;").

117 *Id.* at Art 4.

118 *Id.* at Art. 4.

119 *Id.*

120 *Id.* at Art. 9.

121 *Id.* at Art. 3, § 2.

122 *Id.* at Art. 2.

in social media websites, virtual worlds, chat rooms or other venues where information is shared. As a result, the international de facto standard addresses only one of the three sources of information. The government and the non-processor are left to the hodge-podge of EU and national regulation over safety, security and privacy.<sup>123</sup>

*U.S. State Laws, Federal Regulations and the EU Safe Harbor*

Since the U.S. Privacy Act and the ECPA focused on governmental access to stored data, neither paralleled the EC Privacy Directive's regulation of ISPs and data processors.

The California Online Privacy Protection Act (OPPA) may have the broadest reach of any U.S. state law merely because of its geographic location.<sup>124</sup> This modest statute merely requires that ISPs notify the consumers of the types of personally identifiable information the ISP collects.<sup>125</sup> It does not provide any extensive obligations regarding the rights of consumers to object to the collection of personally identifiable data or the failure to have the right to review and correct the information collected. As such, the statute provides merely a first step towards legislative protection.

123 For example, 2006 Data Retention Directive, EC Directive 2006/24/EC (relating to "internet access, internet e-mail and internet telephony, as well as mobile and fixed line telephony") has just gone into effect, requiring that upon notification ISPs in EU Member States retain details regarding e-mails and Internets data transfers for somewhere between six and twenty-four months, depending on the national implementing legislation. This was adopted as part of a counter-terrorism policy and exists outside the scope of the EC Privacy Directive.

124 Cal. Bus. & Prof Code §§ 22575-79 (Deering 2009).

125 *Id.* at § 22575(b).

(b) The privacy policy required by subdivision (a) shall do all of the following:

- (1) Identify the categories of personally identifiable information that the operator collects through the Web site or online service about individual consumers who use or visit its commercial Web site or online service and the categories of third-party persons or entities with whom the operator may share that personally identifiable information.
- (2) If the operator maintains a process for an individual consumer who uses or visits its commercial Web site or online service to review and request changes to any of his or her personally identifiable information that is collected through the Web site or online service, provide a description of that process.
- (3) Describe the process by which the operator notifies consumers who use or visit its commercial Web site or online service of material changes to the operator's privacy policy for that Web site or online service. ...

*Id.*



Minnesota has a more expansive version of legislation to protect personally identifiable information.<sup>126</sup> Minnesota bars the disclosure of its categories of personally identifiable information except pursuant to a number of specified exceptions.<sup>127</sup> Given the lack of ISPs located in Minnesota, however, it may not be surprising that the law has had little impact. Nonetheless, the law is more robust than that of California and demonstrates that state legislatures are willing to move in the right direction.

At the federal level, the Federal Trade Commission has become the primary enforcement agency in the area of consumer privacy protection.<sup>128</sup> The U.S. Federal Trade Commission ("FTC") bases its jurisdiction on the obligation of companies to refrain from operating in an unfair or deceptive manner.<sup>129</sup> "Under the FTC Act, the Commission guards against unfairness and deception by enforcing companies' privacy promises about how they collect, use and secure consumers' personal information."<sup>130</sup> Under the statute, a practice is unfair and deceptive if "the act or practice causes or is likely to cause substantial injury to consumers which is not reasonably avoidable by consumers themselves and not outweighed by countervailing benefits to consumers or to competition."<sup>131</sup> The FTC has been quite aggressive in finding that the failure to meet a company's self-imposed privacy and data security policies are just such an unfair and deceptive practice.<sup>132</sup>

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126 MINN. STAT. § 325M (2009).

127 *Id.* at § 325M subd. 03-4.

128 See FTC Privacy Initiatives, available at <http://www.ftc.gov/privacy/> (last visited Dec. 28, 2009).

129 15 U.S.C. § 45 (2009) ("Unfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce, are hereby declared unlawful." *Id.* at (1)(a)). Many individual states have laws that operate the same way. See Cal Bus. & Prof Code § 17200 (Deering 2007).

130 FTC Privacy Initiatives, *supra* note 128.

131 15 U.S.C. § 45(n). See *FTC v Colgate-Palmolive Co.* 380 US 374 (1965) (definition flexible and defined by practices in the fields of business).

132 See e.g., Iconix Brand Group Settles Charges its Apparel Web Sites Violated Children's Online Privacy Protection Act, Oct. 29, 2009; CVS Caremark Settles FTC Charges: Failed to Protect Medical and Financial Privacy of Customers and Employees; CVS Pharmacy also Pays \$2.25 Million to Settle Allegations of HIPAA Violations, February 18, 2009; Consumer Electronics Company [Genica Corporation] Agrees to Settle Data Security Charges; Breach Compromised Data of Hundreds of Consumers, February 5, 2009 each available at [http://www.ftc.gov/privacy/privacyinitiatives/promises\\_enf.html](http://www.ftc.gov/privacy/privacyinitiatives/promises_enf.html) (last visited Dec. 29, 2009).

The FTC encourages U.S. businesses to reduce the amount of data they collect and to keep that data more secure.<sup>133</sup> These efforts at creating a regulatory norm of data security and privacy protection provide a modest, incremental step towards the U.S. data privacy protection regime.

Much more influential has been the obligations imposed by the EU on international transactions. The EU/U.S. Safe Harbor has provided a self-certification mechanism to allow U.S. organizations to certify that they meet guidelines more stringent than those generally required in the U.S. that provide sufficient data protections to allow EU Member companies to provide cross-border transfers of their personally identifiable data.<sup>134</sup> In cases such as airlines, for example, the data transfer is critical to their operations.<sup>135</sup> In other cases, the companies operate their business in an international context that makes the separation of U.S. customers from EU customers impractical. International employers are particularly on the spot to comply.<sup>136</sup>

The Safe Harbor has come under a good deal of criticism for being too modest to truly meet the EU demands,<sup>137</sup> but given the realities of business transactions and the increasingly similar uses to which law enforcement and security put private data, these differences may be overstated. More importantly, the protections from the data processor or ISP represent just a small portion of the overall system. Rather than focusing on the territorial differences within this subset of data users, it is more important to look at the remainder of the infrastructure.

## V. Beyond the Law – A Glimpse of the Data Info system

To understand the extent to which identity interests may be influenced by informatics, it is helpful to return to Google and the other search engines. By its very nature, a search engine uses software to read and categorize the content available on the Internet.

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133 See e.g., Fed. Trade Comm'n, Protecting Personal Information: A Guide for Business, available at <http://www.ftc.gov/bcp/edu/pubs/business/idtheft/bus69.pdf>.

134 See U.S. Dep't of Commerce, Safe Harbor Privacy Principles, *supra* note 37.

135 See Tracey DiLascio, *How Safe is the Safe Harbor? U.S. and E.U. Data Privacy Law and the Enforcement of the FTC's Safe Harbor Program*, 22 B.U. INT'L L.J. 399, 400 (2004).

136 Barbara Crutchfield George, Patricia Lynch, and Susan F. Marsnik, *U.S. Multinational Employers: Navigating Through the "Safe Harbor" Principles to Comply with the EU Data Privacy Directive*, 38 AM. BUS. L.J. 735, 759-60 (2001).

137 *Id.* at 421.

## (i) The Internet

### *The Indexed Web*

Search engines use automated software programs known as spiders or bots to survey the Web and build their databases. ... Data collected from each web page are then added to the search engine index. When you enter a query at a search engine site, your input is checked against the search engine's index of all the web pages it has analyzed. The best urls are then returned to you as hits, ranked in order with the best results at the top.<sup>138</sup>

The analysis of the page may include the location of terms in the text, the number of times a word appears, and tags or metatags – information provided about the contents that does not appear in the text.<sup>139</sup>

The indexing is fairly comprehensive, having reached 1.4 billion pages of governmental, commercial and organizational websites by 2008 and growing.<sup>140</sup> At the same time, however, the current state of data search remains somewhat rudimentary because most of the search focuses on the text in the website pages.<sup>141</sup> Increasingly, the search is being expanded to the documents posted to the websites as word processing files and PDF documents. Documents presented as images rather than textual documents require that the text be scanned using OCR (optical character recognition) software to turn the images of the records into text, a step that is technically possible, but much slower than the general indexing. Similarly, voice recognition software could be used to translate the text of audio files into indexable written words. As processing power and storage continues to expand, it is inevitable that these additional steps will be taken.

More speculative is the potential for Internet search capabilities to integrate facial recognition software. Already, millions of photographs are being indexed based on the tags or metatags added to the photographs by the persons posting the photographs. With 164 million users of social media such as Facebook and MySpace online each month, the index of

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138 *How Search Engines Work*, The Spider's Apprentice 4, available at <http://www.monash.com/spidap4.html> (last visited Dec. 24, 2009).

139 *Id.*

140 James Geller, Son Ae Chun, Yoo Jung An, *Toward the Semantic Deep Web*, IT SYSTEMS PERSPECTIVES (Sept. 2008) at 95 (based on web pages calculated in 2008).

141 *Id.*

images has exploded.<sup>142</sup> But this still requires the affirmative steps of the person posting or viewing the photograph. At a minimum, the images of celebrities, politicians, sports figures and others of fame and notoriety have been manually coded in the databases. As the software improves, these individuals will increasingly be recognized by the automated software. Potentially, software could automate the process for everyone. Images available on the Internet could someday be analyzed not just for the information tags and metatags accompanying those images, but also subjected to software analysis that “reads” the pictures to compare to facial and geographic databases. If done with even modest success, then all images retained on Internet sites would be available in searches.

*Content Recognition, Deep Web and the Semantic Web*

Even these steps reflect only a fraction of the data that has the potential to be indexed. Beyond better indexing of the images, audiovisual materials and other posted information is the backend data. “Many organizations generate backend data that is dynamically retrieved through Web-form-based interfaces and thus not indexed by conventional search engines. This hidden, invisible, and nonindexable content is called the Deep Web, and its size is estimated to be tens of thousands of times larger than the surface Web.”<sup>143</sup>

The related concept of the Semantic Web is often attributed to Tim Berners Lee.<sup>144</sup> “The basic idea is that for machines to better make sense of your information, the capability to automatically create intelligent links between “data entities” needs to exist. Think hyperlinking done by machines. In the extreme, they would link anything to anything else. So the idea is to constrain the linking by tying things together based on certain characteristics these things share (or don’t share).”<sup>145</sup> A more robust view

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142 Mark Walsh, *Facebook to Eclipse MySpace in Social Network Ad Spending*, ONLINE MEDIA DAILY, Dec. 22, 2009 at [http://www.mediapost.com/publications/?art\\_aid=119518&fa=Articles.showArticle](http://www.mediapost.com/publications/?art_aid=119518&fa=Articles.showArticle) (last visited Jan. 4, 2010) (“Facebook boasts 350 million users worldwide, and in November cracked 100 million monthly U.S. visitors for the first time to become the fourth-largest Web property overall, according to comScore. MySpace’s U.S. audience, by contrast, had fallen to 64 million as of October.”).

143 *Id.*

144 Greg Boutin, *The Siloed View of the Semantic Web as Linked Data*, Semantics Inc. (Feb. 28, 2009) <http://www.semanticsincorporated.com/2009/02/the-siloed-view-of-the-semantic-web-as-linked-data.html> (last visited Dec. 26, 2009).

145 *Id.*

of the Semantic Web is less technical: “a web in which machines get the meaning of information & use that understanding to transform/synthesize data intelligently on our behalf.”<sup>146</sup> A variation on the semantic web is the massive correlations utilized by Google for its translation software and voice recognition products. The linking is not necessarily one-to-one; correlational data is sufficient and statistically accurate enough.

Neither the Deep Web linking nor the Semantic Web fully exist yet. But efforts are actively being made to improve the understanding of the software indexing, so that more and more of the information can be contextualized and understood. For example, the simple format of a telephone number communicates to Google, Skype and other software programs that the number is capable of being dialed or stored in a personal contact book. Similarly, if information is provided in calendar format, then software can (or should) be able to transfer that information to another calendar of the viewer’s choosing.

## **(ii) Tomorrow’s Data – Transponders, RFID Tags and the Movement of Things**

There is another data revolution taking place. In this case, it is the data about people’s physical objects and their movements. The tiny microchips, some as small as a grain of sand, and many smaller than the size of this typed period (.) are attached to an antenna, allowing their signal to be obtained by a transceiver.<sup>147</sup>

RFID systems comprise three main components: (1) the RFID tag, or transponder, which is located on the object to be identified and is the data

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146 *Id.* In a world with a working Semantic Web, I should not only be able to know without launching a full web expedition, which Chinese restaurant in a 5-mile/km radius carries Peking Duck, but also to aggregate and filter information from various subprime real estate lenders by region and map that against mortgage default rates and lenders’ pools of debt by risk level in a snap. That type of easy data transformation could help avoid a financial crisis of gigantic proportions, which, some would argue, is a handy benefit worth its weight in trillions of dollars. Greg Boutin, *Tying Web 3.0, the Semantic Web and Linked Data Together - Part 2/3: Linked Data is a MediumData*, SEMANTICS INC. (May 11, 2009) available at <http://www.semanticsincorporated.com/2009/05/tying-web-30-the-semantic-web-and-linked-data-together-part-23-linked-data-is-a-medium.html> (last visited Dec. 26, 2009).

147 Sarah Gingichashvili, *Hitachi Develops World’s Smallest RFID Chip*, TFOS, Oct. 26, 2007 available at <http://thefutureofthings.com/news/1032/hitachi-develops-worlds-smallest-rfid-chip.html> (last visited Dec. 29, 2009) (RFID “measuring only 0.15 x 0.15 millimeters in size and 7.5 micrometers thick,”).

carrier in the RFID system; (2) the RFID reader, or transceiver, which may be able to both read data from and write data to a transponder; and (3) the data processing subsystem which utilizes the data obtained from the transceiver in some useful manner.<sup>148</sup>

RFID tags have become popular to control inventory in stores,<sup>149</sup> in credit cards that allow a user to pay merely by putting the credit card in the proximity of the card reader,<sup>150</sup> and to track one's pets, children or self-implanted medical information.<sup>151</sup> They have been described as having "one million and one applications."<sup>152</sup> They can be used to be sure that no sponges or other unwanted medical devices are left inside a patient after surgery.<sup>153</sup> One can easily imagine, for example, that tags can be sprayed upon an "illegal" demonstration, and then used by police to positively identify the individuals participating in the demonstration. Police work and crowd control can readily become another form of inventory control.

RFID tags will generate entirely new genres of interactive toys, games and devices. Players wearing decoder rings – jewelry with RFID enabled tags – will be able to personalize the experience of videogames, virtual worlds and the Internet based on the player information and history triggered by the decoder ring. Groups of objects can interact such that the presence of multiple RFID "keys" provide the player unique benefits.<sup>154</sup> By embedding the secret codes directly in the products or worn on the player, the gaming experience will be much more lifelike and immersive. This will be terribly attractive to manufacturers, consumers and advertisers.

According to a recent study, three states have enacted laws regulating RFID use in the United States while two other have prohibited

148 Julie Manning Magid, Mohan V. Tatikonda, and Philip L. Cochran, *Radio Frequency Identification and Privacy Law: An Integrative Approach*, 46 AM. BUS. L.J. 1, 9 (2009).

149 *Id.* at 4-5 (describing experience of Marks & Spencer).

150 Shane L. Smith, *Gone in a Blink: The Overlooked Privacy Problems Caused by Contactless Payment Systems*, 11 MARQ. INTELL. PROP. L. REV. 213, 259 (2007).

151 See Victor Godinez, *James Bond, 007 days a week; Gadgets move from espionage to the everyday*, DALLAS MORNING NEWS, MAR. 28, 2009 at 1D.

152 Brad Kane, *Merrimack sets precedent in stressing new technology; College will teach radio frequency ID*, BOSTON GLOBE, Feb. 12, 2009 at Reg 3.

153 Judith Tan, *KKH to track surgical dressings electronically; Every piece will have an RFID tag to ensure nothing is left in patient*, THE STRAITS TIMES (SINGAPORE), Sept. 19, 2009.

154 Compare this with the tags on Webkinz plush toys, produced by Ganz. "Webkinz pets are lovable plush pets that each come with a unique Secret Code. With it, you enter Webkinz World where you care for your virtual pet, answer trivia, earn KinzCash, and play the best kids games on the net!" [http://www.webkinz.com/us\\_en/](http://www.webkinz.com/us_en/) (last visited Jan. 4, 2010).

implementation in humans.<sup>155</sup> Many other states are contemplating various versions of regulations aimed at notice or limitations on use.<sup>156</sup> The FTC has played a minor role, again using its general power to hold companies accountable for the information they provide to the public. It has no present authority, however, to regulate RFID usage.

Not surprisingly, the EU has moved forward with a more comprehensive acknowledgement of RFID implementation and the understanding that the data in objects represents an entirely new species of information, the so-called “Internet of things” (IoT).<sup>157</sup>

One major next step in this development is to progressively evolve from a network of interconnected computers to a network of interconnected objects, from books to cars, from electrical appliances to food, and thus create an ‘Internet of things’ (IoT). These objects will sometimes have their own Internet Protocol addresses, be embedded in complex systems and use sensors to obtain information from their environment (e.g. food products that record the temperature along the supply chain) and/or use actuators to interact with it (e.g. air conditioning valves that react to the presence of people).<sup>158</sup>

155 Magid, Tatikonda, and Cochran, *supra* note 148, at 21.

Of the seventeen state legislatures considering RFID in 2006, three states—Georgia, New Hampshire, and Wisconsin—adopted RFID provisions. Georgia and New Hampshire both established study groups to focus on RFID technology. New Hampshire further enacted a law that prohibited the use of RFID to identify occupants of a vehicle or the ownership of a vehicle. Wisconsin law prohibited requiring an individual to have a microchip implanted. North Dakota and California passed bills prohibiting mandatory human microchip implants in 2007. These laws would permit voluntary RFID implants.

*Id.* citing H.R. 1558, 2005–2006 Leg. Sess. (Ga. 2006); H.B. 203, 2006 Sess. (N.H. 2006); A.B. 290, 2005 Leg. Sess. (Wis. 2006); S.B. 2415, 60<sup>th</sup> Leg. Sess. (N.D. 2007); and S.B. 362, 2007–2008 Reg. Sess. (Cal. 2007) (Effective Jan. 1, 2008).

156 *Id.* See also John M. Eden, *When Big Brother Privatizes: Commercial Surveillance, the Privacy Act of 1974, and the Future of RFID*, 2005 DUKE L. & TECH. REV. 20 (2005).

157 *Id.* at 2. See International Telecommunications Union, Internet of Things, 2005 report, available at [www.itu.int/dms\\_pub/itu-s/opb/pol/S-POL-IR.IT-2005-SUM-PDF-E.pdf](http://www.itu.int/dms_pub/itu-s/opb/pol/S-POL-IR.IT-2005-SUM-PDF-E.pdf) or the ISTAG report [ftp://ftp.cordis.europa.eu/pub/ist/docs/istagscenarios2010.pdf](http://ftp.cordis.europa.eu/pub/ist/docs/istagscenarios2010.pdf)

Today, developments are rapidly under way to take this phenomenon an important step further, by embedding short-range mobile transceivers into a wide array of additional gadgets and everyday items, enabling new forms of communication between people and things, and between things themselves. A new dimension has been added to the world of information and communication technologies (ICTs): from anytime, any place connectivity for anyone, we will now have connectivity for anything.

158 Communication From The Commission To The European Parliament, The Council, The European Economic And Social Committee And The Committee Of The Regions, Internet of

RFID and IoT have both positive and negative social implications. The greater integration of electronic equipment, better tracking of products in transit, greater safety in medical procedures all stand to improve the quality of life. The interactive entertainment products will be fun and engaging. At the same time, however, greater access to even more personal information by more data processors and the creation and collection of vastly more metadata regarding the movement of things and information have serious privacy and security implications.<sup>159</sup>

The Commission recognized a number of distinct governmental roles in the development of IoT and expansion in use of RFID and similar technologies. First, there is a role in the development of the nomenclature and architecture of the system to maximize efficiency, scalability and interoperability and avoid spawning a number of competing mini-systems of non-communicative extranets.<sup>160</sup> Second, there is the need to address the impact IoT will have on privacy concerns.<sup>161</sup> Third, the system needs to provide comprehensive information integrity and security safeguards that trust and reliance can be established.<sup>162</sup> Establishing standards, standardization, a research plan, and a public-private partnership will also be part of the Commission agenda.<sup>163</sup>

Unlike the much more scattered U.S. approach and the limits on its regulation, the Commission's approach both embraces the potential of RFID and anticipates the necessary limits. In countries without regulation, the technology may be developed ahead of the security or the privacy protections. In the U.S., for example, the lack of standardized regulation will result either in a patchwork of state laws or an emphasis on technological innovation and a public backlash due to the lack of

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Things — An action plan for Europe, COM (2009) 278, June 6, 2009 (footnote omitted) (Hereinafter IoT ACTION PLAN).

159 *Id.* at 3.

160 *Id.* at 4-5. ("The Commission will initiate and promote, in all relevant fora, discussions and decisions on: defining a set of principles underlying the governance of IoT; [and] setting up an 'architecture' with a sufficient level of decentralised management, so that public authorities throughout the world can exercise their responsibilities as regards transparency, competition and accountability.").

161 *Id.* at 5-6. ("A prerequisite for trust and acceptance of these systems is that appropriate data protection measures are put in place against possible misuse and other personal data related risks.").

162 *Id.* at 7-8.

163 *Id.* at 8-10.



standardization, security protocols and the ability of industry to establish a trust in the data collection and movement.<sup>164</sup>

## VI. Beyond Tomorrow

As suggested by the integration of RFID technologies with massive real-time data correlations, the nature of informatics law is at another precipice. Notions of ownership using a copyright regime have been stressed by the Google Book Search and the struggles with the Database Directive. Scientists and scholars face hurdles both to integrate the various hierarchical studies into comprehensive information systems and to use those systems.

Individual privacy and autonomy rights will be increasingly difficult to administer. To the extent incorrect information enters the data stream, the movement of that data and the lack of ownership exacerbate the ability of a person to correct the information or hold anyone accountable. Over the past few years, for example, one of the more significant trends in computing has been the move to the so-called data cloud.<sup>165</sup> “Gmail, Twitter, and Facebook are all cloud applications, for example.”<sup>166</sup> The cloud is actually the storage on giant server farms managed by companies such as Amazon or Google that sell storage and processing on an as-needed basis.<sup>167</sup>

The greatest security concern for these systems is that the usage by one customer will create an access point to invade the integrity of the data stored for another customer. The protection of data in the shared server farms or cloud represents the hardest challenge and opportunity for the growth of informatics. If clouds become ubiquitous, their management will shape everything in the ecology. If they become unstable or insecure, the entirety of the system could be at risk.

The ability to own the cloud has the potential to revolutionize the metadata available to the server farm operators. On open systems like Twitter and Facebook, there is little expectation of privacy. Users of Gmail,

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164 See Magid, Tatikonda, and Cochran, *supra* note 148, at 21-23.

165 See David Talbot, *Security in the Ether*, MIT TECH. REV. (Jan./Feb. 2010), available at <http://www.technologyreview.com/web/24166/> (last visited Dec. 29, 2009).

166 *Id.*

167 *Id.*

in contrast, are likely to expect greater protections.<sup>168</sup> The ability to target the users of the systems anchored in the clouds should be based upon the informed consent and opt-in agreement by the user to participate in any studies or receive any advertising.

The network effects of Google and the pervasiveness of its service highlight the potential cloud problem.<sup>169</sup> “Google’s status in the ranking is also due to its aggressive use of invasive or potentially invasive technologies and techniques.”<sup>170</sup> Google and other similarly situated cloud companies have the analytic tools to refine search and target very narrowly focused bands of consumers or repackage and sell that highly specified information.

Again, the question is one of balancing. The use of metadata and other data trends to understand how to provide more efficient medical services,<sup>171</sup> more efficient allocation of power or water, better roads, or more entertaining content only benefits the public. The value to the companies compiling this information should both improve their profitability and potentially lower the costs to the users of their services.

Having recognized that data mining has many potential benefits, the most glaring concern must also be noted. In certain situations, the data provides the ability to recombine the de-identified data with non-protected information and re-identify individuals. To the extent a company obtains the right to use protected information in an anonymous manner, it must take steps to assure that its categories of users are not so narrow as to

168 If the members of the public were to base their expectation on anything, it would be based on the Stored Computer Act’s protections for ephemeral communications, if not on any constitutional guarantees. In reality, however, these expectations are likely built on expectations of social norms rather than any actual understanding of law. See Omer Tene, *What Google Knows: Privacy and Internet Search Engines*, 2008 UTAH L. REV. 1433, (2008); Samantha L. Millier, *The Facebook Frontier: Responding to the Changing Face of Privacy on the Internet*, 97 KY. L.J. 541, (2009).

169 Tene, *supra* note 168, at 1437-38. The problems created by the size and number of tools provided by Google has not gone unnoticed.

While a number of companies share some of these negative elements, none comes close to achieving status as an endemic threat to privacy. This is in part due to the diversity and specificity of Google’s product range and the ability of the company to share extracted data between these tools, and in part it is due to Google’s market dominance and the sheer size of its user base. ... *Privacy Int’l, A Race to the Bottom: Privacy Ranking of Internet Service Companies* (Sept. 9, 2007), available at [http://www.privacyinternational.org/article.shtml?cmd\[347\]=x-347-553961](http://www.privacyinternational.org/article.shtml?cmd[347]=x-347-553961) (last visited Dec. 31, 2009).

170 *Id.* (“The view that Google “opens up” information through a range of attractive and advanced tools does not exempt the company from demonstrating responsible leadership in privacy.”).

171 See HIPAA, *supra* note 102, at § 164.514(a)-(b) (defining what constitutes anonymized or de-identified information).

permit such reconstruction.<sup>172</sup> Such safeguards can be built into the algorithms so as to avoid exposing re-identified information to anyone who could read or consume it.<sup>173</sup>

A second issue is the inherent ethical concerns about conduct data studies on individual without their consent. While metadata analysis is not invasive, it still represents an intrusion on autonomy. To provide a reasonable metadata analysis, therefore, procedures not dissimilar from those required of institutional review boards (IRB)<sup>174</sup> can be applied to the data processors and ISPs having access to other parties' data.<sup>175</sup> "[R]esearchers utilizing these techniques must always consider the privacy of those they investigate. Combining two sets of data can intrude on the privacy of the data subjects, even if both of the sets of data are publicly available. More to the point, automated data gathering and analysis may require the prior approval of a University Institutional Review Board."<sup>176</sup>

It has been suggested that IRB policies provide protocols for using de-identified data that "do not need to go through ethics review."<sup>177</sup> This assumption, however, assumes the de-identification itself has been sufficient and further assumes that all research is appropriate if the individual identities are not exposed. Neither assumption is accurate. As such, the IRB process can provide at least a minimal standard of review for the usage of the data.<sup>178</sup> It also assumes that the access to public

172 Religious practice, for example, is often defined in part by diet. The purchase of Halal, Kosher or swine products (which presumptively excludes Muslim and Jewish practice) could identify a minority religious person in many towns around the world.

173 See Stacey Tovino, *The Use and Disclosure of Protected Health Information for Research under the HIPAA Privacy Rule: Unrealized Patient Autonomy and Burdensome Government Regulation*, 49 S.D. L. REV. 447, 455-57 (2004).

174 The Office for Protection from Research Risks (OPRR) is the agency responsible for oversight of federally funded research by the U.S. Department of Health and Human Services involving human subjects. See Mark S. Frankel & Sanyin Siang, American Association for the Advancement of Science, Report of the Workshop on Ethical and Legal Aspects of Human Subjects Research in Cyberspace (1999), available at <http://www.aaas.org/spp/sfml/projects/intres/report.pdf>.

175 Paul Ohm, *Computer Programming and the Law: A New Research Agenda: Article/Computer Program*, 54 VILL. L. REV. 117, 137-39 (2009).

176 *Id.* at 137.

177 Judy Illes and Sofia Lombera, *Identifiable Neuro Ethics Challenges to the Banking of Neuro Data*, 10 MINN. J.L. SCI. & TECH. 71, 80-81 (2009).

178 Michael D. Volk Jr., Christine Meis McAuliffe, and May Mowzoon, *Symposium: Human Genetic Sampling: Ethical, Legal, and Social Considerations, Genebank Management: A Review of Salient Ethical, Legal, and Social Issues*, 45 JURIMETRICS J. 205, 216 (2005).

information makes the subsequent analysis outside the realms of privacy protection. Since both assumptions are inaccurate, it is appropriate that metadata analysis be considered a form of human subject research requiring at least minimal ethical reviews before the data is collected.<sup>179</sup>

The metadata and analytic trends can reveal very useful information. Google provided an example of this benefit by comparing its analytic data to that of the U.S. Centers for disease control to show that query data could predict flu patterns across the U.S. more efficiently than the cumbersome and expensive national survey.<sup>180</sup> In this example, Google addresses the privacy concern about identifying individuals making the queries.<sup>181</sup> “Google Flu Trends can never be used to identify individual users because we rely on anonymized, aggregated counts of how often certain search queries occur each week. We rely on millions of search queries issued to Google over time, and the patterns we observe in the data are only meaningful across large populations of Google search users.”<sup>182</sup>

In other contexts, however, the information may certainly create the appearance that the individual has been targeted. By tracking the online activity of an individual, a company may tailor the messages sent to that person. When done by advertisers, this is called behavioral advertising.<sup>183</sup> With the integration of RFID and IoT technologies, behavioral advertising

179 *Id.*

180 Jeremy Ginsberg, et. al., *Detecting influenza epidemics using search engine query data*, 457 NATURE, 1012, 1012-1014 (Feb. 19, 2009) (“One way to improve early detection is to monitor health-seeking behaviour in the form of queries to online search engines, which are submitted by millions of users around the world each day. ... Because the relative frequency of certain queries is highly correlated with the percentage of physician visits ... we can accurately estimate the current level of weekly influenza activity in each region of the United States, with a reporting lag of about one day.”).

181 Google.org Flu Trends, available at <http://www.google.org/flutrends/about/how.html> (last visited Jan 5, 2010).

182 *Id.*

183 *Id.* at 46.Fed.

Trade Comm’n, FTC Staff Report: Self-Regulatory Principles for Online Behavioral Advertising, available at <http://www.ftc.gov/os/2009/02/P085400behavadreport.pdf> (Feb. 2009) (“Online behavioral advertising involves the tracking of consumers’ online activities in order to deliver tailored advertising.”) (hereinafter Behavioral Advertising Staff Report).

For purposes of the Principles, online behavioral advertising means the tracking of a consumer’s online activities over time – including the searches the consumer has conducted, the web pages visited, and the content viewed – in order to deliver advertising targeted to the individual consumer’s interests. This definition is not intended to include “first party” advertising, where no data is shared with third parties, or contextual advertising, where an ad is based on a single visit to a web page or single search query.

will soon reach beyond the Internet to integrate the informatics footprint of the individual. The data may not be personally identifiable information (“PII”) in the regulated sense. “Instead, businesses generally use “cookies” to track consumers’ activities and associate those activities with a particular computer or device.”<sup>184</sup>

A second version of behavioral advertising involves “deep packet inspection” – a process whereby the ISP tracks the interaction between the user and every location visited on the Internet.<sup>185</sup> These tools are heavily used not just in advertising but also political polling and public policy analysis.<sup>186</sup>

Given the ability to relate various pieces of information one to another, the FTC has recognized that rules focused only on personally identifiable information are insufficient. “[I]n the context of online behavioral advertising, the traditional notion of what constitutes PII versus non-PII is becoming less and less meaningful .... Indeed, in this context, the Commission and other stakeholders have long recognized that both PII and non-PII raise privacy issues...”<sup>187</sup>

The FTC has continued to recommend only voluntary guidelines or principles, but it has at least strengthened these recommendations with its most recent report. The principles include the following:

1. Transparency and Consumer Control. Every website where data is collected for behavioral advertising should provide a clear, concise, consumer-friendly, and prominent statement that (1) data about consumers’ activities online is being collected at the site for use in providing advertising about products and services tailored to

184 *Id.*

185 *Id.* at 16 (citing Broadband Providers and Consumer Privacy: Hearing Before the S. Comm. on Commerce, Sci. & Transp., 110<sup>th</sup> Cong. (2008), available at [http://commerce.senate.gov/public/index.cfm?FuseAction=Hearings.Hearing&Hearing\\_ID=778594fe-a171-4906-a585-15f19e2d602a](http://commerce.senate.gov/public/index.cfm?FuseAction=Hearings.Hearing&Hearing_ID=778594fe-a171-4906-a585-15f19e2d602a).)

In the ISP-based behavioral advertising model, a consumer’s online activities are collected directly from the consumer’s ISP, rather than from the individual websites the consumer visits. This model, which is also often referred to as “deep packet inspection,” could potentially allow targeting of ads based on substantially all of the websites a consumer visits, rather than simply a consumer’s visits to, and activities within, a given network of websites.

*Id.*

186 See BILL TANCER, CLICK – UNEXPECTED INSIGHTS FOR BUSINESS AND LIFE 33-35 (HYPERION 2008).

187 Behavioral Advertising Staff Report, *supra* note 183, at 16-17.

individual consumers' interests and (2) consumers can choose whether or not to have their information collected for such purpose. ...

2. Reasonable Security, and Limited Data Retention, for Consumer Data. Any company that collects and/or stores consumer data for behavioral advertising should provide reasonable security for that data. ...
3. Affirmative Express Consent for Material Changes to Existing Privacy Promises. As the FTC has made clear in its enforcement and outreach efforts, a company must keep any promises that it makes with respect to how it will handle or protect consumer data, even if it decides to change its policies at a later date. Therefore, before a company can use previously collected data in a manner materially different from promises the company made when it collected the data, it should obtain affirmative express consent from affected consumers.
4. Affirmative Express Consent to (or Prohibition Against) Using Sensitive Data for Behavioral Advertising. Companies should collect sensitive data for behavioral advertising only after they obtain affirmative express consent from the consumer to receive such advertising.<sup>188</sup>

The behavioral advertising principles do not go as far as continental privacy directives require, but they do provide an important first step to recognize that the benefits of targeted content can easily be outweighed by the interference with autonomy and the ability of commercial enterprises to capture substantial information about a person's interests and activities. Without these protections, the growing value of the behavioral data would lead to theft of this information for unlawful purposes and potentially to misuse by governments for policing and regulatory efforts. The voluntary guidelines provide only a modest step at reducing these threats, but they provide an important beginning.

The rules limiting behavioral advertising and anonymity or non-identification must be integrated into the rules protecting data integrity, security, reliability and ownership. Taken together, the regulatory regime can promote new scientific advances, improve our understanding of

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188 *Id.* at 45-47. *See also* Tene, *supra* note 168, at 1425-36.

information and still provide safeguards for individuals and the public regarding the use of these data mining tools in the information ecosystem.

## **VII. Conclusion**

Unless the regulatory regime protects the subjects of the data as well as the data itself, the benefits of a comprehensive information ecology will be outweighed by the risks of intrusion and misuse. 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 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. The growth of RFID usage and expansion of the IoT will dramatically magnify the amount of data and personal information. The challenges to copyright management have resulted in three strikes legislation in France and in the copyright notification laws on U.S. university campuses.

The work necessary has been started. The EC Privacy Directive and the EU/U.S. Safe Harbor provisions, based on the OECD privacy directives, are excellent building blocks for a new paradigm. These tools must be expanded across all spheres of the informatics spectrum. Whether the system at issue be the Neilson television rankings, the Google translation services, the cell phone tracking data, or the local bank's credit assessment of its customers, the data to track an individual has never been greater. The ability of machines to correlate among the myriad of sources has only just begun. The time for a new regulatory regime, therefore, is now-before the use of such metadata becomes commonplace.

International cooperation must continue around the globe to provide for comprehensive and standardized protections both for data and from the misuse of that data. Only when the system is seen in its totality can the building blocks be brought together in the appropriate shape.

Tomorrow is upon us.

## THE MIND-RIGGING BY MEDIA: ELECTORAL OFFENCES AND CORRUPT PRACTICES

*Madabhushi Sridhar\**

### *Abstract*

*Advertisement is being packed as 'news' and space that is sold. The General Elections in some states such as Andhra Pradesh and Maharashtra saw a disturbing trend of media space being sold for money without being accounted for. The price paid for was not for an advertisement but 'news', which gives a very favourable and hopeful report about the contesting candidate. The 'favourable' report of rousing reception, surging crowds and increasing support for the candidate as part of 'package deal' is what lure each contestant but that is what misleads the voter which Media is not supposed to do. Started with Andhra Pradesh Elections in 2009, the syndrome of paid news spread and institutionalised in Maharashtra in 2010 and attracted the attention of the Press Council of India which immediately took cognizance of the unethical practice and appointed a committee to examine the possible measures to prevent it. This article analyses the new practice, its ethical problems and the legal provisions which could be used to curb it besides seeking active participation by civil society in exposing falling media also.*

### **I. Introduction**

If a newspaper writes a false story, it is undoubtedly an unethical act. But if media propagates falsity during elections, it could be either an electoral crime or a corrupt practice. The paid-news syndrome is no more an issue of impropriety, but it is a case of massive perpetration of crimes under Representation of Peoples Act 1951 and Indian Penal Code, 1860.

The whole authority to govern is derived from the votes of the adult citizens of the country. This democracy is an inalienable basic feature of Constitution of India. The concept of democracy as visualized by the

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Constitution presupposes the representation of people in Parliament and state legislatures through election<sup>1</sup>. Any influence that hijacks public opinion and affects the exercise of the right to vote in a free and fair manner eats at the roots of democracy. Though political parties and candidates are free to propagate for voting support, they are precluded from misguiding, spreading falsity, selling impossible promises, using caste, religion or regional feelings, using public money and power to influence the voter with allurements of money and sedation of liquor. All these unreasonable influencing factors are declared illegal. Punishments and disqualifications are also prescribed.

### **(i) Constitutional Obligation of Election Commission**

As Article 324 vests in the independent Election Commission of India, the authority of superintendence, direction and control of the preparation of electoral rolls for, and conduct of, all elections to Parliament and state legislatures, and to the offices of the President and Vice-President of India, it is the imperative duty of the Commission to ensure free and fair polls, avoiding any kind of undue influences, because that alone secures the health of democracy. In pursuit of these functions the entire state bureaucratic machinery is kept under the control and supervision of the Election Commission of India during the process of elections. This power devolves on District Collectors, who as Chief Electoral Officers are supposed to prevent any thing that stops the voters from thinking independently.

### **(ii) Freedom of content**

Undoubtedly, the media proprietors have freedom and authority to choose the contents of their page or channel or decide the portion of their space for advertisements<sup>2</sup>. The Supreme Court of India<sup>3</sup> has struck down the statutes and executive orders of the Government when the State tried to introduce controls on the content of newspapers, and restrict the space allotted to advertisement by saying at least 60 per cent should be of news. It was considered as the State's unreasonable interference with the autonomy

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1 *Kesavananda Bharathi v. State of Kerala*, AIR 1973 SC 1461.

2 Article 19(1)(a), The Constitution of India.

3 *Sakal Papers v. Union of India*, AIR 1962 SC 305.

of newspaper to decide how to fill their pages, which was violation of the freedom of press guaranteed by the Constitution.

### **(iii) What is happening?**

The syndrome of “Paid News” that crept up into poll scene during 2009 is the equivalent of ‘criminalization of political parties’, ‘massive booth rigging’, ‘electronic voting machine manipulation’, or massive distribution of liquor and money a few hours before polling. It is wrong to say that money for a news item is just an unethical practice of camouflaging advertisement as news, or passing off a ‘falsity’ as a news event. Heavy monetary packages to campaign for candidate is more than an election crime in which the media men were hand in glove with criminal politicians.

The trend reflects the fatal combination of a trinity of the “Media, Money and Mafia.” Politicians used to hire muscle men with huge amounts of money and train them in booth rigging either by hook or crook. Sometimes they purchased all poll personnel, who usually are teachers and clerks, so that all ballots are polled into their favour wiping out the other contestants. If both the candidates are powerful in muscle and money besides influential, they used to ‘rig’ in proportion to their ‘strength’. Now the rigging never occurs, not simply because of using EVM, but because candidates are training media pens instead of mafia guns to ‘rig’ the minds of people with constant opinion bombarding to constrain them to vote them. It is the new opinion-rigging crime committed by both politicians using both gunmen and “pen-men”.

## **II. Advertorials, News and Advertisements**

(i) News, (ii) views and (iii) advertisement was the old classification of media content. Presently, the classification has changed to: (i) advertorial (no more editorial), (ii) news (events) (iii) news as advertisements and (iv) advertisements.

The basic norm was that there should be strict separation between news and views which was violated day in and day out. The thin line between ‘news’ and ‘advertisement’ was blurring till recently but totally disintegrated. News was supposed to be regarded as factual reporting of events, and generally the newspaper would not be liable for the truthfulness of the contents of the advertisement unless they contain defamatory or obscene material. Now untruthful news is appearing as ‘event coverage’ which in fact is an advertisement.

The much advanced Andhra Pradesh media has dubious distinction of being the pioneer in paid news syndrome. In 2004 elections the traces of this cancer was noticed in some districts, where in the reporters and advertisement executives collected huge amounts of money to write favourable stories. Where the subeditors or little higher position holders noticed the 'treachery' they were also given the share. Earlier, it was limited to a couple of newspapers in a few districts. By 2009, this corruption was institutionalized, newspapers fixed targets for each district bureau, collected huge amounts of money, depriving the reporters of the benefit of exclusively claiming the proceeds without any information. Each and every political party candidate was forced to enter into some package deal with the tabloid newspapers as the continuous campaign of winning stories of their rival candidates created a psychological edge and left a worrying factor in their cadre. Every candidate had to shell out a minimum of Rs. 5 lakh for not writing adverse reports and for publishing favourable reports. The space and frequency of exaggerated or false 'favourable reports' is directly proportional to the size of the package money.

### (i) The deal for undue Influence

Every such item tells the readers that such a candidate is forging ahead leaving others far behind, people are receiving the candidate with great regard. They use exaggerating expressions in Telugu language newspapers like "*brahma ratham pattaru*",<sup>4</sup> or "*prachaaramlo doosuku velli potbunnaru*",<sup>5</sup> "*mabilalu mangala harathulu padutunnaru*",<sup>6</sup> "*yuvatharam utsahamsto urakalu vesthu kerinthalu kottindi*",<sup>7</sup> which are most of the times absolute falsities. The lack of truth in it could be verified in that very newspaper, which publishes a similar story about the rival candidate in the same page or another page or on the next day. It is also reported that some pages of district edition tabloids were changed twice or thrice every day to accommodate 'success trail' of different candidates in the same constituency. One report about successful campaign of candidate 'x' would be confined to a particular area or that those pages are made available only to such a candidate, while another edition with a different page writes about enthusiastic campaign of

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4 A Telugu expression which means huge crowds thronged at the candidates campaign meetings.

5 A Telugu sentence meaning "he is marching ahead in campaign".

6 A Telugu sentence which means "women folk are welcoming lighted lamps".

7 A Telugu sentence saying "youth was very enthusiastic, cheering frequently at the candidate.

candidate 'y' and get that circulated as directed by that candidate. The headlines in moffusil newspapers of big broadsheet dailies claiming that victory was assured have reflected the dishonest payments behind such writings. Some of such headlines are: "*Vijayam Lanchaname*"<sup>8</sup>, "*Bhaaree Majority Dishagaa*"<sup>9</sup>, "*Ye nota vinna bapiraju gelupu maate*"<sup>10</sup>.

These stories claim that a particular candidate would win. Surprisingly, the newspaper did not hesitate to carry three or four such stories ascertaining the victory of the candidates contesting same seat in the same page. One 'paid-news' proves the other wrong. Even if there is a single story stating that victory is sure, it could have an undue influence on other parts of the constituency and they may also decide to vote in his favour as he is winning anyway. The Election Commission has prohibited exit-poll opinion survey by any media before the polling process is completed. This is based on the principle that winning news of one party at one place should not influence voters in different part of the state to favour winning party. If the media takes money to say a particular candidate is receiving unprecedented support from the people, it could send an influencing signal to others to vote for him. This frenzy campaign based on fabricated stories of increasing people's support is misuse of freedom of expression both by candidates and journalists. Thus there is a need to take serious action against paid-misinformation during the polls. What must be realized is that while generally reporting falsity is question of ethics, circulating falsity on payment during polls is an offence.

In selling absolute falsity or ascertaining the victory of a candidate as daily news in package deal, there is a concerted effort to unduly influence the voters in almost all constituencies. The newspapers had offered different packages such as

- a) regularly writing favourably on front page;
- b) writing favourably in regular succession on front page with a colour photo;

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8 A Telugu Headline which means "victory is just a formality" in Telugu Newspaper, Andhra Jyothi (District Edition), Bhimavaram, 23rd April, 2009, p. 4.

9 A Telugu Headline which means "heading towards massive majority", *Ibid.*

10 A Telugu Headline which means "everyone says Bapiraju will win", *Id.*

- c) writing regularly with colour photos all through the campaign session, i.e. from date of nomination to date of polling with interviews, news analysis, campaign trails etc.;
- d) a package to write favourably and also to do negative campaign against his rival candidates;
- e) an informative interview of the candidate with photos on condition that they should purchase 25,000 copies of the newspapers besides some consideration.

The electronic media too followed the trend set by Telugu *moffusil* print media and sold the slot of space and time of their channel to the political party or the candidate showing the surging crowds to his address from *ratham*<sup>11</sup> or road-show. At no place did the media make an effort to indicate that it was a sponsored programme or sold out as a slot for advertisement.

## **(ii) Crime against Democracy**

If it is mere merger of news with commercially paid information, or just commercialization of the media's influence, or vulgar display of bias towards a particular caste or political party or the candidate, it could be a case of 'ethics' or 'breach of code of conduct', or 'impropriety' etc. But selling space or time (by print and electronic media) to propagate falsity is something far above the unethical practice which puts the media on par with poll-criminals. It is not only a transgression against professionalism and ethics but a crime against democracy besides being a punishable offence under both, the Representation of People's Act and the Indian Penal Code. The syndrome is not just the concern of Press Council of India but a real challenge to the Election Commission, whose aim is to conduct free and fair polls, because media sold 'free' news and its freedom for packet, and also spread wrong information to seduce the voters to like a particular candidate. Here again an ethical question arises as the same newspaper, same local bulletin or same page projects the rival candidates for similar amounts of money. With extremely rich candidates contesting

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11 A Telugu expression meaning specially made vehicle.

elections or enriched legislators seeking re-election, who have no dearth of money, the media's targets are easily achieved<sup>12</sup>.

### (iii) Extortion by Media

Several candidates who are not very wealthy, or fighting elections on their own strength or peoples' support, complained of extortion by the media<sup>13</sup>. *The Hindu* reported on this during the Lok Sabha elections, where sections of the media were offering low-end "coverage packages" for Rs.15 lakh to Rs. 20 lakh. "High-end" ones of course, cost a lot more<sup>14</sup>. The State polls saw this go much further. National Election Watch 2009 reported: *Your chances of winning an election to the Maharashtra Assembly, if you are worth over Rs.100 million, are 48 times greater than if you were worth just Rs.1 million or less.* Far lesser still, if that other person is worth only half-a-million rupees or less. Just six out of 288 MLAs in Maharashtra who won their seats declared assets of less than half-a-million rupees.

### (iv) Corrupt Practices

Under Section 123 of Representation of People Act 1951, bribery, undue influence, appeals made on the ground of religion, caste, etc, publication of false statement relating to a candidate, free conveyance of voters, incurring of election expenditure in excess of the prescribed limit and seeking assistance of government servants are "corrupt practices." Later, in 1989 booth capturing was also added as another such corrupt practice. In the present context, media sold space and time to perpetrate undue influence, publication of false statement relating to winning chances of a candidate, and in the process the candidates spent huge amounts of money for coverage packages which is certainly a corrupt practice. These aspects have to be considered, investigated and prevented by the machinery of Election Commission of India. The Commission should not leave it to be decided at the time of hearing of election petition, which means that the state would have allowed perpetration of corrupt practices and then waited for 'proof' of the same before the election tribunals. If this is allowed,

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12 See P. Sainath, in *The Hindu*, December 6, 2009; Sainath quotes National Election Watch 2009, stating that there was 338 percent asset growth of legislators, and that there was 70 percent increase in *crorepati* candidates in 2009.

13 P Sainath, *Medium, Message and the Money*, *The Hindu*, October 26, 2009.

14 News Report, *The Hindu*, April 7, 2009.

elected politicians who purchase ‘news’ will take great advantage, the statement of Ashok Chavan being a perfect example:

When the Press Council of India asked Maharashtra Chief Minister Ashok Chavan to depose on the allegations of indulging in paid news crime, he conveniently tried to escape saying “*the appropriate forum to respond is the court of law the election petitions are tried*”<sup>15</sup>. This means that unless the allegations are meticulously proved, it is almost impossible to handle ‘paid news’ offenders, who might by that time reap the benefits to get into the ‘power’. One truth that emerges from his statement is that such instances are to be tried in courts of law. But was Chavan’s election challenged as based on ‘paid news’ offences? If not, it should be. In Andhra Pradesh, Election Tribunal (High Court) admitted an election petition by a candidate who contested and lost election alleging that massive media opinion rigging was cause of his defeat.

After declaring the candidates elected, the only remedy left is challenging the validity of election and then punishing for poll offences. But by the time the verdict reaches final stage and assuming his conviction would be confirmed, the candidate must have served two terms minimum, before ‘justice’ delivers. If the rival candidates do not choose to trouble themselves in prolonged legal battles, the elected amasses sufficient wealth during his term and gets ready for a renewed attack in the next election wherein he purchases more space and sponsors more falsity. Thus the Election Commission must assume more responsibility in preventing this unfair information war on the side of paying candidates against the vulnerable voters of this country.

### III. Poll Crimes

#### (i) Unduly Influencing Voters

Unduly influencing of voters by the media is an election crime. Such propaganda, done for consideration, and camouflaged as a news item must be examined to see whether it unduly influenced the free exercise of electoral right, which is defined as a crime under Section 171C of the Indian Penal Code and as “undue influence” under the Representation of Peoples Act, 1951. While the RP Act explains “undue influence” in general

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15 PTI Report, *Paid News Issue: Press Council Panel Records Chavan’s Statement*, The Hindu, January 29, 2010.

terms and supplements with an illustration that threatening a candidate or elector with injury, or consequence of divine displeasure if not favoured would constitute “undue influence”. Section 171C of IPC also refers to similar language used in Section 123 of the RP Act, saying interference or attempt to interfere with free exercise of any electoral right is an offence.

Whoever voluntarily interferes or attempts to interfere with the free exercise of any electoral right commits the offence of undue influence at an election. The punishment for the offence of undue influence is prescribed under Section 171F of IPC, which imposes imprisonment up to one year or fine or both. In both legislative provisions, the first part is a general definition, which could include any attempt to unduly influence a voter. While the subsections in both laws give an example for undue influence, it is not limited to these examples only. Subsection (2) begins with the words *‘without prejudice to the generality of the provisions of subsection (1)’*. This means that any undue influence not contemplated by this law also might be offensive. This includes media’s interference through paid news. The voter can be influenced with good deeds and statements, healthy campaigns explaining achievements and prospects, but that should not be undue influence. It refers to abuse of influence.<sup>16</sup> The Supreme Court summed up the position in *Shiv Kripal Singh v. VV Giri*, holding: *“What amounts to interference with the exercise of an electoral right is ‘tyranny over the mind’*.”<sup>17</sup>

As per both laws, not just interference, but also attempt to interfere with free exercise amounts to an electoral offence. If the content of each of such pamphlet in the guise of news item is examined, the possibility of direct or indirect interference or attempt to interfere on behalf of candidate with the free exercise of electoral right would be discovered. In the case of package deals, the reporter or publisher was acting on behalf of the candidate as either of them took money to write such a news item during the election. Media, receiving money to influence the minds in this context either interfered with or attempted to interfere with, along with the paying candidate. A headline read: *“Andari Deevenalu anjibabuke”*, which attempts to show that the candidate has divine blessings to win<sup>18</sup>. Another headline:

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16 *Bachan Singh v. Prithvi Singh*, AIR 1975 SC 926.

17 *Shiv Kripal Singh v. VV Giri*, AIR 1970 SC 2097.

18 A Telugu expression which means ‘all people have blessed Anjibabu’ Andhra Jyothi, Bhimavaram, 23rd April, 2009.



‘Pampinee Vaalladi; Votlu Abbayigari Abbayivi’<sup>19</sup>. While the first headline influences votes using the divine reference, the second one throws an allegation that others distributed money, but the candidate who paid that media house would win. These two statements alone are sufficient to make the newspaper guilty under the RP Act and IPC.

## (ii) Spreading Falsity

Publication of false statements is both, a corrupt practice and an electoral offence. To be precise, the circulation of falsity during election is a clear offence. There is a need to investigate into camouflage-news-selling during elections and prosecute the offenders, whether it is poll agent or media person. Because, every such paid news contained false reporting might lead to violation of several other legal provisions, such as Section 123(4) of the Representation of people’s Act, 1951. Section 123(4) defined that corrupt practice as under:

*The publication by a candidate or his agent or by any other person which the consent of a candidate or his election agent (this expression include media which publishes statement taking money which amounts to consent of candidate or his agent), of any statement of fact which is false, and which he either believes to be false or does not believe to be true, in relation to the personal character or conduct of any candidate or in relation to the candidature, or withdrawal, of any candidate, being a statement reasonably calculated to prejudice the prospects of the candidate’s election.*

This is the most crucial definition, one which the media is expected to know and adhere to in their publications. Within the scope of this definition the paid news, critical remarks about personal character or conduct of any rival candidate, falsity about others and false projection of a candidate also would squarely fall. The truth or otherwise of such comments need to be established and if proved to be false, the candidate and the newspaper reporter or printer could be prosecuted under Section 171 G of IPC also. This section says: Whoever with intent to affect the result of an election makes or publishes any statement purporting to be a statement of fact which is false and which he either knows or believes to be

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19 *Ibid.*, A Telugu expression which means “though others distributed money, votes will go in favour of Abbayigari Abbayi (son of Mr. Abbayi)”.

false or does not believe to be true, in relation to the personal character or conduct of any candidate shall be punished with fine. Thus interpretation of 'falsity' decides the criminality of publication. The media is vulnerable here too.

### **(iii) Not indicating and sending 'Paid News'**

The newspapers have been the pamphlets of politicians during elections. They performed job of a publishing press where pamphlets are simply printed. As per section 127A of Representation of People's Act 1951, every pamphlet has to print the names and addresses of the printer and publisher thereof. Subsection 2(b) of 127A says that every publisher shall send one copy of such publication to the Chief Electoral officer in the capital and to the District Magistrate in case of a district publication. Any person who contravenes this provision shall be punishable with imprisonment for a term which may extend to six months or with fine which may extend to two thousand rupees or with both. The newspapers might have not violated Section 127A(1) as they generally publish the printers and publishers address every day. But by not sending a copy to the District Magistrates, clearly marking which part of their newspaper was in the shape of a pamphlet or advertisement, they have committed a crime under Section 127A(2)(b) which should invite a separate punishment. This section is aimed at providing a regulatory control to the governmental machinery to check unabashed false campaign during elections. Pamphlet will operate as a source and proof of false propaganda of the political party or candidate. By not sending the clearly marked publication copies to the District Magistrate these newspapers-turned-pamphlet printers denied the electoral machinery the chance of regulation and thus committed a violation of the RP Act.

### **(iv) Excessive Expenditure**

The sold news columns often involve exchange of illegal money between the political parties or candidates and journalists. The income tax authorities have enough power to demand for accounts and tax for this amount. The political party or candidate has to reflect this expenditure in his election expenditure. After adding this expenditure for purchasing news columns if the amount spent exceeds the limit prescribed on expenditure, the consequential legal actions should be taken against such a candidate as per Section 77 of Representation of People's Act 1951. The media, through

RTI applications, recovered the statement of election expenditure by Chief Minister, Ashok Chavan, which show ridiculously low amount for advertisement, i.e., Rs. 5379/- only. Both his election expenditure and campaign are riddled with falsity. This outlines the need for implementation of such provisions which empower the Election Commission of India to prevent unhealthy criminal practices like 'paid news', before declaring the candidates polling highest number of polled votes as winner.

#### **(v) Invalidating Election**

In the second phase, the false reporters could be convicted and election could be declared invalid. This is because the 'corrupt practice' of candidate through newspaper reporter or publisher by 'sold news column' has materially affected the prospects of a candidate or adversely affected the prospects of rival candidate, it could become a ground for declaring election as void under Section 100 of RP Act, 1951.

#### **(vi) Disqualification**

On proof of this corrupt practice of the candidate, he would be disqualified from contesting elections, according to Section 8A of RP Act, and along with him, those who committed this corrupt practice would forfeit the right to vote under Section 11-A of the same Act. The Election Commission should probe into the allegations levelled against the journalists union and impose disqualifications on candidates from contesting and journalists from voting in coming elections.

#### **(vii) Breach of Advertisement Code**

If what is being written is believed to be an advertisement, then also it makes the newspaper liable. Besides being criminal, it is also breach of prescribed codes. The Cable Television Networks Rules 1994 prescribes 'Ten Commandments' to advertisers on Cable services. Rule 7 says that advertising carried in the cable service shall be so designed as to conform to the laws of the country and should not offend morality, decency and religious susceptibilities of the subscriber. No advertisement shall be permitted which;

- i) derides any race, caste, color, creed and nationality,
- ii) is against any provision of the Constitution of India;

- iii) tends to incite people to crime, cause disorder or violence or breach of law or glorifies violence or obscenity in any way.

Other Rules say: No advertisement shall be permitted, the objects whereof are wholly or mainly of a religious or political nature. In other words, advertisements must not be directed towards any religious or political end.

All the newspapers must voluntarily disclose as to how much money they made and amount of space they sold to the political parties. They have to account for that money and pay income tax and declare it before the Chief Election Officer or District Magistrate. The candidate should reflect that expenditure in his poll expenses report. Every District Magistrate in his capacity as Returning officer or District Election Officer has to issue a notice to each newspaper and contested candidate to furnish details of the sale and purchase of news columns and also submit the copies of the publication for verification of falsity or other wise of the reports and their influence on the voters. If the influence is adverse and would materially affect the result, necessary action should be taken. Even under the general law, for giving a false affidavits showing receipts or expenditure of less amounts, such candidates and journalists could be prosecuted. The question is the lack of will and courage to punish the widespread political criminals joining hands with media persons.

#### **IV. Conclusion: Role of the Election Commission & the Press Council of India**

The Election Commission of India should act stringently against those committing electoral corrupt practices and crimes at two stages:

- a) During the election process the EC is immune from Judicial, Legislative and Executive interference. It assumes all the three positions. It has to prevent over spending, spread of falsity and undue influence.
- b) After the polls are over, the EC should continue to direct the officers through the Governments to prosecute the offenders before the courts of law, even if no one filed election petitions for the same.

It is the responsibility of the Election Commission of India to curb this undue influence perpetuated by the Political Parties and candidates through the Media because it is their constitutional obligation to facilitate free and

fair poll. These are crimes of false reporting, undue influence, and corrupt practice, poll crimes for which both journalists and the politicians must be prosecuted.

While the EC perform the duty to curb and punish electoral crimes and corrupt practices, the PCI (Press Council of India) has to keep on admonishing unethical media during elections. The PCI should constitute a special task force in each district during elections, to receive complaints, make preliminary study and report to the EC to allow it to take action. The Press Council of India could also censure persons, whether from media or politics, involved in this murky deal and release press notes immediately besides putting all that information on websites. Having tasted huge amounts of money, the media might not heed to professional and ethical advises or felt ashamed for censure. The wide publicity of that censure might bring a feeling of shame, at least. However the prosecution would be more effective. There is no need to amend the law or Constitution; it is enough if the IPC and RP Act are effectively used to prosecute. However, the IPC provisions need to be amended to enhance punishment and amount of fine for the electoral offences and corrupt practices. Once the complaint is received and press clipping show the *prima facie* liability, the law should presume that media and contestant has indulged in 'paid news' and the burden should shift on to accused to prove their innocence. If the content of news item is explicit with exaggeration or ascertainment of victory the presumption of liability should arise.

Besides punishing the crime of undue influence through paid news, it is important to protect the sanctity and fairness of elections by preventing undue influences. For this, the election-conducting machinery should be alert, with its eyes and ears open, to receive complaints from civil society. It must also be prompt in acting effectively to ensure free elections through checking mind-rigging by politicians through media. At the same time, the Press Council of India has to exercise all its power and build a strong opinion among people to protest against the unethical syndrome of paid news. Ethics is something which has to come from within and an issue of integrity of journalist and honesty of media organization.

## PUBLIC INTEREST IN BROADCASTING IN INDIA- JUDICIAL TRENDS

*Lakshmi Kruttika Vijay\**

### *Abstract*

*The paper examines the effect of public interest on broadcasting rights in India, specifically in matters where one party may possess a license or some other form of monopoly. It seeks to set out an understanding of this effect by examining the right of public interest evolved by the Indian courts in certain key judgments.*

The liberty to express one's self freely is important for a number of reasons – for its role in facilitating individual freedoms, epistemology, democracy and artistic and scholarly pursuits.<sup>1</sup> The obvious connection between press freedom and freedom of speech is that the press is a medium for broadcasting information and opinion. Not only is it a tool of personal autonomy, it also aids cultural, scientific and artistic development. Referring to the reasons for regulating the broadcasting media, the Government has obviously realised the potential of channels of mass communication for contributing to democracy. With commercial broadcasters appearing on the scene, it was thought to be important to preserve a diversity of ideas by preventing oligopolistic concentrations of power in the hands of a few, usually rich and conservative media magnates, and to ensure that licences were granted only to people who could be expected not to abuse the privilege. The need to preserve propriety has been a motivating factor in the regulation of commercial broadcasting over much of the world. There are a number of reasons which are generally put forward to justify broadcasting regulations. The first reason advanced is that because the airwaves are a public resource, the Government or some agency on its behalf is entitled to license their use for broadcasting on the terms it sees fit. The second reason given for regulation of broadcasting is the scarcity of frequencies.<sup>2</sup>

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1 DAVID FELDMAN, CIVIL LIBERTIES & HUMAN RIGHTS, 2<sup>nd</sup> ed., 40 (2002).

2 ERIC BARENDT, BROADCASTING LAW, 1<sup>st</sup> ed., 36-44 (1993).

## I. Statutory Framework

Various statutes, international and national, govern the law relating to copyright in India. The Berne Convention for Protection of Literary and Artistic Works (with special provisions regarding developing countries) of 1886 is widely regarded as applicable law by the current regime under the World Trade Organisation<sup>3</sup>. It requires its signatories to recognise the copyright of works of authors from other signatory countries (known as members of the Berne Union) in the same way it recognises the copyright of its own nationals. Thus, it was one of the first legislations to internationalise copyright. Establishing a system of equal treatment that internationalised copyright amongst signatories, the agreement also requires strong minimum standards for copyright law to be set by member states. Copyright under the Berne Convention does not require and, in fact, prohibits any form of formal registration and sets a long period of protection for Copyright. Under the Convention, all works except photographic and cinematographic shall be copyrighted for at least 50 years after the author's death, with a longer term left to the discretion of the member States similar to the EU Directive in 1993 on harmonising the term of copyright protection. However, importantly, for India, the Berne Convention has increasing relevance since there are special privileges accorded with the Stockholm Revision, 1967 and Paris Revision of the Convention, 1971.

The Universal Copyright Convention<sup>4</sup> (1956) is another important international document to be examined when extensively looking at Copyright Law. It is currently a part of the United Nations framework through the United Nations Educational, Scientific and Cultural Organisation (UNESCO). It was first promulgated as an alternative to the Berne Convention, by States such as the United States of America, Soviet Union and China, which did not fully approve of the terms stated in the Berne Convention. The Convention obligates the States to provide adequate and effective protection of the rights of authors and other copyright proprietors. "The member countries are also under an obligation to provide a minimum copyright term of 25 years from publication or the

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3 Article 9 (1) of the WTO states that WTO Member countries are bound to comply with the substantive provisions Articles 1 to 20 of the Berne Convention.

4 Universal Copyright Convention, *Available at*, [http://portal.unesco.org/ci/en/ev.php-URL\\_ID=11299&URL\\_DO=DO\\_TOPIC&URL\\_SECTION=201.html](http://portal.unesco.org/ci/en/ev.php-URL_ID=11299&URL_DO=DO_TOPIC&URL_SECTION=201.html).

lifetime of the author plus 25 years. The foreign authors must be granted exclusive rights at least for seven years.”<sup>5</sup> The International Convention for Protection of Performers, Producers of Phonograms and Broadcasting Organisation, also known as the Rome Convention, came into force in May 1964. The Convention aims to act in a manner protecting parallel and neighbouring rights of copyright. The Convention grants protection to performances taking place in another Contracting State if the same has been incorporated into a sound recording. Generally, the period of protection is 20 years and is applicable to all member States.

The national legislative framework comprises a legislation whose authority is derived from the Constitution. Broadcasting and associated rights in media laws take their roots in Part III of the Constitution of India, in specific, Article 19 (1) (a) read with Article 19 (2) of the Constitution. As a right guaranteed to all citizens of India, as will be seen through various case laws, the Supreme Court has on several occasions justified the need for dissemination of information and further lack of restriction based solely on the right to freedom of speech and expression, especially considering the mode of such dissemination is the airways, widely regarded as public property.

The law of copyright in India, apart from setting out the duration of such protection as well as various rights of a copyright holder, also incorporates certain important provisions that examine the need for grant of compulsory licences. The Copyright Act, 1957 was enacted to amend and consolidate the law relating to copyright. Importantly, this Statute defines the meaning of the term ‘broadcast’ to mean communication to the public-(i) by any means of wireless diffusion, whether in any one or more of the forms of signs, sounds or visual images; or (ii) by wire, and includes a re-broadcast.<sup>6</sup> The Act further contemplates the possibility of exclusive licences<sup>7</sup> being granted by the Copyright Board upon application by interested parties. These very provisions were under the severe gaze of the Supreme Court recently, when they were examined in the light of the grant

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5 Madabhushi Sridhar, *THE LAW OF EXPRESSION: AN ANALYTICAL COMMENTARY ON LAW FOR MEDIA*, 1<sup>st</sup> ed., 768 (2007).

6 Section 2 (dd), Indian Copyright Act, 1957.

7 Section 2(j), Indian Copyright Act, 1957, ‘exclusive licence’ to mean a licence which confers on the licensee or on the licensee and persons Page 2197 authorized by him, to the exclusion of all other persons (including the owner of the copyright), any right comprised in the copyright in a work, and “exclusive licensee” shall be construed accordingly.



of a licence- both voluntary and compulsory. Especially, while granting a compulsory licence, the Copyright Board may grant the licence in favour of the applicant, where the re-publication of such work has been refused or where the communication of the copyrighted work to the public by broadcast has been stopped. The grant of such compulsory licence must be in the manner so as to serve the interests of the general public. The Copyright Act, 1957 must be read in conjunction with the Copyright Rules that also provide circumstances and procedure to be followed by broadcasters, or aspiring broadcasters in the country.

Against this background, the researcher shall now attempt to examine the element of public interest in the dissemination of information and broadcast of events in India.

## II. Judicial Pronouncements and Analysis

Herein, through the thorough examination of three cases, the researcher hopes to better understand the manner in which the Courts have ruled in India on the rights of the broadcaster in relation to public interest. This section shall not just deal with the rights of broadcasters and monopoly, but also hopes to further engage in a finer understanding of the context in which such decisions have been discussed.

### **(i) Secretary, Ministry of Information and Broadcasting, Govt. of India and others v. Cricket Association of Bengal<sup>8</sup>**

This is a landmark judgment with respect to the law relating to broadcasting. One of the important questions considered in this case was whether a right to broadcast outside India (via uplink to a satellite) could be restricted by the Government if India on any grounds other than those in Article 19 (2) of the Indian Constitution.

The Cricket Association of Bengal (CAB) organised in 1993 the “Hero Cup Tournament” comprising several one day matches and its attraction was not confined to India but to all the cricket loving countries which, in effect means all the commonwealth countries. While until 1993, the Doordarshan generally telecast all cricket matches organized in India, this began to change in the early part of 1993. Thus, following such a precedent,

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8 Secretary, Ministry of Information and Broadcasting, Govt. of India and others v. Cricket Association of Bengal, AIR 1995 SC 1236.

the Cricket Association of Bengal invited Doordarshan as well as other private agencies to broadcast the matches. After a series of long correspondences, the deal fell through and Transworld Image (TWI) was awarded the contract, for which the CAB approached Government for the necessary permissions. Caught in the middle of a stand-off between the CAB and Doordarshan, VSNL (Videsh Sanchar Nigam Limited, now Tata Communications Limited) which is an arm of the Ministry of Information and Broadcasting stated that no approval be given to T.W.I. for uplink facilities of the telecast. VSNL accordingly intimated CAB of its inability to grant uplinking facility and also returned the amount received earlier in that behalf.

Faced with the above developments, the CAB approached the Calcutta High Court by way of a writ petition asserting that Doordarshan sought to block and prevent the telecast of the matches by TWI and that a mandamus be issued directing uninterrupted and unobstructed telecast and broadcast of the Hero Cup tournament and restraining the seizure, tamper, removal or transaction of any transmission, (or equipment related to transmission) telecast and broadcast of the said tournament. The Single Judge Bench of the Calcutta HC ruled in favour of the CAB in an interim injunction order, and finalized the judgment later that month. Aggrieved by the orders of the learned Single Judge aforementioned, the Union of India and other governmental agencies filed a writ appeal (along with an application for stay) which came up for orders on November 12, 1993 before a Division Bench of the Calcutta High Court. Citing that neither the CAB nor the TWI had acquired a licence, the Government stated that the Central Government had the “exclusive privilege to establish, maintain and work telegraphs” under Section 4 of the Telegraph Act, and that the definition of the expression “telegraph” includes telecast. The Bench directed that according to their earlier order the TWI is entitled to telecast outside the country and to send their signal accordingly and in case the signaling is required to be made by TWI separately, the necessary permission should be given by the Doordarshan and other competent authorities therefore. The Court examined the right of foreign private agencies to telecast matches, and whether the same could be restricted by the Government based on the provisions of the Constitution of India and the Telegraph Act.

It may be stated here that in the present case, the contention of the Ministry of Information Broadcasting and Doordarshan against the right to telecast claimed by the Cricket Association of Bengal (CAB)/Board of

Control for Cricket in India (BCCI) was raised only on the ground of the limitation of frequencies, ignoring the fact that the CAB/BCCI had not demanded any of the frequencies generated or owned by the MIB/DD. The Cricket Association of Bengal desired to telecast the cricket matches organized by it through a frequency not owned or controlled by the Government but owned by some other agency. Thus, in the present case the main contention was against the right of the Cricket Association of Bengal and the BCCI to telecast based on the limitation of frequencies. A further permission was sought by VSNL, controlled by the Ministry of Information and Broadcasting, which was that the CAB/BCCI sought to uplink to the foreign satellite the signals created by its own cameras and the earth station or the camera or the cameras and the earth station of its agency to a foreign satellite. This permission can never be refused except under law made in pursuance of the provisions of Article 19(2) of the Constitution. Hence, the case raised an important question as to whether the permission to uplink to the foreign satellite, the signal created by the CAB/BCCI either by itself or through its agency can be refused except on the ground stated in the law made under Article 19(2).

Against the backdrop of the legal jurisprudence in India and from across the world on the freedom of expression, the right to communicate, the right to broadcast and monopoly rights, the Court examined the contentions put forth by the parties.

*Firstly* in the instant case, the MIB contended that there was a difference between the implications of the right conferred under Article 19 (1) (a) upon (i) the broadcaster i.e. the person operating the media, (ii) the person desiring access to the media to project his views including the organiser of an event, (iii) the viewer and (iv) a person seeking uplinking of frequencies so as to telecast signals generated in India to other countries. This was opposed by the Cricket Association of Bengal by stating that it was untenable in law under Article 19 (1) (a) to state that the denial of a license to telecast through a media of its choice infringes the viewer's right.

*Furthermore*, on the question of commercial interests of the organizer, the Ministry stated that the CAB was not protected by Article 19 (1) (a) since any analogy drawn with the freedom of press would not extend to Sports Associations. Their rationale behind stating the same was that the basic premise underlying the recognition of the rights of the press under Article 19 (1) (a) was that the commercial element of the press is subservient to the basic object of the press, namely, free dissemination of

news and views which enjoys the protection of free speech. However, free speech element in telecast of sports is incidental. According to the MIB, the primary object of, the telecast by the CAB is to raise funds and hence the activities are essentially of trade. However, the CAB and the BCCI believed that for any event being organized by them, they were firstly entitled to a complete right to commercially exploit the event to the maximum and continue to allow the viewer to access to the event through the television-through a channel that it felt appropriate. This would extend even to allowing a private agent or a foreign agency being sanctioned the necessary permission, such as the frequency necessary for telecast. Furthermore, the Ministry argued that no broadcaster had a right to access airwaves without a license either for the purposes of telecast or for the purposes of uplinking. And that secondly, the grant of a license does not confer any special right inasmuch as the refusal of a license does not result in the denial of a right to free speech. Lastly, the nature of the electronic media is such that it necessarily involves the marshalling of the resources for the largest public good. The state monopoly created as a device to use the resource is not *per se* violative of the right to free speech as long as the paramount interests of the viewers are served and access to the media is governed by the fairness doctrine. According to the MIB, the width of the rights under Article 19(1)(a) has never been considered to be wider than that conferred by the First Amendment to the U.S. Constitution. It is also urged that the licensing of frequencies and consequent regulation of telecast/broadcast would not be a matter covered by Article 19 (2). The right to telecast/broadcast has certain inherent limitations imposed by nature, whereas Article 19 (2) applies to restrictions imposed by the State. The object of licensing is not to cast restrictions on the expression of ideas, but to regulate and marshal scarce resources to ensure their optimum enjoyment by all including those who are not affluent enough to dominate the media.

The Court held that **firstly**, the airwaves or frequencies are public property and their use has to be controlled and regulated by a public authority in the interests of the public and to prevent the invasion of their rights. Since the electronic media involves the use of the airwaves, this factor creates an in-built restriction on its use as in the case of any other public property. **Secondly**, The right to impart and receive information is a species of the right of freedom of speech and expression guaranteed by Article 19 (1) (a) of the Constitution. A citizen has a fundamental right to use the best means of imparting and receiving information and as such to

have an access to telecasting for the purpose. However, this right to have an access to telecasting has limitations on account of the use of the public property, viz., the airwaves involved in the exercise of the right and can be controlled and regulated by the public authority. This limitation imposed by the nature of the public property involved in the use of the electronic media is in addition to the restrictions imposed on the right to freedom of speech and expression under Article 19 (2) of the Constitution. **Thirdly,** The Central Government shall take immediate steps to establish an independent autonomous public authority representative of all sections and interest in the society to control and regulate the use of the airwaves.

This judgment was one of the first cases to examine the monopoly of broadcasters, organizers and as a contrast, the Government. Interestingly, the judgment is extremely forward thinking. The Court in the present case, as far back as 1993 (decided by the SC in 1995) understood the complexities of broadcasting rights despite only being exposed to (at that time) the Government controlled monopoly of Doordarshan. Herein the Court firstly, correctly established that the right to electronic media would include the right to communicate effectively through mass media. This was of course, not subject to any Constitutional limitations unless the same came within the purview of Article 19 (2) of the Constitution of India. Interestingly, the Court also recognized that the Telegraph Act was not the correct legislation to be examined for a situation such as this. Identifying that a more dynamic legislation was needed as against the outdated Telegraph Act, the Court in the present case has recommended the same.<sup>9</sup>

As for the interest of the public at large, cricket as a form of entertainment provides entertainment to the public and its broadcast as held by the Court would fall within the limitations of use of public property owing to the telecast of such events on airwaves. Thus, the Court, in what the researcher considers an extremely well reasoned decision, recommended the establishment of an independent body to decide on matters with respect to the use of such airwaves. This would not only provide for a curb on any bias or influence (as was seen in the present case by the Doordarshan over VSNL, the Ministry of Information and Broadcasting), but would have also allowed for the entrance of foreign

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9 Madhavi Goradia Divan, *FACETS OF MEDIA LAW*, 1<sup>st</sup> ed., 142 (2006).

players into the India, which as is obvious to us all today, has expanded drastically, the scope of media and broadcasting.

**(ii) *Citizen, Consumer and Civic Action Group and Anr. v. Prasar Bharati and Ors.***<sup>10</sup>

In this case the Madras High Court took away exclusivity of secondary broadcasting rights citing public interest and the right of individuals to receive information. The present case revolved around the allotment of terrestrial rights to telecast live cricket matches between India and Pakistan in 2006. TEN Sports, a business concern, has acquired the broadcasting rights of the series from Pakistan Cricket Board for the duration of the series across the world, including India for a whopping sum of 10 million dollars. They subsequently agreed on a price with the Pakistan Television (PTV) and granted them broadcasting rights as well. However, in India, a situation still continued where the Union Government and its agent, Prasar Bharati through Doordarshan were unable to agree on a price for the broadcast of such matches and, in fact, pleaded helplessness to intervene in the matter. Peculiarly, in the present writ matter, the Prasar Bharati appeared to share its sympathies with the petitioners, while the main bone of contention was between the petitioners and the broadcaster TEN Sports, which based its right in a purely contractual realm.

The Court first examined the position of ‘Airwaves’ as property in India. Stating that “Airwaves are a public property and their transmission is regulated by the Government and now it is entrusted with an Authority”, the Court preliminarily concluded that the right to possess such property vested in the Indian public. This they claimed was in accordance with the relevant statutes of the Indian Telegraph Act, 1885, Prasar Bharati Act, 1990 and the Telecom Regulatory Authority of India Act, 1997. Based on such initial premise, the Court further opined that any rights given to an intermediary to transmit or re-transmit are rights only secondary.

Observing the contentions put forth by the parties, the Court firstly stated that the law on such aspects of broadcast was scarce. Relying on the sole case in point, *Secretary, Ministry of I & B v. Cricket Association of Bengal*<sup>11</sup>

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10 *Citizen, Consumer and Civic Action Group and Anr. v. Prasar Bharati and Ors.*, (2006) 5 COMP LJ 74 (Mad).

11 *Supra*, n 8.

which held in no uncertain terms that right to have access to the electronic media is a fundamental right to speech and expression coming within the ambit of Article 19(1)(a) of the Constitution and which can be restricted reasonably only for the reasons enumerated in Sub-Article (2) of Article 19 of the Constitution. Thus, holding that no grounds of Article 19(2) of the Constitution were made out in the present case and that airwaves being public property and therefore belonging to the Indian citizens, primary rights could not be curtailed by allowing Ten Sports “to claim exclusivity even though it holds only secondary rights to cater to the needs of only a specialized class of viewers through satellites and by pay channels”<sup>12</sup>.

Where the matches had been played and further allowed to be telecasted live and further when those rights were sold for transmission or re-transmission, the Court was of the view that *prima facie* a case of fundamental rights of freedom of speech had been made out by the petitioners. This however was not enough to grant the relief. Additionally, observing that the interest of the Broadcaster TEN Sports is not harmed, the Court examined the balance of convenience and held this lay in directing the transmission of the Indo-Pak cricket series as scheduled through Indian Doordarshan, by retaining Ten Sports’ logo and also availing all other modes of transmission through satellites and honouring the advertisement contracts in all modes of transmission whether terrestrial or satellite.

Furthermore, the Court also excused the laches on part of the Government in approaching Ten Sports or the Pakistan Cricket Board for a bid citing “public interest”. Holding that the live telecast of the Indo-Pak Matches which were not played for the past 15 years was in public interest, the Court held that the laches on the part of the Government could be condoned.

While in the present case, the Madras High Court seems justified in allowing the telecast of the live cricket matches between India and Pakistan, the researcher is of the opinion that speeding up the delivery of the judgment has led to a lack of clarity as regards several important issues. Firstly, while the notion of the right to electronic media as a part of the fundamental rights seems a logical argument, the Court has dismissed the

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12 *Ibid.*

very important question of laches on the part of the Government on flimsy grounds.

It is important to note there is a fundamental difference between 'delay' and 'laches', and this difference is of immense importance when distinguishing the intent of the parties. While delay shows specific intent, the question of laches only arises where the person has sat on his rights without such knowledge. Therefore, especially where the Government had full knowledge of the bidding for the telecast of the matches, and did not approach the PCB on grounds of apprehension of a possible cancellation of such schedule, the condonation of laches is, in the researcher's opinion, unjustified.

Furthermore, the Court awarded broadcasting rights to Doordarshan citing public interest and merely demanded that the logo of the respondent, TEN Sports with the advertisements be telecast. However, there was no payment of the amount stipulated in the judgment as a compensation for the loss of several crores of rupees through viewership. Following the judgment, for a long time the royalty sharing agreement was 75:25 with the larger portion going to the private broadcaster. The logic, largely political, behind such compulsory licensing is that DD is the most accessible network since it has an unencrypted signal.<sup>13</sup> Three years after the judgment the Indian Government has looked at this decision more carefully and enacted the Sports Act 2007 (Mandatory sharing of signal)<sup>14</sup> which compels private broadcasters to license their broadcast rights to DD in the case of a sporting event of national interest.

Therefore, while the judgment can be considered as an important milestone in determining public interest as an integral component in all broadcasting, the judgment still fails to accord for other procedural details—all of which are essential in delivering a sound judgment.

### ***(iii) Entertainment Network India Ltd. v. Super Cassettes***<sup>15</sup>

The court in this case held that any monopoly of use that was conferred by way of grant of a copyright is now subject to the will of the prospective

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13 Broadcasting Rights, *available at*, <http://www.ibnlive.com/news/all-matches-our-property-govt-makes-ordinance/32544-3-0.html>.

14 Mandatory sharing of signals under The Sports Act 2007, *available at*, <http://www.thehindubusinessline.com/2007/02/02/stories/2007020204020100.html>.

15 2008 (9) SCALE 69.



licensee and the Copyright Board. The present case involved the scope of sound recordings and compulsory licensing under Indian law. A petition was filed under Section 31 (b) of the Copyright Act before the Copyright Board by radio operators and a compulsory license was sought from Phonographic Performance Ltd. (PPL) in relation to the “sound recordings” after a failure to negotiate rates with the Society<sup>16</sup>.

While PPL argued that a compulsory license could be issued only if the “work” had never been made available to the public earlier, the radio stations argued for an almost automatic CL ground i.e. it was to be granted upon request and the only point for consideration was a determination of “reasonable royalty”. Strangely enough, the two judge bench of the Supreme Court through Justice Sinha held in favour of the latter interpretation. The second issue in the present case pertained to the scope of the provision- Section 31 (2) of the Copyright Act. While the PPL claimed that the provision when read literally restricted the application for a compulsory license to be granted only to one such applicant, the opposite parties argued that multiple parties could apply. Again, oddly enough, Justice Sinha adopted a “purposive” approach and held in favour of multiple applicants. He noted in particular that: “Sub-section (2) of Section 31 would lead to an anomalous position if it is read literally. It would defeat the purport and object of the Act. It has, therefore, to be read down. Purposive construction therefore may be resorted to.”

The two most important aspects of the judgment are – *First*, an automatic Compulsory License can be granted to any applicant especially where the same is in “public interest”. All that is left for determination after the application is made is a reasonable royalty to be paid by the licensee to the licensor. *Second*, after a “purposive interpretation” of the relevant provision, Section 31 of the Copyright Act, 1957, the Bench decided that you can have multiple applicants for awarding licenses as awarding a license to only one person upon application would go against the very spirit of the statute.

What does this mean for copyright holders and the music industry? It means that a sound recording once protected from use by others under the

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16 PPL is one of the two collecting societies in India (the other is IPRS: Indian Performing Rights Society, which is mainly a collecting society for underlying works in sound recordings). 25. Sections 2(ffd), Indian Copyright Act, 1957 defines ‘copyright society’ to mean a society registered under Sub-section (3) of Section 33, Indian Copyright Act.

Copyright Act, 1957, can now be used by any person who makes an application for the same to be licensed to him. Thus, any monopoly of use that was conferred by way of grant of a copyright is now subject to the will of the prospective licensee, and further, the Copyright Board.

In the judgment, Justice Sinha departs from his usual style of astute analysis complemented with sound reasoning, to don a more Krishna Iyer approach to the current facts scenario. In a lengthy judgment that has extensively discussed the various international conventions and the entry of the FM radio scene in India, the Apex Court has understood correctly the context, but seems to have misconstrued the implications the judgment will have on the Indian Music Industry.

Perhaps in a view that may seem overly critical, in my analysis, this judgment of Justice Sinha has stretched the concept of “public interest” a tad too much. Firstly, What is interesting in this case is that Justice Sinha equates an intellectual property right to a “property right” (under Article 300A of the Constitution of India) and even to a human right! He states that: “An owner of a copyright indisputably has a right akin to the right of property. It is also a human right. Now, human rights have started gaining a multifaceted approach. Property rights vis-à-vis individuals are also incorporated within the ‘multiversity’ of human rights.” Thus, not only has he gone on for several pages as to how the public will suffer if this music is not compulsorily licensed to the Respondents, but drawn analogies with tangible property and “human rights” when discussing the various aspects of an Intellectual Property right. The researcher herein feels that the term “public interest” in the context of broadcast of sound recordings is frivolous and used in a manner devoid of any concrete reason. As the judgment itself states, what is in public interest, must be decided based upon the facts and circumstances of every case. In this case, while the Respondents were at a definite disadvantage by not being able to broadcast the music of the repertoire of T-Series, it would be no great loss to them (except perhaps economically).

While Justice Sinha has a definite point in allowing for the possibility of compulsory licenses, the manner in which the same is to be done has been provided for in the Statute itself. And in granting the power of compulsory licensing to be within the purview of the Copyright Board, while Justice Sinha has succeeded in construing the statute “purposively”, an inevitable consequence is the whittling down of the rights of a copyright holder in India. The grant of license as well as the appropriate royalty, is a privilege

granted to the copyright holder by virtue of inventing or being assigned the ownership rights of such a work.

This judgment is bound to be debated a great deal, and strongly opposed by inventors and owners alike. Furthermore, the long drawn battle is set to continue amid reports that Super Cassettes Industries Ltd. and Phonographic Performance Ltd have separately approached the Supreme Court and filed petitions seeking review of the judgment pronounced by Justice Sinha. But until then, we the public can be rest assured that the Supreme Court has taken into account the interests of music lovers across the country!

### **III. Conclusion**

It must be observed that the right of broadcasters in the country has gone through a sea change even with respect to the singular concept of public interest. The judicial trend follows a set pattern- of acknowledging airways to be public property and then stating that the broadcast of any transmission cannot be restricted due to a larger public interest. Interestingly, this broadly follows the US Model of protection of the freedom of speech and expression in the context of broadcast, where cases based on the First Amendment of the Constitution of the United States of America essentially hold that as far as “the First Amendment is concerned those who are licensed stand no better than those to whom licenses are refused. A license permits broadcasting, but the licensee has no Constitutional right to monopolize a radio frequency to the exclusion of his fellow citizens. In India, in this particular context, the concept of “public interest” itself is one which is superfluous and excessive and becoming increasingly difficult to understand due to its wide application. It is opined that the concept of public interest has been used by the State progressively more after the 1990s in the realm of broadcasting, and this has left a sense of arbitrariness and triviality in the understanding of the law of the media, broadcasting and the concept of public interest.

# TRIAL-BY-MEDIA: DERAILING JUDICIAL PROCESS IN INDIA

Zebra Khan\*

## Abstract

*With the augment of 24 hours news channels and scores of newspaper dailies, the obsession with providing breaking news has reached new heights. The Indian judiciary is under the media's microscope. The Indian media has adorned the judge's robe and started conducting parallel trials - one outside the portals of courts, beyond the shackles of procedure - in the public arena. This article examines this phenomenon in the context of Indian law and, in specific, against the background of the Aarushi murder case. It attempts to show that instead of acting as a bulwark of democracy, contemporary intrusive media reportage is derailing the judicial process in India.*

It has been argued that it is pertinent to recognize the role of media vis-à-vis the judiciary. George Gerbner states, "Popular entertainment and news via mass media represent the convention cultural pressures of the social order. The judicial process, however, represents an effort to adjudicate individual cases according to law." Trial by media revolves around the mantra 'feed what the public is interested in' and not 'what is in public interest'. The expression 'trial-by-media' describes the impact of television and newspaper coverage on a person's reputation by creating a widespread perception of guilt regardless of any verdict in a court of law.

According to Ray Surette, 'trial-by-media' have "three basic flavours": "Sinful Rich type", "Evil Stranger, psychotic killers" and "Abuse of Power trial".<sup>1</sup> For instance, Jayendra Saraswati, head priest of Kanchi Kamakoti, was accused of killing two mill-workers as sacrifice, based solely on newspaper reports. The Andhra Pradesh High Court in *Labour Liberation Front v. State*

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1 Ray Surette, *The Media, the Public, and Criminal Justice Policy*, 2003 J. INST. JUST. INT'L STUD. 39, 42.

of *Andhra Pradesh*<sup>2</sup> held that the writ petition filed to force the authorities to investigate relied upon incorrect facts that should have been verified. The court observed that “*once an incident involving prominent person or institution takes place, the media is swings into action, virtually leaving very little for the prosecution or the Courts*”<sup>3</sup>. The media clamor created in the Jessica Lall and Priyadarshini Mattoo cases would be illustrations of the ‘*Sinful Rich type*’ and ‘*Abuse of Power trial*’.

## I. Legality of ‘Trial by Media’

### (i) Freedom of press

Article 19 of the International Covenant on Civil and Political Rights, 1966<sup>4</sup>, embodies the right to freedom of speech, that is, “*everyone shall have the right to hold opinions without interference*” and the “*freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.*”<sup>5</sup>

Nonetheless, this freedom comes with a rider that the exercise of this right comes with “*special duties and responsibilities*” and is subject to “*the rights or reputations of others*”. The right to freedom of speech and expression has been guaranteed under Article 19(1) (a) of the Constitution of India. Even though freedom of press is not a separately guaranteed right in India unlike the United States of America, the Supreme Court of India has recognized freedom of press under the umbrella right of freedom of speech and expression as envisaged under Article 19(1)(a) of the Constitution of India.

2 2005 (1) ALT 740.

3 *Ibid.*, para 14.

4 International Covenant on Civil and Political Rights, 1966, Adopted and opened for signature, ratification and accession by General Assembly resolution 2200A (XXI) of 16 December 1966, entry into force 23 March 1976.

5 Article 19 of the International Covenant on Civil and Political Rights, 1966:

1. Everyone shall have the right to hold opinions without interference.
2. Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.
3. The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:
  - (a) For respect of the rights or reputations of others;
  - (b) For the protection of national security or of public order (ordre public), or of public health or morals.

In *In Re: Harijai Singh and Anr.* and *In Re: Vijay Kumar*<sup>6</sup>, the Supreme Court had the occasion to decide on the scope of the freedom of press, recognized it as “an essential prerequisite of a democratic form of government” and regarded it as “the mother of all other liberties in a democratic society”<sup>7</sup>. The right under Art 19(1) (a) includes the right to information and the right to disseminate through all types of media, whether print, electronic or audiovisual means.<sup>8</sup> It was stated in *Hamdard Dawakhana v. Union of India*<sup>9</sup>, that the right includes the right to acquire and impart ideas and information about matters of common interest.

The Supreme Court has stated that trial by press, electronic media or trial by way of a public agitation are instances that can at best be described as the anti-thesis of rule of law as they can lead to miscarriage of justice. In the opinion of the honourable court, a Judge has to guard himself against such pressure.<sup>10</sup> In *Anukul Chandra Pradhan v. Union of India*<sup>11</sup>, the Supreme Court observed that “No occasion should arise for an impression that the publicity attached to these matters (the hawala transactions) has tended to dilute the emphasis on the essentials of a fair trial and the basic principles of jurisprudence including the presumption of innocence of the accused unless found guilty at the end of the trial”<sup>12</sup>.

## (ii) Immunity under the Contempt of Court Act, 1971

Under the Contempt of Court Act, 1971, pre-trial publications are sheltered against contempt proceedings. Any publication that interferes with or obstructs or tends to obstruct, the course of justice in connection with any civil or criminal proceeding, which is actually ‘pending’, only then it constitutes contempt of court under the Act. Under Section 3(2), sub clause (B) of clause (a) of Explanation, ‘pending’ has been defined as “*In the case of a criminal proceeding, under the Code of Criminal Procedure, 1898 (5 of 1898) or any other law – (i) where it relates to the commission of an offence, when the charge-*

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6 (1996) 6 SCC 466, paras 8, 9 and 10.

7 *Ibid.*, para 8.

8 *Secretary, Ministry of Information & Broadcasting v. Cricket Association of West Bengal*, 1995(2) SCC 161; *Romesh Thapar v. State of Madras* 1950 SCR 594; See also *Life Insurance Corporation of India v. Manubhai D Shah*, (1992 (3) SCC 637.

9 1960 (2) SCR 671.

10 *State of Maharashtra v. Rajendra Jawanmal Gandhi*, 1997 (8) SCC 386.

11 1996 (6) SCC 354.

12 *Ibid.*, para 7.

*sheet or challan is filed; or when the court issues summons or warrant, as the case may be, against the accused.”*

Certain acts, like publications in the media at the pre-trial stage, can affect the rights of the accused for a fair trial. Such publications may relate to previous convictions of the accused, or about his general character or about his alleged confessions to the police. Under the existing framework of the Contempt of Court Act, 1971, media reportage, as seen during the Aarushi Talwar case, where the press, had literally gone berserk, speculating and pointing fingers even before any arrests were made, is granted immunity despite the grave treat 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, or judicial control through gag orders as employed in United States of America.

Due to such lacunas, the press has a free hand in printing colourful stories without any fear of consequences. Like a parasite, it hosts itself on the atrocity of the crime and public outrage devoid of any accountability.

### **(iii) The public’s right to know**

The Supreme Court has expounded that the fundamental principle behind the freedom of press is people’s right to know.<sup>13</sup> Elaborating, the Supreme Court opined, “*The primary function, therefore, of the press is to provide comprehensive and objective information of all aspects of the country’s political, social, economic and cultural life. It has an educative and mobilising role to play. It plays an important role in moulding public opinion*”.<sup>14</sup>

However, the Chief Justice of India has remarked, “*freedom of press means people’s right to know the correct news*”, but he admitted that newspapers cannot read like an official gazette and must have a tinge of “sensationalism,

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13 A.G. v. Times Newspaper, (1973) 3 All ER 54; *Express Publications (Madurai) Ltd. v. Union of India*, AIR 2004 SC 1950, para 29; Secretary, Ministry of Information and Broadcasting, Govt. of India v. Cricket Association of Bengal, AIR 1995 SC 1236, para 4. See also Ritu Tiwari & Aju John, *Contempt of Court and the Media*, [http://www.indlawnews.com/display.aspx?3537#\\_ftnref1](http://www.indlawnews.com/display.aspx?3537#_ftnref1) (Last visited on September 25, 2008).

14 In Re: Harijai Singh and Anr.; In Re: Vijay Kumar, (1996) 6 SCC 466, para 10.

entertainment and anxiety”.<sup>15</sup> In the *Bofors Case*<sup>16</sup>, the Supreme Court recounted the merits of media publicity: “those who know about the incident may come forward with information, it prevents perjury by placing witnesses under public gaze and it reduces crime through the public expression of disapproval for crime and last but not the least it promotes the public discussion of important issues.”<sup>17</sup> Two important core elements of investigative journalism envisage that (a) the subject should be of public importance for the reader to know and (b) an attempt is being made to hide the truth from the people.<sup>18</sup>

#### (iv) Public participation

Some scholars justify a ‘trail-by-media’ by proposing that the mob mentality exists independently of the media which merely voices the opinions which the public already has.<sup>19</sup> In a democracy, transparency is integral. Without a free press, we will regress into the dark ages of the Star Chambers, when the judicial proceedings were conducted secretly. All these omnipresent SMS campaigns and public polls only provide a platform to the public to express its views. It is generating public dialogue regarding issues of public importance.<sup>20</sup> Stifling this voice will amount to stifling democracy.

Quoting Jeremy Bentham, on secrecy in the administration of justice, “In the darkness of secrecy, sinister interest and evil in every shape are in full swing. Only in proportion as publicity has place can any of the checks applicable to judicial injustice operate. Where there is no publicity, there is no justice. Publicity is the very soul of justice. It is the keenest spur to exertion and the surest of all guards against improbity. It keeps the judge himself while trying under trial.”<sup>21</sup>

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15 *CJI says media must not run parallel trials*, <http://www.asiamedia.ucla.edu/article.asp?parentid=99360> (Last visited on October 21, 2008).

16 *Kartongen Kemi Och Forvaltning AB v. State through CBI*, 2004 (72) DRJ 693.

17 *Ibid.*, para 10.

18 G.N. Ray, *Should there be a Lakshman Rekha for the Press*, <http://presscouncil.nic.in/speech7.htm> (Last visited on September 25, 2008).

19 Navajyoti Samanta, *Trial by Media-Jessica Lall Case*, <http://ssrn.com/abstract=1003644>. (Last visited on September 20, 2008).

20 Prabhsahay Kaur, *Freedom of Press vis-à-vis Responsible Journalism*, [www.legalserviceindia.com/articles/fre\\_pre\\_v.htm](http://www.legalserviceindia.com/articles/fre_pre_v.htm) (Last visited on October 20, 2008).

21 K.G. Balakrishnan, *The Constitution, The Media And The Courts*, The Fourth K.S. Rajamony Memorial Public Law Lecture, Kerala, [www.supremecourtindia.nic.in/new\\_links/9%5B1%5D.8.08.rajamony.pdf](http://www.supremecourtindia.nic.in/new_links/9%5B1%5D.8.08.rajamony.pdf) (Last visited on September 20, 2008).



### (v) Ineffective legal norms governing journalistic conduct

Under the Press Council Act, 1978, the Press Council of India is established, with the objectives to “*preserve the freedom of the Press and to maintain and improve the standards of newspapers and news agencies in India*”<sup>22</sup>. To achieve these objectives, it must “*ensure on the part of newspapers, news agencies and journalists, the maintenance of high standards of public taste and foster a due sense of both the rights and responsibilities of citizenship*”<sup>23</sup> and “*encourage the growth of a sense of responsibility and public service among all those engaged in the profession of journalism*”<sup>24</sup>.

The Council, also, enjoys powers to censure. If someone believes that a news agency has committed any professional misconduct, the Council can, if they agree with the complainant, “warn, admonish or censure the newspaper”, or direct the newspaper to, “publish the contradiction of the complainant in its forthcoming issue” under Section 14(1) of the Press Council Act, 1978.<sup>25</sup> Given that these measures can only be enforced after the publication of news materials, and do not involve particularly harsh punishments, their effectiveness in preventing the publication of prejudicial reports appears to be limited.

In *Ajay Goswami v. Union of India*<sup>26</sup>, the shortcomings of the powers of the Press Council were highlighted:

*Section 14 of the Press Council Act, 1978 empowers the Press Council only to warn, admonish or censure newspapers or news agencies and that it has no jurisdiction over the electronic media and that the Press Council enjoys only the authority of declaratory adjudication with its power limited to giving directions to the answering respondents arraigned before it to publish particulars relating to its enquiry and adjudication. It, however, has no further authority to ensure that its*

22 Press Council Act, 1978, Section 13(1).

23 Press Council Act, 1978, Section 13(2) (c).

24 Press Council Act, 1978, Section 13(2) (d).

25 Section 14(1) of the Press Council Act, 1978, states: “Where, on receipt of a complaint made to it or otherwise, the Council has reason to believe that a newspaper or news agency has offended against the standards of journalistic ethics or public taste or that an editor or working journalist has committed any professional misconduct, the Council may, after giving the newspaper, or news agency, the editor or journalist concerned an opportunity of being heard, hold an inquiry in such manner as may be provided by regulations made under this Act and, if it is satisfied that it is necessary so to do, it may, for reasons to be recorded in writing, warn, admonish or censure the newspaper, the news agency, the editor or the journalist or disapprove the conduct of the editor or the journalist, as the case may be.”

26 (2007) 1 SCC 143.

*directions are complied with and its observations implemented by the erring parties. Lack of punitive powers with the Press Council of India has tied its hands in exercising control over the erring publications.*<sup>27</sup>

Along with these powers, the Press Council of India<sup>28</sup> has established a set of suggested norms for journalistic conduct. These norms emphasize the importance of accuracy and fairness and encourage the press to “*eschew publication of inaccurate, baseless, graceless, misleading or distorted material.*” The norms urge that any criticism of the judiciary should be published with great caution. These norms further recommend that reporters should avoid one-sided inferences, and attempt to maintain an impartial and sober tone at all times. But significantly, these norms cannot be legally enforced, and are largely observed in breach. Lastly, the PCI also has criminal contempt powers to restrict the publication of prejudicial media reports. However, the PCI can only exercise its contempt powers with respect to pending civil or criminal cases. This limitation does not consider the extent to which pre-trial reporting can impact the administration of justice.

## II. The relationship between the Public, Press and the Judiciary

Does the media, both print and electronic, influence judges? With the sudden vicious onslaught of verdicts by the activist media in matters that are *sub judice*, one wonders its impact on the administration of justice and the judicial personnel.

Article 10 of the Universal Declaration of Human Rights, (1948), deals with the right of an accused “*in full equality to a fair and public hearing by an independent and impartial tribunal in the determination of his rights and obligations and of any criminal charge against him*”.<sup>29</sup> Judges from various jurisdictions have not denied the influence of media on the judges.<sup>30</sup> In *In Re: P.C. Sen*<sup>31</sup>, it was

27 *Ibid.*, para 41.

28 Hereinafter referred to as the PCI.

29 Article 10 of the Universal Declaration of Human Rights, 10 Dec.1948, UNGA Res. 217 (LXIII).

30 Justice Frankfurter in *John D. Pennekamp v. State of Florida*, (1946) 328 US 331: “No Judge fit to be one is likely to be influenced consciously...However, Judges are also human and we know better than did our forbears how powerful is the pull of the unconscious and how treacherous the rational process ...and since Judges, however stalwart, are human, the delicate task of administering justice ought not to be made unduly difficult by irresponsible print....in a particular controversy pending before a court and awaiting judgment, human beings, however strong, should not be torn from their moorings of impartiality by the undertone of extraneous influence. In securing freedom of speech, the Constitution hardly meant to create the right to influence Judges and Jurors.”

stated that the real danger of prejudicial comments in newspapers or by other media of mass communication that must be guarded against is the “*impression that such comments might have on the Judge’s mind or even on the minds of witnesses for a litigant*”<sup>32</sup>.

The frailty of the judicial system stems from the fact that judges are human beings and undue influence of irresponsible expression may taint the rational process of adjudication.

This limitation has been admitted by the Supreme Court of India, wherein it ruled, “*prejudice, a state of mind, cannot be proved by direct and positive evidence. Therefore, it cannot be judged on the basis of an objective standard...*”<sup>33</sup> The practice of ‘trial-by-media’ has been deprecated by the Courts, “*No journalist can assume the role of an investigator, in a pending case, and then attempt to influence the mind of the Court*”<sup>34</sup> But in the recent past, the Indian judiciary has tacitly denied any influence of media, both print and electronic, upon the judges. In *Balakrishna Pillai v. State of Kerala*<sup>35</sup>, the Apex Court stated, “*the grievance relating to trial by press would stand on a different footing. Judges do not get influenced by propaganda or adverse publicity.*”<sup>36</sup> Another example is the case of *Zee News v.*

Lord Dilhorne in *Attorney General v. BBC*, 1981 A.C 303 (HL): “*It is sometimes asserted that no Judge will be influenced in his Judgment by anything said by the media and consequently that the need to prevent the publication of matter prejudicial to the hearing of a case only exists where the decision rests with laymen. This claim to judicial superiority over human frailty is one that I find some difficulty in accepting. Every holder of a Judicial Office does his utmost not to let his mind be affected by what he has seen or heard or read outside the Court and he will not knowingly let himself be influenced in any way by the media, nor in my view will any layman experienced in the discharge of Judicial duties. Nevertheless, it should, I think, be recognized that a man may not be able to put that which he has seen, heard or read entirely out of his mind and that he may be subconsciously affected by it.*”

Cardozo, one of the greatest Judges of the American Supreme Court, in his ‘Nature of the Judicial Process’ (Lecture IV, Adherence to Precedent. The Subconscious Element in the Judicial Process) (1921) (Yale University Press) referring to the “*forces which enter into the conclusions of Judges*” observed that “*the great tides and currents which engulf the rest of men, do not turn aside in their course and pass the Judges by*”.

On November 3, 2006, former chief justice of India Y K Sabharwal expressed concern over the recent trend of the media conducting ‘trial’ of cases before courts pronounce judgments, and cautioned: “*If this continues, there can’t be any conviction. Judges are confused because the media has already given a verdict*”. Sudhanshu Ranjan, *Media on Trial*, <http://timesofindia.indiatimes.com/articleshow/msid-1460248,prtpage-1.cms> (Last visited on September 25, 2008).

31 AIR 1970 SC 1821.

32 *Ibid.*, para 18.

33 *Bhajan Lal, Chief Minister, Haryana v. Jindal Strips Ltd.*, (1994) 6 SCC 19 para 17.

34 *Rao Harnarain v. Gumori Ram*, AIR 1958 Punjab 273, para 21.

35 AIR 2000 SC 2778.

36 *Ibid.*, para 9.

*Navjot Sandhu*<sup>37</sup> in which the Supreme Court held that media interviews do not prejudice judges.<sup>38</sup>

Due to contempt proceedings under these jurisdictions, the possibility to gauge the extent of the media influence in the outcome of the judicial process is precluded. Additionally, no judge is likely to attribute the eventual ruling in any matter to the reports printed by the media. Therefore, any attempt to conduct any empirical exploration to determine the influence of media on judges is nipped in the bud. Most scholars have admitted that the erosion of judicial independence is hard to track and difficult to measure.<sup>39</sup>

Since most of the documentation of criminal justice system available to the public is based on media reports available, it will resonant the inherent bias of the reporter.<sup>40</sup> The disparity between the reality and the public knowledge of that reality can be attributed to the media. *The light will determine the shadows cast*. Some accused persons are lovable, some are martyrs and some turn out to be criminals.<sup>41</sup>

Even if one discounts the bias created by the media, the accuracy of media reportage comes under the microscope. Media dependency theory suggests that people who have little or no direct experience with certain social phenomenon rely more heavily on the media for their picture of reality.<sup>42</sup> The researcher will exhibit, irrespective of bias, the media, on occasions fails to provide accurate information to keep the populace informed.

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37 2003 (1) SCALE 113.

38 *State v. Mohd. Afzal*, 2003 (3) JCC 1669, para 137.

39 George Gerbner, *Trial by Television: Are we at the point of no return?*, 63 JUDICATURE 416 (1979-1980); Brian V. Breheny & Elizabeth M. Kelly, *Maintaining Impartiality: Does Media Coverage of Trials Need to be Curtailed?* 10 ST. JOHN'S J. LEGAL COMMENT 371; See also *Chandler v. Florida*, 449 U.S. 560, 101 S. Ct. 802, 66 L. Ed. 2d 740 (1981) (There is no empirical data sufficient to establish that the mere presence of the broadcast media inherently has an adverse effect on the judicial process.); 23 C.J.S. Criminal Law § 1555 on "*Allowance of photographic coverage of trial*"; *United States v. Hastings*, 695 F.2d 1278, 1284 (11th Cir. 1983) (upholding federal court ban on coverage of trials and conceding it is very difficult to detect the adverse impact of television coverage on trial participants).

40 Julian V. Roberts, *Public Opinion, Crime, and Criminal Justice*, 16 CRIME & JUST. 99, 116

41 Navajyoti Samanta, *Trial by Media-Jessica Lall Case*, <http://ssrn.com/abstract=1003644>. (Last visited on September 20, 2008).

42 Susanna R. Barber, *Televised Trials: Weighing Advantages Against Disadvantages*, 10 JUST. SYS. J. 279, 284 (1985).

The Delhi Union of Journalists examined the accuracy of news reportage in the Delhi Dailies of the police operation at Batla House on September 19, 2008:

Name of the Newspaper	Times of India	Hindustan Times	Indian Express	Dainik Jagran	Amar Ujala	Dainik Hindustan	Punjab Kesari	Rashtriya Sahara
Time of the Shootout	-	11 a.m.	9.45 a.m.	11 a.m.	10.45 to 11 a.m.	10.30a.m.	-	-
Duration of the Shootout	-	15 minutes	-	-	1 hour 15 minutes	25 minutes	1 hour	Nearly 2 hours
Rounds fired	25 by police; 8 by terrorists		22 by police		22 by police; 8 by terrorists	22 by police	22 by police	22 by police
Ammunition recovered	-	-	-	-	-	AK 47, two pistols, one computer and important papers	AK 47, two pistols and one computer	-
Police personnel present	-	-	Inspector Sharma and five officers	-	22 member police team	-	-	-
How many bullets hit Inspector Sharma?	2 bullets	2 bullets	2 bullets	-	4 bullets	2 bullets	-	4 bullets

\*Source: *Critique of Irresponsible Media: Delhi Shootings*<sup>43</sup>.

The discrepancy is startling especially since all newspapers and TV channels claim that the reporting of the incident was based on the police briefing. Maybe accuracy is being sacrificed at the cost of providing more sensational news. The Indian media should be reminded, “*while comment is free, facts are sacred*”<sup>44</sup>.

Another inadequacy of the study conducted is that majority of the resources at the disposal of the researcher are news reportage and articles. Lack of primary sources will result in media ‘*portraying*’ trial-by-media in whichever role it wants- as an activist or usurper of judicial functions. The research has, to provide both sides of the coin, has reviewed the writings in nearly all dailies that have reported sensationalized court proceedings or have printed opinions on ‘trial-by-media’. But at the end of the day, it is

43 [http://www.thesouthasian.org/archives/2008/critique\\_of\\_irresponsible\\_medi.html](http://www.thesouthasian.org/archives/2008/critique_of_irresponsible_medi.html) (Last visited on October 24, 2008).

44 H.R. Khanna, *Freedom of Expression with Particular Reference to Freedom of the Media*, (1982) 2 SCC (JOUR) 1.

pertinent to remember that these are journalists reviewing the professional conduct of co-professionals; therefore, objectivity will be limited.

According to the author, the most scientific methodology of studying the impact of media influence on judicial process would be to gather a particular line of judicial pronouncements.<sup>45</sup> There is a bias towards sensational crime in media reportage.<sup>46</sup> To execute this methodology, a study of all the homicide cases could be conducted. The gap in this methodology is that since no two murders get the same kind of publicity and media attention, and thereby, it became impossible to reach any conclusive deductions. The arbitrary nature in which the media chooses to shower attention on the details of one crime over the other made this approach unfeasible.

Nonetheless it would be incorrect to say that today the media does not play a significant role as the 'fourth estate' in the administration of justice. To abandon the study due to the abovementioned limitations would be imprudent. Accepting these shortcomings of the hypothesis, the researcher, adopting a different point of departure, will argue that despite the lack of any quantitative findings, there are some qualitative effects of a 'trial-by-media'.

### III. Media Activism - Evils of 'Trial by Media'

Justice Katju and P. Sainath have attacked the media for focusing attention on "non-issues" and "*trying to divert attention of the people from the real issues to non-issues*"<sup>47</sup> and "*stifling of smaller voices*".<sup>48</sup> Who will watch the watchdog as it abdicates its role as an educator in favour of being an

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45 Ray Surette, *Media Echoes: Systemic Effects of News Coverage*, 16 JUST. Q., 601 (1999): The author has conducted a similar research by analyzing 3,453 criminal cases over a 10-year period with charges similar to those in the highly publicized cases. However, the adopted hypothesis is vastly different from the one in this paper, Surette tried to show how media coverage of cases results in how such cases, subsequently, will be processed differently irrespective of the media coverage.

46 Julian V. Roberts, *Public Opinion, Crime, and Criminal Justice*, 16 CRIME & JUST., 99, 117 (1992).

47 Markandey Katju, *Ideal and reality: Media's role in India*, <http://www.hinduonnet.com/thehindu/thscrip/print.pl?file=2008081955330900.htm&date=2008/08/19/&prd=th&> (Last visited on September 21, 2008).

48 P. Sainath, "*Lost the Compass? Rural India is a giant canvas that is begging the media to do a portrait*" Outlookindia.com, 17 October 2005, <http://www.outlookindia.com/full.asp?fodname=20051017&fname=CP+Sainath&sid=1> (Last visited on September 21, 2008).

entertainer?<sup>49</sup> A line between informing and entertaining must be drawn.<sup>50</sup> Due to extensive media propaganda, justice and rule of law are no longer about the process but the outcome.<sup>51</sup>

Public opinion may exercise an indirect influence over the criminal justice system. “*Justice should not only be done, it should manifestly and undoubtedly be seen to be done*”<sup>52</sup>. Psychological pressures stemming from media scrutiny could possibly taint verdicts to conform to public opinion rather than the evidence offered at trial.<sup>53</sup> Justice Bilal Nazki said the credibility of a judge is at stake when a trial by media declares a person guilty but the judge gives a differing opinion based on facts.<sup>54</sup>

For example, a provision of the English Criminal Justice Act of 1967, involving the suspending of sentences of imprisonment, is cited as a law that was passed as a result of the direct influence of public opinion.<sup>55</sup>

In *Labour Liberation Front v. State of Andhra Pradesh*<sup>56</sup>, the High Court of Andhra Pradesh indicated the abyssal levels, to which the norms of journalism have drifted.

Justice L. Narasimha Reddy frowning upon the practice of ‘media-by-trial’ stated:

*...the freedom of the prosecuting agency, and that of the Courts, to deal with the cases before them freely and objectively, is substantially eroded,*

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49 Ramachandra Guha, *Watching the Watchdog-Time for the press to look within*, The Telegraph, May 10, 2008, [http://www.telegraphindia.com/1080510/jsp/opinion/story\\_9244220.jsp#](http://www.telegraphindia.com/1080510/jsp/opinion/story_9244220.jsp#) (Last visited on September 22, 2008).

50 Nancy L. Trueblood, *Curbing The Media: Should Reporters Pay When Police Rides Along Violate Privacy?*, 84 MARQ. L. REV., 541, 549.

51 *Jessica Lal Murder Case and the Rule of Law*, <http://cbcn.blogspot.com/2008/05/jessica-lal-murder-case-and-rule-of-law.html> (Last visited on September 20, 2008).

52 R v. Sussex Justices : Exparte McCarthy : 1924(1) KB 256.

53 Brian V. Breheny & Elizabeth M. Kelly, *Maintaining Impartiality: Does Media Coverage of Trials Need to be Curtailed?* 10 ST. JOHN’S J. LEGAL COMMENT 371, 383.

54 *CJI says media must not run parallel trials*, <http://www.asiamedia.ucla.edu/article.asp?parentid=99360> (Last visited on October 21, 2008); The CJI had to come on record urging judges not to feel pressured by the “disturbing trend” of the media creating public perceptions while a case was pending before the court. They should go strictly by the law and the evidence without fear of becoming unpopular. But he also said: “If this continues, there can’t be any conviction. Judges are confused because the media has already given a verdict.” Navajyoti Samanta, *Trial by Media-Jessica Lal Case*, <http://ssrn.com/abstract=1003644>. (Last visited on September 20, 2008).

55 *Julian v. Roberts, Public Opinion, Crime, and Criminal Justice*, 16 CRIME & JUST. 99, 161 (1992).

56 2005 (1) ALT 740.

*on account of the overactive or proactive stances taken in the presentations made by the print and electronic media. Once an incident involving prominent person or institution takes place, the media is swinging into action and virtually leaving very little for the prosecution or the Courts to examine the matter. Recently, it has assumed dangerous proportions, to the extent of intruding into the very privacy of individuals. Gross misuse of technological advancements, and the unhealthy competition in the field of journalism resulted in obliteration of norms or commitment to the noble profession. The freedom of speech and expression which is the bed rock of journalism, is subjected to gross misuse. It must not be forgotten that only those who maintain restraint can exercise rights and freedoms effectively.*<sup>57</sup>

### **(i) Right to Fair Trial compromised**

The edifice of the Indian criminal justice system is based on the twin principles of ‘*guilt to be proved beyond reasonable doubt*’ and ‘*presumption of innocence until proven guilty*’<sup>58</sup>.

In *T. Nagappa v. Y. R. Muralidhar*<sup>59</sup>, the Supreme Court reiterated, “*An accused has a right to fair trial. He has a right to defend himself as a part of his human as also fundamental right as enshrined under Article 21 of the Constitution of India.*”

Right to fair trial includes the right to be tried an unbiased or prejudiced judge. This right was enunciated in *Bhajan Lal, Chief Minister, Haryana v. Jindal Strips Ltd.*<sup>60</sup> The right to fair trial is guaranteed under the Constitution. It entitles a litigant to adjudication of a cause by a judge who is perceptibly and demonstrably unbiased and without prejudice.<sup>61</sup>

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<sup>57</sup> *Ibid.*, para 14.

<sup>58</sup> Article 14, paras 2 and 7 of International Covenant on Civil and Political Rights, 1966:

“2. Everyone charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to law. 7. No one shall be liable to be tried or punished again for an offence for which he has already been finally convicted or acquitted in accordance with the law and penal procedure of each country. Article 11 of the Universal Declaration of Human Rights: (1) Everyone charged with a penal offence has the right to be presumed innocent until proved guilty according to law in a public trial at which he has had all the guarantees necessary for his defence.”

<sup>59</sup> JT 2008 (6) SC153, 2008 (3) KLT 158 (SC), (2008) 5 MLJ 320 (SC), 2008 (6) SCALE 642, (2008) 5 SCC 633.

<sup>60</sup> JT 1994 (5) SC 254, (1995) 109 PLR 200, 1994 (3) SCALE 703, (1994) 6 SCC 19, [1994] Supp 2 SCR 445, (1995)1UPLBEC80.

<sup>61</sup> *Ibid.*



In *Zahira Habibullah Sheikh v. State of Gujarat*<sup>62</sup>, the Supreme Court explained, “Denial of a fair trial is as much injustice to the accused as is to the victim and the society. Fair trial obviously would mean a trial before an impartial Judge, a fair prosecutor and atmosphere of judicial calm. Fair trial means a trial in which bias or prejudice for or against the accused, the witnesses, or the cause which is being tried is eliminated.”<sup>63</sup>

Sensational journalism has also had an impact on the judiciary. For instance a ‘trial-by-media’ began almost immediately after Afzal’s arrest in the attack on the Indian Parliament case. Only one week after the attack, on 20 December 2001, the police called a press conference during the course of which Afzal ‘incriminated himself’ in front of the national media.<sup>64</sup> The media played an excessive and negative role in shaping the public conscience before Afzal was even tried. This can be demonstrated by the observations of Justice P. Venkatarama Reddi in upholding the imposition of the death penalty on Mohammed Afzal, “the incident, which resulted in heavy casualties, had shaken the entire nation and the collective conscience of the society will only be satisfied if the capital punishment is awarded to the offender.”<sup>65</sup>

62 (2004) 4 SCC 158.

63 *Ibid.*, para 36.

64 Publication of confessions is contemptuous:

Though a confession to police is inadmissible in law still publications of confessions before trial are treated as highly prejudicial and affecting the Court’s impartiality and amount to serious contempt. (See also, 200<sup>th</sup> Report of the Law Commission of India on “Trial by Media-Free Speech and Fair Trial Under Criminal Procedure Code, 1973 (Amendments to the Contempt of Court Act, 1971), August 2006, 199).

In *R v. Clarke* (Ex p Crippen: (1910) 103 LT 636.), Crippen was arrested in Canada but not formally charged, but a publication appeared in England in Daily Chronicle, as cabled by its foreign correspondent, that “Crippen admitted in the presence of witnesses that he had killed his wife but denied the act of murder”. The publication was treated as contempt. Darling J observed, “Anything more calculated to prejudice the defence could not be imagined”.

In New South Wales, a police officer was found guilty of contempt in *AG (NSW) v. Dean* ((1990) 20 NSWLR 650), when, in the course of police media conference following the arrest of a suspect in a murder inquiry, he answered a journalist’s question with a statement which suggested that the person confessed to the police. He was held to be in contempt but was let off without fine.

From the preceding cases, it is evident that publications of confessions are prejudicial to suspect. Closer home, the trial of Afzal Guru was marred by the confession coerced out of him before national television even before the charge sheet was filed. However, unlike other courts, Indian courts have not even chastised the press for such publications save conducting contempt proceedings.

65 *State (N.C.T. of Delhi) v. Navjot Sandhu @ Afsan Guru*, AIR 2005 SC 3820.

If the public believes that justice is a noose around Afzal Guru's neck in the Parliament Attack case, then no dearth of evidence against him will justify his acquittal. The heightened public clamor created by the media leads to a conviction in 'the court of public opinion', a precursor to a conviction in a court of law.

Similarly, S.A.R. Geelani, one of Afzal's co-defendants in the Parliament attack case, was initially sentenced to death for his alleged involvement despite an overwhelming lack of evidence. Even though the prosecution's case was based on a lone telephonic conversation between Geelani and his brother, the media portrayed him as a dangerous and trained terrorist. On appeal, the Delhi High Court overturned Geelani's conviction and described the prosecution's case as "*at best, absurd and tragic*".

Even though the Supreme Court has tacitly admitted that adverse publicity may deny the accused person a fair trial, it denied Vikas Yadav's plea for transfer of appeal against the conviction by the Delhi High Court to the Allahabad High Court in the Nitish Katara murder case.<sup>66</sup>

## (ii) Right to Privacy

Article 12 of Universal Declaration of Human Right enunciates, "*No one shall be subjected to arbitrary interference with his privacy, family, home or correspondence or to attacks upon his honour and reputation. Everyone has the right to the protection of the law against such interference or attacks.*" The following observations of the Supreme Court in *R. Rajagopal v. State of Tamil Nadu*<sup>67</sup> are true reminiscences of the limits of freedom of press with respect to the right to privacy: "*A citizen has a right to safeguard the privacy of his own, his family, marriage, procreation, motherhood, child bearing and education among other matters. No one can publish anything concerning the above matters without his consent, whether truthful or otherwise and whether laudatory or critical. If he does so, he would be violating the right to privacy of the person concerned and would be liable in an action for damages. Position may, however, be different, if a person voluntarily thrusts himself into controversy or voluntarily invites or raises a controversy.*"<sup>68</sup>

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66 *Supreme Court not moved by Vikas' 'media glare' plea*, <http://www.asiamedia.ucla.edu/article.asp?parentid=95587> (Last visited on September 20, 2008).

67 AIR 1995 SC 264.

68 *Ibid.*, para 28

In the Aarushi murder case, the newspapers were flooded with the transcripts of the deceased girl's emails and casting aspersions on her character.

### (iii) Reputations Tarnished

Article 19 of the International Covenant on Civil and Political Rights, 1965, enunciates, “*Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice*”. However, the exercise of such rights carries with it special duties and responsibilities and the same may be subject to certain restrictions like respect for the rights or reputations of others. Right to reputation is an integral part of one's life.<sup>69</sup> It is a facet of right to life of a citizen under Article 21 of the Constitution of India.<sup>70</sup>

During the hearing of the public interest litigation filed by advocate Surat Singh in the Aarushi Talwar murder case before the Supreme Court, Justices Altamas Kabir and Markandey Katju remarked, “*Nobody is trying to gag the media. They must play a responsible role. By investigation, the media must not do anything which will prejudice either the prosecution or the accused. Sometimes the entire focus is lost. A person is found guilty even before the trial takes place. See what happened in this [Aarushi] case. Till today what is the evidence against anyone? We will lay down guidelines on media coverage. We are not concerned about media criticizing us. Let media say anything about us, we are not perturbed. Our shoulders are broad enough and we will ignore it [the criticism]. We are for media freedom. What we are saying is there is no absolute freedom*”<sup>71</sup>

### (iv) Meddling with the criminal justice system

Due to such high-powered salesmanship of ideas, the proactive stance of the media is beginning to intervene with the administration of justice. There is excessive pressure on the police. A recent example of the media

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69 *State of Bihar v. Lal Krishna Advani*, AIR2003SC3357, 2003(3)BLJR2020, JT2003(Suppl1)SC335, 2003(7)SCALE524, (2003)8SCC361; *State of Jammu and Kashmir and Ors. v. Bakshi Gulam Mohammad and Anr.*, MANU/SC/0050/1966; *Smt. Kiran Bedi and Jinder Singh v. Committee of Inquiry and Anr.*, MANU/SC/0512/1989.

70 *Board of Trustees of the Port of Bombay v. Dilipkumar Raghavendranath Nadkarni and Ors.*, MANU/SC/0184/1982.

71 J. Venkatesan, *Apex Court to lay down coverage norms*, <http://www.thehindu.com/2008/08/19/stories/2008081957360100.htm> (Last visited on September 28, 2008).

meddling would be the Reliance Infocomm murder case of its employee, Anandita Mishra, where due to the media reports; the prime accused in the murder absconded. The Bombay Police Commissioner is upset with the media for jumping the gun, “*I think that he got a whiff of it after reading the reports and gave them the slip. Now a manhunt has been launched to nab the accused.*”<sup>72</sup>

The lives of witnesses are compromised. In *State (N.C.T. of Delhi) v. Navjot Sandhu*<sup>73</sup>, the Court deprecated the practice of exposing the accused persons to public glare through TV and in case where Test Identification Parade or the accused person being identified by witnesses (as in the present case) arise, the case of the prosecution is vulnerable to be attacked on the ground of exposure of the accused persons to public glare, weakening the impact of the identification. Due to media propaganda, lawyers of unpopular accused persons are subjected to public derision. Every person has a right to get himself represented by a lawyer of his choice and put his point before the adjudicating court and no one has the right to debar him from doing so. For an instance, when eminent lawyer Ram Jethmalani, the Indian Clarence Darrow, decided to defend Manu Sharma, a prime accused in a murder case, he was subject to public derision and ridicule by the media.<sup>74</sup>

Another example of this would be the serial-killings in Noida. Due to extensive media coverage of police investigations, the owner of the house where the corpses were found, Mohinder Singh Pandher, and his domestic help Surendra Kohli, the prime suspects of having committed these crimes bore the brunt of sensational journalism. Influenced by media coverage, much of it proclaiming that the two men had already confessed to the killings, the local Bar Association announced that it had decided that no

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72 *Police upset with media for revealing name in Reliance murder case*, <http://www.asiamedia.ucla.edu/article.asp?parentid=99353> (Last visited on September 25, 2008).

73 AIR 2005 SC 3820, para 139.

74 Quoting Rajesh Chopra, the creator of LiveIndia.com: “Its surprising to see the behaviour of Mr. Ram Jethmalani. I remember that statement of Ex-Prime minister Mr. Atal Bihari Vajpayee that ‘Ram Jethmalani doesn’t think before speaking anything.’ This man who used to be idol for whole country’s upcoming advocates has shocked the nation by supporting Manu Sharma. Everyone knows who is guilty. But some how Influence and money of some people is posing hurdle to bring justice to this case. I personally request Mr. Ram Jethmalani not to entangle himself in this case to which whole nation’s emotions are attached and would request him not to play legal games...”, <http://www.liveindia.com/news/1c.html> (Last visited on September 20, 2008).

advocate from Noida would defend Pandher and Kohli in court.<sup>75</sup> The media forgets that right to have a lawyer of one's choice is a fundamental right under the Indian Constitution.<sup>76</sup>

#### IV. The Media as a Watchdog

Cases like the Jessica Lall and Nitish Katara murder cases, which involve high profile and powerful people as the accused persons, do benefit from such incessant media exposure. Neelam Katara, mother of the deceased in the Nitish Katara murder case, succeeded in getting a verdict from the lower courts due to the support of the media and the public opinion generated through print and electronic media. In *Praful Kumar Sinha v. State of Orissa*<sup>77</sup>, a writ against sexual exploitation of blind girls in school was filed before the Supreme Court on the basis of an article published in a newspaper. Even though sexual assault was difficult to prove, the Apex Court, on the basis report submitted, gave directions to the institution for proper management. Renowned journalists like Sheela Barse, a champion of human rights, have time and again knocked the doors of Supreme Court to take notice of the plight of the disempowered and marginalized. In *Sheela Barse v. Union of India*<sup>78</sup>, the journalist, through a letter addressed to the Chief Justice of India, made the Apex Court take cognizance of the deplorable conditions of the mentally challenged woman locked up in the Presidency jail, Calcutta. Due to this initiative, Commissioners were appointed to investigate and report on the conditions of prisons where women and children were detained.

In *Sheela Barse (I) v. Union of India*<sup>79</sup>, praised the work of Sheela Barse, a freelance journalist, in the area of juvenile justice. Quoting Justice Bhagwati:

*The petitioner has undertaken great social service by bringing this matter before the Cour. She has stated to us that she intends visiting different parts of the country with a view to gathering further information relevant to the matter and verifying the correctness of statements of facts made in the counter affidavits filed by the respondent*

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75 Trail by Media, April 27, 2007, HRF/164/07, <http://www.hrdc.net/sahrdc/hrfeatures/HRF164.htm> (Last visited on September 29, 2008).

76 *Ranchood Mathur Wasawa v. State of Gujarat*, (1974) 3 SCC 581.

77 AIR 1989 SC 1783.

78 (1995) 5 SCC 654.

79 (1986) 3 SCC 596, para 8.

*States...We would like to point out that this is not an adversary litigation and the petitioner need not be looked upon as an adversary. She has in fact volunteered to do what the State should have done. We expect that each State would extend to her every assistance she needs during her visit as aforesaid.*

The Supreme Court also provided a sum of rupees ten thousand to meet her expenses. This case demonstrates that media personnel and the judiciary do not have to be at loggerheads for the common good instead they may compliment each other.

The Supreme Court in *Sheela Barse (II) v. Union of India*<sup>80</sup> impressed upon the State Governments that remand homes and observation homes must be set up where children accused of an offence can be lodged during the pending investigation and trial. Taking cognizance of the debilitating effect prisons may have on the personality of children, the Court directed that on no account should the children be kept in jail and if a State Government has not got sufficient accommodation in the remand homes or observation homes, the children should be released on bail instead of being subjected to incarceration in jail.

The public hue and cry created in the Jessica Lall murder case by the media forced the Delhi Police to file an appeal in the High Court against the acquittal of Manu Sharma by the Trial Court. The fatal expose by NDTV, telecasted on May 30, 2007, showing the prosecution witness, Sunil Kulkarni, negotiating his testimony for monetary considerations to bail out Sanjeev Nanda, the accused in the hit and run case, propelled the Delhi High Court to suo motu initiate contempt action against R.K. Anand and I.U. Khan. In the Priyadarshini Mattoo murder case, when the Delhi High Court convicted Singh, seven years after a trial court had acquitted him, the deceased father, Chaman Lal Mattoo, the woman's father, wrote in the Indian Express newspaper "*I can't thank the media enough. If it was not for the media, we would have lost the spirit and the battle.*"<sup>81</sup> As part of social action litigation, the Supreme Court accepted a letter sent by a lawyer on the basis of a newspaper report published by Indian Express on the horrid plight of bonded labour as a writ petition under Article 32 of the Constitution. Subsequently, a notice was sent to the District Collector to ascertain the

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80 (1986) 3 SCC 632, para 2.

81 Palash Kumar, *India Media plays judge as justice system fails*, <http://www.asiamedia.ucla.edu/article-southasia.asp?parentid=56828> (Last visited on September 25, 2008).

veracity of the report and submit a detailed report on the working conditions in the mines. This newspaper woke up the State from its bureaucratic stupor into action and to begin with, minimum wages were prescribed to be provided to such workers.

In *D.K. Basu v. State of West Bengal*<sup>82</sup>, the Supreme Court took cognizance of the existence of custodial violence after a letter was sent to the Chief Justice of India drawing attention to newspaper reports regarding death in police lock-ups and custody.

The collateral benefit is that, today, more Indians are aware of their constitutional rights than ever before.<sup>83</sup> The role of the media in such cases is laudable as the disempowered and marginalized get access to justice in matters that have been brushed under the carpet due to *gundaraj*. Wearing the activist avatar, media is merely exposing the rot within our existing judicial system. The question is, which is the greater evil - the intrusive role of the media, which disregards all norms of propriety, or its role as the facilitator of justice?<sup>84</sup>

## V. Introspecting the Aarushi murder case

In May 2008, the media, both electronic and print, were inundated with reports of the murder of thirteen year old Aarushi Talwar in the suburbs of Nodia. It was given its due from the press. Everyone was asking: “*Who did it? Who locked the door? Who was hiding what?*” This is a natural human reaction in such circumstances but in this age of 24/7 connectivity and a plethora of channels, blogs and internet sites it turned into a macabre and voyeuristic interest into every detail and rumour about the case.<sup>85</sup> Insensitivity shown by the media in providing portage to this incident was shocking.<sup>86</sup> To add

82 (1997) 1 SCC 416.

83 A.P. Shah, *Judges And Media- Inter-Relationship*, [www.indlaw.com/bc/JusticeAPShahpaper.doc](http://www.indlaw.com/bc/JusticeAPShahpaper.doc) (Last viewed on September 29, 2008).

84 200th Report of the Law Commission of India on “Trial by Media-Free Speech and Fair Trial Under Criminal Procedure Code, 1973 (Amendments to the Contempt of Court Act, 1971), August 2006; A.P. Shah, *Judges and Media – Inter-Relationship*, [www.indlaw.com/bc/JusticeAPShahpaper.doc](http://www.indlaw.com/bc/JusticeAPShahpaper.doc) (Last visited on September 21, 2008).

85 Vandana K Mittal, *Aarushi murder case: Trial by media and its implications*, <http://www.merineews.com/catFull.jsp?articleID=134631> (Last visited on October 20, 2008).

86 The questioning of the Talwar’s maidservant both inside and outside of the studio is a typical example of the kind of sensationalism that the media has tried to generate. Some TV channels went to ridiculous lengths to keep this case in the public’s attention by resorting to the most puerile form of reporting. There is news that a, particularly inappropriate and irrelevant, MMS

to this, the callous disregard shown by the police was deplorable. A person by the name of Anita Durrani was unveiled on live TV as the 'other woman' in the case out of mere speculation. Even a young friend only 17 years of age was not spared and he was named by police in direct contravention of international norms where all efforts are taken to protect the identity of the under aged. His mobile number was incessantly flashed on TV screens.<sup>87</sup> On August 18, 2008, a public interest litigation action was filed by a Delhi advocate, Dr. Surat Singh reproaching the role played by the press in the case. Markandey Katju remarked,

*Nobody is trying to gag the media. They must play a responsible role. By investigation, the media must not do anything which will prejudice either the prosecution or the accused. Sometimes the entire focus is lost. A person is found guilty even before the trial takes place. See what happened in this [Aarushi] case. Till today what is the evidence against anyone? We will lay down guidelines on media coverage. We are not concerned about media criticizing us. Let media say anything about us, we are not perturbed. Our shoulders are broad enough and we will ignore it [the criticism]. We are for media freedom. What we are saying is there is no absolute freedom. See what happened to Dr. Talwar [Aarushi's father], his reputation is tarnished.<sup>88</sup>*

Media, in its defense, said that the Apex Court is "barking up the wrong tree"<sup>89</sup> and the media could well claim to have acted in good faith when it took the police version at face value and presented the dentist in a poor light.

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clip of the murdered girl was aired for sometime by a channel; UP Police made Public, the email and chat transcripts of Aarushi with her father and few of her friends. The emails indicate some disagreement between father and daughter over some issue. Rajesh Talwar did not like something Aarushi did and she was justifying. *See also "Aarushi murder case...Why is the hell the police murdering her again?"* <http://criticsworld.wordpress.com/2008/05/30/aarushi-murder-case-why-the-hell-police-are-murdering-her-again/> (Last visited September 24, 2008).

87 Vandana K Mittal, *Aarushi murder case: Trial by media and its implications*,

<http://www.merinews.com/catFull.jsp?articleID=134631> (Last visited on October 20, 2008).

88 J. Venkatesan, *Apex Court to lay down coverage norms*, <http://www.thehindu.com/2008/08/19/stories/2008081957360100.htm> (Last visited on September 28, 2008).

89 Manoj Mitta, "The Supreme Court accuses the media of damaging the reputation of murder suspect Rajesh Talwar", *The Times of India*, Thursday, August 21, 2008, <http://www.asiamedia.ucla.edu/article.asp?parentid=96186> (Last visited on September 23, 2008).



## VI. Conclusion

On the power of media, a U.S. appellate Court judge Learned Hand observed, “*The hand that rules the press, the radio, the screen, and the far-spread magazine, rules the country.*”<sup>90</sup>

A trial by press, electronic media or public agitation is the very antithesis of the rule of law. It can only lead to miscarriage of justice.<sup>91</sup> In *MP Lohia v. State of West Bengal*<sup>92</sup>, the Apex Court, admonishing the media, stated, “*We have no hesitation that this type of articles appearing in the media would certainly interfere with the administration of justice. We deprecate this practice and caution the publisher, editor and the journalist who was responsible for the said article against indulging in such trial by media when the issue is sub-judice.*”<sup>93</sup>

It might be enlightening to examine how other countries combat the ramifications of ‘trial-by-media’. Most countries admit that such practices undermine the authority of courts and result in loss of confidence in the judicial system.<sup>94</sup>

The view taken by the courts in New Zealand is laudable: “*In the event of conflict between the concept of freedom of speech and the requirements of a fair trial, all other things being equal, the latter should prevail.*”<sup>95</sup> The courts in India have taken a similar view. The Punjab High Court in *Rao Harnarain v. Gumori Ram*<sup>96</sup> stated that “*Liberty of the press is subordinate to the administration of justice. The plain duty of a journalist is the reporting and not the adjudication of cases.*” The

90 Gary A. Hengstler, *The Media's Role in Changing the Face of U.S. Courts*, <http://usinfo.state.gov/journals/itdhr/0503/ijde/hengstler.htm> (Last visited on October 20, 2008); See also A.P. Shah, *Judges and Media – Inter-Relationship*, [www.indlaw.com/bc/JusticeAPShahpaper.doc](http://www.indlaw.com/bc/JusticeAPShahpaper.doc) (Last visited on September 21, 2008).

91 *State of Maharashtra v. Rajendra Javanmal Gandhi*, (1997) 8 SCC 386.

92 2005 (2) SCC 686.

93 *Ibid.*, para 10.

94 In *Sunday Times v. U.K.*, 1979(2) EHRR 245, the House of Lords’ view that ‘trial by newspaper’ was not permissible was a concern in itself ‘relevant’ to the maintenance of the ‘authority of the judiciary’. However, the European Court accepted that: “*If the issues arising in litigation are ventilated in such a way as to lead the public to form its own conclusion thereon in advance, it may lose its respect for and confidence in courts.*” See also 200th Report of the Law Commission of India on “Trial by Media-Free Speech and Fair Trial Under Criminal Procedure Code, 1973 (Amendments to the Contempt of Court Act, 1971), August 2006, 154.

95 *Solicitor General v. Wellington Newspapers Ltd.*, 1995 (1) NZLR 45: “*In pretrial publicity situations, the loss of freedom involved is not absolute. It is merely a delay. The loss is an immediacy; that is precious to any journalist, but is as nothing compared to the need for fair trial.*”

96 AIR 1958 Punjab 273.

Orissa High Court in *Bijoyananda v. Bala Kush*<sup>97</sup> observed that – “*the responsibility of the press is greater than the responsibility of an individual because the press has a larger audience. The freedom of the press should not degenerate into a licence to attack litigants and close the door of justice nor can it include any unrestricted liberty to damage the reputation of respectable persons.*” It would be ideal if the Supreme Court of India gives a stamp of approval to this harmonious construction.

The precedence given by the Orissa and Punjab High Courts to the right to fair trial over freedom of expression is an excellent example of judicial craftsmanship since the loss of freedom of press is not absolute but merely temporary. The loss of immediacy is the lesser evil of the two. The media can print its critique of the judicial process with wild abandonment after the trial, as Justice Katju has rightly remarked, “*Our shoulders are broad enough and we will ignore it [the criticism]. We are for media freedom.*”<sup>98</sup>

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97 AIR 1953 Orissa 249.

98 J. Venkatesan, *Apex Court to lay down coverage norms*, <http://www.thehindu.com/2008/08/19/stories/2008081957360100.htm> (Last visited on September 28, 2008).

# RELIGION AND CENSORSHIP IN THE INDIAN MEDIA: LEGAL AND EXTRA-LEGAL

Harini Sudershan\*

## *Abstract*

*This article examines the censorship in Indian media on the grounds of religion (hurting religious sentiments, for example) and censorship of religious expression itself. The first part of the article examines the legal framework surrounding this censorship in India. The second part examines some of the extra-legal dimensions of censorship, citing various instances.*

Religion and freedom of speech share a curious relationship. On one hand every religion requires free media for propagation. On the other, it would seem that once established, these very media are attacked by religion for perceived threat to its stability. Every statement or expression in any form of media with the slightest potential to insult or annoy any religious group becomes highly contentious. The immediate reaction then, is to try and censor such expressions, either with the aid of the law, or by social pressure. In seeking to comprehend the dynamics of religion and censorship, it is necessary, firstly, to understand that this is not a one-dimensional issue. There are several angles and aspects to it. In looking at religious censorship of media, censorship of various kinds must be considered. Censorship, in every form, like censorship of religious expression in the media, of expression in the media that hurts the religious sentiments of others, of expression in the media that causes religious disharmony, and censorship on account of “blasphemy”.

It may be noticed, also, that these categories are not necessarily or always mutually exclusive. Often times, there is some degree of overlap, with one kind of expression giving rise to several kinds of censorship. Again, the concept of censorship is itself not completely unproblematic; as much as censorship may be legal, it may be extra-legal (in this context which would imply social censorship) as well. This means that apart from

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formal and legalized mechanisms to address any or all of the situations mentioned above, there are also extra-legal, social, at times even executive (governmental) measures that are undertaken without the support or even against the law, to impose censorship on expression. Instances of both legal and extra-legal religious censorship abound in a nation like India, where religion is a very touchy issue.

In this paper, an effort has been made to examine the issue of religious censorship, legal and extra-legal, encompassing the various forms of religious censorship outlined above. For this purpose, a simple split is introduced into the categorization. Legal censorship of expression is dealt with separately, as is extra-legal censorship. The next level of classification that is extrapolated onto this is of censorship of religious expression and blasphemy, and censorship in the media that causes religious disharmony or hurts the religious sentiments of others. However, a word of caution is added, that the distinctions are regularly blurred, religion being the volatile subject that it is.

## **I. The Legal Framework of Censorship in India**

In India, legal controls cannot be placed on religious expression in the media or blasphemy per se. This is because the fundamental right to freedom of speech and expression, having its root in the Constitution, cannot be restricted otherwise than as provided under the Constitution itself. The various laws referred to here that place restrictions on expression on religious grounds take root from the Constitutional permission to impose some restrictions on free speech.

### **(i) The Constitutional Framework**

Article 19 (1) (a) of the Indian Constitution is the source of a very important right with respect to the media. This provision grants to citizens the freedom of speech and expression. Earlier, the view was that since only *citizens* could exercise the rights provided under Article 19, corporations could not exercise the said rights. This has gradually been diluted, however, with rulings permitting shareholders of corporations to exercise the rights under Article 19.<sup>1</sup> Currently, the position as regards the fundamental right

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1 *Bennett Coleman v. Union of India*, AIR 1973 SC 106; *Divisional Forest Officer v. Bishwanath Tea Co.*, AIR 1981 SC 1368; *D.C.G.M. v. Union of India*, AIR 1983 SC 937.

granted under Article 19(1)(a) is that citizens have a right to freedom of speech and expression, and as for corporations, shareholders may enforce the right on its behalf..

The right granted under Article 19 (1) (a) is not, however, absolute. There are restrictions on this right, and the permissible restrictions are detailed under Article 19 (2). Reasonable restrictions may be placed by a law 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 defamation, contempt of Court or incitement to an offence. The grounds under which restrictions may be placed are exhaustive, however, and restrictions cannot be placed under any other ground.<sup>2</sup>

It may be noted that religion or even hurting the religious sentiments of others is not included under the grounds for imposing restrictions on the freedom of speech and that being so, religion cannot be a valid ground for curbing the freedom of speech. In such a case, what would justify the numerous diktats of the State and Central governments, imposing a ban, time and again, on various forms of expression in different media, on the grounds that they are “hurtful to the religious sentiments” of others? This is a very significant question because unless the State can justify the ban under any of the given grounds, the ban becomes extra-legal. In general, any sort of action taken to prevent any form of expression in the media that threatens to hurt the religious sentiments of a group is purported to be taken in order to maintain public order. The argument is that such expressions that hurt the religious sentiments of a group tend to incite that group to violence, thus disturbing public order. This reasoning has been used time and again. A few cases that explore this reasoning, some that accept it, and some which rebut, are analyzed later.

As far as religious expression in the media is concerned, it is protected as well, as part of the religious freedom of a person granted under Article 25. It guarantees all *persons* the right to freely practice, profess and propagate religion, subject to public order, morality, health and the other provisions of Part III of the Constitution. However, the State may also impose restrictions regulating the non-religious activities of religious practices, for social welfare and reform, and for throwing open Hindu religious

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2 O. K. Ghosh v. E. Joseph, AIR 1963 SC 812; Sakal Papers v. Union of India, AIR 1962 SC 305.

institutions of a public character to all classes of Hindus. What may be culled from a joint reading of Article 19 (1) (a) and Article 25 is that in professing, practicing or propagating a religion, a person may make use of his right to freedom of speech and expression, but that the same would be subject to certain reasonable restrictions that the State may impose.

In *Virendra v. State of Punjab*<sup>3</sup>, there had been an agitation in the State of Punjab, in relation to the division of the State among linguistic and communal lines. This was supported by the Akali Party, but opposed by Hindus, who were Hindi-speaking. The situation escalated when another agitation, termed the "Save Hindi" agitation, was launched as a counter to the Akalis. Because of the turbulent situation in the State, a law was enacted, which permitted the imposition of restrictions on newspapers. These restrictions were in the nature of a suspension of certain kinds of matter or of a newspaper itself, and could be imposed if the matter or the newspaper would threaten communal harmony on publication. Similarly, restrictions could also be placed on bringing into Punjab any newspaper or publication that threatened to disturb the communal harmony. The petitioners' newspapers were subjected to restrictions under these provisions, and they consequently attacked them for being unconstitutional and violative of Articles 19(1)(a) and 19(1)(g), without being saved by Article 19(2) or 19(6). The following contentions were raised against the restrictions sought to be imposed:

- a. That the restrictions amounted to a total prohibition, which was impermissible under Articles 19(2) and/or 19(6);
- b. Even if the restrictions are not total prohibitions, they were unreasonable and hence impermissible under Articles 19(2) and/or 19(6).

Contentions were also raised against the nature of the discretion given and the exercise of the same. Dismissing the same, the Court held, firstly, that the restrictions sought to be imposed in no manner amounted to a total prohibition. In the words of the Court:

*The restrictions, so far as they extend, are certainly complete but whether they amount to a total prohibition of the exercise of the fundamental rights must be judged by reference to the ambit of the rights and, so judged, there can be no question that the entire rights*

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3 *Virendra v. State of Punjab*, AIR 1957 SC 896.

*under Arts. 19(1) (a) and 19(1) (g) have not been completely taken away, but restrictions have been imposed upon the exercise of those rights with reference to the publication of only articles etc. relating to a particular topic and with reference to the circulation of the papers only in a particular territory and, therefore, it is not right to say that these sections have imposed a total prohibition upon the exercise of those fundamental rights<sup>4</sup>*

Secondly, the reasonableness of the restrictions imposed must be considered with regard to the test of reasonableness laid down in *State of Madras v. V.G. Row*,<sup>5</sup> and the ruling in *Ramji Lal Modi v. State of U.P.*,<sup>6</sup> where it was stated that the scope of the expression “in the interests of” used in Article 19(2) was very wide. Finding that such censorship of the media due to communal reasons was indeed reasonable, the Supreme Court went on to remark:

*It is conceded that serious tension had arisen between the Hindus and the Akalis over the question of the partition of the State on linguistic and communal basis. The people were divided into two warring groups, one supporting the agitation and the other opposing it. The agitation and the counter agitation were being carried on in the Press and from other platforms. Quite conceivably this agitation might at any time assume a nasty communal turn and flare up into a communal frenzy and factional fight disturbing the public order of the State which is on the border of a foreign State and where consequently the public order and tranquility is essential in the interest of the safety of the State. It was for preserving the safety of the State and for maintaining public order that the Legislature enacted this impugned Statute.<sup>7</sup>*

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4 *Id.* para8.

5 *State of Madras v. V.G. Row*, [1952] S.C.R. 597, 607.

The test was laid down in the following words: “It is important in this context to bear in mind that the test of reasonableness, wherever prescribed, should be applied to each individual statute impugned, and no abstract standard or general pattern, of reasonableness can be laid down as applicable to all cases. The nature of the right alleged to have been infringed, the underlying purpose of the restrictions imposed, the extent and urgency of the evil sought to be remedied thereby, the disproportion of the imposition, the prevailing conditions at the time, should all enter into the judicial verdict.”

6 *Ramji Lal Modi v. State of U.P.*, AIR 1957 SC 620.

7 *Virendra*, AIR 1957 SC 896. para12.

## (ii) Criminal Law

Certain provisions of the Indian Penal Code relate to restrictions on expression in the media on the grounds of religion. Section 153A penalizes the promoting of enmity between different groups on grounds of religion, race, place of birth, residence, language, etc. Section 295A penalizes deliberate and malicious acts intended to outrage religious feelings of any class by insulting its religion or religious beliefs. Section 298 criminalizes any expression made with deliberate intent to hurt the religious feelings of any person. The intent behind these provisions is evidently to prevent hurt to the religious sentiments of one group by another. However, these provisions, though originally enacted to uphold the secular fabric of the nation and preserve public order, can also be used to place unreasonable or unwarranted checks on the right of expression. Censorship of the written media on religious grounds is generally carried out by invoking these provisions of the Indian Penal Code.

There is a large body of case-law on this issue, which shed light on the essence of problem. In *Babu Rao Patel v. State (Delhi Administration)*<sup>8</sup> the appellant was the editor, printer and publisher of a monthly called 'Mother India'. He published two articles titled "A Tale of Two Communalisms" and "Lingering Disgrace of History", on the basis of which he was prosecuted under Section 153A. It was contended that of these articles, the first was a political thesis, while the second was merely a protest against the naming of roads in Delhi in honour of Mughals, based on historical truths. The Court pointed out that while the first article did begin as a political thesis, it went on to make several uncharitable allegations against the Muslim community. The Court, holding him guilty, noted:

*Whether communalism is the weapon of an aggressive and militant minority as suggested by the accused or the "shield of a nervous and fearful minority", the problem of communalism is not solved by castigating the members of the minority community as intolerant and blood thirsty and a community with a tradition of rape, loot, violence and murder. Whether the Mughals were rapists and murderers or not and whether the Delhi roads should be named after them or not it was wrong to present the Mughals as the ancestors of today's Muslims and to vilify the Muslims as the proud descendants of the "foul" Mughals.*

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8 *Babu Rao Patel v. State (Delhi Administration)*, AIR 1980 SC 763.



*We are convinced that both the articles do promote feelings of enmity, hatred and ill-will between the Hindu and Muslim communities on grounds of community and this cannot be done in the guise of political thesis or historical truth.*<sup>9</sup>

In *Ramesh v. Union of India*,<sup>10</sup> a writ petition had been filed by a practicing advocate under Article 32 of the Constitution,<sup>11</sup> which was heard together with a Special Leave Petition filed against the order of a Division Bench of the Bombay High Court, vacating a stay granted by a single Judge against the telecasting of a serial titled “Tamas” by the respondents. It was the case of the petitioner that exhibition of the said serial was against public order and would incite people to commit offences, as also that it was violative of Article 25 of the Constitution and that it was also likely to promote feelings of enmity, hatred, ill-will, etc. on grounds of religion, or community which was also punishable under Section 153A of the IPC. It was alleged to be violative of Section 5B of the Cinematograph Act. The said serial dealt with the period immediately preceding the partition of India and portrayed the tension between Hindus and Muslims and Muslims and Sikhs. It outlined the creation of communal strife by extremists and fundamentalists and how such persons exploited others to achieve their ulterior objectives. The contention put forth by the petitioners was rejected by the Court for two reasons. First, the Court held that apart from the existence of provisions in the Cinematograph Act itself for the enforcement of the conditions provided in Section 5B, there was a mechanism in place whereby a film would first be screened before being telecast before the Censorship Board. Thus, the Court would hesitate to overturn the conclusion of a specially constituted body. Secondly, the High Court Judges who had viewed the film had found it to be one with a good message for the public. They had viewed it from the perspective of an average person and found that it was not likely to incite the commission of any offence or cause public disorder. This was accepted by the Supreme Court, which, while dismissing the petition, observed:

*...the effect of the words must be judged from the standards of reasonable, strong-minded, firm and courageous men, and not those of*

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9 *Babu Rao Patel*, AIR 1980 SC 763, para 7.

10 *Ramesh v. Union of India*, AIR 1988 SC 775.

11 The said petition had been filed for enforcing his rights under Article 21 and Article 25 of the Constitution.

*weak and vacillating minds, nor of those who scent danger in every hostile point of view. This in our opinion is the correct approach in judging the effect of exhibition of a film or of reading a book. It is the standard of ordinary reasonable man or as they say in English law "the man on the top of a clapham omnibus."*

Another landmark case was that of *Ramji Lal Modi v. State of U.P.*<sup>12</sup>, which involved Section 295A of the Indian Penal Code. The petitioner in this case was the editor, printer and publisher of a magazine titled "Gaurakshak" devoted to the protection of cows. He was charged under Section 153A and Section 295A for an article in the magazine that allegedly hurt the religious sentiments of Muslims, and ultimately convicted under Section 295A. Hence, he filed a writ under Article 32 challenging the constitutionality of Section 295A under Article 19(1)(a). He argued that the Section imposed an unreasonable restriction on his freedom of speech and expression. The contention was that the only relatable ground under Article 19(2) was that of public order, but all expressions that insult the religious beliefs or sentiments of a group might not always lead to a breach of public order. Therefore, the probability of such disorder occurring must be kept in mind before a law curbed the freedom of speech. Furthermore, he argued that since the offence in question was dealt with under the Chapter dealing with Offences against Religion, in the Penal Code, and not under the Offences against Public Tranquility, it was not really one against public order. These arguments were rejected by the Court which pointed out that since the freedom of religion was itself subject to public order under Articles 25 and 26, it could not be said that there was no association between religion and public order, and that this categorization would not by itself render the law invalid. In relation to the first contention, the Court held,

*...In the first place clause (2) of Article 19 protects a law imposing reasonable restrictions on the exercise of the right to freedom of speech and expression "in the interests of" public order, which is much wider than "for maintenance of" public order. If, therefore, certain activities have a tendency to cause public disorder, a law penalizing such activities as an offence cannot but be held to be a law imposing reasonable restriction "in the interests of public order" although in some*

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12 *Ramji Lal Modi v. State of U.P.*, AIR 1957 SC 896.

*cases those activities may not actually lead to a breach of public order. In the next place Section 295A does not penalize any and every act of insult to or attempt to insult the religion or the religious beliefs of a class of citizens but it penalizes only those acts of insults to or those varieties of attempts to insult the religion or the religious beliefs of a class of citizens, which are perpetrated with the deliberate and malicious intention of outraging the religious feelings of that class. Insults to religion offered unwittingly or carelessly or without any deliberate or malicious intention to outrage the religious feelings of that class do not come within the section. It only punishes the aggravated form of insult to religion when it is perpetrated with the deliberate and malicious intention of outraging the religious feelings of that class. The calculated tendency of this aggravated form of insult is clearly to disrupt the public order and the section, which penalizes such activities, is well within the protection of clause (2) of Article 19 as being a law imposing reasonable restrictions on the exercise of the right to freedom of speech and expression guaranteed by Article 19(1)(a). Having regard to the ingredients of the offence created by the impugned section, there cannot, in our opinion, be any possibility of this law being applied for purposes not sanctioned by the Constitution...*<sup>13</sup>

In *Baba Khalil Ahmad v. State*<sup>14</sup>, the publication of certain books was done by the applicant, written in reply to some pamphlets praising a certain person ('Muwaiya') as the leader of the Hanafis. These books were forfeited by the State Government under the provisions of the Code of Criminal Procedure, 1950, which permitted the forfeiture of a newspaper or book in certain instances, including where it was maliciously and deliberately intended to outrage the religious feelings of any class. It was alleged that the said provision was invalid. Referring to the decision in *Ramjilal Modi's* case, the Allahabad Court pointed out that it was bound by it and that since Section 295A had been upheld in the said case, the impugned provisions could not be challenged either. The Court also referred to certain passages in the six books written by the petitioner, all containing offensive references to Muwaiya. Further, it was noted that the main ingredient of Section 295A was an insult to the religion or religious beliefs of a class of persons in India, and that a person having great regard for Muwaiya would be insulted

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<sup>13</sup> *Ibid*, para9.

<sup>14</sup> *Baba Khalil Ahmad v. State*, AIR 1960 All 715.

by the statements made in the books. The next aspect of the provision to keep in mind was that the statements should have been made with a deliberate and malicious intent to outrage the religion or religious feelings of a group of citizens. Since the applicant had written six books in reply to certain pamphlets, it could be understood that the books had been written deliberately, and that could be no excuse to save him from Section 295A. In relation to his intention in writing the books, it was also alleged that the statements therein were a justification; it was claimed that they were true and that there was "high authority" in support of these statements. The Court rejected this contention and dismissed the application holding:

*...I decline to decide the question whether Muawiya was a man of bad character as urged by the applicant, or a pious man as urged on behalf of Abdul Malik. It was pointed out in AIR 1927 All 649 (FB) that, in such cases the truth of the language can neither be pleaded nor proved. The present enquiry has to be confined to the question whether there was malicious intention of outraging the religious feelings of a class of citizens of India. Even a true statement may outrage religious feelings. It is, therefore, unnecessary to record a verdict about the true nature of Muawiya's character.<sup>15</sup>*

In "*Veerabadran Chettiar v. Ramaswami Naicker*",<sup>16</sup> it was held:

*Section 295, I.P.C. has been intended to respect the religious susceptibilities of persons of different religious persuasions or creeds. Courts have got to be very circumspect in such matters, and to pay due regard to the feelings and religious emotions of different classes of persons with different beliefs irrespective of the consideration whether or not they share those beliefs, or whether they are rational or otherwise, in the opinion of the Court. That was a case under Section 295, I.P.C. But those observations have a bearing on Section 295-A, I.P.C. also.<sup>17</sup>*

In *Shalibhadra Shah v. Swami Krishna Bharati*,<sup>18</sup> an article had been published in a Gujarati weekly, 'Aaspass', with the caption "Why Acharya Rajnishji leaves Pune?". The said piece was alleged to have remarks of a scurrilous and defamatory nature. Devotees of Acharya Rajnishji hence

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<sup>15</sup> *Ibid*, para 27.

<sup>16</sup> AIR 1958 SC 1032

<sup>17</sup> *Supra* n. 14, para 29.

<sup>18</sup> *Shalibhadra Shah v. Swami Krishna Bharati*, 1981 CriLJ 113.

filed a private complaint claiming a violation of S.295A and Section 298 of the IPC. Process was issued by the Magistrate for in respect of the complaint, and the petitioners contested the complaint on the grounds that the necessary sanction before prosecution had not been obtained under the Code of Criminal Procedure, in respect of the prosecution under Section 295A, and that Section 298 would not be attracted in the instant matter since it dealt with oral utterances and could not apply to articles published in magazines. The Court noted that in this case, the requisite sanction prior to prosecution had not been taken. In relation to this, the respondents argued that there was a violation of Article 14 in discriminating between complainants who complained of an offence under Section 295A, and those who complained of an offence under Section 298. Comparing the two provisions, the Gujarat High Court observed:

*...In the first place it is necessary to bear in mind that the offence punishable under Section 295A of the Indian Penal Code is far more serious than the offence punishable under Section 298. Under Section 298 whoever, with the deliberate intention of wounding the religious feelings of any person, utters any word or makes any sound in the hearing of that person or makes any gesture in the sight of that person or places any object in the sight of that person, is liable to be punished with imprisonment of either description for a term which may extend to one year, or with fine, or with both. The Section speaks of the deliberate intention of wounding the religious feelings of 'any person' whereas Section 295A speaks of deliberate and malicious intention of outraging the religious feelings of 'any class of citizens of India'. The use of the word 'wounding' and the use of the word 'outraging' also shows that the offence under Section 295A is far more serious than the offence punishable under Section 298 of the Indian Penal Code and this becomes further clear if we bear in mind the punishment provided for the commission of the said two offences. Therefore, there can be little doubt that those who complain of the commission of the offence punishable under Section 298 stand on a different footing from those who complain of the commission of an offence under Section 295A of the Indian Penal Code. It is, therefore, difficult to understand the contention of the learned advocate that Section 196(1) of the Code of Criminal Procedure discriminates between complainants who complain about an offence punishable under Section 295A by imposing a letter on their right to move the criminal law by providing that previous*

*sanction of the concerned Government shall be a sine qua non to the Court taking cognizance of an offence alleged to have been committed under the said provision and those complainants who complain about the commission of an offence punishable under Section 298 of the Indian Penal Code. The petition was hence allowed and the complaints, dismissed.*<sup>19</sup>

### **(iii) Restrictions on Expression in Cinema and Television**

In the case of motion pictures, the Cinematograph Act, 1952, imposes certain restrictions on exhibition of films, etc. and authorizes the establishment of the Central Board of Film Censors ("CBFC") which previews films and certifies them according to certain guidelines. They may be certified as being fit for unrestricted viewing ("U" Certificate), for partially restricted viewing ("U/A" Certificate), for restricted viewing ("A" Certificate) or be denied such certification.<sup>20</sup> Section 5B lists the principles for certifying films that are to be kept in mind by the censors before granting a film a certificate. This provision mainly repeats the grounds for imposition of reasonable restrictions detailed under Article 19(2). Section 5E, an important provision, allows for revocation of a film's certificate by the Central Government. The Central Government may revoke the certificate by publishing a notification to that effect, if it is of the opinion that the film for which the certificate has been granted is being exhibited in any form other than that in which it was to be exhibited, or the certificate granted is violative of any of the provisions of Part II of the Act, which encompasses the aforementioned provisions and provides for certification of films for public exhibition. This would imply that the Central Government is given the executive power to revoke a certificate granted by an expert body (i.e. the CBFC) if it is of the opinion that a certificate granted would justify restrictions on any of the grounds under Article 19(2). Section 6 contains the revisional powers of the Central Government,<sup>21</sup> and allows for the suspension of the certificate granted to a film. Further, under

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<sup>19</sup> *Ibid*, para3.

<sup>20</sup> *See also*, Sections 3, 4 of the Cinematograph Act, 1956. Under Section 5C of the Act, a person dissatisfied with the categorization of the film and the certificate granted can appeal to the Appellate Tribunal, constituted under Section 5D.

<sup>21</sup> It is to be noted, however, that the revisional powers of the Government over the Tribunal set up under the Act have been held to be invalid in *Union of India v. K.M. Shankarappa*, (2001) 1 S.C.C. 582.

Section 13, the Central Government may suspend the screening of a film in any Union Territory if of the opinion that it will lead to a breach of peace. Several States have enacted State legislations along the lines of this Act as well, and these legislations provide for the suspension of the screening of films in a manner similar to Section 13. Religion being such a sensitive issue in India, this provision could easily be invoked to effect religious censorship of films where the same could be justified on the ground that not doing so would lead to a breach of peace.

As regards cable television, the provisions of the Cable Television Networks (Regulation) Act, 1995 apply. A joint reading of the Cable Television Networks (Regulation) Act, 1995 and the Programme and Advertising Codes under Rules 6 and 7 of the Cable Television Network Rules, 1994 places restrictions on the matter aired by operators of cable television. Under Section 19 of the Act, an authorized officer may prohibit the transmitting or re-transmitting of any programme or channel which is either not in conformity with the Programme Code or the Advertising Code, or is likely to promote “...on grounds of religion, race, language, caste or community or any other ground whatsoever, disharmony or feelings of enmity, hatred or ill-will between different religious, racial, linguistic or regional groups or castes or communities or which is likely to disturb the public tranquility...”

Similarly, under Section 20, the Central Government may regulate or prohibit the transmission or retransmission of any channel or programme. These restrictions are imposed on grounds that resemble those permissible under Article 19(2)<sup>22</sup> and also those relating to non-conformity with the Programme and Advertising Code. However, it would seem that these rules and regulations are not strictly implemented. On paper though, there exists law which permits the imposition of restrictions on programmes and advertisements and these laws, so long as the restrictions imposed were reasonable and under one of the permissible grounds (which are mirrored in such laws as grounds for imposing restrictions), would not be unconstitutional.

An important instance of religious censorship of media was that of the banning of the film “The Da Vinci Code” in several States throughout India and abroad. The film was based on a book of the same name written

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22 For instance, some of the grounds deal with incitement of communal disharmony and violence, obscenity and indecency, criticism of friendly countries, incitement of violence, contempt of court or defamation, etc.

by Dan Brown, which wove a fictitious plot around the Holy Grail and the life of Jesus Christ, suggesting that the Holy Grail actually referred to Mary Magdalene and that the Church was involved in a centuries-long attempt to conceal the existence of the lineage of Jesus and Mary Magdalene. Expectedly, there was opposition from some members of the Christian community to the idea portrayed in the book, and the film as well. Following this, the film was banned in Andhra Pradesh, Tamil Nadu, Goa, Punjab, Nagaland and other States, despite the Supreme Court's refusal of a petition by the All India Christian Welfare Association against the screening of the film, and the certificate given by the CBFC approving the screening of the film.<sup>23</sup> Some of these bans were challenged in the High Courts, for example, in Tamil Nadu and Andhra Pradesh.

In *Sony Pictures v. State of Tamil Nadu*,<sup>24</sup> the suspension by the State of Tamil Nadu on the screening of the film was challenged before the Madras High Court. The suspension, allegedly under Section 13 of the Cinematograph Act, was challenged as being violative of Article 19(1)(a) of the Constitution. It was argued that the film had been given the go ahead under Section 5B of the Cinematograph Act by an expert body, and that at this stage the Executive ought not to interfere to ban the film.<sup>25</sup> It was suggested that in order to reconcile Sections 5B and 13 of the Act, it would be necessary to read down the latter. Against this, it was argued that there was great opposition to the movie by the Christian community, and that the movie, which wove a fictitious tale, was blasphemous.

The first question to be considered was the effect of the difference in wording between "breach of peace" used in Section 13 of the Cinematograph Act, and "public order", used in Article 19(1)(a). It was noted that in the writ petition filed before the Supreme Court seeking the prohibition of the screening of the film, the question had already been considered, and it had been held, following the decision in *Madhu Limaye v. Sub Divisional Magistrate*,<sup>26</sup> that the expression "in the interest of public

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23 In fact, before the film was screened in public, it was screened specially for Catholic leaders and the Minister for Information and Broadcasting, Priyaranjan Dasmunshi.

24 *Sony Pictures v. State of Tamil Nadu*, (2006) 3 MLJ 289.

25 In this regard, it was also mentioned that the film had been released in 65 countries worldwide, including countries like Italy and Spain with predominantly Catholic populations, without any problems. In fact, even in India, the book, which had never been banned, was a huge hit in Kerala, having the maximum Christian population, and the State had not banned the film.

26 *Madhu Limaye v. Sub Divisional Magistrate*, AIR 1971 SC 2486.



order” used in the Constitution was wide enough to encompass instances of “breach of peace as well”. In relation to the violation of freedom of speech, the Court observed that the day before the ban, the petitioner had approached the Chief Minister of Tamil Nadu, seeking his cooperation in the screening of the film, and offered to have a special screening of the movie for members of the Christian community. Instead, the film had been banned, leaving aside the certificate provided by an expert body. Moreover, the film was clearly stated to be a work like fiction, unlike the book which alleged references to places, secret rituals, architecture, etc. to be real. In this backdrop, it was held that the impugned order was violative of the fundamental freedom of speech and expression of the petitioner.

To buttress the contention that the film was blasphemous and hence liable to be banned, the State relied upon the decision in *Parameswaram v. District Collector, Ernakulam*.<sup>27</sup> In the said case, a play dealing with Jesus Christ had been banned as it was found to be blasphemous and objectionable. The Court, however, rightly pointed out that the said case could be distinguished from the case at hand. Here, the film had been screened for members of the Christian community and the Catholic leaders, and the Catholic Bishops’ Conference of India had found that the movie, though it might leave viewers with an erroneous opinion of Christians and Christianity, was not blasphemous. It was further significant to remember that, even if it were, blasphemy was not a valid ground for suspending the screening of a film under Section 13 of the Cinematograph Act. In deciding thus, the Madras High Court referred also to the decision in *Lakshmi Ganesh Films v. State of A.P.*,<sup>28</sup> wherein a similar order by the Andhra Pradesh State Government suspending the screening of “The Da Vinci Code” had been held invalid. In Andhra Pradesh, the order placing the suspension was passed under Section 8 of the A.P. Cinemas Regulation Act, 1955. This provision permitted the suspension of screening of a film if its screening would lead to a “breach of peace”. Similar arguments had been raised in the said case as well, defending the right to freedom of speech and expression and contesting the ban, which were upheld. In addition, the Court also underscored that fact that the objectors to the film were not required to watch the film, and hence could not seek to censor it:

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27 *Parameswaram v. District Collector, Ernakulam*, AIR 1988 Ker 175.

28 *Lakshmi Ganesh Films v. State of A.P.*, 2006 (4) ALD 374.

*...The objectors to the exhibition of the film are not a captive audience. Casual passers-by on the public street, those using public transport or by compulsive exposure to billboards are not involuntarily and forcibly exposed to the contents of this film. The film is a work of fiction and is exhibited for commercial purposes. Those who go to the theatre are required to buy a ticket to see the film. Thus they watch it at their volition and by conscious choice. Those who are offended by the content or its theme are free to avoid watching the film. The objectors are thus not captive audience of the film. Dissenters of speech and expression have no censorial right in respect of the intellectual, moral, religious, dogmatic or other choices of all mankind. The Constitution of India does not confer or tolerate such individualized, hyper-sensitive private censorial intrusion into and regulation of the guaranteed freedom of others. The authority that passed the impugned order has not even seen the film. He mechanically certified the heckler's veto of a few objectors, on dictation as it were, rather than informed satisfaction of his own, as legislatively ordained. This is not rational regulation of a protected constitutional right - freedom of speech and expression.<sup>29</sup>*

#### **(iv) Restrictions on Expression on the Internet**

As far as the Internet is concerned, an effective and comprehensive mechanism for imposing censorship is yet to be devised. As of now, there is one mechanism in place for imposing censorship. The CERT-IND (Indian Computer Emergency Response Team) is the sole authority for blocking websites in the country, and has the power to do so under a notification released by the Ministry of Communications and Technology under the Information Technology Act, 2000. This notification permits the blocking of websites on the ground that they pose a security threat, but since the notification has been passed under Section 67 of the IT Act read with Section 88 of the Act, and Section 67 deals with penalties for publication of obscene material, presumably, a website may be also blocked by the CERT-IND on the ground that it contains obscene matter. In relation to religion, it may be observed that action may be taken by such a body not merely for the reason that some religious expression hurts the sentiments of any religious group, but only if this translates into a security threat or if it is "obscene" as well. It is submitted that the chances of this

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<sup>29</sup> *Ibid*, para82.

are slightly remote, and as the provision exists, it seems to be a very bare and basic provision. Further, it is to be noted that the CERT-IND primarily acts on complaints addressed by others (including governmental bodies) and is essentially a responsive body and not one that takes proactive steps itself.

## II. Extra-Legal Censorship of Media

Once one enters the domain of extra-legal religious censorship, one enters a land of haze, without any set rules or parameters. In this situation, censorship of media is carried out not by any rule of law, but by protests and attacks, verbal and physical, on those making the expression, and others associated with it. Often, either the State buckles to public pressure to impose some sort of ban on the expression,<sup>30</sup> or those making the expression themselves step down. In rare instances, regardless of public pressure, expression is allowed to survive. Here, in looking at extra-legal or social censorship, two kinds of expression are identified. Firstly, religious expression, sought to be censored as being blasphemous, and expression that promotes religious disharmony, or has the potential to lead to hurt the religious sentiments of others.

### (i) Censorship of Religious Expression

Religious expression usually involves expression by a person which portrays a certain version of a religion or religious tenets, or his or her understanding of that religion or its tenets, which may include a critique of it. How strong the reaction of the public is to a form of religious expression depends to a great extent on its content and whether it defies principles or concepts already accepted by the religion. Critiques are always received with more chagrin, but ridicule and humour suffer the brunt the most.

One of the best recent examples for this would be the enraged reaction of members of the Muslim community to certain cartoons published in the "Jyllands-Posten," a Danish newspaper. The newspaper had published twelve cartoons depicting Prophet Muhammad in various demeaning ways, including a cartoon with the Prophet telling suicide bombers at the gates of Heaven that there were no virgins left anymore. Even while the original cartoons were stoking the anger of Islamic clerics and Muslims all over the

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30 However, this ban could be challenged and lifted, as was evidenced in the *Da Vinci Code* cases in India.

world, more cartoons began to appear, and the situation began to escalate.<sup>31</sup> Originally, the stand of the newspaper was that the cartoons were not intended to insult or annoy Muslims, but were critical of its (allegedly) fundamentalist aspect. It was also alleged that the cartoons were printed in relation to the issue of self-censorship in Islam.<sup>32</sup> An invitation had been issued to caricaturists to give their interpretation of Muhammad, and twelve of the entries had been published. Along with the cartoons, the culture-editor of the newspaper had added a comment:

*The modern, secular society is rejected by some Muslims. They demand a special position, insisting on special consideration of their own religious feelings. It is incompatible with contemporary democracy and freedom of speech, where you must be ready to put up with insults, mockery and ridicule. It is certainly not always attractive and nice to look at, and it does not mean that religious feelings should be made fun of at any price, but that is of minor importance in the present context.... we are on our way to a slippery slope where no-one can tell how the self-censorship will end. That is why Morgenavisen Jyllands-Posten has invited members of the Danish editorial cartoonists union to draw Muhammad as they see him....*<sup>33</sup>

This was what sparked the initial outrage, including claims of targeting the religious minority and blasphemy. These allegations were responded to by the newspaper which maintained that it published matter relating to all religions, and did not confine itself to targeting any one religion.<sup>34</sup> The newspaper did, however, issue a qualified apology in the event Muslims had been offended, but maintained that the publication was within the laws of Denmark. It is also notable that the Prime Minister did not apologize, but only made an indirect reference to the issue, supporting the freedom of speech.<sup>35</sup>

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31 See Anne Cheung, 'Ending Liberalism's Holy War against the Holy?', available at [http://works.bepress.com/cgi/viewcontent.cgi?article=1000&context=anne\\_cheung](http://works.bepress.com/cgi/viewcontent.cgi?article=1000&context=anne_cheung).

32 Earlier, in 2004, there had been instances of artists refusing to make illustrations for a book on Islam and the Quran, and some of them had even cited the assassination of Theo Van Gogh (dealt with later) as one reason for the same. By and by this attitude came to be seen as an act of self-censorship on the part of followers of Islam.

33 See Wikipedia, *Cartoon Controversy*, available at [http://en.wikipedia.org/wiki/Jyllands-Posten\\_Muhammad\\_cartoons\\_controversy](http://en.wikipedia.org/wiki/Jyllands-Posten_Muhammad_cartoons_controversy).

34 *Ibid.*

35 See The Washington Post, *Cartoons of Prophet Met with Outrage*, January 21, 2006.

As the controversy was raging in Denmark, with the cartoons being published in other newspapers around the world, the issue began to receive global attention. Matters reached a stage where *fatwas* were issued around the world, calling for the execution of the Danish cartoonists, reminiscent of the *fatwas* calling for Salman Rushdie's execution.<sup>36</sup> In India itself, a reward of Rs. 51 crore was offered for their assassination.<sup>37</sup> The threats did not end with the cartoonists either, but extended to anybody publishing the cartoon or somehow remotely connected with it. For instance, the editor of Senior India, who had already been arrested by the Police, found *fatwas* being issued against him as well.<sup>38</sup> The situation seemed all set for large-scale protests and violence on communal lines.<sup>39</sup>

Admittedly, the cartoons were not all particularly in good taste. Critique of terrorism or even of a religion can be done in ways less likely to upset millions all over the world, especially in a manner not blasphemous to begin with.<sup>40</sup> However, the point also remains that the reaction to the incident was geometrically disproportionate. Yet, it remains true that social censorship was only partially successful in this instance.

The controversy surrounding the Danish cartoons revived memories of the controversy surrounding the book, "The Satanic Verses", authored by Salman Rushdie. The book on the face of it spins a tale of two Indians who immigrate to Britain, and return to India subsequently. However, there are underlying themes (as is normally the case with Rushdie's books). The very title of the book refers to certain verses in the Quran, which though originally recited by the Prophet, were later recanted by him, with the explanation that the Devil had influenced him to speak those verses. The controversial verses permitted some form and extent of worship of Allat, Uzzah and Manah, three Pagan Goddesses. This is against monotheism,

36 *Infra*, note 38.

37 See Indian Express, *Rs 51 crore reward for Danish Cartoonist's head*, February 18, 2006; Hindustan Times, *Bounty Offered on Cartoonists*, February 18, 2006; The Times of India, *Death Fatwa on Cartoonist*, February 21, 2006; Hindustan Times, *Toon Bounty: Case Filed Against Qureshi*, February 22, 2006.

38 See Indian Express, *Magazine Editor Held in Delhi Over Prophet Cartoons*, February 23, 2006; The Statesman, *Delhi Editor Held for Publishing Prophet Cartoon*, February 23, 2006; Indian Express, *Prophet Cartoons: JMM Leader Puts Rs 50 Lakh on Editor's Head*, February 2, 2006.

39 See Times of India, *Toon Turmoil Spirals Across Civilizations*, February 10, 2006; The Statesman, *Toon Protests Peak in Pakistan*, February 16, 2006; Times of India, *Bloodiest Toon Riots Flare Up in Nigeria*, February 20, 2006; Hindustan Times, *Toon Fury Erupts on Hyderabad*, February 18, 2006.

40 In Islam, portrayal of the Prophet is blasphemous, as it is perceived as a form of idolatry.

one of the most fundamental tenets of Islam. The tale goes that the Muhammadans at that point were being persecuted by the Meccans, who worshipped these Pagan Goddesses. Some of the Prophet Muhammad's followers escaped to Ethiopia, but the Muhammadans were still persecuted by the Meccans. Around this time, in a seemingly compromising manner, the Satanic Verses were uttered by the Prophet, and for a while the Muhammadans were spared. Later, however, when the Prophet revealed that he had been misled by the Devil but that he was now speaking with the help of God,<sup>41</sup> and recanted those verses, the persecution of the Muhammadans was resumed.<sup>42</sup> References to this incident may be found in the works of Ibn Ishaq and Al Tabari.

There were several controversial elements in the book, apart from the title itself that enraged believers of Islam. In the story, a film actor, Gibreel is made a sort of angel after surviving a plane crash, to refer to the Angel Gabriel. Another important character in the book, Saladin, who also survives the plane crash, becomes a Devil. Mecca is cast as Jahilia, a term dating from the age prior to Islam, the age of "ignorance". Some women in a brothel, in the story, were named after the Prophet's wives, and a girl who leads an entire village to its death is named Ayesha, the name of the Prophet's youngest wife. Finally, a reference is also made to one of the Pagan Goddesses, who appears before the prophet in the book as he lies on his deathbed. This was read as implying that Al-lat actually existed, or at least that the Prophet thought she did.<sup>43</sup>

In this case as well, there was widespread and explosive action against the expression. In 1988, a customs ban was placed on the book in India.<sup>44</sup> It was also banned in Bangladesh, Sudan and South Africa shortly thereafter. In 1989, a *fatwa* was issued against Rushdie by Ayatollah Khomeini, awarding him (as also all those associated with the publication of the book) a sentence of death. Following some reports, Rushdie issued an apology, expressing regret over the fact that the publication had caused great distress to the followers of Islam. The apology was not, however

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41 He explained that the Devil tempts all Prophets, and that God tests believers in this manner, so that the weak-willed and the hard-hearted followers who do not maintain faith may walk away.

42 See Muhammedanism Organization, *Satanic Verses available at*, <http://www.muhammadanism.org/Quran/SatanicVerses.htm>.

43 See Wikipedia, *Satanic Verses Controversy*, [http://en.wikipedia.org/wiki/The\\_Satanic\\_Verses\\_controversy](http://en.wikipedia.org/wiki/The_Satanic_Verses_controversy).

44 Rajeev Dhavan, *Ban, burn, destroy*, The Hindu, January 23, 2004.

accepted by Khomeini, who reinforced his demand for the execution of Rushdie. In fact, attempts were made on the lives of several of the book's translators<sup>45</sup> and some of them were killed in the process. Rushdie himself had to be more or less on the run for some months after the *fatwa*, moving as many as 56 times in the first few months. The *fatwa* calling for his death was renewed after his recent knighting by the Queen.<sup>46</sup>

A discussion of social censorship of religious expression would not be complete without reference to the film *Submission*. The film *Submission* was a short film directed by Theo van Gogh, the story having been written and conceived by Ayaan Hirsi Ali, a Member of the Parliament in the Netherlands. The story talks about the oppression and ill-treatment of women in Islam, and points specifically to certain verses in the Quran that seemingly approve of it. The writer, Hirsi Ali, had been known to be a critic of Islam, though originally a Muslim herself, and lived under security even before the film was made and aired on Dutch television. The film was criticized for being a rather simplistic critique, and also considered blasphemous by sections of the Islamic population.<sup>47</sup>

Hirsi Ali had warned the director of the film prior to their making it, of the danger involved. After the movie was aired, in November 2004, the director was assassinated in public in Amsterdam. He was shot repeatedly, then his throat was slit and he was stabbed, a note to Hirsi Ali being pinned to his body. The event shocked the Netherlands, which has a tradition of free speech, and caused a ripple effect of anti-Muslim violence, followed by violence against Christian establishments as well. A Mohammed Bouyeri was arrested and charged with murder, and eleven others were charged with conspiracy to kill Hirsi Ali.<sup>48</sup>

45 Attacks were carried out on the Italian, Norwegian, Japanese, and Turkish translators. Of these, the Japanese translator died in the assassination bid, while the Italian and Norwegian were seriously wounded. The attack against the Turkish translator had the most casualties, however, as it was carried out at the venue of a conference he was attending, where the building was set alight and firefighters were not allowed to put out the flames. 37 people died in the fire, though the translator himself survived; See Voice of Dharma, *Salman Rushdie*, available at <http://koenraadelt.voiceofdharma.com/articles/misc/rushdie.html>.

46 *Supra*, note 43, Wikipedia.

47 Marlise Simons, *Ex-Muslim turns her lens on a Taboo*, available at [http://www.thevangogh.nl/Hirsi\\_Subm.html](http://www.thevangogh.nl/Hirsi_Subm.html).

48 See CBS News, *Slaughter and Submission*, August 20, 2006, available at <http://www.cbsnews.com/stories/2005/03/11/60minutes/main679609.shtml>.

## (ii) Censorship of Expression on Religious Grounds

Thus far we have seen the ways in which social censorship of religious expression has been achieved, primarily through the use of force, intimidation and violence. The very same tactics are used to silence expressions that offend religions, religious sentiments and practices, or followers of certain religions.

In 1996, M.F. Hussain, an internationally acclaimed Indian painter, received a shock when as many as 8 criminal complaints were filed against him. These were filed pursuant to the publication in a magazine, *Vichar Mimansa*, of nude paintings of the Goddesses Saraswati and Durga, said to have been created by him around 1970. There was public outrage over these paintings, and the criminal complaints were filed against him under S.153A and S.295A of the IPC. Hussain moved the Supreme Court and had the complaints transferred to Delhi to defend all of them, and he filed an application in the Delhi High Court for quashing the complaints *inter alia* on the ground that prior sanction to prosecute, as required under the Code of Criminal Procedure, had not been obtained. While quashing the complaints for lack of prior sanction to prosecute, the Delhi High Court observed that the said paintings did indicate a malicious and deliberate intention to outrage the religious sentiments of a group, and that it would attract liability under the sections under which he had been charged.<sup>49</sup>

A wave of protest marked several of Hussain's paintings after this. It would seem that his paintings of Hindu deities were viewed only with bias thereafter, and it was commonly remarked that he was seeking to denigrate these Hindu deities. It was argued in favour of this opinion that he refrained from painting any themes from his own or any other religion in this light, choosing to focus on Hinduism alone. Such arguments found echoes even in the aforementioned judgment of the Delhi High Court. The argument being raised however is fallacious for several reasons. Firstly, Hussain is known to have painted on a wide variety of themes, and his paintings on Hindu deities – whether nude or not – are only a small subset of all his paintings. Secondly, to say that Hussain did not paint themes from Islam in such manner and so he was seeking to deliberately insult or annoy Hindus is wrong, inasmuch as it misses out an important fact about Islam –

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49 J.D. Kapoor (Just.), *Hussain Verdict*, available at [http://www.hindujagruti.org/activities/campaigns/national/mfhussain-campaign/hussain\\_verdict.pdf](http://www.hindujagruti.org/activities/campaigns/national/mfhussain-campaign/hussain_verdict.pdf).



any form of representation in Islam is blasphemous *per se*. As opposed to this, in Hinduism, there has always been a culture of free expression in art, from the ancient times, with nude versions of deities in art and sculpture to be found along the length and breadth of the country. Lastly, the interpretation of some of the paintings by Hussain is what caused public outrage, not the painting itself. In many cases, the paintings seem perfectly innocent to an innocent mind.<sup>50</sup>

Yet another controversy that Hussain got drawn into was in relation to one of the songs in a movie written by him, “Meenaxi: A Tale of Three Cities.” The song in question had some verses from the Quran, and was targeted by audiences in India as being blasphemous, and the movie was pulled out of theatres almost immediately after its release.<sup>51</sup> Ultimately, the movie was screened for a few months in about forty cities throughout India.<sup>52</sup> As a result of the many controversies and especially because of imminent criminal complaints and action against him, Hussain left India and lives in exile in Europe and Dubai, though he has expressed the wish to return.<sup>53</sup>

There has been a history of social opposition to certain kinds of films or certain depictions in films in India, often fueled by right wing politicians and fundamentalist Hindu or Muslim outfits. A typical example of this is the case of the film “Water” which was to be made by Indian-born director Deepa Mehta. The film was to discuss the plight of Hindu widows in India in the 1930s in the city of Varanasi, considered a holy city. After obtaining the relevant permits, shooting was about to commence when a Hindi version of the script was demanded and it was communicated to the director that some more time would be taken to give final approval. Meantime, protests had begun against the shooting of the film, which many perceived would cast India in bad light. Deepa Mehta had already been at the receiving end of such protests with one of her previous films, “Fire”, which explored the concept of lesbianism in a middle class family. The sets were destroyed and huge damages were sustained. The State Government

50 Some interesting interpretations of the paintings, both outrageous and graceful, showing the painter in bad or good light, as the case may be, may be found at <http://www.cds.caltech.edu/~nair/husain.php>.

51 Wikipedia, *M. F. Hussain*, available at, [http://en.wikipedia.org/wiki/M.\\_F.\\_Husain](http://en.wikipedia.org/wiki/M._F._Husain).

52 The Hindu, *Meenaxi*, available at <http://www.hinduonnet.com/thehindu/mp/2004/08/25/stories/2004082500980300.htm>.

53 Hindustan Times, *Nomad Husain turns 93 in exile*, September 17, 2008.

subsequently suspended the production, on the ground that the law and order situation could not be guaranteed.<sup>54</sup> Finally, the film was shot in Sri Lanka and released world over, to much acclaim.<sup>55</sup>

One very interesting controversy that brewed up in Bangladesh and was slowly transmitted to India was in relation to the book “Lajja” written by Taslima Nasrin. The book was apparently about the fate of Hindus in Bangladesh after anti-Hindu riots which began when the Babri Masjid was demolished in India. When communal riots broke out in India in 1993, some Muslims in Bangladesh began blaming Hindus in general for the violence, and began persecuting the Hindus there. In actuality, the book takes a look at a much deeper issue – the status of Hindus in Bangladesh. The plot is twisted around Sudhamoy Dutta, a Hindu patriot in Bangladesh who has taken part in several revolutions in the country and is strongly attached to it, his son Suranjan Dutta, equally a patriot, who places his country before his family for the most of his life, and his supportive wife Kiranmoy and daughter Nilanjana. When the riots commence, the entire family looks to Suranjan to have them removed to some Muslim friend’s home, like the time of the riots in 1991, but he makes no such attempt. With the progress of the riots, the plot reveals the change in attitudes of Suranjan and Sudhamoy – from hard core nationalists who would never dream of migrating to India, to shattered members of a family which lost its daughter/sister to rioters, disillusioned residents of a country which treated them only as second class citizens, and finally, heartbroken migrants to India. In constructing this plot, the author makes use of significant events in the history of Bangladesh that progressively undermine the standing of Hindus as citizens – from the conversion of the State from a secular to an Islamic State to movements in which pro-Pakistan fundamentalists who had opposed the very creation of Bangladesh persecuted patriotic Hindus to repeated riots and violence against Hindus (supported with exhausting statistics, references and reports) to more mundane forms like the number of Hindus in various fields of public service. The book acts as a critique of successive governments in Bangladesh and their fundamentalist, anti-Hindu stance.

The book was banned in Bangladesh and several states in India and fearing for her life, Taslima Nasrin left Bangladesh in 1995. She was given

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54 See <http://www.wsws.org/articles/2000/feb2000/film-f12.shtml>.

55 New York Times, *Film Ignites the Wrath of Hindu Fundamentalists*, May 3, 2006.

asylum in the European Union, but came to Kolkata in 2005 although the State of West Bengal had banned another of her books, an autobiography, in 2003.<sup>56</sup> She was staying in Kolkata for a few years when, after protests by the Muslim community, she had to leave. In August 2007, she was attacked at a book launch in Hyderabad, shamefully, by members of the Legislative Assembly as well. She was subsequently moved to an undisclosed location amidst more threats to her life, and left to Sweden. She has now returned to India and is once again living in an undisclosed location.<sup>57</sup>

### III. Conclusion

The interactions of religion, free speech and the media will always be problematic. The core right on which all enterprise in the media is based is free speech. For this reason, any limits on free speech in the media will be allowed grudgingly at best. Apart from the economical angle, and indeed more significantly, it is by expression in the media and communication through it that the potential and the importance of free speech as a right is really recognised.

The other dimension to the debate is State-sponsored censorship of media. Even where laws exist, religious censorship of expressions in the media may not always be well founded. In such cases, a lot depends on the interpretation of the laws, usually coloured by the background of the Judge himself, or sometimes even by ongoing social agitation. A typical example of this is the decision of the Delhi High Court as to the criminal complaints against painter M. F. Hussain. Yet the fact remains that in almost all jurisdictions world-over, it has been recognized that speech cannot be absolutely free. Some restrictions can and should be imposed on it in the interests of society at large, care being taken that the restrictions are reasonable. To that end, the restrictions sought to be imposed by the laws discussed here are not *per se* objectionable, though, as expressed above, their interpretation may lead to questionable results.

The other side of the debate is religion, an institution that has survived with mankind for centuries, in fact, millennia. It is slightly paradoxical that religion thrives through propagation and expression, and survives by crushing expression and criticism. What is interesting to note, is that from earlier times when it was institutions that would oppose and persecute

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56 BBC News, available at [http://news.bbc.co.uk/2/hi/south\\_asia/7108880.stm](http://news.bbc.co.uk/2/hi/south_asia/7108880.stm).

57 The Guardian, available at <http://www.guardian.co.uk/books/2007/nov/30/fiction>.

blasphemers, heretics and even any person putting forth an alternative view of that religion, it is now as much ordinary persons without any semblance of religious “authority” who take up the cause of defending their religion. This is causing a dangerous trend all over the world: it is easy to ignore what the Vatican or any high-standing Imam or Hindu leader says (as long as that isn’t a death sentence against some particular blasphemer, which is becoming alarmingly common), but it is far more difficult to ignore actual physical and verbal attacks or protests by dozens, hundreds, thousands, at times even millions of people, self-appointed crusaders for their religion. Several such instances have been studied in this paper, and in all these cases, the social censors have achieved at least some degree of success, but at the cost of the freedom of speech.

The most important question that survives is whether the law should avert its eyes from such censorship to preserve order in society and protect the defenseless or whether one must take the high ground should and fight against such forms of censorship? It is easy enough and morally correct to say that social censorship is wrong and should not be allowed. However, it is also practically very difficult to prevent it or protect those affected by it. What is really required is a change in mindset amongst people, and for them to understand the value of freedom speech and expression, as much as they value religion. Meanwhile, all the State can do is to fight social, extra-legal censorship on religious grounds, where possible, and shamefacedly give in, where it cannot, strengthening itself all the time to wage further battles and reinforce the right.

# JUVENILE JUSTICE: THE MEDIA PERSPECTIVES IN US AND INDIA

*Lalitha Gadepally\**

## *Abstract*

*This article aims to analyze the effect of the media on juvenile justice systems. The first part examines the juvenile justice system in the United States of America and the media's impact on it. It is proposed that the media has represented certain crimes committed by juveniles (like school shootings) as occurring more often than they actually do. The second part examines the evolution of the Indian juvenile justice system and discusses instances where the media has been used as a tool of social activism (as seen in certain decisions of Indian courts).*

## **I. Introduction**

The creation of separate institutions for the treatment of youth who engage in illegal or immoral behavior is a recent development. Up until the 1800s, youth were subject to the same criminal justice process as adults. Consequently, children who were apprehended for crimes were tried in the same courts, and when found guilty, were subject to the same punishments, although there is considerable evidence that many youth were spared the harshest of punishments.<sup>1</sup> Today, most people are unaware that there is a separate judicial process for juveniles.

Even though many people lack an understanding of how the juvenile justice process works, they often express strong opinions about the causes of delinquent behavior and how such behaviors should be dealt with. Such opinions are found in letters to local newspapers or radio talk show programs and television commentaries. Some members of the public call for increased efforts to prevent delinquency and rehabilitate young

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1 Preston Elrod and Scott Ryder, *Juvenile Justice*, available at [http://books.google.co.in/books?hl=en&id=c6JHL5rC8G4C&dq=juvenile+justice&printsec=frontcover&source=web&ots=xkUg\\_Y2P8F&sig=Kakrt6\\_Sb55IRhVBRI7K67dw&sa=X&oi=book\\_result&resnum=3&ct=resu](http://books.google.co.in/books?hl=en&id=c6JHL5rC8G4C&dq=juvenile+justice&printsec=frontcover&source=web&ots=xkUg_Y2P8F&sig=Kakrt6_Sb55IRhVBRI7K67dw&sa=X&oi=book_result&resnum=3&ct=resu)lt#PPA2,M1.

offenders. Delinquency, from a legal standpoint, consists of those behaviors that are prohibited by the family or juvenile code of the state and that subject minors to the jurisdiction of the Juvenile Court.<sup>2</sup> Behaviors can be categorized into two categories: first, behaviors that would be defined as criminal offenses if committed by adults, and second, behaviors that are only prohibited for minors, which are called status offenses.<sup>3</sup> It is simple to define delinquency as a behavior violating the legal code of the state, but it suffers from shortcomings.

The treatment of juvenile crime by the print and television media has historically been both insufficient and overblown. It has been "not enough" because coverage is mostly episodic and the context of individual events is largely ignored. This dynamic, in turn, creates a new world in which a disconnected series of discrete incidents receives attention out of proportion to the actual frequency and severity of juvenile crime as a whole. Juvenile crime news does not mirror crime trends, with stories regarding a small number of sensational or unusual crimes receive the maximum coverage. The number of stories on juvenile crime may even increase as crime rates decrease.

## II. Juvenile Justice and the Media in the United States

### (i) The Juvenile Courts/Justice System

The juvenile court originated at the end of the nineteenth century from the progressives' reformulation of two ideas: strategies of social control and cultural conceptions of children.<sup>4</sup> Many Progressive programs share a unifying, child-centered theme. The juvenile court combined this new imagery of childhood with approaches to social control in a specialized agency designed to accommodate the child offender.<sup>5</sup> Progressive reformers envisioned juvenile court professionals using indeterminate, informal procedures to make discretionary, individualized treatment decisions.<sup>6</sup> They substituted a scientific and preventative alternative to the more punitive approach of the criminal law. Juvenile court judges thus

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2 *Ibid.*

3 *Id.*

4 Barry C. Feld, *Violent Youth and Public Policy: A Case study of Juvenile Justice Law Reform*, 79 MINN. L. REV. 965, 969.

5 *Ibid.*

6 *Id.*, p. 970.

exercised enormous discretion to make dispositions in the “best interests of the child.” In their social and psychological inquiry into the whole child, the specific criminal offense a child committed was of minor significance because it indicated little about a child’s “real needs”. The misdeeds that brought a child before the court affected neither the intensity nor the duration of intervention as each child’s “real needs” differed and no limits could be defined in advance.

By separating children from adults and providing an alternative to punishment, in the form of rehabilitation, juvenile courts rejected both the criminal law’s jurisprudence and its procedural safeguards such as juries and lawyers. Court personnel used informal procedures and a euphemistic vocabulary to eliminate any stigma or implication of a criminal proceeding.<sup>7</sup> From the juvenile court’s inception, judges could deny some young offenders its protective jurisdiction and transfer them to adult criminal courts.<sup>8</sup> The option to waive jurisdiction and transfer highly visible or serious cases to adult courts also protected juvenile courts from political criticism.

In 1967, the Supreme Court in *In Re Gault*,<sup>9</sup> mandated procedural safeguards in adjudicating delinquency, and began to alter juvenile court operations. *In Re Gault*, the Court reviewed the history of the juvenile justice system and the traditional rationales for denying procedural safeguards to juveniles. The Court in *Gault* mandated elementary procedural safeguards because of the juvenile court’s failure to realize the Progressives’ ideals. These safeguards included the right to advanced notice of charges, a fair and impartial hearing, the right to the assistance of counsel with the opportunities to confront and cross-examine witnesses, and the protections of the privilege against self-incrimination. The Court noted that its rulings would not impair the court’s unique procedures for processing and treating juveniles separately from adults, and asserted the importance of adversarial procedural safeguards both to determine truth and to preserve individual freedom.<sup>10</sup> The Supreme Court subsequently elaborated on the procedural

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7 *Id.*

8 *Ibid.*

9 *In Re Gault*, 387 U.S. 1 (1967), it was established that under the Fourteenth Amendment, juveniles accused of crimes in a delinquency proceeding must be accorded many of the same due process rights as adults such as the right to timely notification of charges, the right to confront witnesses, the right against self-incrimination, and the right to counsel.

10 *Ibid.*

and functional equivalence between criminal and delinquency proceedings. In *In Re Winship*,<sup>11</sup> the Court held that juvenile courts must establish delinquency “beyond a reasonable doubt,” rather than by the lower standards of proof used in civil trials. The Court did not, however, extend to juveniles all the procedural criminal safeguards available to adults -- in *McKeiver v. Pennsylvania*<sup>12</sup> the Court denied to juveniles a constitutional right to jury trials in state delinquency proceedings. In *McKeiver* the Court held that the due process standard of “fundamental fairness” in juvenile proceedings, as interpreted and applied in *Gault* and *Winship*, emphasized “accurate fact-finding,” which a judge could provide as readily as a jury. The Court also expressed concern that requiring jury trials would disrupt traditional juvenile court practices.

Despite the Court’s reluctance in *McKeiver* to hasten the demise of the juvenile court system, its earlier decisions in *Gault* and *Winship* drastically altered the form and function of the juvenile court. By emphasizing procedural regularity as a prerequisite to a delinquency disposition, the Supreme Court shifted the focus of the juvenile court from the “real needs” of a child to proof of criminal guilt. Those decisions provided the impetus for the continuing procedural and substantive convergence of juvenile and criminal Courts.

## **(ii) Trends in Juvenile Crime Rates**

The shape of juvenile justice in America has been significantly transformed over the past decade. A growing number of juveniles, especially serious, habitual, and violent offenders, are being tried and sentenced as adults. Those youth retained in juvenile or family court for trial as juveniles are subjected to increasingly punitive penalties. Curfews are being enacted in big cities and small towns, parental responsibility statutes have become very popular, and the traditional confidentiality of juvenile proceedings and records has been dramatically eroded. These policy changes have affected the handling of juveniles in the legal system in a very profound way. For example, in 1988, transfers of juveniles to adult courts were approximately 7000 in number.<sup>13</sup> By 1994 the number had risen to 12,300, and continues to rise even today. Even those juveniles retained in

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11 *In Re Winship*, 397 U.S. 358 (1970).

12 *McKeiver v. Pennsylvania*, 403 U.S. 528 (1971).

13 Robert E. Shepherd, Jr., *Film at Eleven: The News Media and Juvenile Crime*, 18 QLR 687, (1999).



the juvenile justice system are frequently exposed to more severe sanctions than previously, with a proliferation of boot camps, longer commitments to juvenile correctional facilities, the more frequent use of determinate sentences, and greater exposure to publicity. There are long-term negative effects of juvenile court adjudication through its subsequent use in adult sentencing guidelines and “three-strikes-and-you’re-out” proceedings. The impetus for these major “reforms,” that have significantly narrowed the gap between the juvenile process and adult criminal treatment, is generally attributed to a dramatic increase in juvenile delinquency and violent crimes.

However, the facts reveal that in 1974 juveniles committed 31.3% of all crimes cleared by arrest and 12.5% of all violent crime, compared with 20% of all crimes twenty-three years later in 1997, and with just 12% of all violent crime.<sup>14</sup> Although there was an intervening dip in juvenile delinquency in the mid-1980s, juvenile offending rates have varied little over the past twenty years or so. What has actually driven much of the punitive legislation is a dramatic increase in juvenile homicides, largely attributed to the greater availability of firearms, and more importantly, the public and political perception that juvenile delinquency and youth crime have become epidemic, and a major threat to the peace and order of society. There is an obvious gap between perception and reality and we need to place the increases in juvenile delinquency and youth crime into perspective with other developments in our society.

Although juvenile crime has fluctuated somewhat over the years, there has been a recent increase in juvenile crime rates. However, the juvenile crime increases have been matched by similar crime increases by adults. In fact, almost every category of juvenile delinquency, including violent juvenile crime and even homicides, has dropped significantly in the last three years with the greatest drops being among youth under the age of fifteen. Also, the statistics used are sometimes quite misleading because juvenile arrest data is quoted out of context, and without acknowledgment of the fact that because juveniles commit some types of crimes in groups, they are over-represented in most compilations of arrest data. For example, juveniles accounted for 30% of all arrests for robbery in 1997 but only 17% of all robberies cleared by arrest were of juvenile suspects.<sup>15</sup> Juveniles may also be more easily arrested than adults, further skewing the data. Although

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14 *Ibid.*

15 *Id.*

homicides have driven much of the media and political hype about “super predators” and “young thugs”, and it is true that juvenile arrests for murder have increased dramatically, practically all of the increase is attributable to shootings and much has been concentrated in only a few geographic areas. In 1995, the states of California, Florida, Michigan, New York, and Texas accounted for about half of all juvenile homicide arrests. The cities of Chicago, Detroit, Houston, Los Angeles, and New York alone generated 25% of the total. Eighty-four percent of the counties in the nation had no known juvenile homicide offenders in 1995.

### **(iii) Confidentiality in Juvenile Proceedings**

The juvenile justice system was created to protect the best interests of juveniles. Publicity, particularly public identification of the juvenile, may greatly damage the juveniles’ best interests. Legislatures and courts, therefore, should not allow media access to juvenile proceedings unless it is absolutely necessary to serve a compelling public need, such as public safety.<sup>16</sup> Confidentiality has been a hallmark of the juvenile justice system of the United States.<sup>17</sup> The primary rationale for this has long been the beneficial effects of confidentiality on the prospects for rehabilitating the juvenile.<sup>18</sup> Anonymity can aid rehabilitation in four primary ways: (1) by preventing the self-perpetuating stigma of delinquency; (2) by deterring youths from committing crimes for the sake of publicity or attention; (3) by eliminating an accompanying stigma on family members, which could otherwise seriously impair the juvenile’s familial relationships; and (4) by preventing a deterioration in the juvenile’s interaction with his peers, the educational system, and the surrounding community.<sup>19</sup> These strong arguments in favor of confidential proceedings contrast with the contention that media access to the juvenile courtroom is necessary to achieve different goals.<sup>20</sup> However, this controversy should be resolved in favor of

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16 Kathleen M. Laubenstein, *Media Access to Juvenile Justice: should Freedom of the Press Be Limited to promote rehabilitation of Youthful Offenders?*, 68 TEMP. L. REV. 1897.

17 Smith, 443 U.S. 107.

18 *Ibid.* pp.107-108.

19 Louis A. Day, *Media Access to Juvenile Courts*, 1984 JOURNALISM Q. 751, 753.

20 Arguments in favor of permitting media access include (1) serving the increased public interest in the proceedings; (2) promoting the conscientious performance of the judges, attorneys, and others involved in the proceeding; (3) producing a deterrent effect on both the offender and others; and (4) insuring that juvenile offenders receive full protection of their rights.

anonymity, because the goals furthered by access can be fulfilled in other ways.

A number of compelling reasons support the presumption of confidentiality in juvenile adjudications. *First*, public juvenile adjudications may create a self-perpetuating cycle in which the juvenile may, for whatever reason, alter his conduct to match society's image of him. This theory of behavior, known as the "labeling perspective," attempts to explain the conduct of a person based upon how he believes others perceive him.<sup>21</sup> While some scholars have questioned the validity of this theory, others have recognized the strength of its assumptions.<sup>22</sup> *Second*, media publicity may have the effect of creating a recidivist juvenile offender, as it may "provide the hardcore delinquent the kind of attention he seeks, thereby encouraging him to commit further anti-social acts."<sup>45</sup> Publicity provides delinquent youths with "wanted recognition" and can contribute to the initial act of delinquency as well as subsequent recidivist behavior. Eliminating media coverage of juvenile criminal activity may reduce such recidivism. *Third*, publicized juvenile adjudications may also have a negative impact on society in general by encouraging other juveniles to commit crimes in order to get the attention and recognition of their peers that they would not otherwise receive. With such publicity, it is possible that "they will find 'proof' in the story that the path to the front page is to shoot or aim or kill". Given the powerful influence that a juvenile's peers can have on his behavior, the publicity surrounding a delinquent's actions, particularly that provided by television news coverage, may serve for many as a way to gain the acceptance of their peers. Eliminating extensive media coverage could, therefore, reduce the number of first-time offenders appearing in juvenile court. *Fourth*, public delinquency adjudications can have a substantial impact on juveniles' relationships with their families and their surrounding communities. A lack of parental support has been linked to delinquency; therefore, a strong family relationship is essential to successful rehabilitation. Parents who are already alienated from their children may be further inclined to distance themselves from these children after

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21 Curt R. Bartol & Anne M. Bartol, JUVENILE DELINQUENCY: A SYSTEMS APPROACH 176 (1989).

22 For example, Donald J. Shoemaker, THEORIES OF DELINQUENCY: AN EXAMINATION OF EXPLANATIONS OF DELINQUENT BEHAVIOR 223 (1990).

23 Supra n. 13

delinquency proceedings, depriving the children of valued family support and reducing their prospects for rehabilitation.

*Fifth*, the publicity surrounding a juvenile proceeding may affect a juvenile's positive interaction with his peers and the school system. Research indicates that the greater a juvenile's sense of attachment to his school and education in general, the less likely he is to engage in delinquent behavior. Once labeled a "delinquent," the juvenile's relationships with teachers and with classmates who are succeeding in school may be adversely affected, leading to a chain of delinquency.<sup>24</sup> A similar result may be seen in the delinquent's interactions with peers: public labeling as a delinquent can hinder the juvenile's peer relationships with non-delinquents and may therefore increase his associations with other delinquent youths.<sup>25</sup> Publicity also tends to have a negative impact on the juvenile's chances for future employment.<sup>26</sup> Public exposure of delinquent status will adversely affect the juvenile's family, school, friends, and employment prospects and the likelihood that the juvenile will commit further delinquent acts. In sum, "the resultant widespread dissemination of a juvenile offender's name . . . may defeat the beneficent and rehabilitative purposes of a State's juvenile court system."<sup>27</sup>

In contrast to these arguments in favor of closed juvenile delinquency proceedings are the arguments in favor of granting media access. These arguments go beyond the First Amendment presumption that freedom of the press gives the media the right to go anywhere and report on anything.<sup>4:</sup> Supporters of this view frequently contend that media coverage of juvenile proceedings will increase public awareness of the judicial system and will improve its integrity.

#### **(iv) Media and Juvenile Crime**

Despite this data, the public believes that teen violence is a major problem and one which is increasing. Research indicates that the news media plays a major part in shaping these perceptions. Although there are

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24 Delos H. Kelly, *Labeling and the Consequences of Wearing a Delinquent Label in a school setting*, 97 EDUC. 371, 373 (1977).

25 *Id.*

26 *Id.*

27 Smith, 443 U.S. 108.

28 *Supra* n. 13

not many surveys focusing on public perceptions about youth crime and teenage violence, one 1996 poll reported that 81% of respondents said that teen violence was a major problem nationally, and 84% said that it had increased nationwide in the previous year.<sup>29</sup> Ironically, the same survey reported that only 58% of those responding believed that youth crime had increased in their communities in the past year and just 33% said that it was a big problem in their communities.<sup>30</sup> A 1989 Time-CNN poll revealed that 88% of respondents believed that teenage violence was a bigger problem than in the past, and 70% believed that “lenient treatment of juvenile offenders by the courts” was a factor to blame for such violence.<sup>31</sup> In 1994, a poll of American teens similarly revealed that 74% believed that teenage violence and crime was a major problem and 53% believed it was a major problem in the schools.<sup>32</sup> However, again, only 30% reported teen crime as a serious problem in their school and only 18% said it was serious in their own neighborhoods.<sup>33</sup> Thus, the expressed perceptions of the seriousness of juvenile crime overall are not necessarily a reflection of personal experience, victimization, or close observation in the respondent’s own community, neighborhood, or school, either by youth or adults.

Research focusing on coverage of children and youth by the national news media through the monitoring of news broadcasts and the analysis of certain national newspapers reveals that television devoted over 47% of all news coverage of youth to crime and violence, and newspapers devoted about 40% of their stories to these topics.<sup>34</sup> In the same survey, television devoted only about 15% of its stories to education issues while the print media focused 25% of its coverage on the schools. Issues such as child poverty, childcare, and child welfare occupied only about 4% of the attention of the media, both electronic and print. Very little space in either medium was devoted to policy discussions or debate about the possible solutions to youth problems.<sup>35</sup> A survey of local television news coverage of youth in California in 1993 concluded that over half of the stories on

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29 News Report, CBS News/ N.Y. Times Poll, May 31-June 3, 1996.

30 *Ibid.*

31 Anastasia Toufexis, *Behavior: Our Violent Kids*, TIME, June 12, 1989.

32 Ira Apfel, *Crime-Teen violence: Real or imagined?*, (citing a survey conducted by Roper Starch Worldwide, Inc. in 1994 entitled Teens Talk About Violence in Their Schools and Neighborhoods) AM. DEMOGRAPHICS, June 1995, 22.

33 *Id.*

34 Dale Kunkel, THE NEWS MEDIA'S PICTURE OF CHILDREN (1994) 6.

35 *Id.*

youth involved violence, while more than two-thirds of all the violence stories concerned youth.<sup>36</sup> By way of comparison, only 14% of all arrests for violent crime in California that same year (1993) were of youth younger than eighteen, lower than the national average of 18.5%.<sup>37</sup> Thus, more than two-thirds of the TV news coverage of violent crime was focused on juveniles, while youths were responsible for about 14% of that violence. Even routine news stories about children and youth are overwhelmingly negative, and few bright pictures are painted, either in the electronic or print media.

The problem of creation or reinforcement of public impressions about violent crime is exacerbated by the persistent nature of reporting, especially by television news, on crime in general and homicides in specific. It seems to be that "if it bleeds, it leads" is a truly governing maxim on both local and network news shows. Coverage of crime stories on television news has gone up dramatically while actual crime has remained relatively constant, or even gone down during the same time periods. A survey of local TV news shows on about 100 stations on one date (February 26, 1997) revealed that almost 60% of the stations had their lead story focused on crime and that some stations devote as much as 70% of their news time to crime.<sup>38</sup>

There are many instances where crimes committed by juveniles have been overly publicized. Cover stories in national newsmagazines, over the years have also heightened the emphasis on negative pictures of young people. Newsweek's cover story for its March 9, 1992 issue focused on the topic of 'Kids and Guns: A Report from America's Classroom Killing Grounds', with a teenage victim strapped to an ambulance gurney with tubes running from his mouth depicted on the cover.<sup>39</sup> Time similarly printed a story on October 26, 1992, entitled 'Children without Pity'.<sup>40</sup> In August of 1993, Time magazine had a cover story entitled 'A Boy and His Gun' superimposed over a picture of a youth with a gun.<sup>41</sup> The Newsweek issue for the same date also showed a teenager with a gun on the cover

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36 Lori Dorfman, et al., *Youth and Violence on local Television news*, 87 AM. J. PUB. HEALTH 1311, 1313 (1997).

37 Kathleen O'Leary Morgan, et al., *Crime State Rankings 1995*, 50 UNITED STATES 42 (1995).

38 Paul Klite, et al., *Baaad News: LOCAL TV NEWS IN AMERICA* 29 (1997).

39 Ken Murray, in *Kids and guns: A report from America's classroom killing ground*, NEWSWEEK, March 9, 1992.

40 Nancy Traver, *Children without pity*, TIME October 26, 1992.

41 John D. Hull, *A boy and his gun*, TIME, Aug. 2, 1993.

coupled with the headline 'Teen Violence: Wild in the Streets'.<sup>42</sup> Likewise, on November 8, 1993, U.S. News & World Report had a youth with a handgun on its cover with the caption 'Violence in Schools' emblazoned over the illustration.<sup>43</sup> These last three sensational cover stories all ran during 1993, a year which saw teens arrested for only 18% of the violent crimes in America. More recently, U.S. News & World Report ran a cover story in 1996, entitled 'Crime Time Bombs'.<sup>44</sup> People Magazine featured a cover story in June of 1997 on 'Why Are Kids Killing? Coincidence - or a Scary Trend?' focusing on sensational cases.<sup>45</sup> The June, 1998 issue of Ladies Home Journal had a banner on the cover advertising a story titled 'Teen Violence: A Special Report', while a search of the magazine revealed an article entitled 'When Young Love Hurts'<sup>46</sup> about dating violence in Marshalltown, Iowa. Many of these more recent covers ran in years which had witnessed consecutive drops in the juvenile violent crime rate. Incidentally, the story reported by People on six homicides allegedly committed by nine youths, only two of whom, charged with one of the killings, were under the age of eighteen.

The media thus devote a disproportionate share of their news coverage to crime and delinquency, particularly on television and at the local level. Similarly, crime coverage is also inordinately concentrated on crimes of violence, including random violent acts such as "drive-by shootings", and yet, crime statistics still show that most homicides are committed by family members or acquaintances.

### (v) School Shootings

Over the past decade a new crime emerged in the world of juvenile justice that has already had an enormous impact on nationwide policy. The crime in question is the now infamous occurrence of school shootings. These shootings are heinous mass murders performed by juveniles who open fire on their own schools, for a variety of reasons, and with a wide range of lethality. The most infamous of these shootings is, of course, the incident which occurred at Columbine High School in Littleton, Colorado.

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42 Robert Yager, *Teen violence: wild in the streets*, NEWSWEEK, Aug. 2, 1993.

43 Thomas Toch et al., *Violence in schools*, U.S. NEWS & WORLD REP., Nov. 8, 1993.

44 Ted Gest & Victoria Pope, *Crime time bombs*, U.S. NEWS & WORLD REP., Mar. 25, 1996.

45 Maria Eftimiades et al., *Why are kids killing? coincidence--or scary trend?*, PEOPLE MAG., June 23, 1997.

46 Jeannie Ralston, *When young love hurts*, LADIES HOME J. 1998, 62.

However, school shootings have taken place nationwide ranging from Springfield, Oregon, to Palm Beach, Florida. In total, these school shootings have claimed the lives of well over 50 people and wounded over 100.<sup>47</sup> However, while the loss of any life, especially that of a juvenile is tragic, the death totals of these incidents do not amount to a sweeping crime wave. Yet, several laws have been introduced to combat these shootings which seem to suggest that the shootings are a major threat to public safety. In addition, school districts have become increasingly aggressive in efforts to remove the possibility of violence from the school. While this is in theory a noble goal, the lengths to which administrators have gone hardly seem representative of the need as expressed by the above numbers.

What is the reason for so much importance to be given to school shootings by legislators, and by school districts? The answer lies in public opinion. Public opinion carries a great deal of influence with both legislators, and with school administrators. Public opinion must be consistently suggesting that the issue of school shootings is of great importance, in order to have such a drastic impact on policy decisions. Before entering into a discussion of why public opinion leans this way it is important to first understand how public opinion is formed.

Public opinion is really a collection of information compiled from four sources; personal experiences, significant others, social groups and institutions, and the mass media.<sup>48</sup> Individual's personal experiences create a set of values within a person through which all other events are examined. Therefore, although a group of people may see the same event unfold they could each have a different view of the causes for the event. Obviously the number of things that an individual can experience is limited by time, and therefore, the other three factors also influence what an individual's opinions are.<sup>49</sup> The experiences of significant others, combine with the influences of social groups and institutions to form what is termed a symbolic reality.<sup>50</sup> This reality is formed to help fill in some of the lack of

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47 Scott Chenault, *An Overview of The Relationship Between Juvenile School Shootings, and The Media*, 2004 J. INST. JUST. INT'L STUD. 101.

48 *Ibid.*

49 Repenning, K., Powell, H., Doane, A., & Dunkle, H., *Demystifying School Violence: A Local, State, and National Perspective on The Phenomenon of School Violence*, JOURNAL OF SECURITY ADMINISTRATION, 24 (1), 45-64.

50 *Ibid.*



genuine experience when forming opinions. The final factor in forming public opinion is the media, which creates a “social reality.”

This is especially true in matters of criminal justice, as experienced by people in direct contact with the criminal justice system. The question therefore becomes, do the media accurately portray the world of criminal justice? A brief answer can be found in two sets of data regarding juvenile crime. First, according to official justice department crime statistics, in 1999 the juvenile arrest rate for homicide reached its lowest level since the 1960s.<sup>51</sup> This indicates a sharp decrease in the level of violent juvenile crime. However, according to a 2001 report in *Corrections Today* 62% of adults believe that juvenile crime is increasing.<sup>52</sup> This contradiction illuminates the need to explore the relationship between the media and juvenile crime, specifically school shootings.

As discussed above, public opinion is formed by combining information gained from four different sources, ranging from personal experience to mass media. The media has been identified as an essential contributor to opinion due to its pervasive nature on matters of public concern. Before continuing with this paper it is necessary to develop a working definition of the term media, so that what will be examined is exactly understood. For the purposes of this paper, the media is any distributor of information that “is easily, inexpensively, and simultaneously accessible to large segments of the population”.<sup>53</sup> This definition includes newspapers, books, periodicals, television, movies, music, and the internet, so the issue that is being undertaken is a noticeably large one.

It is difficult to express the impact of the media in a concrete manner, because people do not exist in a vacuum devoid of other influences. Due to this, perhaps the best way to measure the impact of media on attitudes toward an issue is to measure congruence between the media and the facts about the issue. Two of the most prevalent forms of criminal justice statistics are the Uniform Crime Reports and the National Crime Victimization Survey. They form the basis for most statistical crime analysis. In 1994, one such poll by the Children’s Defense Fund, it found that four out of every five juvenile murders that year were committed by

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51 Benekos, P., Merlo, A., Cook, W., & Bagley, K., *A Preliminary Study of Student Attitudes on Juvenile Justice Policy*, JOURNAL OF CRIMINAL JUSTICE EDUCATION, 13 (2), 273-299.

52 Klug, E., *Juvenile Crimes over Reported*, CORRECTIONS TODAY, 63 (4), 14.

53 *Ibid.*

adults. Another poll, this time conducted by the Office of Juvenile Justice and Delinquency Prevention states that one-half of 1% of all juveniles were arrested for a violent crime in 1997. Other research conducted by the U.S. Department of Education found that 90% of the schools in America had no incidents of violent crime in 1997.<sup>54</sup> Another study revealed that between the years 1995-1999 the percentage of students who reported being the victim of a violent crime at school dropped from 10% to 8%.<sup>55</sup> While this may seem high, the report goes on to show that there was a drop of up to 36% in the last 5 years.<sup>56</sup>

All the studies seem to agree that the rate of juvenile crime is dropping and more importantly that schools are not a dangerous place, but amongst the safest for juveniles. Many more findings of the Uniform Crime Report and other official data also show that juvenile violence is actually decreasing and not increasing. However, if these are the trends, and the media is accurately representing them, then an examination of public opinion on the topic of juvenile crime should show similar findings. Public opinion should be that juvenile crime is decreasing, and that schools are especially safe places.

The best way to measure public opinion is through polls. An analysis of various polls goes to show that the media has even infiltrated the criminal justice education system, which should naturally offset the effects of the media.<sup>57</sup> Many other polls have been taken and have observed similar results. Research on the issue of media causing fear of crime has shown mixed results. The overall finding of the studies seems to be that some programming is related to fear of crime among some viewers. While this finding may seem ambiguous it represents studies that lie on both sides of the issue. It appears that there is at least correlation between the media, and fear of crime, even if a causal relationship cannot be established. However,

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54 *Id.*

55 Snell, C., Bailey, C., Carona, A., & Mebane, D., *School Crime Policy Changes: The Impact of Recent Highly-Publicized School Crimes*, AMERICAN JOURNAL OF CRIMINAL JUSTICE: AJCJ, 26 (2), 269-289.

56 *Supra* n. 13.

57 This study was to determine the beliefs and attitudes of college students toward juvenile justice. The study specifically focused on students pursuing a degree in criminal justice. The first question the study asked was, "Do you believe school violence is getting worse?" In response, 49% of the students answered yes, they do believe school violence is getting worse. Even worse however, is that 45% of the criminal justice majors polled said they believed school violence is getting worse. These findings are not in tune with the above facts.

even if the media does not cause the public to fear crime, it definitely does not accurately present the crime problem. The issue of inaccurate presentation of crime remains a problem even if it does not result in escalated levels of fear of crime among the public. The media's misrepresentation of the extent and severity of crime damages public opinion, even if the fear of crime does not increase.

This section has revealed a great deal of incongruence between the facts, and the public's perceived reality. This incongruence seems to be a direct result of misrepresentation of the facts by media.

#### **(vi) The Media and Public Policy**

The previous section presented evidence which suggested that the media has a great deal of influence on public opinion. This influence, caused the public to believe that juvenile crime, and especially school related violent crime was rising. However, statistics on juvenile crime show that it is actually decreasing, and school violence statistics show that schools are among the safest places for juveniles.

Legislators are in a position, where, they are controlled by public opinion. Therefore, the media has an indirect impact on legislative policy decisions. Between 1994 and 1999 state legislators passed a total of 92 laws dealing with the issue of school safety. Additionally, state legislators passed 76 laws dealing with the prevention and intervention of juvenile delinquency. These laws often called for the implementation of "safe school zones".<sup>58</sup> These "safe school zones" prohibit any weapons being brought within close proximity of the school, with violations resulting in severe punishment. The legislative reform does not stop at the state level. Even federal legislators have implemented new policies to deal with the perceived problem of juvenile violence in schools. The chief piece of federal legislation is the Gun Free School Zones Act of 1994. This act required any school that receives federal funds to expel for at least one year, any student found with a weapon on school grounds. This was following the "zero tolerance policy".<sup>59</sup>

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58 Supra n. 13.

59 "Zero tolerance policies" include a mandatory sentence for anyone found in violation of the policy regardless of the circumstances. An example of this is seen in a 12 year boy from Virginia who was expelled from school for waving a stapler on a school bus.

In reaction to the information presented by the media and in combination with media-influenced public opinion school administrators have initiated several “safety” practices in recent years. Among them is the use of metal detectors, the use of the aforementioned zero-tolerance policies, and the use of a law enforcement presence within the schools. The last area of pertinent policy changes in the area of juvenile violent crime concerns those changes affecting the juvenile justice system itself. The first juvenile court was established in 1899, in Cook County, Illinois. The goal of this first court was to prevent cruelty to children. However, in reaction to political pressure, caused by public opinion this 100 plus year old system is now being attacked at its very source. Increasingly, there are public cries to try children as adults, and to impose lengthy prison sentences on young offenders. In fact, between 1992 and 1997, 40 states passed legislation making easier for juveniles to be tried as adults.<sup>60</sup> This is in fact contrary to the findings of much research related to this aspect. The whole point of trying juveniles in Juvenile Courts is being defeated. The way in which these children should be dealt with is not being followed anymore resulting in injustice to the juvenile offenders.

### III. Juvenile Justice and the Media in India

#### (i) Statutory Framework

The first legislation governing children was the Apprentice Act of 1850 which provided that children in the age group of 10-18 convicted by courts were intended to be provided with some vocational training which might help in their rehabilitation. It was followed by Reformatory Schools Act, 1897. The Indian Jail Committee (1919-1920) brought to the fore the vital need for square trial and treatment of young offenders. Ever since the 1920s, when as a sequel to the Indian Jail Committee (1919-20) recommendations, comprehensive Children Acts were first enacted in the Provinces of Madras (1920), Bengal (1922) and Bombay (1924), the twin concepts of “juvenile delinquency” and “juvenile justice” have gone through a constant process of evolution and refinement.<sup>61</sup> That is the reason why today we can identify with a fair degree of certitude towards certain core notions and ideas as the distinguishing features of the Indian

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60 Geraghty, T. & Drizin, S., *Charting a new course for Juvenile Justice: Listening to outsiders*, JOURNAL OF CRIMINAL LAW & CRIMINOLOGY, 90 (1), 363-390.

61 Pande, B. B., *Rethinking Juvenile Justice: Arnit Das Style*, (2000) 6 SCC (Jour) 1.

juvenile justice system, which are used as a touchstone for internal as well as transnational evaluations. Such core notions undergo changes through a process of conscious law reforms, which includes both legislative as well as judicial reforms. But, at times, we do encounter thought currents that run counter to the settled notions and tend to unsettle the accepted meanings and understandings. In 1960, at the second United Nations Congress on the Prevention of Crime and Treatment of offenders at London, this issue was discussed and some therapeutic recommendations were adopted.

The Central enactment, the Children Act, 1960 was passed to cater to the Union Territories. To remove some inherent lacunae in the Act, the Children (Amendment) Act was passed in 1978. But the need of a uniform legislation regarding juvenile justice for the whole country had been expressed in various forums, including the Parliament, but it could not be enacted on the ground that the subject matter of such legislation fell in the State List of the Constitution. To bring the operations of the juvenile justice system in the country in conformity with the UN Standard Minimum Rules for the Administration of Juvenile Justice, Parliament seems to have exercised its power under Article 253 of the Constitution read with Entry 14 of the Union List to make law for the whole of India to fulfill international obligations. On 22nd August, 1986, the Juvenile Justice Bill, 1986 was introduced in the Lok Sabha. Apart from the need for a uniform Act regarding children, the Juvenile Justice Act, 1986 was a result of the *Sheela Barse case*<sup>62</sup>.

The objectives of this enactment was to lay down a uniform framework for juvenile justice in India, to provide a specialized approach towards the prevention and treatment of juvenile delinquency in its full range, to spell out the machinery and infrastructure required for the care, protection, treatment, development and rehabilitation of various categories of children coming within the purview of the juvenile justice system, to establish norms and standards for the administration of juvenile justice in terms of investigation and prosecution, adjudication and disposition and care, treatment and rehabilitation, to develop appropriate linkages and coordination between the formal system of juvenile justice and voluntary agencies engaged in the welfare of neglected or society maladjusted children and to specifically define the areas of their responsibilities and roles, to

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62 1986 (2) Scale 1 (1).

constitute special offences in relation to juveniles and provide for punishments therefore and to bring the operation of the juvenile justice system in the country in conformity with the United Nations Standard Minimum Rules for the Administration of Juvenile Justice.

Section 2 of the 1986 Act defines certain terms -

*In this Act, unless the context otherwise requires:*

- (e) 'delinquent juvenile' means a juvenile who has been found to have committed an offence;*
- (b) 'Juvenile' means a boy who has not attained the age of sixteen years or a girl who has not attained the age of eighteen years.*

Consequent to India's signing the United Nations Declaration on the Rights of Child, the programmes and activities relating to child welfare and children have been redesigned in conjunction with the provisions of Convention. India ratified the Convention on the Rights of the Child in 1992, which through a set of standards to be adhered to, emphasizes social reintegration of child victims, to the extent possible, without resorting to judicial proceedings. Accordingly, the Juvenile Justice Act of 1986 has been repealed by the Juvenile Justice (Care and Protection of Children) Act, 2000.

The Juvenile Justice (Care and Protection of Children) Act, 2000 was enacted with the purpose of consolidating and amending the laws relating to juveniles in conflict with law and children in need of care and protection. This is sought to be done by providing for proper care, protection and treatment by catering to their development needs, and by adopting a child-friendly approach in the adjudication and disposition of matters in the best interest of children and for their ultimate rehabilitation through various institutions established under this enactment. Apart from this, the Constitution, in several provisions, including clause (3) of Article 15, Clauses (e) and (f) of Articles 39, 45 and 47, imposes on the State a primary responsibility of ensuring that all the needs of children are met and that their basic human rights are fully protected.

In India, there are three basic kinds of duties imposed on the media with respect to protection of children, namely-

- a) *Positive duty* - Duty of the media to expose the violation of any rights of children,
- b) *Objective duty*: Duty of the media to objectively report of any such violations, and

- c) *Negative duty*: Duty of the media not to reveal the identity of a child (in any manner), who is in conflict with law.

## (ii) Media as a Tool for Social Activism

The following are two cases where the media has been used as a dynamic tool of social activism with respect to the protection of rights of juvenile delinquents:

*Sheela Barse v. Union of India*<sup>63</sup> is one of the best examples of the impact of social activism on rights of juveniles. In this case, the appellant was an active social worker who had made historic contributions towards the development of laws for protecting children. On September 10, 1985 she approached the Supreme Court with information supplied by the Ministry of Home Affairs and Ministry of Social Welfare that there were some 1,400 children under the age of 16 years in the jails of 18 states and 3 union territories. The Ministries could not do anything in this respect because the state governments had exclusive jurisdiction in these matters. The laws applicable to children at the time did not uniformly prohibit imprisonment of juveniles in jails.

Her petition alleged that the absence of a children's act in Nagaland, non-establishment of alternate custodial institutions for children and processing of delinquent juveniles by ordinary Criminal Courts due to non-constitution of Juvenile Courts violated the Fundamental Rights of Equality and Liberty guaranteed under Articles 14 and 21 of the Constitution of India. She pleaded that laws permitting imprisonment of children in jails in some states were arbitrary and unconstitutional. She further asked the Court to release all children (below 18 years of age) who were detained in various states and to direct district judges to visit jails and police lock ups to identify and release children and to ensure follow-up action after release. She also wanted the Court to direct respective State Legal Aid Boards and District Legal Aid Committees to appoint 'duty counsel' to ensure protection of children housed and to be housed in homes.

Pursuant to the filing of the petition, 25 notices were issued to the respondent states. The Supreme Court through its subsequent orders expanded the scope of the case and sought information on various other aspects relating to the juvenile justice system. These included the conditions

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63 *Ibid.*

of homes under the Children Acts, reasons for non-enforcement of the Act and the names of governmental and non-governmental organizations for the case of mentally and physically handicapped juveniles. Through its first order, the Court directed district judges throughout the country to nominate appropriate judicial officers to visit jails and sub-jails in their sub-district and report by a certain date and provide complete details about the number of children at the jails, the offences with which they are charged, etc. The Court also issued directions to the State Legal Aid Boards and any other legal aid organization to arrange a visit of two advocates to custodial institutions once a week.

The Court deprecated keeping of children in jail even if they were kept in a separate wards away from other prisoners, due to the lack of institutions for children. The Court further directed that no children were to be kept in jails and in the event that the state government does not have sufficient space in its remand/observation homes, the children should be released on bail. Directions were issued for expeditious enquiries and disposal of cases concerning children preferably by a Juvenile Court. Due to the vastness and deep rooted nature of the problem, deadlines set by the Court for filing reports was not followed. The court issued a Contempt Notice and subsequently modified its stand requiring each state to enforce its Children Act. The Supreme Court suggested that the Union Government enact a legislation to provide for uniformity of provisions relating to children in the country. This led to the enactment of the Juvenile Justice Act, 1986- which prohibited the imprisonment of children in all states.

The case proved to be a boon to hundreds of children detained in the various prisons all over the country. They were all either released or transferred to homes established or recognized under the Juvenile Justice Act. The reports on juveniles in jails from all districts led to awareness of the illegality of detaining juveniles in the future. Even though the case may not be credited with the implementation of various provisions on the Juvenile Justice Act, it was the main initiator for the process of implementation of the Act. The case also resulted in the creation of functionaries under the Juvenile Justice Act.



*Munna v. State of Uttar Pradesh*<sup>64</sup> concerned three writ petitions that were filed on the notice of the State of Uttar Pradesh seeking relief in respect of certain juvenile under-trial prisoners in the Kanpur Central Jail. The allegations in respect of the juvenile under-trial prisoners was that though there was a children's home in Kanpur, more than a 100 children were lodged in the Kanpur Central Jail and are also being sexually exploited by the adult prisoners. The allegations were based on a news report published in the Indian Express where a reference is made to a visit of Shri Madhu Mehta of the Hindustani Andolan to the Kanpur Central Jail. According to the news report, it was found that young boys, between the ages of 10-14 years were being supplied to convicts for their delectation. Further the findings of the report revealed a boy named Munna whom was in agony because "after the way he was used, he was unable to sit". During this time, an organization by the name Human Rights Organization filed a writ petition in the High Court of Allahabad seeking relief in respect of the juvenile under-trials. The High Court actively decided to investigate into the matter by requesting the senior most Sessions Judge of Kanpur to visit the Kanpur Central Jail and make a report. In pursuance of this, the Sessions Judge visited the Kanpur Central Jail and submitted his report, wherein 7 juvenile under-trial prisoners below the age of 16<sup>65</sup> had been admitted in the Kanpur Central Jail.

The report noted that curiously enough, barring one boy named Deshraj, who was transferred to Children's Home Kanpur two days prior to the Sessions Judge's visit to the Central Jail, all the rest of the children (remaining six children) happened to be released on different dates within a span of a week and a half. The interesting aspect is that the news report in the Indian Express was published days before the release of the juvenile under-trials. It was only after the publishing of the article that one Ms. Lily Thomas filed the writ petition the next day in the High Court. Even as far as Deshraj was concerned, he had been admitted into the Central Jail almost 9 months prior to his transfer to the Children's Home. Unfortunately, as a consequence of their release, the Sessions Judge could not interview them.

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64 *Munna v. State of Uttar Pradesh*, (1982) 1 SCC 545.

65 16 years being the limit of age below which a juvenile would be regarded as a 'child' within the meaning of the U.P. Children Act, 1951.

This is an apt example of media as a strong tool for socialism. Thanks to the article published in the Indian Express, six children were released and one child was transferred to the Children's Home. The release of the children happened even before the formal enquiry took place. That is a great step for the media in reform and portraying the child as a victim of unspoken injustices. Also, the Court noted that children are to be reformed and not punished and that this objective cannot be gained by sending juveniles to jail.

### (iii) Duty of Non-Disclosure

This negative duty imposed on the media does not allow the media to publish any content disclosing the identity of a juvenile who is in conflict with law. Section 21 of the Juvenile Justice (Care and Protection of Children) Act, 2000 reinstates this by providing that there can be no report regarding a juvenile in conflict with the law, such that the identity of the juvenile or even a picture of the juvenile is not to be published, unless the authority requires this to be done in the interest of the juvenile.

*Section 21: Prohibition of publication of name, etc., of juvenile involved in any proceeding under the Act-*

*(1) No report in any newspaper, magazine, news-sheet or visual media of any inquiry regarding a juvenile in conflict with law under this Act shall disclose the name, address or school or any other particulars calculated to lead to the identification of the juvenile nor shall any picture of any such juvenile be published: Provided that for reasons to be recorded in writing the authority holding the inquiry may permit such disclosure, if in its opinion such disclosure is in interest of the juvenile.*

*(2) Any person contravening the provisions of sub-section (1) shall be punishable with fine, which may extend to one thousand rupees.*

The case of *Ved Kumari v. Sunday Times*<sup>66</sup> illustrates this. On September 10, 1995, the Sunday Times published a story on its front page with the headline '12 year old servant spun a fine story in murder case: Police' and a

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<sup>66</sup> *Ved Kumari v. Sunday Times*, Complainant filed in the Juvenile Court, Sewa Kartir, Delhi on September 12, 1995.

photograph of the child involved in the case. The news was shocking and distressing for reasons apart from the fact that it was a gruesome murder of a middle-aged woman, allegedly by her domestic servant. Section 36 of the Juvenile Justice Act, 1986 is the corresponding section to section 21 of the present Juvenile Justice Act- which clearly prohibits and penalizes the publication of any information capable of revealing the identity of children under the Act unless such publication was authorized in the interest of the children.

Initial efforts by the author were directed towards mobilizing concerned persons to write letters to the editor of the newspaper however this proved futile as the newspaper refused to publish the letters. It was finally decided to file a complaint in the Juvenile Court to prevent such violations in the future. The complaint was filed in 'my capacity as a person concerned with the prosecution of right and welfare of children' and drew the Court's attention to the gross violation of Section 36. Thinking that the Juvenile Court had the prime legal and moral responsibility to take all actions for the protection of the interests of alleged delinquent children and authority to do so, it was requested to initiate the necessary processes for bringing the wrong-doer to book and save not only the accused child but others who could also become victims of mass media's unawareness or disregard of law resulting in the attachment of a lifelong stigma, dooming them to a life of crime. Another paper, *The Pioneer*, also published a similar article along with a picture and another application was filed to include it in the proceedings, which was admitted by the Magistrate. *The Times of India* contended that there was no violation of Section 36 and that such publication was made in the view of the public interest, and in accordance with the media's duty to inform and protect the public, etc. The Court held that since the newspaper did not and could not deny publication of the photograph, its publication without proof of intention or object of publication was sufficient for conviction under Section 36 of the Act. Since publication of information could be authorized only in the interest of the child, nobody is exempted from liability for following illegal orders of any authority. Also, the Court noted that the interest of the public could have been served by just the news of the murder, without revealing the identity of the child suspect. This is an instance of the media abusing its power and victimizing the juvenile suspect.

#### **IV Conclusion**

As seen in the first chapter, due to the media's influence on public opinion, even though crimes committed by juveniles have actually decreased, there is a strange belief that crime rates have increased. Fear and ignorance of issues lead people to believe that juvenile crime has increased and not vice-versa. Many research findings have proved that crime has gone down and yet the media seems to portray the image that violence by teenagers and juveniles is raging. This has led to much insecurity in the United States - which leads to further safety measures being taken by schools to ensure that no child is a threat to others.

The media should act as a medium to show the truth about youth crimes in the present times. It should befriend juvenile delinquents instead of being a foe or nuisance to them. It must be used to inform the public about the truth of events and not create fallacies for its own convenience. There is still a large role that the media needs to play to bring about changes in the society and to mainly protect the interests of those children who have been punished. The media should not portray victims to be the culprits. Only with the necessary safeguards in place will the media be able to fulfill its objectives.







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