

CHAPTER 3

LEGISLATIONS: NATIONAL & INTERNATIONAL

3.1 Introduction

Fundamental rights are enshrined in Part III of the Constitution of India and it can be even called the Magna Carta of India. The rights in the said Chapter help in strongly guaranteeing certain fundamental rights to each and every citizen of the nation and they cannot be violated by anyone. Not only in India but in almost all modern Constitutions of other nations, fundamental rights have been guaranteed to the citizens of those nations and that indicates the necessity for securing such rights to the people. In case of *Golak Nath vs. State of Punjab*⁹⁷ Hon'ble Supreme Court has gone to the extent of saying that fundamental rights are the modern name for what have been traditionally known as "natural rights". The Constitution of India has guaranteed freedom of speech and expression to every citizen. This freedom could be curtailed by Legislature only if the restrictions imposed were reasonable and they are made in interests of any of the several specified grounds mentioned in the Article.

Apart from the said freedom, there are other fundamental rights available to the citizens, which can be classified either by their applicability or by their contents. If classified by applicability, some provisions relating to Fundamental Rights are limited to citizens, i.e. Article 15, 16, 19, 29, 30. Rest of the provisions of this Part are applicable to citizens as well as aliens or non-citizens, to all persons residing within the territory of India for the time being and subject to its jurisdiction, i.e. Article 21. Likewise, if classified by contents, while some of them impose limitations upon State action (i.e. Article 14, 15(1), 16, 18(2), 19, 20-22, 31), there are other provisions which are limitations upon the freedom of action of private individual as well (i.e. Art. 15(2), 17, 18(1), 23(1), 24). Further, some other rights belong only to a section or community (i.e. Art. 26, 29(1), 30). Difference between the two classes is that where the rights have been guaranteed against state action, no

⁹⁷ AIR 1967 SC 1643

constitutional remedy lies against breach of such right by private individuals, unsupported by the state action. Fundamental rights operate as a limitation upon State action, collectively and also individually.

The term “State” has been defined in Article 12 of the Constitution so as to offer guidance to the Courts while deciding cases involving State and bodies covered under the said word. Thus State includes not only the organs of government, but also other bodies exercising legal authority.⁹⁸ Accordingly, Art. 12 extends not only to the Legislature and Executive organs of the Union and the State, but also the instrumentalities of government whether acting under statutory authority or not, a local authority as well as any body of persons exercising statutory powers whether such powers are governmental or non-governmental.⁹⁹

As such, there is no separately guaranteed freedom of speech or for that matter, even freedom of press or of media in the Constitution of India but freedom of speech covers freedom of press and media. Media which is popularly referred as fourth estate of our democracy serves as a medium of communication between government and the public. Sometimes it provides voice to the voiceless and at other times, serves as a watchdog against misdeeds of government. Due to media, several times, politicians, ministers and high-ranking officers have been caught indulging in corruption, bribery, nepotism, sex scandals etc. and their stories have reached to the public at large sometimes through TV sets and internet news and sometimes through print media. Thus, media has a very powerful impact on minds of those who access it. Hence, it is of utmost importance that media should be regulated properly so that information can be provided to the viewers in a fair and impartial manner.

The present chapter discusses in detail several legislative and constitutional provisions related to freedom of speech and expression in U.S., U.K., Australia and India as the laws of India have been heavily borrowed from English laws. Likewise, reasonable restrictions on free speech and media also are similar in all the nations. Further, international charters and conventions the clauses and articles of which govern the signing nations have been discussed to identify how far the international

⁹⁸Bhasheshwar vs. I.T. Commissioner, AIR 1959 SC 158

⁹⁹ Rajasthan State Electricity Board vs. Mohan Lal, AIR 1967 SC 1856

regulatory bodies recognize and implement this significant right. Also, major legislative provisions pertaining to freedom of speech and expression as are found in other Acts prevailing in the nation as well as legislative attempts of implementing further Acts which provide for regulating free speech of media shall be discussed.

3.2 Meaning of Freedom of Speech and Expression

At the very outset, freedom of speech and expression would imply the rights of every citizen of nation in connection to speaking out his thoughts, views, opinions, be they in favor of or against any topic of national, political or social interest without fear of any restraint or punishment. Each person has his intellect and an ability to see, grasp and analyze the situation in his own special manner. The same may or may not be in conformation with the overall opinion in that regard but that does not restrict anyone from not making his opinion heard. It maybe published or printed in print media, telecast or relayed in electronic media or posted, blogged, tweeted on social media. Media gives ample space to everyone though in different levels to society for making their opinions heard to the world at large. This right of an individual is known as freedom of speech and expression.

3.2.1 Origin of freedom of speech and expression

The origins of the freedom of speech can be found in ancient Greece where the citizens pioneered free speech as a democratic principle. The ancient Greek word “parrhesia” meant “free speech or “to speak candidly”. The term first appeared in Greek literature around the end of fifth century B.C. During the classical period, parrhesia became a fundamental art of the democracy of Athens. Leaders, philosophers, playwrights and everyday Athenians were free to openly discuss politics and religion and even to criticize the opinions and decisions of government in some settings.¹⁰⁰

The term “speech” maybe defined as “a spoken expression of ideas, opinions, etc. that is made by someone who is speaking in front of a group of people.”¹⁰¹ Oxford Dictionary defines the term as “the expression of or the ability to express thoughts and feelings by articulate sounds.” Thus, speech is expressing the thoughts,

¹⁰⁰ Available at <http://www.history.com/topics/freedom-of-speech> (Visited on 24.4.2018)

¹⁰¹ Available at <http://www.merriam-webster.com> (Visited on 30.11.2016)

ideas and opinions held by a person in respect of a subject, which he chooses to present verbally to another person or even in front of a crowd.

The term “expression” means “the act of making your thoughts, feelings, etc. known by speech, writing or some other method”.¹⁰² Oxford Dictionary defines the term as “the action of making known one’s thoughts or feelings.” According to Halsbury’s Laws of England, the expression “freedom to express” incorporates both the right to receive and to express ideas, information and secrecy of private communications. However, they are all subject to reasonable restrictions so that while exercising the freedom, an individual does not trespass similar rights of other individual. Freedom of speech and expression includes liberty to propagate one’s personal views as well as views of other people on their behalf. Whenever there are issues involving public interest, they may be raised either by one and all or by one who represents the voice of all and the same shall still be a part of freedom of speech and expression. The right to acquire as well as get ideas and information about matters of common interest is also covered therein.

When used together, the term “speech and expression” can be said to mean “an oral and verbal communication of ideas, thoughts and opinions held by a person in regard of any subject which he chooses to speak and convey to another person or even to a large crowd.” Freedom of speech is the right to express opinions without government restraint. Over the years, several judgments of Hon’ble Supreme Court and High Court have interpreted the term in the cases before them. Some of the major interpretations that have been found are as under:

- (1) Freedom of expression means the right to express one’s convictions and opinions freely by word of mouth, writing, printing, picture or in any other manner. It would thus include not only the freedom of the press but expression of one’s ideas by any visible representation such as by gestures and the like, by banners and signs¹⁰³, and through radio, cinema, television, etc.¹⁰⁴

¹⁰² Available at <http://www.merriam-webster.com> (Visited on 30.11.2016)

¹⁰³ Lovell vs. Griffin (1938) 303 US 444

¹⁰⁴ Mane Sachin Babruvan, “A Critical Study on Right to Freedom of Speech and Expression and Role of Media in Indian Democracy”, (2017)

- (2) Further, it is important to note that the freedom of speech and expression includes the liberty of expressing or propagating not only one's own views but also includes the right to propagate or publish the views of other people. The most common example of propagating views of others is that this freedom also includes freedom of the press.¹⁰⁵
- (3) Expression cannot be done by an individual to his own self. In order to express, a second party is inevitably required to whom the ideas are expressed or communicated. To surmise, expression includes the idea of publication, distribution and circulation.¹⁰⁶
- (4) Freedom of speech and expression includes freedom to hold opinions, to seek, receive and impart information and ideas either orally, by written or printed matter or by legally operated visual or auditory devices such as radio, cinematograph, gramophone, loudspeaker, etc. In short, it is the freedom of communication of one's ideas through any medium.¹⁰⁷
- (5) It includes the right not only to give but also to acquire and import ideas and information from others about matters of common interest. Thus, it includes right to be informed as well.¹⁰⁸
- (6) Freedom of speech includes freedom of discussion also. A discussion helps in exchange of knowledge, ideas and viewpoints and beliefs between two persons. Freedom of speech includes dissemination of knowledge according to one's own ideas so long as that does not infringe the collective interests or the object is not purely commercial.¹⁰⁹

Article 19(1)(a) does not specifically mention about freedom of the press, but it is a settled view of Apex Court that the freedom of speech and expression includes freedom of press and circulation. Freedom of the press is simply an emanation from concept of fundamental right of freedom of every citizen.

¹⁰⁵ Express Newspapers vs. Union of India AIR 1958 SC 578

¹⁰⁶ Romesh Thappar vs. State of Madras (1950) SCR 594

¹⁰⁷ Hamdard Dawakhana vs. Union of India (1960) 2 SCR 671

¹⁰⁸ Hamdard Dawakhana vs. Union of India (1960) 2 SCR 671

¹⁰⁹ Valentine vs. Chrestensen (1942) 316 US 52

In *Romesh Thappar vs. State of Madras*¹¹⁰ it was held that freedom of speech and of the press lay at the foundation of all democratic organizations, for without free political discussion, no public education so essential for the proper functioning of process of popular government is possible. Thus, freedom of “speech and expression” means right to express one’s own convictions and opinions freely by words of mouth, printing, pictures or any other mode. It includes expression of one’s ideas through any communicable medium or visible representation such as gesture, signs and the like. From the cases decided from time to time, it can also be concluded that media also has the freedom of speech and expression. Initially, it was available to print media as it was the sole media in nation but later as electronic and social media came into the domain of common man, the same were also entitled to this freedom albeit not without giving rise to certain controversies of the extent of use of this freedom. Likewise, just as a citizen’s freedom of speech and expression is subject to reasonable restrictions, the same follows for media as well.

3.3 Need and object of Freedom of Speech and Expression

Historian Bury in his book *History of Freedom of Thought*¹¹¹ has stated that freedom of expression is a “supreme condition of mental and moral progress.” In an American case¹¹², Supreme Court observed that, it is absolutely indispensable for the preservation of a free society in which government is based upon the consent of an informed citizenry and is dedicated to the protection of the rights of all, even the most despised minorities. Thus, the said freedom is available to all irrespective of their social status. In yet another case, it was held that the maintenance of the opportunity for free political discussion to the end that government may be responsive to the will of the people and that changes may be obtained by lawful means is a fundamental principle of our constitutional system.¹¹³

Even in India, the vitality of free speech has been emphasized upon by Supreme Court in its judgments. In *Union of India vs. Motion Picture*

¹¹⁰ AIR 1950 SC 124

¹¹¹ J.B. Bury, *History of Freedom of Thought*, P. 239 (Library of Alexandria, 1913)

¹¹² *Speiser vs. Randall* (1958) 357 US 513

¹¹³ *Stromberg vs. California* (1931) 283 US 359

Association¹¹⁴, it was held that free speech is the foundation of a democratic society. A free exchange of ideas dissemination of information without restraints, dissemination of knowledge, airing of different viewpoints, debating and forming one's own views and expressing them, are the basic ideas of a free society. This freedom alone makes it possible for people to formulate their own views and opinions on a proper basis and to exercise their social, economic and political rights in a free society in an informed manner. Restraints on this right have been jealously watched by courts. In *S. Rangarajan vs. P Jagjivan Ram*¹¹⁵ it was held that the democracy is a Government by the people via open discussion. The democratic form of government itself demands by its citizens an active and intelligent participation in affairs of the community. Democracy can neither work nor prosper unless people go out to share their views.

It has also been held in one case¹¹⁶ that freedom of thought and expression and the freedom of press are not valuable freedoms in themselves but are basic to a democratic form of government which proceeds on the theory that problems of the government can be solved by free exchange of thought and by public discussion of various issues facing the nation. This right is one of the pillars of individual liberty – freedom of speech which has always been guarded by Constitution. Thus, it is implicitly clear that the Apex Courts even in India have safeguarded the freedom of speech and expression of an individual. No person can express himself without putting forth his ideas, thoughts and expressions before others. Only a healthy exchange of conversations, political views and debates can ensure that the freedom of speech and expression is amply available to every citizen of the nation. Failure on part of State or authority to provide such freedom may result in failure of democracy itself.

The purpose of free expression is derived from widely accepted promise that the proper end of man is realization of his character and potentialities as a human being. Free expression is an integral part of this development of ideas, mental

¹¹⁴ AIR 1999 SC 2334

¹¹⁵ (1989) 2 SCC 574

¹¹⁶ *Express Newspapers P Ltd. Vs Union of India* (1986) 1 SCC 133

exploration and of the affirmation itself.¹¹⁷ By means of free speech, we are bestowed with a mechanism that helps in establishing and maintaining a reasonable balance between stability and social change. That is to say, what has been achieved needs to be maintained and what is yet to be achieved must be made known to all by means of free speech. Thus, all members of society should be able to form their own beliefs and communicate them freely to others.

Freedom of speech and expression to an individual helps in governing his own self rather than being governed as per the whims of someone else. Free expression is a must for exchange of ideas which are necessary for self-governance without any hindrance. The people of the nation who are governors of the democracy must have freedom to choose all ideas that may be helpful in formulating a public policy. The self-governance rationale also has several other factors in addition which are sometimes assumed as independent purposes for free expression. Firstly, free expression helps in preventing the sealing of interest in government. As democracy presumes that Governments continue to change after their terms are over, their powers will continue to change hands from time to time. In case this process comes to an end, democracy will also cease.

Also with the help of free expression, political stability becomes more possible. Thus, politicians who lost the elections will not resort to violence if they have had a fair chance to be heard. Free speech also serves to “check the abuse of power by public officials” by providing to the citizenry the information needed to exercise their veto power when the decision of public officials pass certain limitations. Thus, due to freedom of speech and expression, self-governance becomes much more possible and effective.

Likewise, free speech is indispensable for determination of truth. Truth may be different in the opinion of different people but to sum up, it would be what the majority of people assume it to be. The critical question is not how well truth will advance absolutely in conditions of freedom but how well it will advance in

¹¹⁷ Massey, Massey on American Constitutional Law, 798-799 (Aspen Publication, 2nd Ed., 2005)

condition of freedom as compared with some alternative set of conditions.¹¹⁸ People who believe that truth is a knowable but not necessarily a verifiable concept also firmly agree that free expression is critical for finding truth. Free speech and expression are hence inevitable in man's quest for search of truth. Also free speech can serve in checking abuse of power by public officials. As abuse of power is an immensely serious evil due to government's power to employ legitimized violence, checking value becomes necessary. Public opinion should be freely exchangeable so that there is a check on the government's powers of legitimized violence.

The practice of free expression also cultivates virtues of tolerance and self-restraint amidst those practicing it. Justice Holmes noted that free expression does not mean "free thought for those who agree with us, but freedom for the thought we hate."¹¹⁹ In an increasingly culturally diverse society, these virtues are inevitable for preservation and maintenance of the societal norms. Thus, this purpose is in a manner related to self-governance too.

These objects can be fulfilled only by strict adherence of freedom of speech and expression throughout the nation. Considering what role freedom of speech and expression can play in a society for its citizens, and what will be the plight of removing the same, the said freedom has been specifically mentioned in numerous international instruments, conventions and treaties.

3.4 Meaning of "media regulation"

Forms of media in India have multiplied extensively in past two decades. Earlier there were only few state-owned channels under the control of national broadcaster Doordarshan while today foreign-owned channels and joint ventures from Star and NDTV to Zee and MTV, etc. rule the market. Simultaneously, alongwith international and foreign channels and websites, even national, regional and local broadcasters have grown and they are often owned and run by capital derived from India which is linked to powerful elite interests including regional and national politicians and large newspaper groups. Several unethical and often illegal practices

¹¹⁸Durga Das Basu, Commentary on the Constitution of India (Vol.2) Pg. 2370 – (Wadhwa Publications, Nagpur, 8thedn., 2007)

¹¹⁹United States vs. Schwimmer 279 US 644 (1929)

have been found taking place and there is an urgent need for a strong well defined regulatory framework and enactment.

Some of the major vices found in media are listed below:

- (i) threats by elites and political interests to the independence of journalists;
- (ii) paid news;
- (iii) misreporting of news by media and often defaming individuals;
- (iv) bribery, corruption that links lobbyists
- (v) sale of editorial space and airtime for advertisements¹²⁰

In light of this scenario, it has become inevitable that the media should be regulated not from inside but from an external body with sufficient checks and punitive powers. According to Justice Ravindran, Indian media requires regulation but the extent of regulation is a matter of discussion. Regulation maybe in either of the following forms:

- (i) A complete statutory regulation of media through a regulator whose members are appointed by the government;
- (ii) An independent regulation by a regulator who decides the extent of regulation.
- (iii) Non-statutory independent regulator appointed by trade associations
- (iv) Non-statutory self regulation where every media entity creates and provides its own grievance redressal mechanism.¹²¹

According to late Justice J S Verma, “when you acquire great strength, you should realize that there is danger of its misuse. Therefore, self-regulation is the best way so that there is no justification for outside intervention to regulate.”¹²²

Presently no single Indian media body exists which entirely oversees either the content and ethics or even the ownership of all these diverse media platforms. There have been disputes with government bodies due to unrestricted cross media ownerships. However, media industry has strongly resisted attempts of external regulation on the ground that such regulation will interfere with its freedom of

¹²⁰Shakuntala Banaji, “Regulating the Media in India – An Urgent Policy Priority” (blogs.lse.ac.uk) (2013)

¹²¹ Nikhil Pahwa, “On Self-Regulation of media in India – Notes from Law Commission Consultation” Oct. 9, 2014 (Visited on 25.11.2016)

¹²²Vinod Mehta “For media, self-regulation is best” (M.timesofindia.com/edit-page (Visited on 25.11.2016)

expression. Again, according to media, self-regulation of the press is sufficient to protect public interest and hence no external regulation is required.

3.5 International Instruments, Conventions and Treaties

International instruments refer to the worldwide treaties, conventions and major international documents which are drafted and implemented in respect of rights common and vital to the population of every country. So vital is the right of free speech to an individual that even international instruments and treaties have recognized it. The parties signing thereto need to ratify and implement the same in their respective nations. Some of the major international instruments wherein this important right has been recognized are as under:

3.5.1 Universal Declaration of Human Rights 1948

The Charter of the United States came into force on 24.10.1945. The Statute of the International Court of Justice is an integral part of this Charter. However, the Charter did not define or specify any human rights nor any means to implement them in the Member States. Hence, a need arose to adopt various international instruments relating to human rights so as to remove the need for lack of provisions relating to human rights in the U.N. Charter. Accordingly, the first important document Universal Declaration of Human Rights 1948 was adopted which specified various human rights mainly concentrating on civil, political, social, economic and cultural rights. The Universal Declaration of Human Rights was adopted by the United Nations General Assembly on 10th Dec., 1948 at Paris after severe flagrant violation of human rights during Second World War. It is also as Magna Carta and is the first globally accepted expression of rights to which all human beings are inherently entitled. The said Declaration has been further divided into various parts as under, each of which is dedicated to a specific set of rights:

- (a) Preamble;
- (b) General Part (Article 1, 2)
- (c) Civil and Political Rights (Article 3-21)
- (d) Economic, Social and Cultural Rights (Article 22-27)

(e) Concluding Chapter (Article 28-30)

The main object of the Declaration was to define the meaning of words “Fundamental freedoms” and “human rights” as mentioned in the United Nations Charter which is binding on all member states. Article 19 of Universal Declaration of Human Rights provides for freedom of opinion and expression including freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers

3.5.2 International Covenant on Civil and Political Rights, 1966

The International Covenant on Civil and Political Rights mainly elaborated the rights mentioned in the Universal Declaration of Human Rights 1948. The said Covenant is a part of International Bill on Human Rights and India has ratified it in the year 1979. It is mainly divided into following parts:

- (a) Preamble;
- (b) Part I: Right of self determination
- (c) Part II: General provisions, i.e. Duties of State, right during emergency and interpretation
- (d) Part III: Civil and Political Rights
- (e) Part IV: Enforcement machinery
- (f) Part V: Saving Provisions
- (g) Part VI: Concluding Provisions

Article 19 of the said Covenant entitles every individual to right to hold opinions without interference including freedom of expression which 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. Special duties and responsibilities have been attached on part of citizens for the exercise of rights provided for in this Article. Hence it is subject to certain restrictions but these shall only be such as are provided for by law and are necessary either for respect of the rights or reputations of others or for the protection of national security or of public order or public health and morals.¹²³

¹²³ Available at http://www.claiminghumanrights.org/opinion_expression_definition.html (Visited on 13.8.2018)

3.5.3 American Declaration of the Rights and Duties of Man

Prior to adoption of Universal Declaration of Human Rights, the American Declaration of the Rights and Duties of Man was the world's first international human rights instrument of a general nature. Article 4 of the said Declaration provides for right to freedom of investigation, opinion, expression and dissemination. It states that every person has the right to freedom of investigation, of opinion, and of the expression and dissemination of ideas, by any medium whatsoever.

3.5.4 European Convention for Protection of Human Rights and Fundamental Freedoms

Article 10 of the European Convention for Protection of Human Rights and Fundamental Freedoms states that “everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This article shall not prevent States from requiring licensing of broadcasting, television or cinema enterprises. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or the rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.

3.5.5 UNESCO Mass Media Declaration 1978

The UNESCO Mass Media Declaration was proclaimed by the General Conference of United Nations Educational, Scientific and Cultural Organization at its twentieth session in Paris on 28.11.1978. Article II(1) states that the exercise of freedom of opinion, expression and information recognized as an integral part of human rights and fundamental freedoms is a vital fact in the strengthening of peace and international understanding. Art. II(2) provides that access by the public to

information should be guaranteed by the diversity of sources and means of information available to it, thus enabling each individual to check the accuracy of facts and to appraise events objectively. For this purpose, journalists must have freedom to report and the fullest possible facilities of access to information. It is also important that the mass media be responsive to concerns of peoples and individuals, thus promoting the participation of public in the elaboration of information. Also, if mass media are to be in a position to promote the principles of UNESCO Mass Media Declaration in their activities, it is essential that journalists and other agents of mass media in their own country or abroad, must be assured of protection guaranteeing them the best conditions for exercise of their profession.

Article IV of the said Declaration states that the mass media have an essential part to play in the education of young people in a spirit of peace, justice, freedom, mutual respect and understanding in order to promote human rights, equality of rights as between all human beings and all nations and economic and social progress. Equally they have an important role to play in making known the views and aspirations of the younger generation. Article V states that in order to respect freedom of opinion, expression and information and in order that information may reflect all points of view; it is important that the points of view presented by those who consider that the information published or disseminated about them has seriously prejudiced their efforts to strengthen peace and international understanding, to promote human rights or to counter racialism, apartheid and incitement to war be disseminated.

3.5.6 Charter for a Free Press (1987)

This Charter includes provisions as per suggestions and approvals of journalists from several nations at the Voices of Freedom World Conference on censorship problems held in London in 1987. Several provisions supporting free flow of news and information within a nation as well as across the nations were mentioned in the Charter. The major ones of them are:

- (i) Censorship, direct or indirect is unacceptable; thus laws and practices restricting the right of news media freely to gather and distribute information must be abolished,

and government authorities national or local, must not interfere with the content of print or broadcast news or restrict access to any news source.¹²⁴

- (ii) Independent news media, both print and broadcast must be allowed to emerge and operate freely in all countries.
- (iii) There must be no discrimination by governments in their treatment, economic or otherwise of the news media within a country. In those countries where government media also exist, the independent media must have the same free access as the official media have to all material and facilities necessary to their publishing or broadcasting operations.
- (iv) States must not restrict access to newsprint, printing facilities and distribution systems, operation of news agencies, and availability of broadcast frequencies and facilities.
- (v) Legal, technical and tariff practices by communications authorities which inhibit the distribution of news and restrict the flow of information are condemned.
- (vi) Government media must enjoy editorial independence and be open to a diversity of viewpoints.
- (vii) There should be unrestricted access by print and broadcast media within a country to outside news and information services and the public should enjoy similar freedom to receive foreign publications and foreign broadcasts without interference.
- (viii) National frontiers must be open to foreign journalists. Quotas must not apply and applications for visas, press credentials and other documentation requisite for their work should be promptly approved. Foreign journalists should be allowed to travel freely within a country and have access to both official and unofficial news sources, and be allowed to import and export freely all necessary professional materials and equipments.¹²⁵
- (ix) Restrictions on the free entry to the field of journalism or over its practice, through licensing or other certification procedures must be eliminated.

¹²⁴ Available at <http://slulibrary.saintleo.edu/c.php?g=368038&p=2487227> (Visited on 13.8.2018)

¹²⁵ Available at <https://www.rferl.org/a/1347296.html> (Visited on 13.8.2018)

- (x) Journalists like all citizens must be secure in their persons and be given full protection of law. Journalists working in war zones are recognized as civilians enjoying all rights and immunities accorded to other civilians.¹²⁶

3.5.7 The Madrid Principles on the Relationship between the Media and Judicial Independence (1994)

The International Commission of Jurists and the Spanish Committee of UNICEF held a meeting through several legal experts and media representatives in order to examine the prevailing relationship between media and judicial independence as guaranteed by UN Principles on Independence of Judiciary, 1985 as also to formulate principles addressing the relationship between freedom of expression and judicial independence. The Preamble to the meeting stated that “freedom of the media, which is an integral part of freedom of expression is essential in a democratic society governed by the Rule of Law and that it is the responsibility of the Judges to recognize and give effect to freedom by media by applying a basic presumption in their favor and by permitting only such restrictions on freedom of media as are authorized by the International Covenant on Civil and Political Rights and are specified in precise law.” It was observed that the media has an obligation to respect the rights of individuals, protected by the International Covenant and independence of judiciary. The principles which are minimum standards of protection of the freedom of expression were divided as follows¹²⁷:

3.5.7.1 Basic Principle

- Freedom of expression (as defined in Article 19 of the Covenant), including the 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 media to gather and convey information to the public and to comment on administration of justice, including cases before, during and after trial, without violating the presumption of innocence.

¹²⁶ Available at <https://www.rferl.org/a/1347296.html> (Visited on 13.8.2018)

¹²⁷ Law Commission of India: 200th Report on Trial by Media Free Speech and Fair Trial under CrPC 1973, August 2006

- This principle can only be departed from in the circumstances envisaged in the International Covenant on Civil and Political Rights.
- The right to comment on administration of justice shall not be subject to any special restrictions.

3.5.7.2 Scope of Basic Principle

- The Basic Principle does not exclude the preservation by law of secrecy during the investigation of crime even when investigation forms part of judicial process. Secrecy in such circumstances must be regarded as being mainly for 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 to the press, information about investigation or the circumstances being investigated.
- The Basic Principle does not exclude the holding in camera of proceedings intended to achieve conciliation or settlement of private disputes.
- The Basic Principle does not require to broadcast or record court proceedings. Where this is permitted, the Basic Principle shall remain applicable.

3.5.7.3 Restrictions

- Any restriction of 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 by a Judge.
- Where a Judge has a power to restrict the Basic Principle and is contemplating the exercise of that power, the media as well as affected person shall have the right to be heard for purpose of objecting to the course of that power and if exercised, a right of appeal.
- Laws may authorize restrictions of the Basic Principle to extent necessary in a democratic society for the protection of minors and members of other groups in need of special protection.
- Laws may restrict Basic Principle in relation to the criminal proceedings in the interest of administration of justice to the extent necessary in a democratic society

for the prevention of serious prejudice to a defendant as well as for preventing serious harm or pressurizing a witness, a member of Jury or a victim.

- Where a restriction of the Basic Principle is sought on grounds of national security, this should not jeopardize the rights of parties including the rights of defence. The defence and media shall have the right to greatest extent possible to know the grounds on which 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.
- In civil proceedings, restrictions of Basic Principle may be imposed if authorized by law to the extent necessary in a democratic society to prevent serious harm to the legitimate interests of a private party.
- No restriction shall be imposed in an arbitrary or discriminatory manner.
- No restriction shall be imposed except strictly to the minimum extent and for 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. Moreover, the order to restrict shall be subject to review by a Judge.

Thus, even at this meeting, a balance was strived to be achieved between rights of media and free trial. While on one hand, freedom of expression was stated to include freedom of media and constituting one of the essential foundations of a democracy, on the other hand scope of Basic Principles to deal with media rights during investigation in a crime were governed by laws of secrecy during investigation of crime. However, any person involved herein was free to communicate to the press any information regarding investigation.

It can be said that at an international level, all the major nations of the world have recognized the vitality of an individual's freedom of speech and expression. It must be a guaranteed right considering that in its absence, a person may not be able to communicate his thoughts, ideas and opinions to another or even to the world at large. Such failure will lead to choke up of the creative development of a man as well as hinder the free exchange of ideas. We live in a extremely fast and changing world and hence it is of utmost importance that person is aware of what is changing

and what is redundant and of what is right and what is wrong. Only a free press can help the man in his pursuit of keeping up with the changing world. In recognition of this very fact, freedom of press has been often considered to be a part of freedom of speech and expression. Needless to say that no freedom should be absolute lest it may be misutilized and the same also applies to freedom of press. Accordingly, reasonable restrictions have been applied to freedom of press also. Maintaining public order, decency and morality as well as preserving sovereignty and security of State while exercising the freedom of speech and expression is a pre-condition for media just as it is for individual citizens.

3.6 Position in United States

America pretty much leads the world in matters of protecting freedom of speech and expression of its citizens. It covers several aspects under the freedom of speech given to its citizens. In America, you can say practically anything without fear of being dragged away in the middle of the night, locked in a jail cell for offending the wrong person or holding a politically incorrect position.¹²⁸

3.6.1 Constitutional Provisions

That the citizens of the nation have a right to know is the foremost principle of American society. The framers of Constitution believed that the power of knowledge should not be in the hands of the few powerful rulers but rather everyone should have a right to it. In order to ensure a healthy and uninhibited flow of information, freedom of the press was included among the basic human rights protected in the Bill of Rights. In 1791, several amendments to the Constitution came into force as law and accordingly the First Amendment to Constitution guarantees and protects freedom of speech, of the press, of association, of assembly and petition. The First Amendment of the American Constitution specifically provides that Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of people peaceably to assemble, and to petition the Government for a redress of grievances. The said Amendment is the part of the American Bill of Rights. According to the

¹²⁸Available at <http://www.joshuakennon.com/freedom-of-speech-united-states/> (Visited on 20.4.2018)

Bill of Rights, United States Congress cannot make laws of nature infringing the freedom of speech, freedom of press and even limiting the right to assemble peacefully. The First Amendment was adopted into the Bill of Rights in 1791. The freedom of the press is guaranteed by the First Amendment.¹²⁹

The said expressions were provided under the Constitution in such a liberal manner that due to its effect the freedom of speech of press was considered absolute and free from any restrictions whatsoever. However, thereafter when courts were given wider powers of judicial review, US Supreme Court preferred to test each case on the touchstone of the rule of “clear and present danger”. Accordingly, freedom of speech and expression was available to citizens but subject to the condition of “clear and present danger.” However, application of this rule was unable to withstand the pace of development of law and hence, after passage of sometime, US Supreme Court applied the doctrine of “balancing of interests” in its later judicial pronouncements. Thus, freedom of speech is not absolute even in US. Supreme Court of United States has recognized several categories of speech that are excluded from the freedom and it has recognized that governments may enact reasonable time, place or manner restrictions on citizens’ freedom of speech.¹³⁰ All the clauses of First Amendment, when merged together greatly safeguard a US citizen’s freedom of speech. As such, as mentioned in the provision, the First Amendment only explicitly applies to Congress, but Supreme Court of America has interpreted it as applying to the executive and judicial branches as well. The Supreme Court has interpreted the First Amendment's guarantee of freedom of speech in a very broad manner.¹³¹ The following are examples of speech, both direct (words) and symbolic (actions) that the Court has decided are either entitled to First Amendment protections, or not¹³²:

Freedom of speech includes the right:

¹²⁹ Available at <https://usa.usembassy.de/media-freedom.htm> (Visited on 31.7.2018)

¹³⁰ Available at <http://en.m.wikipedia.org/wiki/> (Visited on 26.11.2016)

¹³¹ Dheerajendra Patanjali, Freedom of Speech and Expression India vs. America – A study (www.indialawjournal.org/archives/volume3/issue_4/article_by_dheerajendra.html) (Visited on 5.1.2016)

¹³² www.uscourts.gov/about-federal-courts/educational-resources/about-educational-outreach/activity-resources/ (Visited on 20.4.2018)

- Not to speak (specifically, the right not to salute the flag)¹³³
- Of students to wear black armbands to school to protest a war (Students do not shed their constitutional rights at the schoolhouse gate)¹³⁴
- To use certain offensive words and phrases to convey political messages.¹³⁵
- To contribute money (under certain circumstances) to political campaigns.¹³⁶
- To advertise commercial products and professional services (with some restrictions)¹³⁷
- To engage in symbolic speech (e.g. burning the flag in protest)¹³⁸

Some of the acts which are not covered under the protection offered by freedom of speech are as under:

- To incite actions that would harm others¹³⁹
- To make or distribute obscene materials.¹⁴⁰
- To burn draft cards as an anti-war protest.¹⁴¹
- To permit students to print articles in a school newspaper over the objections of school administration.¹⁴²
- Of students to make an obscene speech at a school sponsored event.¹⁴³

The State under its police powers has the right to punish utterance tending to corrupt public morals including indecent exposure, obscene language and obscene publications; to restrict the distribution of such literature, to prevent their publication, to deny them the use of mails or to seize and destroy them. In one case¹⁴⁴ it was held that there are certain well defined and narrowly limited classes of speech, the prevention and punishment of which has never been thought to raise any constitutional problem. These include the lewd and obscene, the profane, the libelous and the insulting words – those by their very utterance inflict injury or tend

¹³³ West Virginia Board of Education v Barnette, 319 U.S. 624(1943)

¹³⁴ Tinker v. Des Moines, 393 U.S. 503 (1969)

¹³⁵ Cohen v. California 403 U.S. 15(1971)

¹³⁶ Buckley v. Valeo 424 U.S. 1 (1976)

¹³⁷ Bates v State Bar of Arizona 433 U.S. 350 (1977)

¹³⁸ Texas v. Johnson 491 U.S. 397 (1989)

¹³⁹ Schenck v. United States 249 U.S. 47 (1919)

¹⁴⁰ Roth v United States 354 US 476 (1957)

¹⁴¹ United States v O'Brien 391 U.S. 367 (1968)

¹⁴² Hazelwood School District v Kuhlmeier 484 U.S. 260 (1988)

¹⁴³ Bethel School District 43 v Fraser, 478 U.S. 675 (1986)

¹⁴⁴ Chaplinsky vs. New Hampshire 315 US 568

to incite an immediate breach of the peace. It has been well observed that such utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly out-weighed by the social interest in order and morality.¹⁴⁵

As to the test of obscenity, some of the earlier decisions adopted *R v. Hicklin* test of its effect on particularly susceptible persons. But since 1957, the Supreme Court rejected the test and defined obscene material as “material which deals with sex in a manner appealing to prurient interest.” Simultaneously, it also laid down a different test for declaring any material to be obscene, i.e. whether to the average person applying contemporary standards, the dominant theme of the material taken as a whole appeals to prurient interest.”¹⁴⁶ In the same case, the *Hicklin* Test was also rejected mainly on the ground that “judging obscenity by the effect of isolated passages upon the most susceptible person might well encompass material legitimately treating with sex, and so it must be rejected as unconstitutionally restrictive of the freedoms of speech and press. On the other hand, the substituted standard provides safeguards adequate to withstand the charge of constitutional infirmity.” Thus, what is offensive to refinement or good taste is not necessarily obscene unless it is concerned with sexual desire. In short, the test of an obscene publication is whether it is erotic. Merely vulgar language cannot be punished as obscene.¹⁴⁷

The test was further elaborated in the case¹⁴⁸ in following words:

“The proper test of whether a given book is obscene is its dominant effect. In applying this test, relevancy of objectionable parts to the theme, the established reputation of the work in the estimation of approved critics, if the book is modern, and the verdict of the past, if it is ancient, are persuasive pieces of evidence; for works of art are not likely to sustain a high position with no better warrant for their existence than their obscene content.”

¹⁴⁵ Available at <https://www.duo.uio.no/handle/10852/22867> (Visited on 13.8.2018)

¹⁴⁶ *U.S. vs. Ulysses* (1934) 72 F. 2d. 705

¹⁴⁷ *Cohen vs. California* (1970) 403 US 15

¹⁴⁸ *U.S. vs. Ulysses* (1934) 72 F. 2d. 705

It is according to this test of dominant effect that Courts have upheld literature which is intended for sex education and gives an accurate exposition of the relevant facts of sex side of life in decent language even though it may have an incidental tendency to arouse sex impulses.¹⁴⁹ In later cases, Supreme Court held that a publication is not to be deemed obscene even though its predominant appeal be prurient if it has some redeeming social value.¹⁵⁰ Supreme Court has rewritten the law too frequently resulting in failure to set general propositions to represent correct position of the present day law. However, following tests have been set up in case of *Miller vs. California*¹⁵¹ to be satisfied before condemning any material as obscene:

- (i) The average person, applying contemporary community standards should find that the work taken as a whole, appeals to the prurient interest.
- (ii) The work must depict or describe in a patently offensive way, sexual conduct such as representation or description of ultimate sexual act or lewd exhibition of genitals, excretory functions, etc.
- (iii) The work, as a whole, must lack serious literary, artistic, political or scientific value.

As an outcome of the several tests, it can be concluded that it is only the public portrayal of hardcore sexual conduct or lewd exhibition of genitals for its own sake and for ensuing commercial gain which can be punished as obscene. Mere nudity is not enough. The publication must be read as a whole and in order to determine whether it would tend to stir the sex impulses or to arouse lustful thoughts, the Court has to form its opinion as to its effect on a person with average sex instincts, i.e. a normal person. While the text of publication itself is the primary basis for determining whether it is obscene, the setting in which the publication was presented may be presented as an aid to such determination.¹⁵²

Another ground of restriction of free speech is when anything is said which results in contempt of court. In U.S., while punishing contempt of Court, State has to secure a balance between two equally important principles, i.e. need for freedom of expression and that for independence and dignity of the judiciary and due

¹⁴⁹U.S. vs. Dennett (1930) 39 F (2d) 564

¹⁵⁰*Memoirs vs. Massachusetts* (1966) 383 US 413

¹⁵¹ (1973) 413 US 1

¹⁵²*Ginzburg vs. U.S.* (1966) 383 US 463

administration of justice.¹⁵³ The American Supreme Court has held that punishment for contempt of court is constitutionally permissible only where it constitutes-

- (a) An imminent danger to the administrations of justice according to the facts and circumstances involved in the particular case¹⁵⁴
- (b) An interference with the judicial proceedings in the immediate presence of the Court.¹⁵⁵
- (c) Comments on a pending proceeding which would tend to provoke public resistance to the order sought for in the proceeding or to influence the Judge and Jury before they have made up their minds.¹⁵⁶

On the other hand,

- (a) Mere criticism of a Judge is not punishable, however untrue, deliberate unfair or intemperate the criticism may be.

Even criticism of a pending proceeding has been allowed where the proceeding concerned a matter of public interest such as a labour dispute and no possibility of the criticism causing the unfair disposition of pending litigation was shown or where the criticism imputed a general attitude of courts towards persons charged with crime.

In the exercise of police power, State is competent to punish libels not only against individuals but also against groups of people with whose position and esteem in society, the affiliated individual maybe inextricably involved.¹⁵⁷ Right of privacy has been recognized as constitutional right in U.S. so that the question arises as to what weight should be given to it when confronted with the freedom of press to publish news or information relating to public affairs.¹⁵⁸ It has been also held that where the information published is from court records, the Press need not bother to further inquire whether the information was reportable or not.

Thus, in the United States freedom of speech receives a very high degree of constitutional protection. The constitutional protection afforded to freedom of

¹⁵³Cf Walker vs. Birmingham (1967) 388 US 307

¹⁵⁴Bridges vs. California (1941) 314 US 252

¹⁵⁵Nye vs. U.S. (1941) 313 US 33

¹⁵⁶Pennekamp vs. Florida (1946) 328 US 331

¹⁵⁷Beauharnis vs. Illinois (1952) 343 us 250

¹⁵⁸Griswold vs. Connecticut (1965) 381 US 479

speech is perhaps the strongest protection afforded to any individual right under the American Constitution. Simultaneously, as is evident from the above list, American judiciary, too, has played a pivotal role in broadening the scope of freedom of speech.

3.6.2 Legislative Provisions

In addition to protection of freedom of speech by the First Amendment to the American Constitution, several legislations have been enacted from time to time which cover various areas of society that are bound to indulge in overstepping their freedom of speech and expression. These Acts are as under:

3.6.2.1 Espionage Act 1917

The Espionage Act made it a crime to interfere with the war effort or with military recruitment or to attempt to aid a nation at war with the US wartime violence on part of local groups of citizens. In their view the country was witnessing instances of public disorder that represented the public's own attempt to punish unpopular speech in light of government's inability to do so. Amendments to enhance the government's authority under the Espionage Act would prevent mobs from doing what the government could not.

3.6.2.2 Sedition Act 1918

The Sedition Act extended the scope of Espionage Act 1917 to cover a broader range of offences related to speech and expression of opinion that cast the government or the war effort in a negative light. The Act prohibited speeches, remarks or comments of negative nature about government. The Act also made it an offence to use disloyal, profane, scurrilous or abusive language about the United States Government, its flag or its armed forces. Though the legislation enacted in 1918 is commonly known as Sedition Act, it was actually a set of amendments to the Espionage Act.

3.6.2.3 Smith Act 1940

The Smith Act makes it an offence to advocate the violent overthrow of the government, to distribute any material that teaches or advocates such, or to belong to a group with such an aim. In 1957, the US Supreme Court restricted the application of Smith Act to instances of active participation in, or verbal encouragement of specific insurrectionary activities.¹⁵⁹

3.6.2.4 The Freedom of Information Act 1967

The Freedom of Information Act generally provides that any person has the right to request access to federal agency records or information except to the extent the records are protected from disclosure by any of nine exemptions contained in the law or by one of three special law enforcement record exclusions.¹⁶⁰

3.6.2.5 The Privacy Act 1974

The Privacy Act establishes a code of fair information practices that governs the collection, maintenance, use, and dissemination of information about individuals that is maintained in systems of records by federal agencies. A system of records is a group of records under the control of an agency from which information is retrieved by the name of the individual or by some identifier assigned to the individual. The said Act prohibits the disclosure of a record about an individual from a system of records absent the written consent of the individual, unless the disclosure is pursuant to one of twelve statutory exceptions. The Act also provides individuals with a means by which to seek access to and amendment of their records, and sets forth various agency record-keeping requirements.¹⁶¹

3.6.2.6 Communications Decency Act 1996

Communications Decency Act also called Title V of the Telecommunications Act of 1996 was enacted by the U.S. Congress in 1996 primarily in response to concerns

¹⁵⁹ Changing Views of Free Speech in the U.S. – www.infoplease.com/timelines/freespeech.html (Visited on 29.12.2016)

¹⁶⁰ <https://foia.state.gov/Learn/FOIA.aspx> (Visited on 27.4.2018)

¹⁶¹ <https://www.justice.gov/opcl/privacy-act-1974> (Visited on 27.4.2018)

about minors' access to pornography via the internet. It was the first organized attempt to censor the internet since its formation in the early 1960s.¹⁶²

Section 230 of the Communications Decency Act gives immunity to the websites from legal liability for comments made by its users. It was recognized well in advance, almost at the time of enacting the said Section, that holding websites legally responsible for user-generated content would setback the rapidly developing online world. The Act was struck down as it violated the First Amendment's guarantee of freedom of speech.

3.6.2.7 Telecommunications Act 1996

The Telecommunications Act provided major changes in laws affecting cable tv, telecommunications and the internet. The main object of enacting this Act was to stimulate competition in telecommunication services.

3.6.2.8 Digital Millenium Copyright Act 1998

The Digital Millenium Copyright Act endeavors to balance the interests of internet service providers and copyright owners when copyright infringement occurs in digital environment. The Act protects internet service providers from liability for copyright infringement by their users if the internet service provider meets certain statutory requirements.¹⁶³The Act mainly provides for¹⁶⁴:

- (a) Imposing rules prohibiting the circumvention of technological protection measures;
- (b) Setting limitations on copyright infringement liability for online service providers;
- (c) Expanding an existing exemption for making copies of computer programs;
- (d) Significantly updating the rules and procedures regarding archival preservation;
- (e) Mandating a study of distance education activities in networked environments;
- (f) Mandating a study of the effects of anti-circumvention protection rules on the 'first sale' doctrine.

¹⁶² The Communications Decency Act 1996 – Raj Shah (21H931 Seminar in Historical Methods) May 15 1996

¹⁶³ Available at <http://Dmca.harvard.edu/pages/overview>

¹⁶⁴ Available at <http://www.ala.org> (Visited on 30.12.2016)

3.6.2.9 Broadcast Decency Enforcement Act 2005

The Act has been implemented with the object of increasing penalties for violations by television and radio broadcasters of the prohibitions against transmission of obscene, indecent and profane language.

3.6.2.10 Securing the Protection of our Enduring and Established Constitutional Heritage (SPEECH) Act 2010

The SPEECH Act intended to protect American authors and publishers from the risk of enforcing the judgments provided by US mainly in nature of defamation which have been rendered in less media-friendly jurisdictions. The Act requires that American courts should not recognize or enforce any judgment pertaining to defamation which has been obtained outside the United States unless the law applied by the nation where it has been delivered provides at least as much protection for freedom of speech and press in that case as would be provided by the First Amendment to the Constitution of the US and by the law of the state where enforcement was being pursued.¹⁶⁵

3.6.3 Legislative attempts

Apart from above enactments, following Bills which affect the freedom of speech and expression were introduced but shelved:

3.6.3.1 Free Speech Protection Act 2009

The object of the Bill is to create a Federal cause of action to determine whether defamation exists under United States law in cases in which defamation actions have been brought in foreign courts against United States persons on the basis of publications or speech in the United States. In Section 2(3) of the Bill titled as Findings it has been stated that the free expression and publication by journalists, academics, commentators, experts and others of the information they uncover and develop through research and study is essential to the formation of sound public

¹⁶⁵Melkonian Harry, “The Speech Act, A View From Abroad” (August 11, 2012) (Available at www.acdemocracy.org/the-speech-act-a-view-from-abroad/) (Visited on 10.5.2018)

policy and thus to the security of Americans. According to Section 2(5), some persons are obstructing the free expression rights of Americans and the vital interest of the American people in receiving information on matters of public importance by first seeking out foreign jurisdictions that do not provide the full extent of free speech protection that is fundamental in the United States and then suing Americans in such jurisdictions in defamation actions based on speech uttered or published in the United States – speech that is fully protected under First Amendment jurisprudence in the United States and the laws of several States and the District of Colombia. Section 2(12) states that the United States respects the sovereign right of other countries to enact their own laws regarding speech and seeks only to protect the First Amendment rights of Americans in connection with speech that occurs in whole or in part, in the United States.¹⁶⁶ The Bill was introduced in House in 2008 and again in 2009 but neither was passed. Instead, the SPEECH Act referred to above on similar lines was enacted.

3.6.3.2 Free Flow of Information Act 2013

According to Preamble of the Bill, its object is to maintain the free flow of information to the public by providing conditions for the federally compelled disclosure of information by certain persons connected with news media. The Act had it been implemented required that before ordering a journalist to reveal a source, a judge must weigh the public interest in disclosure against the public interest in “gathering and disseminating the information or news at issue and maintaining the free flow of information.” Disclosure could be compelled to prevent a death or kidnapping or an act of terrorism. Thus, the Bill was a shield law i.e. It provided statutory protection for the legal rules which protect journalists against the government requiring them to reveal confidential sources or other information. The Senate Committee has held a hearing on the bill and voted to issue a report to the full chamber recommending that the bill be considered further.¹⁶⁷

¹⁶⁶<https://www.congress.gov/bill/111th-congress/house-bill/1304/text> (Visited on 27.4.2018)

¹⁶⁷www.govtrack.us/congress/bills/113/s987 (Visited on 10.5.2018)

3.6.4 Regulatory bodies

Apart from legislative provisions as discussed above, media is also regulated by other bodies which have been solely constituted with the object of media regulation, maintenance and improvement of media channels, setting basic standards and norms for media adherence, receiving complaints and grievance resolution of media related problems from public, etc. These bodies are as under

3.6.4.1 Federal Communications Commission

The Federal Communications Commission regulates interstate and international communications by radio, television, wire, satellite and cable in all 50 states, the District of Columbia and U.S. territories. The Commission is an independent U.S. government agency under the control and supervision of Congress. It is the federal agency responsible for implementing and enforcing America's communications law and regulations. In 1972, Congress passed the Federal Advisory Committee Act to ensure that advice by advisory committees is objective and accessible to the public. The Advisory committees provide federal departments and agencies with access to expertise and advice on a broad range of issues affecting policies and programs. Some of the current advisory Committees established under the said Act are Broadband Deployment Advisory Committee, Communications Security, Reliability and Interoperability Council, Diversity and Digital Empowerment, World Radiocommunication Conference, Technological Advisory Council.¹⁶⁸ Each of these Committees aim at maintenance, improvement and growth of the area for which they have been developed. The major functions of FCC are¹⁶⁹:

- Developing and implementing regulatory programs;
- Processing applications for licenses and other filings;
- Encouraging the development of innovative services;
- Conducting investigations and analyzing complaints;
- Public safety and homeland security;
- Consumer information and education

¹⁶⁸ Available on www.fcc.gov/about/overview (Visited on 26.4.2018)

¹⁶⁹ Available on www.fcc.gov/about-fcc/what-we-do (Visited on 26.4.2018)

The FCC governs two major Bureaus namely The Media Bureau and the International Bureau. The Media Bureau develops, recommends and administers the policy and licensing programs relating to electronic media, including cable television, broadcast television and radio in the United States and its territories. It also administers licensing and policy matters for broadcast services and cable, and handles post-licensing matters for satellite services. Likewise, the International Bureau administers international telecommunications and satellite programs and policies including licensing and regulatory functions. The Bureau also promotes pro-competitive policies abroad, coordinates global spectrum activities and advocates U.S. interests in international communications and competition.¹⁷⁰

3.6.4.2 CTIA – The Wireless Association

CTIA represents the U.S. wireless communications industry and companies throughout the mobile ecosystem. Initially at its establishment in the year 1984, it was known as Cellular Telecommunications Industry Association but later in 2004, it changed to Cellular Telecommunications and Internet Association. The major functions of CTIA are¹⁷¹:

- To advocate for legislative and regulatory policies at federal, state and local levels that foster the continued innovation, investment and increasing economic impact of America's wireless industry. CTIA is active on a wide range of issues including spectrum policy, wireless infrastructure and Internet of Things.
- To convene the industry to tackle most difficult challenges and coordinate voluntary best practices and initiatives. CTIA works with members to develop test plans and certification processes for mobile devices, coordinates with members and other industry leaders to ensure the security of mobile networks and devices and leads industry initiatives to enhance accessibility, etc.
- To promote its members through numerous campaigns aimed at building awareness among policymakers and the general public as well as through industry-leading events on topics ranging from cybersecurity to 5G.

¹⁷⁰ www.fcc.gov/international (Visited on 26.4.2018)

¹⁷¹ Available at www.ctia.org/about-ctia/our-mission (Visited on 26.4.2018)

3.6.4.3 National Cable and Telecommunications Association (NCTA)

The major function of NCTA is to monitor, track, conduct research and analyze state regulatory, legislative and competition issues related to broadband, internet, telecommunications and video.¹⁷²

3.6.4.4 Fairness & Accuracy in Reporting (FAIR)

Independent, aggressive and critical media are essential to an informed democracy. But mainstream media are increasingly cozy with the economic and political powers they should be watchdogging. Mergers in the news industry have accelerated, further limiting the spectrum of viewpoints that have access to mass media. With U.S. media outlets overwhelmingly owned by profit conglomerates and supported by corporate advertisers, independent journalism is being compromised.

FAIR is the national progressive media watchdog group challenging corporate media bias and misinformation. It has been offering well-documented criticism of media bias and censorship since 1986. It functions to keep the First Amendment active by seeking greater diversity in the press and by scrutinizing media practices that marginalize public interest, minority and dissenting viewpoints. Being an anti-censorship organization, it also brings to light the neglected news stories and defends working journalists whenever they are muzzled. According to FAIR, structural reform is ultimately needed to break up the dominant media conglomerates, establish independent public broadcasting and promote strong non-profit sources of information. The organization works with both activists and journalists. It also remains connected with reporters at news outlets across the country for providing constructive critiques whenever required and supports exceptional journalism. It encourages general public to give its feedback to media alongwith any suggestions, complaints or queries connected to news programs. Thus, it encourages the audience to become media activists rather than being mere passive news views.¹⁷³

¹⁷² Available at www.ncta.com/careers (Visited on 26.4.2018)

¹⁷³ Available at www.fair.org/about-fair (Visited on 30.12.2016)

3.6.4.5 Newseum Institute

Exercising, defending and promoting freedom is crucial to protecting the life of citizens. The Newseum Institute headquartered at the Newseum in Washington DC promotes, explains and defends free expression and the five freedoms of the First Amendment namely religion, speech, press, assembly and petition. The Institute explores the challenges confronting freedom around the world with a variety of initiatives including its First Amendment Center which serves as a forum for the study and debate of free expression issues. The Newseum and the Newseum Institute regularly host compelling programs that seek to generate solutions to some of the most pressing national and international challenges of the day. By embracing its role as a neutral forum committed to fostering open discussions, the Newseum and the Newseum institute engage in the central debates like future of investigative journalism, tensions between national security and privacy, etc.¹⁷⁴ The Institute was renamed as Freedom Forum Institute from May 1st, 2018. However, the Institute's important mission remains the same, namely to champion the five freedoms of the First Amendment. The Freedom Forum is a nonpartisan foundation dedicated to free press, free speech and free spirit.¹⁷⁵

3.6.4.6 American Society of News Editors

The American Society of News Editors focuses on leadership development and journalism-related issues. It was established in 1922 as a nonprofit professional organization and was initially known as American Society of Newspaper Editors. It promotes fair, principled journalism, defends and protects First Amendment rights and fights for freedom of information and open government. ASNE's members include editors, producers, directors in charge of journalistic organizations or departments, opinion journalists, deans or faculty at university journalism schools, leaders and faculty of media related foundations and training organizations and other individuals at the discretion of board. The main objects of ASNE are:

- (a) To protect First Amendment rights and enhance the free flow of information;

¹⁷⁴ Available at www.newseum.org/about (Visited on 30.12.2016)

¹⁷⁵ Available at www.newseum.org/about/freedom-forum (Visited on 11.5.2018)

- (b) To drive the quest for diversity and inclusion in workplace and in news content across all platforms;
- (c) To promote the news media's role in providing information necessary to informed practice of citizenship;
- (d) To encourage innovation and celebrate creativity in news organizations.¹⁷⁶

3.6.4.7 National Association of Broadcasters

The National Association of Broadcasters overlooks the functioning of radio and television broadcasters in U.S. As the premier trade association for broadcasters, NAB advances the interests of its members in federal government, industry and public affairs; improves the quality and profitability of broadcasting; encourages content and technological innovation and spotlights the important and unique ways in which stations serve the communities. The main features of NAB's functioning are advocacy, education and innovation. Thus, NAB is the chief advocate of broadcasters in U.S and it ensures that policymakers have knowledge of the issues that can affect broadcasting industry. It also helps broadcasters in exploring new opportunities in the present digital age. Due to advances in technology, broadcasters get more opportunities to find better ways to deliver high-quality content and services as are expected by the people. Likewise, NAB also offers several programs to broadcasters which help them to promote diversity in workplace, strengthen their business and help in growing their careers. It provides free public service materials to assist in implementing locally focused community service initiatives and offers educational programs to support diversity and professional development.¹⁷⁷

3.6.4.8 National Coalition Against Censorship (NCAC)

NCAC's mission is to promote freedom of thought, inquiry and expression and oppose censorship in all its forms. The Coalition formed in response to the 1973 Supreme Court decision in *Miller v. California*, which narrowed First Amendment protections for sexual expression and opened the door to obscenity prosecutions.

¹⁷⁶ Available at <http://www.asne.org/content.asp> (Visited on 30.12.2016)

¹⁷⁷ Available at <http://www.nab.org/about-us> (Visited on 5.1.2017)

Over 40 years, as an alliance of more than 50 national non-profits, including literary, artistic, religious, educational, professional, labor, and civil liberties groups, NCAC has engaged in direct advocacy and education to support First Amendment principles. NCAC works with community members to resolve censorship controversies without the need for litigation.¹⁷⁸

3.6.4.9 Internet Free Expression Alliance

Today internet has evolved and become a powerful and positive forum for free expression. Internet users, online publishers, and other groups along with free speech and journalistic organizations share a common interest in opposing the adoption of techniques and standards that could limit the vibrance and openness of the internet as a communications medium. The Internet Free Expression Alliance serves to¹⁷⁹:

- (a) Ensure the continuation of internet as a forum for open, diverse and unimpeded expression;
- (b) To maintain vital role the internet plays in providing an efficient and democratic means of distributing information around the world;
- (c) Identifying new threats to free expression and First Amendment values on the internet whether legal or technological;
- (d) Protect the free speech and expression rights of both the speaker and the audience in interactive online environment;
- (e) Encourage approaches that highlight “recommended” internet content rather than those that restrict access to materials labelled as “harmful” or otherwise objectionable and emphasize that any rating that exists solely to allow specific content to be blocked from view may inhibit the flow of free expression;
- (f) Ensure that internet speakers are able to reach the broadest possible interested audience and that internet listeners are able to access all material of interest to them;
- (g) Oppose any governmental effort to promote, coerce or mandate the rating or filtering of online content;

¹⁷⁸ Available at <http://ncac.org/about-us> (Visited on 27.4.2018)

¹⁷⁹ Available at <http://www.ifea.net/mission.html> (Visited on 13.4.2018)

- (h) Promote openness and encourage informed public debate and discussion of proposals to rate and/or filter online content.¹⁸⁰

The broad constitutional protection provided by First Amendment and similar provisions in the constitutions of 50 states in U.S. does not leave scope for any other law that may provide for a more exhaustive freedom of press. The existing laws that are in force only provide additional protections for those categories which have not been covered under the First Amendment to the Constitution. Thus, while The Privacy Act 1974 regulates collection and dissemination of personal information contained in files of federal agencies, the Privacy Protection Act, 1980 establishes protection from police searches of newsrooms. Likewise The Broadcast Decency Enforcement Act 2005 keeps a guard on violations by television and radio broadcasters of the prohibitions against transmission of obscene, indecent and profane language while the Communications Decency Act 1996 regulates indecency and obscenity in cyberspace. Bodies such as the Federal Communications Commission working since 1934 is empowered with licensing and rulemaking powers in respect of media houses subject to public interest, convenience and necessity. The National Association of Broadcasters overlooks the functioning of radio and television broadcasters in U.S. Thus, the print and electronic media are amply safeguarded in United States.

3.7 Position in United Kingdom

India maintains a hybrid legal system with an array of several segments of law such as civil law, religious law as well as common law within its legal framework. The same have been largely inherited from the colonial era and various legislations which were formerly introduced by the British are still in effect in modified forms today. Since the drafting of Indian Constitution, Indian laws also adhere to the United Nations guidelines on human rights law as well as environmental law.¹⁸¹ Accordingly, the researcher has studied the position of freedom of speech and expression in United Kingdom. Although there is no equivalent to the first

¹⁸⁰ Available at <http://www.ifea.net/mission.html> (Visited on 30.12.2016)

¹⁸¹ Available at http://En.m.wikipedia.org/wiki/Law_of_India (Visited on 11.5.2018)

amendment in the United Kingdom, the British through a long history recognizing the importance of freedom of speech, enjoy some of the greatest freedom of any people in the world to write and speak their mind. Yet, in a number of areas, methods of controlling speech used in the United Kingdom would violate the first amendment in the United States.¹⁸²

3.7.1 Restrictions under Constitution

Freedom of speech and expression are extremely important rights in U.K. They have been recognized under the European Convention of Human Rights as a fundamental right. In Britain these rights can be found as early as 1215 in the Magna Carta. The European Convention was drafted by newly formed Council of Europe in Rome on 4.11.1950. In 1998, United Kingdom incorporated the European Convention and the guarantee of freedom of expression it provided under Article 10 into its domestic law under the Human Rights Act.¹⁸³ Prior to the Human Rights Act, the freedom of expression was permitted as long as the law did not prevent it. But now the Human Rights Act guarantees under the law, the rights to freedom of speech and expression.¹⁸⁴ The Convention for protection of human rights and fundamental freedoms aimed to achieve greater international unity in recognizing the equal rights of men and women and to incorporate the traditions of civil liberty. Article 10 of the Convention provides for freedom of expression. It states as under¹⁸⁵:

- (1) Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.
- (2) The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder

¹⁸² Shapiro Stephen J. "Comparing Free Speech: United States v United Kingdom", University of Baltimore Law Forum: Vol. 19 No. 2 Article 5 (Pg. 1)

¹⁸³ Available at http://En.m.wikipedia.org/wiki/Censorship_in_the_United_Kingdom (Visited on 11.5.2018)

¹⁸⁴ Available at <http://www.civilrightsmovement.co.uk/right-freedom-speech.html> (Visited on 11.5.2018)

¹⁸⁵ Available at <https://www.duo.uio.no/handle/10852/22867> (Visited on 13.8.2018)

or crime, for the protection of health or morals, for the protection of reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of judiciary.

Thus, under Article 10, the citizens of UK have a right to hold and express opinions, to receive and share information and ideas and to express opinions which others might find offensive or shocking. Article 10 however is a qualified right which means that a citizen's right to freedom of expression can be curbed if it is in the interests of public safety or for protection of rights and freedoms of others.¹⁸⁶ It means that if an individual in the process of exercising his freedom of speech and expression comes out with an intellectual work in the nature of publication of offensive nature, the same may be restricted on the ground of falling under reasonable restrictions. The major grounds of restrictions are as under:

3.7.1.1 Security of the State

Preserving security of the State is of foremost importance in any nation. A citizen may exercise his freedom of speech and expression but if it is done at the cost of disturbing security of the state, the same needs to be restricted immediately because exercise of one's freedom should not be a cause for nation's distress. Hence, in the interests of "security of the State" in England, following restrictions have been imposed by various statutes on freedom of speech and expression:

(a) The Treason Act, 1795:

Under the said Act, it is a treason to express, utter or declare by publishing any printing or writing, an intention or to incite another, to commit any of the acts of treason.

(b) The Unlawful Oaths Act, 1797:

The Act makes it an offence for any person to administer or cause to be administered or to aid or consent to the administering or taking of an oath to bind the person taking the oath to engage in mutinous or seditious purpose or to disturb the public peace.

(c) The Incitement to Mutiny Act, 1797:

¹⁸⁶ Available at <http://www.rightsinfo.org/the-rights-in-the-european-convention/> (Visited on 13.11.2016)

The Act makes it an offence to endeavor to seduce the King's soldiers or sailors from their duty or to commit an act of mutiny or traitorous practice.

(d) The Incitement to Disaffection Act 1934:

Under the Act, it is an offence to attempt to seduce any member of the armed forces from duty, or to be in possession of any document for this purpose, with intent to commit, abet or counsel the commission of above offence.

(e) The Police Act, 1964:

The Act makes it an offence to attempt to cause disaffection amongst members of any police force or to attempt to induce any such member to withhold his services or to commit breaches of discipline.

(f) Further, during periods of war, additional restrictions are placed by Defence Regulations, made under the Emergency Powers (Defence) Act. Thus, Defence Regulations 39B, 1939 make it an offence to make use of any false statement to influence public opinion in a manner likely to be prejudicial to the defence of the realm or the efficient prosecution of the war.

3.7.1.2 Friendly relations with foreign States

Peace can be maintained in the world only when friendly relations are made and maintained between all nations of the world. To this end treaties are signed and conferences are held between nations at regular intervals for maintaining a healthy business and cultural environment. It is difficult to return back the balance of harmony and existence of cooperation if it gets hindered by any individual. Therefore, it has been considered a reasonable restriction in the exercise of freedom of speech and expression so that nobody utilizes his freedom to the extent of creating disturbances with friendly foreign states. In England there are two-tier provisions for maintaining friendly relations with foreign States, i.e.-end, often peace treaties, world conventions and other forms of

- (i) As per the common law, everyone is guilty of a misdemeanor who publishes any libel which has a tendency to degrade, revile or expose to hatred and contempt any foreign prince, ambassador or other foreign dignitary with intent to disturb peace between the United Kingdom and the country to which any such person belongs. However, it

is not an offence if the writing is a fair criticism on a matter of public interest or if it is calculated to disturb the government of a foreign country.

- (ii) The Foreign Enlistment Act 1870 prevents disturbance between States at peace with United Kingdom, by making any of the following acts by a British subject an offence if done without the King's licence-
 - (a) Acceptance of a commission or engagement in the naval or military forces of a foreign State at war with a friendly State or leaving the country with intent to accept such engagement;
 - (b) Building, equipment or dispatch of a ship, knowing or having reasonable cause to believe that it will be employed by a foreign State at war with a friendly State.
 - (c) Preparation or fitting out of a naval or military expedition against the territory of a friendly State.

3.7.1.3 Public Order

The freedom of speech and expression is a fundamental right guaranteed to one and all. A healthy exercise of this freedom will ensure the overall development of a man while an excess of this exercise in such a way that it hinders another's similar right will only lead to disturbance. An individual should not overstep the freedom of speech and expression of another while using his own right. Acts like threatening or using abusive language whether orally or in writing or even through visible representations will only disturb the public order in the society. In England, following statutes impose restrictions in the interest of public order on the freedom of speech and expression:

- (a) The Public Order Act 1986 makes it an offence
 - to use threatening, abusive or insulting words or behavior towards another person;
 - to distribute or display any writing, sign or visible representation which is threatening, abusive or insulting with intent to cause that other person to fear immediate unlawful violence, or to provoke such violence or whereby that other person is likely to believe will be used or whereby it is likely to be provoked.

- to use threatening, abusive or insulting words or behavior or displaying any writing, sign or other visible representation of similar nature within the hearing or sight of a person likely to cause harassment, alarm or distress thereby.
 - to incite racial hatred by using threatening, abusive or insulting words or behavior or writing with intent to stir up racial hatred.
- (b) The Wireless Telegraphy Acts 1949, the Broadcasting Act 1981 and the Telecommunications Act 1984 provide for regulating the communications made on radio and television.
- (c) Knowingly making a false complaint to the police is an offence under the Criminal Law Act 1967
- (d) Under the Incitement of Disaffection Act 1934, it is an offence maliciously to endeavor to seduce any member of the Armed Forces from his duty or allegiance.

3.7.1.4 Decency or morality

Obscenity is an offence against public morals and at common law, it is a misdemeanor committed either by making an indecent publication or by indecent conduct. Publishing indecent remarks or offensive pictures and other content that harms the feelings of any class of the society has been considered a reasonable restriction in the exercise of freedom of speech and expression. Even the media is restricted from publishing such content that directly affects the thoughts of any person going through their publication and makes them further share such offensive material or indulge in any acts which are punishable. In England, the test of an indecent publication or 'obscene libel' is laid down in the case of *R. v. Hicklin* stating that the test of obscenity is this, whether the tendency of matter charged is to deprave and corrupt those whose minds are open to such immoral influences, and into whose hands a publication of this sort may fall.¹⁸⁷

The Hicklin Test was laid down by the Queen's Bench in landmark case of *Regina vs. Hicklin* or famously known as *R. vs. Hicklin*. In the said case, it was held that the test to determine obscenity would be to verify if tendency of the matter charged as obscene is to deprave and corrupt those whose minds are open to such

¹⁸⁷ *R vs. Hicklin* (1868) 3 QB 360

immoral influences and into whose hands a publication of this sort may fall. Once the Hicklin test is applied, any publication can be judged for obscenity based on isolated passages of a work considered out of context. Thus, Hicklin Test laid down a very strict criteria to judge obscenity in any matter because on application of the same, any material could be declared as obscene merely on basis of few lines written in such a manner without considering the entire context in which they have been written.

It was also further held that “a medical treatise with illustration necessary for information of students or practitioners may not be treated as obscene if so published as to reach such persons, though it might be indictable if exhibited in a shop window for any passer-by to see. And to exhibit a picture of the nude in a public gallery is regarded as different from selling photograph of it in the street.” Thus it can be said that obscenity can be determined from the following conditions as laid down in *R vs. Hicklin*:

- (a) If the content in any publication is of such a nature that it spoils the minds of people who are already open to such immoral influences, it shall be considered as “obscene”.
- (b) If the content in any publication is published for a specific group of people for academic purpose or for public good, it shall not be considered as obscene. But if the same publication is exhibited on public streets or displayed in art gallery, the same may be treated as obscene. However, the Hicklin Test has been rejected on the ground that “judging obscenity by the effect of isolated passages upon the most susceptible person might well encompass material legitimately treating with sex, and so it must be rejected as unconstitutionally restrictive of the freedoms of speech and press. On the other hand, the substituted standard provides safeguards adequate to withstand the charge of constitutional infirmity.”¹⁸⁸

It was further held in case of *U.S. vs. Ulysses* that what is offensive to refinement or good taste is not necessarily obscene unless it is concerned with sexual desire. In short, the test of an obscene publication is whether it is erotic. The proper test of whether a given book is obscene is its dominant effect. In applying this test,

¹⁸⁸ *U.S. vs. Ulysses* (1934) 72 F. 2d. 705

relevancy of the objectionable parts to the theme, the established reputation of the work in the estimation of approved critics, if the book is modern, and the verdict of the past, if it is ancient, are persuasive pieces of evidence; for works of art are not likely to sustain a high position with no better warrant for their existence than their obscene content.”

Main features of the present English law namely Obscene Publications Act 1959 on this issue are as under:

- (a) Essence of the offence is not the motive of writer or the purpose of writing but its tendency to deprave and corrupt.¹⁸⁹ The Obscene Publications Act 1959 has also stated that a matter is deemed to be obscene if its effect or the effect of any one of its items is, if taken as a whole, such as to tend to deprave and corrupt persons who are likely having regard to all relevant circumstances to read, see or hear it.
- (b) Since Obscene Publications Act 1959 does not define the words “deprave and corrupt”, the common law interpretation will apply. These words, it has been held do not mean merely offensive, shocking or disgusting, but mean suggesting to the minds of the young of either sex or even persons of more advanced years, thoughts of a most impure and libidinous character.¹⁹⁰
- (c) Tendency of a publication is to be determined by a reading of the publication itself; the examination of other books or opinions of people relating to other books are irrelevant.¹⁹¹
- (d) The offending article must be read as a whole to determine its effect.
- (e) Purity of motive is not an excuse for publishing indecent matter but if the manner and extent of publication are within appropriate bounds, it is a good defense that the publication is for the public good as being necessary or advantageous to religion, science, art or literature.¹⁹²
- (f) Where there is innocent dissemination, the Obscene Publications Act 1959 makes it an exception to the restriction. Accordingly if booksellers and others have not read

¹⁸⁹ Ct. R. V Reiter (1954) 1 All ER 741

¹⁹⁰ R vs Hicklin (1868) 3 QB 360

¹⁹¹ Ct. R. vs. Reither (1954) 1 All ER 741

¹⁹² R. vs. Barraclough (1906) 1 KB 201

the publication in question or have no reason to suspect its contents, they shall not be guilty of the offence.

- (g) Publication is an essential ingredient of the offence. Showing of the obscene matter to any other person constitutes publication.¹⁹³

Apart from the Obscene Publications Act, some of the other statutes in England which deal with obscenity and indecency are as under:

(a) Vagrancy Act 1838

The Act penalizes exhibition of obscene pictures, posters, etc in any street, public place, shop window or the exposure of his person by a male to insult a female.¹⁹⁴

(b) Customs Act 1876

The Act prohibits importation of obscene or indecent matter and also empowers the custom authorities for their destruction.

(c) Indecent Advertisements Act 1889

The Act penalizes certain advertisements relating to venereal disease or sexual ailments if such advertisements have been displayed in any public place like building, street, public urinals, etc.

(d) Post Office Acts 1908-1953

Under this Act, it is an offence for any person to use mails for sending indecent or obscene matters. The Post Office in such cases is empowered to detain and open postal packets and even destroy the obscene articles.

(e) Judicial Proceedings (Regulation of Reports) Act, 1926

The Act prohibits publication of indecent matters relating to judicial proceedings or particulars of matrimonial cases.

(f) Children and Young Persons (Harmful Publications) Act 1955

The Act penalizes import and sale of harmful publications like stories, etc. which portray the commission of crimes, acts of violence or cruelty and incidents of repulsive horrible nature in such a way that the work as a whole would tend to corrupt a child or young person in whose hands it might fall. The Act mainly aims at restricting and penalizing horror comics.

¹⁹³ De Montalk's Case (1932) 23 Cr App Rep 182

¹⁹⁴ Ford vs. Falcome (1971) 2 All ER 1138

(g) Sexual Offences Act 1967

The Act punishes indecent acts by or between males in public even though such acts between consenting males would be no offence if done in private.

(h) Theatres Act 1968

The Act abolishes censorship of the theatre and penalizes presentation or directing of an obscene play.

(i) Unsolicited Goods and Services Act, 1971

The Act makes it an offence to send to another person any publication or advertising material which is unsolicited and which describes or illustrates human sexual technique.

(j) Protection of Children Act 1978

The Act makes it an offence to take, distribute or exhibit indecent photographs of children.

(k) Local Government (Misc. Provisions) Act 1982

The Act empowers local authorities to refuse licence to shops dealing in sale of sex articles.

Thus, England has ample provisions for restricting the freedom of speech and expression of citizens in case it is found that the freedom is being misused for spread of indecent and obscene activities.

3.7.1.5 Contempt of Court

Subjecting a court to contempt in either form - civil or criminal, has been considered a restriction to the freedom of speech and expression. Using abusive language in pleadings or while addressing the court or outraging the court with insulting remarks will merely shake the faith of a common man in the justice system of the country. Therefore, no litigant, howsoever dejected or disappointed with the justice system of his country can make an excessive use of his freedom of speech and expression so as to humiliate the court. It is a reasonable restriction to his freedom of speech and expression and rightly so. The basic foundation of the English Law of contempt is based on the decision given in *Rex vs. Almon*¹⁹⁵ wherein it was observed that “It is

¹⁹⁵ (1765) Wilmot Notes 243

not the own cause of Judges, but the cause of public which they are vindicating at the instance of the public..and so if the seat of Justice abuses that confidence and an impression is created in the public mind that the Judge is excitable indecorum and insulting to party or counsel, then the confidence of the public is shaken in the administration of justice.. and whenever man's allegiance to the law is fundamentally shaken, it is the most fatal and dangerous obstruction of justice and calls out for a more rapid and immediate redress than any obstruction whatsoever not for the sake of the judges as private individuals but because they are the channels by which the King's justice is conveyed to the people.”

Further in the landmark case of *R. v. Grey*¹⁹⁶, three kinds of contempts of Court have been observed namely:

- (1) Scandalising the Court itself;
- (2) Abusing parties involved in cases before the Court;
- (3) Prejudicing mankind against persons before Court hears the cause.

In case of *R. vs Editor of Statesman*¹⁹⁷, it was held that there are two primary considerations which should weigh with the Court in such cases, namely:

- (a) Whether the reflection on conduct or character of the Judge is within the limits of fair and reasonable criticism, and
- (b) Whether it is a mere libel or defamation of the Judge or amounts to a contempt of the Court.

3.7.1.6 Defamation

No person can defame someone in the garb of exercising his right of freedom of speech and expression. Using spoken or written words, signs or visible representations, making or publishing imputations so as to harm a person's reputation amount to defaming him. Citizen is free to fully utilize his right to speech and expression but it should not go to the extent of harming a person's reputation before the society or the world at large. A man's reputation and image in a society are a result of years and years of hard work. No Constitution should be empowered to

¹⁹⁶ (1900) 2 QB 36

¹⁹⁷ (1928) 44 TLR 301

give such rights to its citizens which can injure such reputation. In this respect, defamation has been considered a reasonable restriction while utilizing the freedom of speech and expression.

In U.K., libel is an actionable wrong and indictable offence when there is a danger to public peace. Even if libel is committed in the course of a dramatic performance, it is punishable under the Theatres Act 1968. However, since there is no constitutional right to the right of privacy, newspapers can freely obtain and publish details of private lives of people without any public interest justification.¹⁹⁸The Defamation Act 2013 has reformed the English defamation law on issues of the right to freedom of expression.

3.7.1.7 Incitement to an offence

Provoking someone to commit a crime has also been considered a reasonable restriction while exercising freedom of speech and expression. Often it is found that a person may not commit crime himself but incite someone else with similar intentions to actually commit the criminal act. Freedom of speech and expression cannot be exercised in a negative manner or to incite someone to commit offences.

In U.K., if a person incites somebody to commit felony, it is indictable at common law even if the incitement has no effect. In case of *R vs. Higgins*¹⁹⁹, it was held that if the addressee does not even read the letter containing incitement, it is still punishable. Even an attempt to incite the commission of such offence is indictable. Provoking somebody to commit acts of violence by mischievous libels including even libels reflecting on the memory of dead, burning effigies, etc are offences on the same ground.

Thus, to conclude, Article 10 of the European Convention of Human Rights provides right to freedom of expression, freedom to hold opinions and also to receive and impart information and ideas without interference by public authority and regardless of frontiers. The only restrictions are those as mentioned above for protecting the peace in state and for exercise of the said freedom by one and all without stepping on the similar rights of fellow being.

¹⁹⁸ Robertson, *Freedom, the Individual and the Law* (1989)

¹⁹⁹ (1801) 2 East 5

3.7.2 Legislative Provisions

In addition to the constitutional provisions and reasonable restrictions as discussed above, some of the important legislations which deal with the subject of research are as under:

3.7.2.1 Defamation Act 1952

Section 7 of the said Act provides for Qualified privilege of newspapers which states that subject to the provisions of this section, the publication in a newspaper of any such report or other matter as is mentioned in the Schedule namely “Statements privileged without Explanation or Contradiction” shall be privileged unless the publication is proved to be made with malice. It further states that in an action for libel in respect of the publication of any such report or matter as is mentioned in Part 11 namely “Statements Privileged subject to explanation or Contradiction”, the provisions of this section shall not be a defence if it is proved that the defendant has been requested by the plaintiff to publish in the newspaper in which the original publication was made a reasonable letter or statement by way of explanation or contradiction, and has refused or neglected to do so, or has done so in a manner not adequate or not reasonable having regard to all the circumstances.²⁰⁰

3.7.2.2 Obscene Publications Act 1959

Obscene Publications Act was enacted against spread of obscene publications in forms of printed material. It was originally adopted in 1857 and in much revised form in 1959. The earlier act, also called Lord Campbell’s Act was very stringent and not only outlawed obscene publications but empowered police to search premises on which obscene publications were kept for sale or distribution. Prior to enactment of the Act in 1959, cases of obscenity were dealt with by the ruling observed in case of *R v Hicklin* which did not make any exceptions for cases involving artistic merit or public good. The 1857 law was often criticized as it was widely felt that it often compelled authors to falsify social realities. The application

²⁰⁰Available at http://www.legislation.gov.uk/ukpga/1952/66/pdfs/ukpga_19520066_en.pdf

of the law in specific cases was also attacked, for judges frequently permitted prosecutions on the basis of isolated passages. Judges also refused to permit evidence of the author's intent or purpose or of his literary reputation, or to hear the testimony of recognized literary critics. The law was also criticized because the prosecutions were often directed against booksellers, who were indifferent to the fate of the book in question.²⁰¹ The Act of 1959 was enacted with object to amend the law relating to the publication of obscene matter and also to provide for protection of literature as well as to strengthen the law concerning pornography. The new law highlighted on test to determine if something is obscene (Sec. 1), prohibition of publishing 'obscene material' (Sec. 2), powers of search and seizure (Sec. 3), defense of public good applicable to prosecutions for publication of obscene materials and to the forfeiture proceedings described in Section 3.

The law after its enactment first came notably into picture in case of *R v Penguin Books Ltd.*²⁰² for publishing a book titled "Lady Chatterley's Lover" by D.H. Lawrence. The book was banned in U.K., U.S., Canada, Australia, India and Japan for its explicit descriptions of sex and usage of several offensive words. At the trial, views of several academic critics and subject experts were taken to consider if the book was actually obscene or not. After the trial ended with a not guilty verdict, the book was allowed to be openly published and sold in England as well as other parts of the world.²⁰³

3.7.2.3 Telecommunications Act 1984

The Telecommunications Act 1984, an Act of Parliament, gives potentially wide-reaching power to the Secretary of State in relation to communications networks. Sec. 94 of the Act empowers the Secretary of State. It states that the Secretary of State may, after consultation with a person to whom this section applies, give to that person such directions of a general character as appear to the Secretary of State to be necessary in the interests of national security or relations with the government of a

²⁰¹ Available at <https://www.britannica.com/event/Obscene-Publications-Act> (Visited on 30.4.2018)

²⁰² (1961) Crim LR 176

²⁰³ Available at https://en.m.wikipedia.org/wiki/Obscene_publications_Act_1959 (Visited on 16.8.2018)

country or territory outside the United Kingdom. The present section applies to OFCOM and to providers of public electronic communications networks.

3.7.2.4 Malicious Communications Act 1988

The Malicious Communications Act 1988 makes it an offence in England and Wales to send or deliver letters or other articles for the purpose of causing distress or anxiety. In other words, any type of communication or message which is indecent, grossly offensive, threatening or false is an offence under the present Act. Earlier its applicability was restricted only to printed material but eventually, the section has been amended to include electronic communications also.

3.7.2.5 Broadcasting Act 1990

The Broadcasting Act 1990 has been enacted with following objects:

- (i) For making new provisions with respect to provision and regulation of independent television and sound programme services and of other services provided on television or radio frequencies.
- (ii) The Act also is empowered to amend the law relating to broadcasting and provision of television and sound programme services
- (iii) to make provisions with respect to the supply and use of information about programmes.
- (iv) to make new provisions relating to Broadcasting Complaints Commission
- (v) To provide for the establishment and functions of a Broadcasting Standards Council

3.7.2.6 The Human Rights Act 1998

Citizens of UK are entitled to some fundamental rights and freedoms and the Human Rights Act 1998 provides for them. The applicability of said Act is threefold namely:

- (i) It incorporates the rights set out in European Convention on Human Rights into domestic British law.
- (ii) It requires all public bodies carrying out public functions to respect and protect human rights of every individual.

- (iii) Parliament in UK seeks to ensure that new laws are compatible with rights set out in European Convention on Human Rights.

Article 10 of the Act provides that everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.²⁰⁴

3.7.2.7 Communications Act 2003

The Communications Act 2003 has been enacted with following objects:

- (i) To confer functions on the Office of Communications;
- (ii) To make provisions about regulating of provision of electronic communications networks and services and of the use of electro-magnetic spectrum;
- (iii) To make provision about regulation of broadcasting and of provision of television and radio services;
- (iv) To make provision about mergers involving newspaper and other media enterprises

Sec. 127(1) of the Act makes it an offence to make improper use of a public electronic communications network. Thus, sending a message or other matter that is grossly offensive or of an indecent, obscene or menacing character is an offence under the Act. Likewise, Sec. 127(2) makes it an offence to send messages for the purpose of causing annoyance, inconvenience or needless anxiety to another. If convicted, the punishment may extend upto 6 months imprisonment and a fine of upto 5000 pounds.²⁰⁵

²⁰⁴ Available at <https://www.duo.uio.no/handle/10852/22867> (Visited on 16.8.2018)

²⁰⁵ Available at <https://www.iomcc.im/media/1021/telecommunications-act-1984.pdf> (Visited on 16.8.2018)

3.7.2.8 Digital Economy Act 2010

The Digital Economy Act 2010 makes provisions for functioning of the Office of Communications and online infringement of copyright and penalties for the same. It also makes provisions for regulation of television and radio services and regulation of the use of electromagnetic spectrum as well as for internet domain registries, etc. U/s. 37 of the Act, Secretary of State may by order provide for any condition included by virtue of this Act in a regulatory regime to be excluded or any condition excluded from a regulatory regime by an order to be included in the regime again.

Currently the Digital Economy Bill 2016-17 is being considered for implementation. It is substantially different and shorter than the Digital Economy Act 2010 whose several provisions largely ended up not being passed into law.²⁰⁶ The major highlights of the Bill are:

- Allowing Ofcom, the communications sector's regulator to financially penalize communications providers for failing to comply with licence commitments;
- Creating an age-verification regulator to publish guidelines about how pornographic sites should ensure their users are aged 18 or above.

3.7.2.9 Independent Television Commission (ITC) Programme Code

Broadcasting sector in UK is governed by following major content codes:

- Radio Authority (RA)'s Programme Code and News and Current Affairs Code;
- ITC's Programme Code;
- BBC's Producer's Guidelines;
- BSC's Code on Fairness and Privacy
- Code on Standards

The said Code provides for various facts like good taste, decency and extent of showing violence on television, privacy and information gathering²⁰⁷ and impartiality²⁰⁸ amongst other matters. U/s. 2 of the Code, the Code aims at providing an appropriate balance between personal privacy, unnecessary intrusion and creating sensationalism on one hand and public's right to receive true, correct and fair picture

²⁰⁶ Available at <http://En.m.wikipedia.org/digitaleconomybill2016-17> (Visited on 28.12.2016)

²⁰⁷ Section 2 of ITC Programme Code

²⁰⁸ Section 3 of ITC Programme Code

and entertainment even though somewhat offensive or intrusive of privacy of some individuals. U/s. 3 of the Code, detailed requirements have been specified regarding impartiality in broadcasting mainly in programming and broadcasting of news and current affairs. Accordingly, impartiality rules must be followed when any broadcaster is dealing with matters of political or industrial controversy, public policy, politics or affairs of government.²⁰⁹ The Code aims at ensuring that broadcasters present the news stories accurately without using unreasonable power to influence public opinion or favoring any one viewpoint over the other when screening programs of such nature. The broadcasters must take care to make accurate, factual and neutral reporting as far as possible. Broadcasters should report the facts as they are without molding them as per their own ideas and thoughts. A line must be maintained between broadcast of factual reporting or documentary programmes and programmes involving presentation of personal opinions.

3.7.2.10 Ofcom Broadcasting Code

The Office of Communications (Ofcom) is required to draw up a code for TV and radio broadcast under the Communications Act 2003 and the Broadcasting Act 1996. The Code should cover standards of broadcast in programmes, sponsorship, fairness and privacy. The Code is divided in 9 Sections which deal with protecting the Under-Eighteens (Sec. 1), regulating harmful or offensive material (Sec. 2), prohibiting broadcast of content involving crime, disorder, hatred and abuse (Sec. 3), broadcasting responsibly the programs of religious nature (Sec. 4), presenting news with impartiality and due accuracy (Sec. 5), duties to be performed during broadcast of election news (Sec. 6), avoiding unfair treatment of any individual/organization (Sec. 7), avoiding unwarranted infringement of privacy in programmes (Sec. 8), distinguishing between editorial content and advertising (Sec. 9), commercial communications on radio (Sec. 10).

When applying the Code to content, broadcasters should be aware that the context in which the material appears is key. In setting this Code, Ofcom has taken

²⁰⁹ Available at <https://www.article19.org/data/files/pdfs/publications/uk-media-regulation.pdf> (Visited on 16.8.2018)

into account as required by section 319(4) of the Communications Act 2003, the following²¹⁰:

- (a) the degree of harm and offence likely to be caused by the inclusion of any particular sort of material in programs generally or in programs of a particular description;
- (b) the likely size and comparison of potential audience for programs included in television and radio services generally or in television and radio services of a particular description;
- (c) the likely expectation of the audience as to nature of a program's content and extent to which the nature of a program's content can be brought to the attention of potential members of audience;
- (d) the likelihood of persons who are unaware of nature of a program's content being unintentionally exposed, by their own actions, to that content;
- (e) the desirability of securing that the content of services identifies when there is a change affecting the nature of a service that is being watched or listened to and in particular a change that is relevant to the application of standards set under this section;
- (f) the desirability of maintaining the independence of editorial control over program content.

3.7.3 Regulatory provisions

Media content regulation in the UK revolves primarily around codes of practice, drawn up by a variety of bodies which are either entirely or largely independent, following wide public consultation. In some cases, these codes of practice have been developed by bodies with statutory powers over the media while in others the responsible bodies have been established by the media or journalists themselves.²¹¹

²¹⁰ Pg. 6, The Ofcom Broadcasting Code, April 2017

²¹¹ Available at <https://www.article19.org/data/files/pdfs/publications/uk-media-regulation.pdf> (Visited on 27.4.2018)

3.7.3.1 Press Standards Board of Finance (PRESSBOF)

The Press Standards Board of Finance is the only self-regulatory body governing UK written press. It funds the Press Complaints Commission and also has the following bodies under its regulatory umbrella:

- Newspaper Publishers Association;
- Newspaper Society;
- Periodical Publishers Association;
- Scottish Newspapers Association;
- Scottish Daily Newspaper Society

Functions of the Press Standards Body of Finance are as under:

- (a) Raising a levy on the newspaper and periodical industries in order to finance the Press Complaints Commission. This arrangement ensures secure financial support for the Press Complaints Commission while the Commission's complete independence is at the same time guaranteed by a majority of lay members, and is a further sign of industry's commitment to effective self-regulation²¹²;
- (b) Co-ordinate and promote the system of self-regulation within the industry;
- (c) Enable the bodies under its system of self-regulation to liaise appropriately with the Press Complaints Commission.

3.7.3.2 Press Complaints Commission

Prior to the currently prevailing Independent Press Standards Organisation (IPSO), complaints related to print media were handled by the Press Complaints Commission which was the-then active self-regulatory body for print journalism industry. It was established, managed and funded by newspapers and magazines themselves. The main function of PCC was to determine adjudications in the event of complaints about content in newspapers and magazines. The main members of PCC were the Chairman, the Public or the Lay Members and the Press or the Industry members and were appointed by independent Appointments Commission.²¹³ The Press

²¹² Available at <https://www.pcc.org.uk/about/whoswho/pressbof.html> (Visited on 2.8.2018)

²¹³ Available at <https://www.inbrief.co.uk/media-law> (Visited on 26.12.2016)

Complaints Commission dealt with complaints regarding written press by taking following actions:

- (a) All complaints will be judged against the Code of Practice²¹⁴;
- (b) If the Code has not been breached on the face of it then the Commission will take the matter no further;
- (c) The Commission deals only with complaints made within one month of publication;
- (d) If letter is written to the editor of publication concerning the matter then Commission will deal with complaints within one month of editors reply;
- (e) If there is litigation currently running concerned with piece or about to commence then the Commission will not get involved. Once the litigation has concluded the Commission may deem it necessary to get involved.

PCC was fatally wounded by its response to the phone-hacking scandal wherein employees of UK newspaper namely News of the World and other British newspapers were accused of engaging in acts like phone hacking of celebrities, politicians, victims of London bombings, etc. It was declared that PCC will be formally closed and replaced with a transitional body which will take charge of press regulation until a new system is set up in the wake of Leveson inquiry.²¹⁵

3.7.3.3 International Press Standards Organisation (IPSO)

IPSO is the largest independent regulator of the newspaper and magazine industry. Its main function is to promote and uphold the highest professional standards of journalism in UK and to support members of the public in seeking redressal where they believe that the Editors' Code of Practice has been breached. The main object of IPSO is to provide a trusted, thriving, free and responsible press reinforced by independent, effective regulation. Its functions are²¹⁶:

- (i) to support those who feel wronged by the press;

²¹⁴ All member of the press have a duty to maintain the highest professional and ethical standards meaning that they should consistently operate within the confines of the Code of Practice. Editors are responsible for the actions of journalists which are employed by their publication meaning that it is necessary for them to ensure that the Code of Practice is followed. The code deals with areas like accuracy of material, giving fair opportunity of hearing, preventing harassment by journalists and dealing with caution wherever necessary, etc.

²¹⁵ Available at <http://www.theguardian.com/media/2012/mar/08/press-complaints-commission-close-phone-hacking> (Visited on 6.8.2018)

²¹⁶ www.ipso.co.uk (Visited on 24.11.2016)

- (ii) to uphold the highest professional standards in UK press
- (iii) to determine whether standards have been breached and provide redress if so.

IPSO handles complaints related to print media and conducts investigations on its own in maintenance of editorial standards and compliance thereof. It also monitors the numerous print media houses by requiring publications to submit annual compliance reports.

3.7.3.4 Leveson Regulation Reforms

In 2011, it was discovered that thousands of people were being victimized due to phone hacking by “News of the world” detectives and that the existing Press Complaints Commission which was the main industry regulator of press in UK since 1990 was not fit for the purpose of regulation anymore. The newspaper was closed with immediate effect and a public, judge-led investigation was set namely the Leveson Inquiry in order to examine the culture, behavior and ethics of press. After taking the evidentiary statements from several witnesses, Lord Leveson recommended that newspapers should continue to be self-regulated as they had been regulated by Press Complaints Commission but there should also be a new press standards body created by the press industry which is backed by a legislation and has a new code of conduct. It was also suggested that the body should be backed by legislation which would create a means to ensure the regulation was independent and effective. According to Lord Leveson, such arrangement would provide the public with confidence that their complaints would be seriously dealt with and ensure that the press are protected from interference. However, according to critics, PCC was weak in its powers compared to powerful publishers. Also its activities were restricted in scope and several issues like privacy and libel, etc. were left for decision by the courts and people preferred to get justice from courts rather than seeking help from PCC. Eventually, PCC was wound up due to its frequent lack of action. The major recommendations of the report are²¹⁷:

²¹⁷Leveson Report: Key Points – Lisa O’Carroll – www.theguardian.com/media/2012/nov/29/leveson-report-key-points (Visited on 7.1.2017)

3.7.3.4.1 The new regulatory mechanism should be independent of government and newspapers

It was suggested that an independent self-regulatory body underpinned by statute should be established. It should be free of any influence from industry or government. It should be governed by an independent board and there should be full transparency in appointment of its members.

3.7.3.4.2 Government's duty to protect free press

It was suggested that the new legislation should provide for an independent regulator to be organized by the industry but it should also place an explicit duty on government to uphold and protect freedom of the press.

3.7.3.4.3 Powers of new watchdog

It was suggested that the new regulatory mechanism should be enabled to impose severe fines in extreme cases, i.e. fine of 1% of turnover with a maximum of a million pounds was suggested. The watchdog should have sufficient powers to carry out investigations in every form of breach of the code whether suspected or serious.

3.7.3.4.4 Membership

Membership of the new regulatory mechanism need not be legally mandatory but if any body does not join the independent regulator, they should be overlooked by the Ofcom.

3.7.3.4.5 Speedy disposal of trials

It was suggested that the new watchdog should be capable enough to make the process fair, quick and inexpensive. It should try to strike out any kind of frivolous or vexatious claims at an early stage itself.

3.7.3.4.6 Reckless pursuit of sensationalizing stories

It was observed that there was a recklessness in prioritizing sensational stories without thinking of the kind of harm that may be inflicted by such stories or the people who may be affected.

3.7.3.4.7 Casual approach towards complainants

It was observed that there was a cultural tendency within parts of the press to vigorously resist or dismiss the complaints as a matter of course. Some papers were

found to be operating in defensive mode and even after agreeing to apologize, resorted to personal attacks on those who challenged them.

3.7.3.4.8 Establishment of arbitrary system

It was suggested that an arbitration system should be set up for victims of the press so that speedy redressal can be availed without entering endless procedures of courts.

3.7.3.4.9 Criticism of role of police

It was observed that though no evidence was found of any form of corruption during police investigation, the decision-making of police during original phone hacking inquiry itself was faulty. Former Met Asst. Commissioner John Yates should have declined to review phone hacking investigation because of his personal friendship with News of the World deputy editor Neil Wallis. Hence, it was suggested that all ranking officers should record all of their contact with the media and publish a summary of what was discussed.

However, seven years after the Leveson Inquiry, MPs in UK are yet again preparing to vote on a cross party proposal to establish another inquiry into the media's actions. The proposal which is in form of an amendment to the data protection bills aims at inquiring in allegations of data protection breaches committed by or on behalf of national news publishers. Another amendment to the same legislation aims at imposing punitive legal costs on media organisations which refuse to be recognized by IMPRESS which is the officially sanctioned press regulator. If passed, the two proposed amendments would undermine the government's recent decisions by legislating for a fresh inquiry similar to Leveson and introducing punitive measures for newspapers that refuse to join IMPRESS.²¹⁸

3.7.3.5 Royal Charter 2013

In 2013, David Cameron, P.M. and Nick Clegg established Royal Charter which was to function as a new press watchdog. The said Charter had power to impose heavy fines on UK publishers and also demand prominent corrections and apologies, wherever necessary, from UK news publishers. If any news agency refused to join

²¹⁸ Available at <http://www.theguardian.com/media/2018/may/08/why-is-uk-press-regulation-back-in-the-headlines> (Visited on 7.8.2018)

the new regulatory regime, it would be liable to pay heavy damages in case a claim came up against them. In response to it, heads of newspapers like Daily Mail and News Corp launched a vicious assault on Leveson's proposals arguing that any form of statutory regulation constituted the end of 300 years of press freedom. This is despite the fact that press are already subject to multiple forms of statute and in receipt of public money via their exemption from sales taxes. Simultaneously, press also formed a self-regulatory mechanism namely the Independent Press Organisation which had wider powers than any previous bodies ever had.²¹⁹ The Royal Charter was approved by the Queen in October 2013 but the publishers and newspapers in large numbers have remained confined to their own regulator, i.e. Independent Press Standards Organisation rather than signing up for Royal Charter.

3.7.3.6 Editors' Code of Practice

The Editors' Code of Practice is a set of rules to be followed by the publishers of newspapers and magazines. It sets the standards that newspapers and magazines can be held to account by IPSO and is part of the contract between IPSO and the newspapers and magazines regulated by it. The Code is administered by the Editors' Code of Practice Committee constituted of ten editors and five lay members including the Chairman and Chief Executive of IPSO.²²⁰ The Editors' Code aims at addressing the potentially competing rights of freedom of expression and other rights of individuals like right of privacy. Newspapers and magazines have editorial freedom to publish what they consider to be appropriate provided that the rights of individuals are not compromised and that the Code is not otherwise breached. The Code currently addresses issues like reporting of suicide (Clause 5), intrusion into grief or shock (Clause 4), protecting identity of minors involved in sex offences (Clause 7), protecting identity of victims of sexual assault (Clause 11), prohibiting publication of distorted, misleading material (Clause 1) and protecting vulnerable class of persons namely children (Clause 6) and hospitals (Clause 8). The Editors' Code also allows newspapers and magazines to be partisan generally including in

²¹⁹ Available at <http://www.mediareform.org.uk/blog/> (Visited on 24.11.2016)

²²⁰ Available at <http://www.ipso.co.uk/faqs> (Visited on 28.12.2016)

their coverage of election related material. The selection and presentation of material for publication is a matter for individual editors provided that the Editors' Code of Practice has not otherwise been breached.

3.7.3.7 Press Recognition Panel

The Press Recognition Panel is the independent body set up by Royal Charter to ensure that regulators of the press in UK are independent, well-funded and also able to protect the public while recognizing the important role carried out by press.²²¹ It was created as a result of the Leveson Inquiry into press standards, which followed widespread concern about unlawful activities like phone hacking which were carried out in some sections of media. The main function of Press Recognition Panel is to recognize press regulators who fulfil all the major conditions in the Royal Charter for press regulation. If the regulator fulfils all the conditions, it is known as an approved regulator. The Panel ensures that approved regulators are independent of the publishers they regulate, are funded properly to do their job, are open to all publishers and provide the public with proper opportunities to raise concerns about the conduct of regulator's members.²²² The Panel also carries out reviews at regular intervals to ensure that approved regulators continue to meet the criteria as laid down in Charter. If at any point of time even after being recognized as approved regulator, any of the conditions remains to be fulfilled, Press Recognition Panel is empowered to withdraw the recognition.

3.7.3.8 Independent Monitor for the Press (IMPRESS)

The Independent Monitor for the Press (IMPRESS) is a Leveson-compliant regulator and is currently the only organization that has applied for recognition by the Press Recognition Panel. It is independent of Government or press industry and does not depend on any publisher. Nobody with a political background is allowed to be a part of its Board. Complaints can be made to IMPRESS about content in a news article or the behavior of any journalist or publisher provided the relevant news publication

²²¹ Available at <http://www.Pressrecognitionpanel.org.uk> (Visited on 28.12.2016)

²²² Available at <http://www.pressrecognitionpanel.org.uk/faq> (Visited on 28.12.2016)

is regulated by IMPRESS. Also the publication or behavior should be a potential breach of one or more provisions of the Editors' Code of Practice. Currently IMPRESS is in process of drafting a new Standards Code for the press.

3.7.3.9 Office of Communications (Ofcom)

The Office of Communications (Ofcom) controls the statutory regulation of commercial television and radio stations in UK. It is the regulating body dealing with ownership of organisations, program content and transmission of various programs. The main function of Ofcom is to further the interests of citizens and of consumers, where needed by promoting competition.²²³Ofcom operates under several Acts of Parliament including the Communications Act 2003, Wireless Telegraphy Act 2006, Broadcasting Act 1990 and 1996, Digital Economy Act 2010 and the Postal Services Act 2011. It is thus accountable to Parliament and enforces regulatory rules for sectors like television, radio, postal services, etc. The main duties of Ofcom are to ensure:

- (i) that UK has a wide range of electronic communications services
- (ii) a wide range of high quality television and radio programmes are provided appealing to a range of tastes and interests;
- (iii) television and radio services are provided by a range of different organisations;
- (iv) people who watch television and listen to radio are protected from harmful or offensive material;
- (v) people are protected from being treated unfairly in television and radio programmes and from having their privacy invaded.
- (vi) Viewers of video on demand service are protected from harmful content.
- (vii) Universal postal service is provided in UK
- (viii) Radio spectrum (airwaves used by everyone) is used in most effective way.

3.7.3.10 The British Broadcasting Corporation

The British Broadcasting Corporation is the public service broadcaster in the UK and was established by Royal Charter in 1926. It provides television and radio services

²²³ Available at <http://www.ofcom.org.uk> (Visited on 27.12.2016)

to the United Kingdom. It is primarily funded through licence fee which has to be paid by every person owning a television in UK. Also, it is involved in commercial activities for getting its funds. Even though the Corporation has been established by an executive order and its governors are appointed by government, practically it functions relatively independently of government. Its independence in relation to broadcasting content is formally guaranteed in a detailed agreement between the corporation and the government.²²⁴

Both the Royal Charter and the agreement with the executive require the Corporation to ensure that its broadcasts are accurate and impartial, do not offend good taste or decency or include anything which is likely to incite or encourage crime, lead to disorder or be offensive to public feeling. The Corporation is required to draw up a code regulating these matters in details and all producers must follow the codes subject to internal procedures. The BBC has developed a detailed code namely the Producers' Guidelines for dealing with various matters including impartiality, fairness, privacy, surreptitious recording, taste and decency, terrorism and national security, politics, election broadcasts, violence, conflicts of interest, suffering and distress, crime and the police, etc. BBC has also established a Programme Complaints Unit for domestic licence-fee funded broadcasting and online services. This unit investigates complaints against the standards set out in the Producers' Guidelines and suggests appropriate measures and sanctions wherever required. If complainant is dissatisfied with decision of the unit, appeal can be made to the Governors' Programme Complaints Appeals Committee.²²⁵

3.7.3.11 Broadcasting Standards Commission

The Broadcasting Standards Commission has been established by the Broadcasting Act 1996. It looks over all broadcasters including the BBC as well as private broadcasters. The major functions of Commission include²²⁶:

- (i) producing codes of conduct relating to fairness, privacy and standards;

²²⁴ Clause 2.1 of Agreement (www.bbc.co.uk/info/bbccharter) (Visited on 28.12.2016)

²²⁵ <https://www.article19.org/data/files/pdfs/publications/uk-media-regulation.pdf> (Visited on 14.8.2018)

²²⁶ <https://www.article19.org/data/files/pdfs/publications/uk-media-regulation.pdf> (Visited on 14.8.2018)

- (ii) monitoring, conducting research and compiling reports on standards and fairness in UK broadcasting; and
- (iii) receiving and adjudicating upon complaints received from general public.

3.7.3.12 Body of European Regulators for Electronic Communications (BEREC)

The Body of European Regulators for Electronic Communications was established by the European Parliament as part of Telecom Reform package. It replaced the European Regulators Group for electronic communications networks and services which was established as an advisory group to the Commission in 2002. BEREC commenced its activities in January 2010. It is committed to independent, consistent, high quality regulation of electronic communications markets for the benefit of Europe and its citizens. It contributes to the development and better functioning of the internal market for electronic communications networks and services. As the European body which brings together all national regulatory authorities (NRA), BEREC is informed by the ‘on the ground’ knowledge, experience and technical expertise of its constituent regulatory authorities. According to European law establishing BEREC, it should provide advice to both the European institutions and NRAs in field of electronic communications for the European institutions and for NRAs. In line with this, Article 5(3) of the Regulation EU 2015/2120 explicitly obliges BEREC to issue guidelines on net neutrality in order to provide guidance to NRAs on their implementation of the rules.²²⁷

Media has a duty to play in the society. It should report freely, fairly, with transparency and without any bias. It is powerful enough to create an image that can last for ages or spoil an image that has been made after years of hard work. The people from within the media should not for their narrow and personal goals indulge in reporting negativities and falsehoods of politics, sports, society or any other field. Article 10 of European Convention of Human Rights hence provides not only the freedom to hold opinions and receive and impart information and ideas, but also subjects its usage to reasonable restrictions so as to maintain peace and order in society and the nation. Several regulatory bodies have been established in U.K. to

²²⁷ Available at <http://Berec.europa.eu/eng/netneutrality/> (Visited on 2.1.2017)

meet these ends which will enforce a fair exchange of ideas, healthy exercise of freedom to hold opinions and maintenance of standards of morality, decency and good taste in print, broadcast and social media. Absence of such regulation or restrictions will merely give a free hand to media for indulging in vices and careless reporting of its own accord.

To conclude, regulation of media in UK is mainly supervised by several codes of practice as discussed above which have been drawn by several bodies mainly working independently. The print media sector in UK is self-regulatory in nature. No specific statutory rules are regulating it. While some of the codes of practice have been drafted and developed by bodies having statutory powers over media, in some other cases the responsible bodies have been established by media itself. While all forms of media are subject to laws related to defamation, obscenity, etc., the broadcast or electronic media is also additionally subject to small number of specific content rules like the Ofcom. The various codes of conduct have mostly provided guidelines for media professionals rather than declaring clear prohibitions on specific types of content. Unlike US, where free speech of media is not limited by any restrictions, UK has tried to balance its right of free speech against several restrictions.

3.8 Position in India

India being one of the most populated countries of the world has several enactments as well as one of the lengthiest Constitutions. Considering the various sects, religious groups, castes of people living in the country, it becomes inevitable that the freedom of speech and expression are taken care of for one and all. Likewise, exercise of freedom of speech and expression by one should not hamper or hinder the similar right of another. For this reason, Article 19(1)(a) of the Constitution provides for freedom of speech and expression while Article 19(2) lists the reasonable restrictions on the said freedom. The same are discussed at length below:

3.8.1 Constitutional Provisions

The Constitution of India is the longest written constitution of any sovereign country in the world. It was adopted by the Constituent Assembly on 26.11.1943 and came

into effect on 26.1.1950. With its adoption, the Union of India became the modern and contemporary Republic of India replacing the Government of India Act 1935 as the country's fundamental governing document. The Constitution of India declares India as a sovereign, socialist, secular, democratic republic assuring its citizens of justice, equality and liberty and endeavors to promote fraternity among them. The following Articles of the Constitution of India deal with freedom of speech and expression, reasonable restrictions, emergency, etc.

3.8.1.1 Protection of certain rights regarding freedom of speech, etc (Art. 19)

(1) All citizens shall have the right-

- (a) to freedom of speech and expression;
- (b) to assemble peacefully and without arms;
- (c) to form associations or unions or cooperative societies;
- (d) to move freely throughout the territory of India;
- (e) to reside and settle in any part of the territory of India; and
- (f) to practice any profession, or to carry on any occupation, trade or business

Sub-clause (2) of Article 19 provides that nothing in sub-clause (a) of Clause (1) shall affect the operation of any existing law, or prevent the State from making any law, in so far as such law imposes reasonable restrictions on the exercise of right conferred by the said sub-clause in the interests of sovereignty and integrity of India, the security of State, friendly relations with foreign states, public order, decency or morality or in relation to contempt of court, defamation or incitement to an offence.

3.8.1.2 Supreme Court to be a court of record (Art. 129)

The Supreme Court shall be a court of record and shall have all the powers of such a court including the power to punish for contempt itself.

3.8.1.3 High Courts to be courts of record (Art. 215)

Every High Court shall be a court of record and shall have all the powers of such a court including the power to punish for contempt of itself.

3.8.1.4 Proclamation of Emergency (Art. 352)

If the President is satisfied that a grave emergency exists whereby the security of India or of any part of the territory thereof is threatened, whether by war or external aggression or armed rebellion, he may, by Proclamation, make a declaration to that effect in respect of the whole of India or of such part of territory thereof as may be specified in the Proclamation.

3.8.1.5 Suspension of provisions of Article 19 during emergencies (Art. 358)

- (1) While a Proclamation of Emergency declaring that the security of India or any part of the territory thereof is threatened by war or by external aggression is in operation, nothing in Article 19 shall restrict the power of the State as defined in Part III to make any law or to take any executive action which the State would but for the provisions contained in that Part be competent to make or to take, but any law so made shall, to the extent of incompetency, cease to have effect as soon as the Proclamation ceases to operate except as respects things done or omitted to be done before the law so ceases to have effect.

3.8.1.6 Protection of publication of proceedings of Parliament and State Legislatures (Art. 361A)

- (1) No person shall be liable to any proceedings, civil or criminal, in any court in respect of the publication in a newspaper of a substantially true report of any proceedings of either House of Parliament or the Legislative Assembly, or as the case maybe, either House of the Legislature, of a State, unless the publication is proved to have been made with malice.

Nothing in this clause shall apply to the publication of any report of the proceedings of a secret sitting of either House of Parliament or the Legislative Assembly, or, as the case maybe, either House of the Legislature of a State.

- (2) Clause (1) shall apply in relation to reports or matters broadcast by means of wireless telegraphy as part of any programme or service provided by means of a broadcasting station as it applies in relation to reports or matters published in a newspaper.

3.8.2 Article 19 and restrictions thereon

Article 19 of the Constitution of India guarantees six fundamental rights that maybe referred to as “freedoms” available to every citizen of India. These freedoms are:

- (i) Freedom of speech and expression;
- (ii) Freedom of assembly;
- (iii) Freedom of association;
- (iv) Freedom of movement;
- (v) Freedom of residence & settlement;
- (vi) Freedom of profession, occupation, trade or business

Article 19 not only defines the freedoms but also sets the limitations against each freedom. Through their various judgments from time to time, Courts have summarized general principles to be kept in mind for considering the constitutionality of a statutory provision which has been deemed unreasonable due to restrictions imposed by it. These principles are as under²²⁸:

- (1) Restriction sought to be imposed on fundamental rights guaranteed under Article 19 of the Constitution must not be arbitrary or of excessive nature, so as to go beyond the requirement of the felt need of society and object sought to be achieved.
- (2) There must be a direct and proximate nexus or a reasonable connection between restriction imposed and the object sought to be achieved.
- (3) No abstract or fixed principle can be laid down which may have universal application in all cases. Such consideration on the question of reasonableness is hence expected to vary from case to case.
- (4) While interpreting constitutional provisions, Courts should be clear about present requirements of society and complex issues facing the people which legislature intends to solve through effective legislation.
- (5) When tackling such problems and understanding present needs of society, the judicial approach must necessarily be dynamic, pragmatic and elastic.
- (6) While considering reasonableness of restriction imposed by a statute, Court should examine whether the social control as envisaged in Article 19 is being effectuated by the restriction imposed on Fundamental Rights.

²²⁸Papanasam Labour Union vs. Madura Coats Ltd. (1995) 1 SCC 501

- (7) Although Article 19 guarantees all 6 freedoms to citizens, such guarantee does not confer any absolute unconditional rights but is subject to reasonable restriction which the legislature may impose in public interest. Hence, it is necessary to examine whether such restriction meant to project social welfare satisfying the need of prevailing social values.
- (8) Reasonableness must be tested both from procedural and substantive aspects. It should not be bound by processional perniciousness or jurisprudence of remedies.
- (9) Restriction imposed on the Fundamental Rights guaranteed under Article 19 of the Constitution must not be arbitrary, unbridled, uncanalised and excessive and also not unreasonably discriminating. Thus, a restriction to be reasonable must also be consistent with Article 14 of the Constitution.
- (10) In judging the reasonableness of restriction imposed by Article 19(6), Court must bear in mind the Directive Principles of State Policy.
- (11) Ordinarily any restriction so imposed having the effect of promoting or effectuating a directive principle can be presumed to be a reasonable restriction in public interest. Freedom of speech and expression is a human right guaranteed under both international and national laws. Its importance has been recognized by almost all nations of the world by way of various codes, conventions, legislations, etc. However, the said freedom of speech and expression is not absolute, i.e. the freedom can be exercised by an individual subject to certain reasonable restrictions. These restrictions have been placed on freedom of speech and expression so that while exercising the said freedom, similar rights of another individual are not harmed.

Article 19(2) recognizes right of the State to make laws putting reasonable restrictions for the reasons set on that clause. Freedom of expression guaranteed under Article 19(1)(a) is subject to various limitations imposed for public good. The restrictions must be reasonable restrictions. Also, the fundamental rights guaranteed by Article 19 are available against the State only. In this context, the “State” includes not only legislative authorities of the Union and the States but also other local or statutory authorities, i.e. municipalities, local bodies, etc. within territory of India or under the control of Government of India.

The term “reasonable restrictions” refers to limitations against any available right of an individual. Thus, a person may exercise his right in all manners without going to the extent of crossing its limitations, i.e. the reasonable restrictions. In order to judge the meaning of reasonable restriction, following factors must be considered:

- (a) The restrictions must have a reasonable relation to the object which the legislation seeks to achieve and must not go in excess of that object.
- (b) Reasonableness of a restriction has to be determined in an objective manner.
- (c) It is the effect of a law which constitutes the test of its reasonableness, its object, whether good or bad is immaterial for this purpose.
- (d) In adjudging the validity of restriction, courts have necessarily to approach it from the point of view of furthering the social interest.
- (e) A restriction to be valid must have a rational or proximate relation with the grounds which legislature is entitled to impose.

In another case²²⁹, it was held that in order to be valid, the limitations under Clauses (2) to (6) of Article 19 must comply with the following conditions:

3.8.2.1 **The restriction must be imposed by law**

A restriction in order to be valid, must have been imposed by a ‘law’ which is made by the ‘State’ which is made by the ‘State’ as defined in Article 12. The words “the State making any law” in each of the limitation Clauses (2) to (6) clearly signify this purpose.

“Law” includes valid subordinate legislation as stated in Article 13(3)(a) but without legislative authority, Executive cannot impose any restriction upon any of the fundamental rights guaranteed by Art. 19(1).²³⁰

Any law which may be made under Article 19(2) to (6) to regulate the exercise of the right to the freedoms guaranteed under Article 19 must be ‘law’ having statutory force and not a mere executive or departmental instruction.²³¹ Thus, the control or restriction must be imposed only by a ‘legislative act’ and not by any

²²⁹Joseph vs. RBI AIR 1962 SC 1371

²³⁰Ganapati vs. State of Ajmer (1955) 1 SCR 1065

²³¹Bijoe Emmanuel vs. State of Kerala (1986) 3 SCC 615

executive instruction. The State undisputably can issue direction which should meet the criteria of ‘law’ within the meaning of Article 13 of the Constitution.²³² Simultaneously, the Legislature is not required to make a law solely for the purpose of imposing the restriction. A restriction may be imposed by a general law, if other conditions are satisfied.²³³

3.8.2.2 Law must be made by the ‘State’

Restrictions referred to in Article 19(2) to (6) may be imposed by any of the authorities that come within the comprehensive definition of “the State” in Art. 12 who are competent to make a ‘law’ as defined in Art. 13(3)(a).²³⁴ Authority to impose limitations on the freedoms is thus wider in Indian Constitution than in the United States where the “Police Power” is regarded as an attribute of sovereignty of the States. Even the Federal Government does not have this power since it is supposed that the States did not delegate this power to the Union at the time of federal compact.²³⁵ In India, power of imposing limitations has been conferred not only on the States and the Union, but also on local and other authorities who have the power to make ‘laws’ including within that term all forms of subordinate legislation such as ‘bye-laws.’²³⁶

3.8.2.3 Such law must be otherwise valid

In order to justify a restriction under Clause (2) to (6), the law which imposes restriction must be otherwise valid. A restriction which is not authorized by a valid law cannot be saved by any of these clauses. Hence, in the case of subordinate legislation, it must be *intra vires* and accordingly the procedure required by statute must be complete before it can be defended under Clause (2) to (6). Also, law must be within the legislative competence of relevant Legislature and must not contravene

²³²Modern School vs. Union of India (2004) 5 SCC 583

²³³Babulal vs. State of Maharashtra AIR 1961 SC 884

²³⁴Vrajlal vs. State of M.P. AIR 1970 SC 129

²³⁵Thornhill vs. Alabama (1940) 310 US 88

²³⁶Rashid Ahmed vs. Municipal Board (1950) SCR 566

the other fundamental right or any other mandatory provision of the Constitution which constitutes limitations upon the legislature.²³⁷

3.8.2.4 Restriction must be related to one of the grounds specified in the limitation clauses

Once it is held that Article 19 is applicable and a fundamental right enumerated therein has been infringed, the only thing which can save the law from constitutional invalidity is if it comes within any of the exceptions enumerated in Article 19(Clause 2 to 6). Citizens of India are entitled to enjoy each and every freedom as enshrined in Article 19 without having to choose one freedom over another. The state cannot make a law which directly restricts one freedom even for securing the better enjoyment of another freedom. If any restriction is made under Art. 19(b) which is reasonable and if the same affects freedom of speech and expression, the restriction would be invalid.

3.8.2.5 Relationship with permissible ground must be ‘proximate’

Relationship between the impugned legislation and any of the relevant specified grounds must be rational or proximate²³⁸. A restriction to be valid must have a material relation with the grounds for which the legislature is entitled to impose restriction. If the connection between a restriction and the constitutionally authorized ground for restriction is very remote, it will render the law invalid.²³⁹

A law which affects fundamental right of any individual is not valid due to its vague and uncertain nature. In *K.A. Abbas vs. Union of India*²⁴⁰ it was held that if persons applying a specific law are uncertain about its very nature and even that law itself *prima facie* takes away a guaranteed freedom, the law must be held to offend the Constitution. It is the substance of legislation and not merely its appearance or form which is to be taken into consideration while assessing its validity. Thus, there must be a direct and proximate nexus or reasonable connection between the

²³⁷*Cooper vs. Union of India* AIR 1970 SC 564

²³⁸*Hamdard Dawakhana vs. Union of India* AIR 1960 SC 554

²³⁹*Superintendent District Jail vs. Lohia* AIR 1960 SC 633

²⁴⁰ (1970) 2 SCC 780

restriction imposed and the object sought to be achieved. If this is a direct nexus between restriction and object of the Act, then a strong presumption in favour of the constitutionality of the Act will naturally arise.²⁴¹

3.8.3 Scope of grounds for reasonable restrictions on Freedom of Speech and Expression

If maintenance of democracy is the foundation for free speech, society is also equally entitled to regulate freedom of speech and expression by democratic action. Freedom of speech and expression brings within its ambit the corresponding duty and responsibility and puts limitation on the exercise of liberty. The State has legitimate interest to regulate the said freedom by restraining its limits. While each citizen has been granted this freedom, there is a correlative duty on all not to interfere with the liberty of others. Each is entitled to dignity of person and of reputation. Nobody has a right to denigrate other's right to person or reputation. Therefore, freedom of speech or expression is tolerated so long as it is not malicious or libelous.²⁴²

Preservation of the right of freedom of speech and expression to all the citizens is of utmost necessity in any democracy. Likewise, as no freedom can be absolute, it also becomes necessary to impose some specific restrictions on this freedom in order to maintain social order. Accordingly, under Article 19(2) of the Constitution of India, the State may make a law imposing "reasonable restrictions" on the exercise of the right to freedom of speech and expression "in the interest of" the public on the following grounds:

- (i) Sovereignty and integrity of India;
- (ii) Security of the State;
- (iii) Friendly relations with foreign States;
- (iv) Public order;
- (v) Decency or morality;
- (vi) In relation to contempt of court;

²⁴¹MRF Ltd. Vs. Inspector Kerala Govt. (1998) 8 SCC 227

²⁴²D.C. Saxena vs. Hon'ble Chief Justice of India (1996) 5 SCC 216

- (vii) Defamation;
- (viii) Incitement to an offence;

Position of the said grounds, their validity and extent have been discussed in detail as follows:

3.8.3.1 Sovereignty and integrity of India

To maintain sovereignty and integrity of a state is prime duty of government. Taking into it into account, freedom of speech and expression can be restricted so as not to permit any one to challenge sovereignty or to permit any one to preach something which will result in threat to integrity of the country.

Restriction on freedom of speech and expression on the ground of maintaining sovereignty and integrity of India was added by Sixteenth Amendment of Constitution w.e.f. 6.10.1963. Object of the amendment was to confer on Parliament specific power to legislate on this topic so that the constitutionality of an Act such as the Criminal Law Amendment Act 1961 could not be challenged on the ground of being inconsistent with Article 19(1)(a). By this Act, any expression by words, writing or visible representation which is prejudicial to the “safety or security” of India has been made punishable.

Thus, insulting the National Flag in any form is a punishable offence under the Prevention of Insults to National Honour Act 1971. But where any political party is named on the basis of a language recognized under Arts. 344(1) and 351 cannot render the party illegal as being violative of the integrity of India.²⁴³

3.8.3.2 Security of State

However precious the freedom of speech may be in a democratic society, means can never override the end itself. Since object of freedom of speech is to “maintain the opportunity for free political discussion, to the end that government may be responsive to the will of people and that changes, if desired may be obtained by peaceful means, that opportunity can hardly be maintained without the existence of an organized government having power to ensure the exercise of that right and to

²⁴³Rama Rao vs. TeleguDesam AIR 1984 AP 353

prevent interferences with that right which belongs to every citizen.²⁴⁴ No State can therefore tolerate utterances which threaten the overthrow of organized government by unlawful or unconstitutional means. The reason is that security of the State organized government is the very foundation of freedom of speech.²⁴⁵ Security of state is vitally essential and a government must have sufficient powers to impose restrictions on any kind of activity that may create disturbance or hamper it in any manner. Under Article 19(2) reasonable restrictions can be imposed on freedom of speech and expression in the interest of security of State.

The term "security of state" refers only to serious and aggravated forms of public order e.g. rebellion, waging war against the State, insurrection and not ordinary breaches of public order and public safety, e.g. unlawful assembly, riot, affray. Thus speeches or expression on the part of an individual, which incite to or encourage the commission of violent crimes, such as, murder are matters, which would undermine the security of State. In India, following legislations by Parliament have been enacted in order to maintain security of the State as a restriction to freedom of speech and expression:

- (i) The Press (Objectionable Matter) Act 1951 which remained in force until 1956 contained restrictions upon expressions and publications which "incite or encourage any person to resort to violence or sabotage for the purpose of overthrowing or undermining the Government established by law in India or in any State thereof or its authority in any area. Subsequent to the expiry of this Act in 1956, Parliament enacted Criminal Law Amendment Act 1961 imposing restrictions upon the freedom of expression and of press as well as the freedoms of assembly and of movement on grounds of "security of the State" and public order.
- (ii) The Customs Act, 1962 prohibits export or import inter alia of documents which are prejudicial to the security of India.
- (iii) In Indian Penal Code, offences u/s. 121-121A (abetment or conspiracy to wage war against the Government of India), to instigate people to resort to violence to remove the government by some writing would be covered under the present head.

²⁴⁴De Jonge vs. Oregon (1937) 299 US 353

²⁴⁵Stromberg vs. California (1931) 283 US 359

- (iv) Section 3 of the Police (Incitement to Disaffection) Act 2933 makes it an offence to do any act which causes or is likely to cause disaffection towards the Government established by law in India amongst the members of a police force or induces or attempts to induce any member of a police force to withhold his services or to commit a breach of discipline.²⁴⁶
- (v) The Civil Defence Act 1968 empowers Central Government to take steps for prohibiting acts prejudicial to the civil defence of India, which includes measures not amounting to actual combat which are necessary for protection of any person, property, police or thing in India against any hostile attack and such measures may be taken before, during at or after the time of such attack. For prohibiting any matter which is to be published in the Press but is prejudicial to civil defense, Central Government is empowered to make rules that prohibit the printing or publication of such matter. It can even demand security from any press used for the purpose of printing or publishing such matter and forfeit copies of any publication containing such matter.
- (vi) The National Security Act, 1980 provides for preventive detention of any person with a view to preventing him from acting in any manner prejudicial to the defense of India, the relations of India with foreign powers and of the security of India.

The degree and extent of the reach of objectionable activity upon the society are extremely relevant in deciding whether a man has committed only a breach of “law and order” or has acted in a manner likely to cause disturbance to public order. It is the potentiality of any act to disturb the normal life of community which makes it prejudicial to the maintenance of public order.²⁴⁷

3.8.3.3 Friendly relations with foreign states

In the present global world, a country has to maintain good and friendly relationship with other countries. Something which has potential to affect such relation ship should be checked by government. Keeping this thing in mind, this ground was added by the constitution (First Amendment) Act, 1951. The object behind the

²⁴⁶Dalbir Singh vs. State of Punjab AIR 1963 SC 1106

²⁴⁷Durga Das Basu, Commentary on the Constitution of India (Vol.2) 2445 – (Wadhwa Publications, Nagpur, 8thedn., 2007)

provision is to prohibit unrestrained malicious propaganda against a foreign friendly state, which may jeopardize the maintenance of good relations between India, and that state.

The expression “friendly relations with foreign States” being very wide includes not only libel of foreign dignitaries, inducement of foreign enlistment but also propaganda in favor of rival claimants to authority in a foreign State after India has already recognized a particular person to be authority in that State, propaganda in favor of war with a State at peace with India, etc.²⁴⁸ “Friendly relations with foreign States” means and includes international relations. Article 19(1)(a) permits restrictions to be imposed in the interest of friendly relation with foreign States” which include international relations. No similar provision is present in any other Constitution of the world. In India, the Foreign Relations Act, (XII of 1932) provides punishment for libel by Indian citizens against foreign dignitaries but it has been repealed in 1951 and no legislation in this regard exists currently. Interest of friendly relations with foreign States, would not justify the suppression of fair criticism of foreign policy of the Government. However it is interesting to note that member of the commonwealth including Pakistan is not a "foreign state" for the purposes of this Constitution. The result is that freedom of speech and expression cannot be restricted on the ground that the matter is adverse to Pakistan.²⁴⁹

3.8.3.4 Public Order

This ground was added by the Constitution (First Amendment) Act. None of the freedoms as guaranteed by Constitution can be utilized properly in a state of disorder. Hence, order is a major requirement in any organized society. 'Public order' is an expression of wide connotation and signifies "that state of tranquility which prevails among the members of political society as a result of internal regulations enforced by the Government which they have established."²⁵⁰ It is something more than ordinary maintenance of law and order. 'Public order' refers to

²⁴⁸R. vs. Antonelli 70 JP 4.

²⁴⁹Dheerajendra Patanjali, Freedom of Speech and Expression – India vs. America – A Study (www.indialawjournal.org/archives/volume3/issue_4/article_by_dheerajendra.html) (Visited on 5.1.2016)

²⁵⁰ Justice R Fazal Kasim - Judicial Review of Public Action Vol. 1 631

public peace in general, safety and tranquility in society. Anything that disturbs public tranquility or public peace disturbs public order. Thus communal disturbances and strikes promoted with the sole object of accusing unrest among workmen are offences against public order.

Public order thus implies not just absence of violence but also an orderly state of affairs in which citizens can peacefully pursue their normal vocation of life. Public order also includes public safety. Thus creating internal disorder or rebellion would affect public order and public safety. But mere criticism of government does not necessarily disturb public order. In India, in *Romesh Thappar's* case, after elaborately analyzing the concept of "public order", Supreme Court observed that public order is an expression of wide connotation and signifies that state of tranquility which prevails among the members of a political society as a result of internal regulations enforced by government which they have established.²⁵¹

The words 'in the interest of public order' includes not only such utterances as are directly intended to lead to disorder but also those that have the tendency to lead to disorder. Following are some of the laws which impose restriction upon the freedom of speech and expression in the interest of public order:

3.8.3.4.1 Indian Penal Code

It is an offence to promote enmity between different classes of citizens by words, either spoken or written or by representation or otherwise (Sec. 153A); to utter words, make visible representations with deliberate intent to wound the religious feelings or belief of another person or of any class of citizens (Ss. 295A, 298)

3.8.3.4.2 Indian Telegraph Act, 1885

Prohibition of private broadcasting except under a licence granted by Government of India is a reasonable restriction under Article 19(2).²⁵² For the purpose of ensuring the free speech rights of citizens, it is not necessary to have private broadcasting stations. If private broadcasting is allowed, it will also lead to powerful economic

²⁵¹*Romesh Thappar vs. State of Madras* (1950) SCR 594

²⁵²*Lakhanpal vs. Union of India* AIR 1982 Delhi 167

commercial and political interests to participate in it which may not prove beneficial to free speech right of the citizens and more so, if strict program controls and regulatory steps are not provided.

3.8.3.4.3 The Cinematograph Act 1952

The Act empowers Government to suspend the exhibition of any film likely to cause breach of peace.

3.8.3.4.4 Representation of People Act 1951

Section 130 prohibits canvassing or exhibiting any notice or sign in or near polling stations on the date of pollings.

3.8.3.4.5 Drugs and Magic Remedies (Objectionable Advertisements) Act, 1954

The Act prohibits objectionable advertisements relating to magic cure and self medication in the interests of public health.

3.8.3.4.6 Customs Act, 1962

Section 11 empowers Central Government to prohibit import and export of goods if it is satisfied that it is necessary so to do in the interests of maintenance of security of India and maintaining public order and standards of decency or morality.

3.8.3.4.7 Criminal Procedure Code, 1973

Section 95 punishes any person who publishes a map of India not in conformity with Map as published by Survey of India with imprisonment or fine or both.

3.8.3.4.8 Civil Defence Act, 1968

The Act enables the Government to prohibit publication of any newspaper, etc. containing matters prejudicial to civil defence; demanding security from any press in that context.

3.8.3.5 Decency and morality

While expressing the opinions and views, a citizen should stay decent in his words and language. It should not affect the morality of society adversely. The Constitution has taken care of this view and inserted decency and morality as a ground of restriction to freedom of speech and expression.

In *Miller vs. California*, obscenity was confined to “works which depict or describe sexual conduct.” In Webster’s New International Dictionary, the term has been defined as “offensive to taste, foul, loathsome, disgusting.” Advanced Law Lexicon defines obscene to mean something offensive to chastity, decency or delicacy expressing and presenting to the mind or view something that delicacy and purity forbid be exposed. Indecency is an act against good behavior and a just delicacy. Obscenity is such indecency as is calculated to promote violation of the law and general corruption of morals.²⁵³ The freedom of speech and expression is subject to reasonable restriction which may be thought necessary in interest of general public and one such is the interest of public decency and morality. Sections 292 to 294 of the Indian Penal Code provide instances of restrictions on the freedom of speech and expression in the interest of decency or morality. These sections prohibit the sale or distribution or exhibition of obscene words, etc. in public places.

In case of *Director General of Doordarshan vs. Anand Patwardhan*²⁵⁴ the guidelines for testing obscenity were laid down as under:

- (i) Whether the average person applying the contemporary, community standards would find that work, if taken as a whole appeals to the prurient interests;
- (ii) Whether the work depicts or describes in a patently offensive way sexual conduct specifically defined by the applicable State law and
- (iii) Whether the work taken as a whole, lacks serious literary, artistic, political or scientific value. While judging decency of a film, it must be viewed from an average, healthy and common sense point of view. Also, it was held that the correct approach to be taken while watching a film is to look at it as a whole and not in bits,

²⁵³RamanathaIyer, Advanced Law Lexicon Part 3, 3279, 3rd Ed. 2005

²⁵⁴ (2006) 8 SCC 433

as any message that is purported to be conveyed by way of a film cannot be conveyed just by watching certain bits of the film.

In above case, the court held that the test of obscenity which was laid down in *R v. Hicklin* is the only test in India to determine obscenity.

Some other observations in leading cases on this restriction are as under:

- (i) Obscene means offensive to modesty or decency; lewd, filthy, repulsive. But even an immodest representation may not be reasonably restricted in the interests of decency or morality if it conduces to the propagation of ideas or information of public interest, i.e. in the books of medical science, there are figures showing male and female private parts but these figures are meant for the purpose of learning and understanding and hence reasonable restriction will not apply to the same. In general, ideas having social importance will *prima facie* be protected unless the obscenity is so gross and decided that the interest of public dictates the other way. The test of obscenity is thus a question of degree and varies with the moral standard of community in question.²⁵⁵
- (ii) It is not the intention of an author but the effect of his published writing on the readers which constitutes the test of obscenity. i.e. whether the tendency of matter in question is to deprave and corrupt those whose minds are open to such immoral influences and into whose hands a publication of this sort may fall.²⁵⁶
- (iii) While determining the effect of offending publication, Court is to have regard to the moral standard of contemporary society which is rapidly changing in India and both, the young and adolescent class have access to a large mass of literature which have a mixed content of sex and romance. Considering this changing scenario, Court must determine whether the offending publication, read as a whole, has the tendency of rousing sexual desire in adolescent youth to whom it is made available.²⁵⁷
- (iv) The Exception to S. 292 IPC gives absolute immunity to publications kept or used bonafide for religious purposes.²⁵⁸ Apart from this, the said section does not admit any exception on the plea of 'public good'.

²⁵⁵*Ranjit vs. State of Maharashtra* (1965) 1 SCR 65

²⁵⁶*State vs. Kunji* AIR 1970 All 614

²⁵⁷*Chandrakant vs. State of Maharashtra* AIR 1970 SC 1390

²⁵⁸*Hari Singh* (1905) 28 All 100

Both the terms, i.e. “morality” and “decency” also have been attempted to be elaborated in order to clarify what constitutes a reasonable restriction on freedom of speech and expression. In case of *Benazir Bhutto vs. Federation of Pakistan*²⁵⁹ it was held that in common parlance, the word ‘morality’ is far more vague than the word ‘decency’. The difficulty of determining what would offend against morality is enhanced by the fact that not only does the concept of immorality differ between man and man, but the collective notion of society also differs amazingly in different ages. All that can be said is that the autonym of the word ‘morality’ according to the existing notion depends upon acts which are regarded as acts of immorality by the consensus of general opinion. However, it may be pointed out that owing to ethnic, cultural and even psychological differences, it is not possible to formulate a universal standard of morality. Thus, notions of morality vary from country to country and from age to age and the international community has not yet been able to settle any common code of morality.”

Some of the major legislations in India imposing a reasonable restriction on the ground of morality and decency are as under:

- (1) The Cinematograph Act 1952 provides for sanctioning of cinematograph films for exhibition;
- (2) The Young Persons (Harmful Publications) Act 1956 has been enacted to restrict production and distribution of pictorial and other publications having subjects like glorification of crime, violence etc. known as “horror comics” which are likely to encourage antisocial tendencies among children and also have a harmful influence on young persons.
- (3) The Drugs and Magical Remedies (Objectionable Advertisements) Act, 1954 restricts objectionable advertisements with reference to curing sexual ailments with the help of magic.
- (4) Ss. 20-23 of Post Office Act 1898 prohibit transmission of obscene material by post.
- (5) S. 3 of Dramatic Performances Act 1876 provides for prohibition of any dramatic performance which is likely to deprave and corrupt people who are watching the performance.

²⁵⁹ PLD 1988 SC 416

No fix standard is laid down till now as to what is moral and indecent. The standard of morality varies from time to time and from place to place.

3.8.3.6 Contempt of Court

Judiciary plays a vital role in any democratic country by imparting justice, laying down guidelines and often indulging in judicial activism. In this situation it becomes essential to respect such institution and its order. Thus, restriction on the freedom of speech and expression can be imposed if it exceeds the reasonable and fair limit and amounts to contempt of court. In England, three sorts kinds of contempts of Court have been observed in the leading case of *R. v. Grey*²⁶⁰ namely:

- (a) Scandalising the Court itself;
- (b) Abusing parties involved in cases before the Court;
- (c) Prejudicing mankind against persons before Court hears the cause.

All the above kinds of contempt lead to “criminal contempt” only and not civil contempt. Since the general principles of English common law are followed by Indian Courts in determining what constitutes contempt of court, these principles can be elaborated further as below:

3.8.3.6.1 Scandalising the Court

“Scandalising” refers to scurrilous attack on the majesty of justice which is calculated to undermine the authority of Courts and public confidence in the administration of justice. The malicious or slanderous publication inculcates in the mind of people a general disaffection and dissatisfaction on the judicial determination and indisposes their allegiance to obey them. If the peoples’ allegiance to the law is so fundamentally shaken, it is the most vital and most dangerous obstruction of justice calling for urgent action.²⁶¹

Any act which is done or writing that is published with an object of bringing a Court or a Judge of the Court into contempt, or lower his authority is a contempt of Court. Thus, imputing corruption, misconduct or incapacity in the discharge of his

²⁶⁰ (1900) 2 QB 36

²⁶¹ *D.C. Saxena vs. Hon’ble Chief Justice of India* (1996) 5 SCC 216

public duties on the judge are some of the examples of scandalizing the Court. Any criticism which tends to bring into ridicule and contempt the administration of justice is contempt.²⁶² As freedom of press has not been separately provided under the Constitution of India, any expression of opinion is not immune from the liability for exceeding the limits either under the law of defamation or contempt of Court or other constitutional limitations under Art. 19(2). If a citizen tries to scandalize the Court or undermines its dignity while exercising his right of free expression under Art. 19(1), the Court is empowered to exercise power under Art. 129 or Art. 215.

However, a fair criticism of the conduct of any Judge or even the institution of Judiciary and its functioning may not amount to contempt if it is made in good faith and public interest. In order to ascertain that good faith and public interest existed while making any remark, the Courts deciding the matter must also go through the surrounding circumstances as well as the persons responsible for such remarks comments, their knowledge in the field regarding which comments are made and also the intended purpose sought to be achieved through such comments. Each and every single citizen of the nation cannot be permitted to freely comment upon conduct of the institution.

The said contempt of scandalizing the court is subject to following important qualifications:

- (1) Power to punish for scandalizing the Court is a weapon to be used sparingly and always with regard to administration of justice and not for vindicating personal insult to a judge not affecting administration of justice.²⁶³

In case of *R. vs Editor of Statesman*²⁶⁴, it was held that there are two primary considerations which should weigh with the Court in such cases, namely:

- (a) Whether the reflection on conduct or character of the Judge is within the limits of fair and reasonable criticism, and
- (b) Whether it is a mere libel or defamation of the Judge or amounts to a contempt of the Court.

²⁶²R v Editor of Statesman (1928) 44 TLR 301

²⁶³Debi Prasad vs. King Emperor (1943) 48 CWN 44 (PC)

²⁶⁴ (1928) 44 TLR 301

Scandalising of Court is a species of contempt and it may take several forms. A common form is the vilification of the Judge. When proceedings in contempt are taken for such vilification, Courts have to inquire whether the vilification is of the judge “as a judge” or it is the vilification of the Judge as an individual.²⁶⁵

- (2) Object of the punishment is not protection of Judges personally from imputations to which they may be exposed as individuals but protection of the public themselves from the mischief they will incur if the authority of tribunal is impaired.²⁶⁶
- (3) A fair and reasonable criticism of a judicial act in the interest of public good does not amount to contempt. However, the liberty of free expression cannot be equated or confused with a licence to make unfounded and irresponsible allegations against the judiciary.²⁶⁷

Courts are not unduly sensitive to fair comment or even outspoken comments being made regarding their judgments and orders made objectively, fairly and without any malice but no one can be permitted to distort orders of the Court and deliberately give a slant to its proceedings which have a tendency to scandalize the court or bring it to ridicule in the larger interest of protecting administration of justice.²⁶⁸

3.8.3.6.2 Obstruction of or interference with due course of justice

A speech or conduct of a party which tends to influence the result of a pending trial, civil or criminal or otherwise tends to interfere with proper course of justice amounts to contempt of court and hence considered as a reasonable restriction on the freedom of speech and expression.²⁶⁹ Anything which prejudices the Court against any party before hearing of the actual cause takes place amounts to contempt even though the Court may not have been influenced by such act or statement.

Likewise, any threat to a party to a pending litigation which would force him to withdraw his action or to abandon it amounts to contempt. Also it would be contempt on part of a subordinate Court where it intentionally and wilfully disobeys

²⁶⁵B. Mishra vs. Registrar of Orissa High Court (1974) 1 SCC 374

²⁶⁶R. vs. Almon (1765) Wilmot’s Notes 243

²⁶⁷Radha Mohan Lal vs. Rajasthan High Court AIR 2003 SC 1647

²⁶⁸Narmada BachaoAndolan vs. Union of India (1999) 8 SCC 308

²⁶⁹R. v Catro (1873) 9 QB 219

the order of a superior Court. There cannot be an intentional disobedience unless the subordinate Court had knowledge of orders of the superior Court.²⁷⁰

3.8.3.6.3 Contempt in the face of the Court

Where any kind of words are uttered or an action is made by a party in face of the Court or in course of proceedings, it may amount to contempt provided such conduct interferes with the course of justice. Thus, an attempt or threat of using violence on opposite party or using abusive language which may likely result in physical provocation will amount to contempt in the face of Court.

In case of Advocate General, St. of Bihar vs. M.P. Khair Ind., it was held that abuse of process calculated to hamper the due course of judicial proceedings or orderly administration of justice amounts to contempt.²⁷¹ Thus, maintaining dignity of the Courts is one of the cardinal principles of the rule of law. If anyone criticizes a judicial institution in a manner which at first instance may seem mere criticism but ultimately leads in undermining the dignity of Courts, the same cannot be permitted. Undermining the dignity of Supreme Court or High Court would attract Art. 129 of 215 of the Constitution and also the provisions of Contempt of Courts Act 1971.

3.8.3.7 Defamation

Freedom of one person should be exercised properly and not in a manner which affects the reputation of some other person. Defamation is causing an injury to a man's reputation. The freedom of speech and expression does not give a right to a person to injure, lower the esteem, expose to hatred, ridicule or contempt of some other person by publishing a false statement regarding that other person without having any lawful justification. Defamation may be either in form of "libel" (remarks in oral form) or "slander" (remarks in written form which are published in some manner). In India, the criminal law relating to defamation is a part of Sec. 499 of Indian Penal Code while the civil law though uncoded follows the English common law.

²⁷⁰Kar vs. Chief Justice of Orissa AIR 1961 SC 1367

²⁷¹ AIR 1980 SC 946

To surmise, one's freedom, be it of any type, must not affect the reputation or status of another person. A person is known by his reputation more than his wealth or any thing else and Constitution considers it as ground to put restriction on freedom of speech.

3.8.3.8 Incitement to an offence

The ground of incitement to an offence as a restriction on freedom of speech and expression was added by the Constitution (First Amendment) Act, 1951. An individual has a freedom of speech and expression but it does not confer on him a right to incite people to commit offence. Offence refers to any act or omission made punishable by law for the time being in force. The term "incitement" means an act or instance of provoking, urging on, or stirring up. The act of persuading another person to commit a crime is incitement.²⁷²

In India, the term "offence" has been given a wide scope. Under S. 3(38) of the General Clauses Act, it means any act or omission made punishable by any law for the time being in force. Thus, legislature is competent to enact that incitement to commit any offence punishable under any Central or State-made law is an offence in itself. The ground of incitement may be invoked on freedom of speech and expression subject to following conditions:

- (a) The impugned law imposing restriction upon advocacy or incitement must relate to a pre-existing offence. Thus, in order to be punishable, the incitement must be of an act which at the time of commission of offence, was already an offence under any law for the time being in force. In other words, an incitement cannot be restricted under the present ground if the act or omission which is incited does not constitute an offence.
- (b) The legislation must be levelled against a 'definite offence'. It is not a valid restriction of the freedom if it is vague in nature. In case of *State of Bombay vs. Balsara*²⁷³, it was held that prohibition of incitement or encouraging any member of the public to commit any act 'which frustrates or defeats the provisions of this Act or

²⁷²Black – 7th Ed. 1999

²⁷³ (1951) SCR 628

any rule, regulation or order made thereunder' is too wide and vague, to be justified by Art. 19(2).

The present clause of incitement to an offence as a restriction to the freedom of speech and expression shall not affect mere approval or admiration of an act of murder or of violence in some literary or historical work unless such work itself has a tendency to incite or encourage the commission of such offence.²⁷⁴ It cannot be held as a general proposition that in all cases of admiration or approval of an offence or offender, there must be a tendency to encourage violent offences. Court must look into the circumstances of each case in judging such a tendency i.e. purpose of the work, period during which it was published, class of society to which it is aimed for referring, its effect on the minds of readers, context in which objected words appear and the interval of time between incidents narrated and the publication of work.²⁷⁵

From above analysis, it is evident that Grounds contained in Article 19(2) show that they are all concerned with the national interest or in the interest of the society. The first set of grounds i.e. the sovereignty and integrity of India, the security of the State, friendly relations with foreign States and public order are all grounds referable to national interest, whereas, the second set of grounds i.e. decency, morality, contempt of court, defamation and incitement to an offence are all concerned with the interest of the society. Freedom of speech and expression is a basic right for all the citizens in order to express themselves and live their life in the best possible manner by enjoying the said right. Removing the said right might suffocate the man in the sense that he shall not be able to express his thoughts, communicate to his fellow citizens or opine with anyone his views about any topic. Needless to say, free speech is a vital organ of a free society as the political, national, personal agendas cannot be progressed or seen with a different view if there is a total restriction on the same.

²⁷⁴State of Bihar vs. Shailabala Devi (1952) SCR 654

²⁷⁵ Justice Fazal Karim , Judicial Review of Public Action Vol.1 –2006

3.8.4 Penal Provisions

Penal provisions relate to, constitute or prescribe punishment for a specific offence. The following enactments include penal provisions for violation of any act in respect of freedom of speech and expression.

3.8.4.1 Indian Penal Code

Indian Penal Code is the major crime-punishing legislation of our country. It is a comprehensive code and defines and punishes all sorts of offences. It is sub-divided in 23 chapters and 511 sections. Various major offences pertaining to murder, rape, theft, breach of trust, cruelty, etc. are covered under the Code. The major sections pertaining to print media under Indian Penal Code are as under:

3.8.4.1.1 Sedition: (Section 124A)

Sedition refers to words or actions that make people rebel against the authority of the State. According to Coleridge, the word ‘sedition’ in its ordinary natural significance denotes a tumult, an insurrection, popular commotion or an uproar; it implies violence or lawlessness in some form. Lord Fitzgerald explained meaning of the word stating that it is a crime against society, nearly allied to that of treason, and it frequently precedes treason by a short interval. Sedition in itself is a comprehensive term and it embraces all those practices whether by word, deed or writing which are calculated to disturb tranquility of the State and lead ignorant persons to endeavor to subvert the Government and laws of the country. Objects of sedition generally are to induce discontent and insurrection and to stir up opposition to the Government and bring administration of justice into contempt, and the very tendency of sedition is to incite people into insurrection and rebellion.²⁷⁶

Sedition has been described as disloyalty in action and the law considers as sedition all those practices which have for their object to excite discontent or dissatisfaction, to create public disturbance, or to lead to civil war; to bring into hatred or contempt the Sovereign of the Government, the laws or the Constitution of the realm and generally all endeavours to promote disorder. Section 124A of Indian

²⁷⁶ Dr. S. R. Myneni, Media Law 216 Asia Law House 2013

Penal Code which deals with the offence of “sedition” provides that whoever by words, either spoken or written, or by signs, or by visible representations, or otherwise brings or attempts to bring into hatred or contempt, or excites or attempts to excite disaffection towards the Government established by law in India shall be punished with imprisonment for life, to which fine may be added, or with imprisonment which may extend to three years to which fine may be added, or with fine. The Section also mentions explanations namely:

- (a) The expression “disaffection” includes disloyalty and all feelings of enmity;
- (b) Comments expressing disapprobation of the measures of the Government with a view to obtain their alteration by lawful means, without exciting or attempting to excite hatred, contempt or disaffection do not constitute an offence under this section;
- (c) Comments expressing disapprobation of the administrative or other action of Government without exciting or attempting to excite hatred, contempt or disaffection do not constitute an offence under this section.

In case of *KedarNath Singh vs. State of Bihar*²⁷⁷, it was held that comments however strongly worded expressing disapprobation of action of Government without exciting those feelings which generate the inclination to cause public disorder by acts of violence, would not be penal. In other words, disloyalty to Government established by law is not the same thing as commenting in strong terms upon the measures or acts of government or its agencies so as to ameliorate the condition of people or to secure the cancellation or alteration of those acts or measures by lawful means, that is to say, without exciting those feelings of enmity or disloyalty which imply excitement to public disorder or the use of violence. Again, in case of *Balwant Singh vs. State of Punjab*²⁷⁸ it was held that raising of some lonesome slogans a couple of times by two individuals without anything more did not constitute any threat to the Government of India as by law established nor could the same give rise to feelings of enmity or hatred among different communities or religion or other groups. Thus, the major criteria in order to apply this section to any

²⁷⁷ AIR 1962 SC 955

²⁷⁸ AIR 1995 SC 1785

act is that there should be an attempt to bring disaffection, hatred or contempt towards the Government either in written or verbal form or by signs or visible representations. Any form of comment which merely expresses disapproval on moral grounds of the steps taken by Government or its administrative actions but does not invoke hatred, contempt or disaffection towards the same shall not be considered as sedition.

3.8.4.1.2 Promoting enmity between different groups on grounds of religion, race, place of birth, residence, language, etc. and doing acts prejudicial to maintenance of harmony (Section 153A)

Section 153A of Indian Penal Code deals with words, spoken or written, or representations that promote disharmony and feelings of enmity, hatred or ill-will on grounds of religion, race, language, caste or community or any other ground. Likewise, any act prejudicial to the maintenance of harmony between different religious, racial, language or regional groups or castes or communities which disturbs public tranquility or organizes any movement whereunder participants are trained to use criminal force or violence against any religious group shall also be punishable under this Section. The penalty is 3 years in jail and/or fine.

3.8.4.1.3 Sale, etc. of obscene books, etc. (Sec. 292)

The term “obscene” has not been defined in Indian Penal Code. The general meaning of the word as available in Oxford New English Dictionary is “offensive to modesty or decency, expressing or suggesting unchaste and lustful ideas; impure, indecent and lewd.” Likewise, Black’s Law Dictionary defines the term as “lewd, impure, indecent, calculated to shock the moral sense of man by a disregard of chastity or modesty”. U/s.292(2) a book, pamphlet, paper, writing, drawing, painting, representation, figure or any other object shall be deemed to be obscene if it is lascivious or appeals to the prurient interest or if its effect, or where it comprises two or more distinct items, the effect of any one of its items, is, if taken as a whole, such as to tend to deprave and corrupt persons who are likely having regard to all relevant circumstances, to read, see or hear the matter contained or embodied in it.

As per sub-section (2), whoever:

- (a) Sells, lets to hire, distributes, publicly exhibits or in any manner puts into circulation or for purposes of sale, hire, distribution, public exhibition or circulation, makes, produces or has in his possession any obscene book, pamphlet, paper, drawing, painting, representation or figure or any other obscene object whatsoever, or
- (b) Imports, exports or conveys and obscene object for any of the purposes aforesaid, or knowing or having reason to believe that such object will be sold, let to hire, distributed or publicly exhibited or in any manner put into circulation or
- (c) Takes part in or receives profits from any business in the course of which he knows or has reason to believe that any such obscene objects are, for any of the purposes aforesaid, made, produced, purchased, kept, imported, exported, conveyed, publicly exhibited or in any manner put into circulation, or
- (d) Advertises or makes known by any means whatsoever that any person is engaged or is ready to engage in any act which is an offence under this Section, or that any such obscene object can be procured from or through any person, or
- (e) Offers or attempts to do any act which is an offence under this Section.

Shall be punished on first conviction with imprisonment of either description for a term which may extend to two years and with fine which may extend to Rs. 2000/- and in the event of a second or subsequent conviction, with imprisonment of either description for a term which may extend to 5 years and also with fine which may extend to Rs. 5000/-.

However, the above Section shall not apply to any book, pamphlet, paper, writing, drawing, painting, representation or figure the publication of which is proved to be justified as being for the public good on the ground that such book, pamphlet, paper, writing, drawing, painting, representation or figure is in the interest of science, literature, art or learning or other objects of general concern, or which is kept or used bona fide for religious purposes. The Section shall also not be applicable to any representation sculptured, engraved, painted or otherwise represented on or in any ancient monument within the meaning of Ancient Monuments and Archaeological Sites and Remains Act 1958 or to any temple, or on any car used for conveyance of idols, or kept or used for any religious purpose.

Thus, u/s. 292, following two things need to be proved in order to apply the Section, i.e.:

- (a) That the thing in question was obscene, and
- (b) That the accused used it in any of the ways enumerated, i.e. sold, distributed, imported, printed or exhibited it, or attempted or offered to do so.

3.8.4.1.4 Sale, etc. of obscene objects to young persons (Sec. 293)

Whoever sells, lets to hire, distributes, exhibits or circulates to any person under the age of twenty years any such obscene object as is referred to in Sec. 292, or offers or attempts so to do, shall be punished on first conviction with imprisonment of either description for a term which may extend to 3 years, and with fine upto Rs. 2000/- and in the event of subsequent conviction, with imprisonment of either description for a term which may extend to 7 years, and also with fine upto Rs. 5000/-

3.8.4.1.5 Deliberate and malicious acts, intended to outrage religious feelings of any class by insulting its religion (Section 295A)

Whoever with deliberate and malicious intention of outraging the religious feelings of any class of citizens of India by words, either spoken or written or by signs or by visible representations or otherwise insults or attempts to insult the religion or the religious beliefs of that class shall be punished with imprisonment for a term extending to three years or with fine, or with both.

3.8.4.1.6 Defamation (Sec. 499)

Whoever by words, either spoken or intended to be read, or by signs or by visible representations, makes or publishes any imputation concerning any person intending to harm, or knowing or having reason to believe that such imputation will harm, the reputation of such person, is said to defame that person.

Any of the following acts may amount to defamation:

- (i) It may amount to defamation to impute anything to a deceased person, if he imputation would harm the reputation of that person if living and is intended to be hurtful to the feelings of his family or other near relatives.

- (ii) It may amount to defamation to make an imputation concerning a company or an association or collection of persons as such.
- (iii) An imputation in form of an alternative or expressed ironically, may amount to defamation.
- (iv) No imputation is said to harm a person's reputation, unless that imputation directly or indirectly in the estimation of others, lowers the moral or intellectual character of that person, or lowers the character of that person in respect of his caste or of his calling or lowers the credit of that person or causes it to be believed that the body of that person is in a loathsome state, or in a state generally considered as disgraceful.
However, following acts though in the same nature, would not amount to defamation:
 - (i) Imputation of truth which public good requires to be made or published:
 - (ii) Public conduct of public servants:
 - (iii) Conduct of any person touching any public question:
 - (iv) Publication of reports of proceedings of Courts:
 - (v) Merits of a case decided in Court or conduct of witnesses and others concerned:
 - (vi) Merits of public performance:
 - (vii) Censure passed in good faith by person having lawful authority over another:
 - (viii) Accusation preferred in good faith to authorized person:
 - (ix) Imputation made in good faith by person for protection of his or other's interests:
 - (x) Caution intended for good of person to whom conveyed or for public good:

Sec. 500 provides for punishment for defamation and states that "Whoever defames another shall be punished with simple imprisonment for a term which may extend to two years, or with fine, or with both."

3.8.4.1.7 Printing or engraving matter known to be defamatory (Sec. 501)

"Whoever prints or engraves any matter knowing or having good reasons to believe that such matter is defamatory of any person, shall be punished with simple imprisonment for a term which may extend to two years, or with fine, or with both."

3.8.4.1.8 Sale of printed or engraved substance containing defamatory matter (Sec. 502)

“Whoever sells or offers for sale any printed or engraved substance containing defamatory matter knowing that it contains such matter shall be punished with simple imprisonment for a term which may extend to two years or with fine, or with both.”

3.8.4.1.9 Statements conducing to public mischief (Sec. 505)

Whoever makes, publishes or circulates any statement, rumour or report, -

- (a) With intent to cause, or which is likely to cause, any officer, soldier, sailor or airman in the Army, Navy or Air Force of India to mutiny or otherwise disregard or fail in his duty as such; or
- (b) With intent to cause, or which is likely to cause fear or alarm to the public or to any section of the public whereby any person may be induced to commit an offence against the State or against the public tranquility; or
- (c) With intent to incite, or which is likely to incite, any class or community of persons to commit any offence against any other class or community;

Shall be punished with imprisonment which may extend to three years, or with fine, or with both.

Likewise, Sec. 505(2) states that whoever makes, publishes or circulates any statement or report containing rumour or alarming news with intent to create or promote, or which is likely to create or promote on grounds of religion, race, place of birth, residence, language, caste or community or any other ground whatsoever, feelings of enmity, hatred or ill will between different religious, racial, language or regional groups or castes or communities shall be punished with imprisonment which may extend to three years, or with fine, or with both.

3.8.4.1.10 Section 298:

Section 298 penalises the “utterance of words” that might hurt the religious feelings of any person; the penalty is 1 year and/or fine.

3.8.4.2 Newspaper (Incitement to Offences) Act, 1908

The said Act was enacted in British India and aimed against Extremist nationalist activity. It empowered the magistrates to confiscate press property which publishes objectionable material likely to cause incitement to murder or acts of violence.

3.8.4.3 The Prevention of Seditious Meetings Act, 1911

The said Act was enacted to consolidate and amend the law relating to the prevention of public meetings which are likely to promote sedition or disturb public tranquility. Sec. 4 of the said Act makes it mandatory to seek permission in writing or give written notice of a public meeting of such nature from District Magistrate or the Commissioner of Police. A person failing to take such permission or give a written notice shall be punished with imprisonment for a term extending to six months or with fine or with both. Further, Sec. 7 also provides that any person delivering lecture or speech that is likely to cause disturbance or public excitement amidst present people may be arrested without warrant and punished with imprisonment for a term which may extend to six months or with fine or with both.

3.8.4.4 The Official Secrets Act, 1923

The said Act has been enacted for maintaining the secrecy of official documents, information, communications, etc. pertaining to government. The same are of national importance and Section 3 of the present Act states that any person who acts against the interest of State and its safety by entering any prohibited place as defined u/s. 2(8) of the Act or by making any sketch, plan, model or note which maybe directly or indirectly useful to the enemy or obtains, publishes or communicates any secret official code or password to any other person or similarly passes any official information to any other person which is likely to affect the sovereignty and integrity of India, security of the State or friendly relations with foreign States shall be punished with imprisonment ranging from three years to fourteen years. Likewise, u/s. 5 if a person who is already having under his control any information, sketches, or documents which are of national importance passes it any third person not authorized to receive such information or fails to take reasonable care of the same

thus endangering interest of the State shall also be guilty of offence under this Act and subject to imprisonment upto three years.

3.8.4.5 The Representation of the People Act 1951

Section 127A of the said Act restricts the printing and publishing of pamphlets or posters without the names and addresses of the printer and publisher thereof. The same may be printed after declaring the identity of publisher along with his signature and attesting witnesses and copy thereof is sent to the district magistrate or Chief Electoral Officer. Any person acting in contravention of the same shall be punished with imprisonment extending to six months or with fine of upto Rs. 2000/- or both.

3.8.4.6 The Drugs and Magic Remedies (Objectionable Advertisements) Act, 1954

The said Act was passed to control the advertisement of drugs in certain cases, to prohibit the advertisement for certain purposes of remedies alleged to possess magic qualities and to provide for matters connected therewith. The term “advertisement” has been defined to include any notice, circular, label, wrapper or other document and any announcement made orally or by any means of producing or transmitting light, sound or smoke. Thus, law makers have taken care to prohibit misleading advertisements by way of either print media or electronic media. Section 3, 4 and 5 of the Act prohibit publication of advertisement of drugs of any kind for treatment of some diseases and disorders, misleading advertisements and advertisements of magic remedies for treatment of certain diseases and disorders. U/s. 3, persons are prohibited to be a part of publication of any advertisement referring to any drug in terms which suggest or are calculated to lead to the use of that drug for:

- (a) Procurement of miscarriage in women or prevention of conception in women; or
- (b) Maintenance or improvement of capacity of human beings for sexual pleasure;
- (c) Correction of menstrual disorder in women; or
- (d) Diagnosis, cure, mitigation treatment or prevention of any disease, disorder or condition specified in the Schedule or any other disease, disorder or condition which may be specified in the rules under this Act.

Simultaneously, giving false impression, making false claims in respect of true character of a drug has been prohibited u/s. 4 and import or export of such misleading advertisements into and out of India also has been prohibited u/s.6. Section 7 of the Act penalizes any contravention of above sections and states that whoever contravenes any of the provisions of this Act or the rules made thereunder shall on conviction be punishable:

- (a) In case of first conviction, with imprisonment which may extend to 6 months or with fine or with both;
- (b) In case of subsequent conviction with imprisonment which may extend to 1 year, or with fine, or with both.

3.8.4.7 The Prize Competitions Act, 1955

Section 15 of the Act states that where any newspaper or other publication contains any prize competition promoted or conducted in contravention of the provisions of this Act or except in accordance with the provisions of a licence under this Act or any advertisement in relation thereto, the State Government may by notification in the Official Gazette declare every copy of the newspaper and every copy of the publication containing the prize competition or the advertisement to be forfeited to Government.

3.8.4.8 The Young Persons (Harmful Publications) Act, 1956

Pictorial and other publications containing stories of glorification of crime, violence and vice known as “horror comics” have found easy circulation and a large number of readers in India. The spread of such stories is likely to encourage anti-social tendencies amongst children and they also exert a harmful influence on the tender minds of young persons. Hence, in order to prevent dissemination of certain publications that are harmful to young persons, the said Act has been implemented. A harmful publication has been defined u/s. 2(a) to mean any book, magazine, pamphlet, leaflet, newspaper or other similar publication which consists of stories told with/without the aid of pictures or wholly in pictures being stories portraying wholly or mainly-

- (i) The commission of offences; or
- (ii) Acts of violence or cruelty; or
- (iii) Incidents of a repulsive or horrible nature

in such a way that the publication as a whole would tend to corrupt a young person into whose hands it might fall, whether by inciting or encouraging him to commit offences or acts of violence or cruelty or in any other manner. Section 3 of the Act penalizes sale, hire, distribution, exhibition, advertisement, etc. of such harmful publication with imprisonment of 6 months or with fine or both. Courts are also empowered to order the destruction of such publications.

3.8.4.9 The Prevention of Insults to National Honour Act, 1971

Section 2 of the Act states that whoever burns, mutilates, defaces, defiles, disfigures, destroys, tramples upon or insults the Indian National Flag or the Constitution of India by written or spoken words in any place shall be punished with imprisonment extending upto 3 years or with fine or with both. Likewise, Sec. 3 punishes any person intentionally preventing the singing of Indian National Anthem or causing disturbance to any assembly engaged in such singing with imprisonment extending upto three years.

3.8.4.10 The Contempt of Courts Act, 1971

The jurisdiction to punish for contempt touches upon two important fundamental rights of the citizen namely, the right to personal liberty and the right to freedom of expression.²⁷⁹ The Contempt of Courts Act, 1971 has been enacted with the object of defining and limiting the powers of certain courts in punishing contempts of courts and to regulate their procedure in relation thereto. The said Act defines “civil contempt” u/s. 2(b) as wilful disobedience to any judgment, decree, direction order, writ or other process of a court or wilful breach of an undertaking given to a court. Sec. 2(c) defines “criminal contempt” as the publication (whether by words, spoken or written or by signs, or by visible representation or otherwise) of any matter or the doing of any other act whatsoever which –

²⁷⁹ Available at <http://www.legalserviceindia.com/article/I255-Contempt-of-Court.html> (Visited on 14.8.2018)

- (i) scandalizes or tends to scandalize, or lowers or tends to lower the authority of, any court; or
- (ii) prejudices, or interferes or tends to interfere with, the due course of any judicial proceeding; or
- (iii) interferes or tends to interfere with, or obstructs or tends to obstruct, the administration of justice in any other manner.

Apart from the acts mentioned above, no other act shall be considered contempt namely;

- (i) innocent publication and distribution of matter by any person which interferes or obstructs the course of justice of any pending civil or criminal proceedings if at that time he had no reasonable grounds for believing that the proceeding was pending. (Sec. 3);
- (ii) Fair and accurate report of judicial proceeding (Sec. 4)
- (iii) Statement made by a person in good faith concerning the presiding officer of any subordinate court to any other subordinate court or High Court to which it is subordinate. (Sec. 6)
- (iv) Publication of information relating to proceeding in chambers or in camera except in certain cases.(Sec. 7)

3.8.4.11 The Code of Criminal Procedure, 1973

The Code of Criminal Procedure lays down exhaustive procedures for several circumstances wherein freedom of print media is restrained for the protection of larger interest of public. Some of these cases are as under:

3.8.4.11.1 Power to declare certain publications forfeited and to issue search warrants for the same: (Sec. 95)

Sec. 95(1) of the CrPC states that where any newspaper, book or any document appears to the State Government to contain any matter the publication of which is punishable u/s. 124A, 153A, 153B, 292, 293 or 295A of IPC, the State Government may by notification stating the grounds of its opinion, declare every copy of the issue of the newspaper containing such matter and every copy of such book or other

document to be forfeited to Government and thereupon any police officer may seize the same wherever found in India and any Magistrate by warrant may authorize any police officer to enter upon and search for the same in any premises where any copy of such issue or any such book or other document may be or may be reasonably suspected to be.

3.8.4.11.2 Application to High Court to set aside declaration of forfeiture: (Sec. 96)

Sec. 96(1) provides that any person having any interest in any newspaper, book or other document in respect of which a declaration of forfeiture has been made u/s. 95, may within two months from the date of publication in the Official Gazette of such declaration, apply to the High Court to set aside such declaration on the ground that the issue of newspaper or the book or other document in respect of which the declaration was made did not contain any such matter as referred to in Sec. 95(1). Sec. 96(2) provides that the copy of such newspaper may be given in evidence in aid of the proof of the nature or tendency of the words, signs or visible representations contained in such newspaper in respect of which declaration of forfeiture was made. U/s. 96(4), if the High Court is not satisfied that the issue of newspaper, book or other document contained any matter of mischievous nature, it can set aside the declaration of forfeiture.

3.8.4.12 The Parliamentary Proceedings (Protection of Publication) Act, 1977

Opinion of the nation's citizens is the basis of any democratic government. Without knowing their opinion and free will, if a government takes arbitrary decisions of its own, the same shall lead to chaos and anarchy in the nation. Hence, it is vital that proceedings of Parliament are communicated to the public. For this purpose, newspapers should be provided the privilege of publishing substantially true reports of proceedings in Parliament without being exposed to any civil or criminal action.

Thus, u/s. 3 of the Act, a person is not liable to any civil or criminal proceedings in any court in respect of publication in a newspaper of a substantially true report of any proceedings of either House of Parliament unless the publication is proved to have been made with malice.

3.8.4.13 Indecent Representation of Women (Prohibition) Act 1986

The Indecent Representation of Women (Prohibition) Act 1986 was enacted to prohibit indecent representation of women through advertisements or in publications, writings, paintings, figures or in any other manner. Sec. 2(c) of the said Act defines “indecent representation” as depiction in any manner of the figure of a woman; her form or body or any part thereof in such way as to have the effect of being indecent or derogatory to, or denigrating women, or is likely to deprave, corrupt or injure the public morality or morals. Sec. 3 of the Act prohibits advertisements containing indecent representation of women while Section 4 prohibits publication or sending of books, pamphlets, etc. containing such indecent representation by post. Section 6 provides that any person who contravenes the provisions of Sec. 3 or 4 shall be punishable on first conviction with imprisonment of either description for a term which may extend to Rs. 2000/- and in the event of a second or subsequent conviction with imprisonment for term of not less than six months but which may extend to 5 years and also with a fine not less than Rs. 10000/- but which may extend to Rs. 1 lac. An exception is made for any book, pamphlet, film, writing, etc. publication of which is proved to be justified as being for public good on the ground that such book, pamphlet, etc. are in the interest of science, literature, art or learning or other objects of general concern or if they are used bona fide for religious purpose.

3.8.4.14 Information Technology Act, 2000

The Information Technology Act came into force in the year 2000. After the popularity and usage of internet increased in the world everyday, it also saw rise in the complaints of obscenity, hacking, phishing, etc. The Act was enacted to bring the emerging technology of internet under the scope of law so that the crimes committed through the medium of internet could be made punishable offences.²⁸⁰ Section 66A provides that any person who sends by means of a computer source or a communication device, any information that is grossly offensive or has menacing

²⁸⁰Siddharth Narrain, A Broad Overview of Broadcasting Legislation in India, Alternative Law Forum, Bangalore (2008)

character, any information which he knows to be false but for the purpose of causing annoyance, inconvenience, danger, obstruction, insult, injury, criminal intimidation, enmity, hatred or ill will, persistently by making use of such computer resource or a communication device, and any electronic mail or electronic mail message for the purpose of causing annoyance or inconvenience or to deceive or to mislead the addressee or recipient about origin of such messages shall be punishable with an imprisonment of upto 3 years and fine of uptoRs. 5 lacs or both. The said section was repealed in the year 2015. Section 67 of the said Act deals with publishing of information which is obscene in electronic form. It states that whoever publishes or transmits or causes to be published in electronic form any material which is lascivious or appeals to the prurient interest or if its effect is such as to tend to deprave and corrupt persons who are likely having regard to all relevant circumstances, to read, see or hear the matter contained or embodied in it shall be punished for a first time offence with imprisonment of up to 5 years and fine of uptoRs. 1 lac and for second or subsequent conviction, with imprisonment of upto 10 years and fine of uptoRs 2 lacs.

3.8.5 Regulatory Provisions

Regulation has become one of the most highly used tools across the world to restrict media freedom. The recent spread of broadcast sector in several countries and regions has been a major cause behind the need of regulation. However, in order to strike the right balance between public's right to freedom of expression and the state's obligation to protect its citizens from violence continues to be a major challenge amidst growth of digital and satellite media.²⁸¹

Regulations are enforced usually by a regulatory agency formed or mandated to carry out the purpose or provisions of a legislation. For example, The Press Council of India is an organization that was established for the purpose of preserving freedom of press and of maintaining and improving the standards of newspaper and news agencies in India. Thus, it is an authorized body to develop and enforce

²⁸¹ Available at <http://www.freedomhouse.org/report/special-reports> (Visited on 26.11.2016)

regulations for newspaper industry in India. The major enactments with regulatory provisions are:

3.8.5.1 Print Media

The print media or the earliest form of media across the world which was mainly in forms of books, newspapers, magazines, etc. was regulated through several legislations which are as under:

3.8.5.1.1 The Press and Registration of Books Act 1867

Several new books related to diversified subjects were written in India during the British regime. At the same time, as printing presses also started getting established, the number of publishers, books as well as copies of books kept on rising. Even education was given vital importance due to which books in nature of educational material also started getting published. All this led to opining that an authority should be created for keeping a record of the books and other publications which were being printed in huge numbers through various printing presses across India. For this purpose, a Bill was introduced in Legislature for regulation of printing presses and newspaper for preservation of copies of books and periodicals containing news printed in the whole of India and for the registration of such books and periodicals.²⁸² Hence, for the regulation of printing presses and newspapers as well as for the preservation of copies of books printed in India as also for registration of such books and newspapers, the Press and Registration of Books Act 1867 was enacted. The Act under its various sections required the printers and publishers of books and newspapers to provide specific declarations regarding setting up such printing press as well as details as to the material being published. Also, the books had to be compulsorily registered in the Catalogue of Books to be maintained u/s. 18 of the Act giving exact details of the book, i.e. number of pages, edition, author's details, etc. Sec. 19B provided for a similar Register of Newspapers whereunder details pertaining to the newspaper being published had to be given.

²⁸²Barua, Vidisha, Press & Media Law Manual, Universal Law Publishing Co., 2002 (Pg. 74)

3.8.5.1.2 The Copyright Act, 1957

The statutory meaning of copyright is the exclusive right to do or authorize others to do certain acts in relation to literary, dramatic or musical works; artistic works; cinematograph films and sound recording. Trespassing the above right is considered as infringement of the right of author and is punishable. The Copyright Act, 1957 currently prevails in India for regulation of original works created by authors, musicians, etc. U/s 14 of the Act, copyright means the exclusive right to do or authorize the doing of any of the following acts in respect of a work:

- (a) In the case of a literary, dramatic or musical work, not being a computer programme:
 - (i) To reproduce the work in any material form including storing of it in any medium by electronic means;
 - (ii) To issue copies of the work to the public not being copies already in circulation;
 - (iii) To perform the work in public or communicate it to the public;
 - (iv) To make any cinematograph film or sound recording in respect of the work;
 - (v) To make any translation of the work;
 - (vi) To make any adaptation of the work;
 - (vii) To do, in relation to a translation or an adaptation of the work, any of the acts specified in relation to the work in sub-clauses (i) to (vi);

Simultaneously, copyright is also available in cases where new computer programmes, artistic works, cinematograph films and sound recordings are created.

3.8.5.1.3 Registrar of Newspapers for India

The Office of the Registrar of Newspapers for India came into existence on 1st July 1956. It found its origin after the First Press Commission made a recommendation in 1953 followed by amendment of the Press and Registration of Books Act 1867. The Registrar office is entrusted with following statutory functions²⁸³:

- Compiling and maintaining Register of Newspapers which shall include particular details of all the newspapers published in India.
- Issuing Certificate of Registration to newspapers published under valid declaration.

²⁸³ Available at https://www.rni.nic.in/all_page/History.aspx (Visited on 20.9.2018)

- Scrutinizing and analyzing annual statements as to circulation and ownership sent by newspaper publishers u/s. 19D of Press and Registration of Books Act.
- Informing District Magistrates as to availability of titles to intending publishers for filing declaration.
- Ensuring that newspapers are published in accordance with provisions of the Press and Registration of Books Act and Rules 1867.
- Verification of circulation claims furnished by the publishers in their Annual Statements
- Preparation and submission of report containing available information and statistics about the press in India focusing on emerging trends in circulation and in direction of common ownership units etc.

The Registrar also has some non-statutory functions to be performed namely formulation of Newsprint Allocation Policy Guidelines and issuing Eligibility Certificate to newspapers to enable them to import newsprint and to procure indigenous newsprint and to assess and certify the essential need and requirement of newspaper establishments to import printing and composing machinery and allied materials.

3.8.5.1.4 Defence of India Act, 1962

The Defence of India Act 1962 was enacted to provide for special measures to ensure the public safety and interest, the defence of India and civil defence and for the trial of certain offences. The Act came into effect during proclamation of emergency in 1962 and empowered the Central Government to make rules regarding prohibition of publications or communications prejudicial to the civil defense or military operations, prevention of prejudicial reports and prohibition of printing or publishing any prejudicial matter in any newspaper. U/s. 3(6) of the Act, Central Government could make rules requiring publication of news and information. U/s. 7, printing or publishing of any newspaper, news sheet, book or other document containing matters prejudicial to defense of India and civil defense, public safety, maintenance of public order was prohibited. The Central Government could also demand security from any press used for purpose of printing or publishing and

forfeiting the copies of any newspaper, etc. or even forfeit such security in specified circumstances and order for closure of such press or premises.

3.8.5.1.5 The Press Council Act, 1978

The Press Council of India was established under the PCI Act, 1978 for the purpose of preserving freedom of press and of maintaining and improving the standards of newspaper and news agencies in India. Section 13 of the Act mentions objects and functions of the Council which are as follows:

- (a) To preserve the freedom of Press and to maintain and improve the standards of newspapers and news agencies in India;
- (b) To help newspapers and news agencies to maintain their independence;
- (c) To build up a code of conduct for newspapers, news agencies and journalists in accordance with high professional standards;
- (d) To ensure maintenance of high standards of public taste on part of newspapers, news agencies and journalists and foster a due sense of rights and responsibilities of citizenship;
- (e) To encourage the growth of a sense of responsibility and public service among all those engaged in profession of journalism;
- (f) To keep under review any development likely to restrict the supply and dissemination of news of public interest and importance;
- (g) To keep under review cases of assistance received by any newspaper or news agency in India from any foreign source including such cases as are referred to it by the Central Government or are brought to its notice by any individual, association of persons or any other organization;
- (h) To undertake studies of foreign newspapers including those brought out by any embassy or other representative in India of a foreign State, their circulation and impact;
- (i) To promote a proper functional relationship among all classes of persons engaged in production or publication of newspapers or in news agencies;

- (j) To concern itself with developments such as concentration of or other aspects of ownership of newspapers and news agencies which may affect the independence of press;
- (k) To undertake such studies as may be entrusted to the Council and to express its opinion in regard to any matter referred to it by Central Government;
- (l) To do such other studies as may be incidental or conducive to the discharge of above functions.

PCI also has the power to receive complaints of violation of journalistic ethics, or professional misconduct by an editor or journalist. It is responsible for enquiring into complaints received and may summon witnesses and take evidence under oath, demand copies of public records to be submitted, issue warnings and admonish the newspaper, news agency, editor or journalist. It can even require any newspaper to publish details of the inquiry. Decisions of the PCI are final and cannot be appealed before court of law.

Powers of PCI are restricted due to following reasons:

- (a) PCI has limited powers of enforcing the guidelines issued. It cannot penalize newspapers, news agencies editors and journalists for violation of guidelines;
- (b) PCI only overviews functioning of media press. It can enforce standards upon newspapers, journals, magazines and other forms of print media only but not upon sources of electronic media like radio, television and internet media.

As announced by Rajyavardhan Rathore – Minister of the State for Information and Broadcasting, Press Council of India is also in the process of making amendments to the Press Council Act so that electronic media can be brought under its jurisdiction. When questioned as to whether government proposes to set up a common statutory regulator, Rathore said the PCI is in the process of considering its earlier proposal for amendments to the Press Council Act 1978 to bring electronic media under jurisdiction of PCI which maybe considered after receiving the view of Chairman, PCI. He further added that the Parliamentary Standing Committee on Information Technology had in its 47th report recommended that there should be statutory body, viz. Media Council having eminent persons as its members to look into all media contents both from print and electronic media. He also said that TRAI

had in its report on cross media ownership recommended that government should not regulate the media and there should be a single regulatory authority for print and electronic media.²⁸⁴

3.8.5.1.6 The Right to Information Act, 2005

The Government of India resolved that in order to ensure greater and more effective access to information to all citizens of the nation, it is required that the Freedom of Information Act of 2002 must be made more progressive, participatory and meaningful. On this issue, National Advisory Council suggested certain important changes to be incorporated in the said Act to ensure smoother and greater access to information. After examining the suggestions of National Advisory Council, Government decided to make several changes in the said law. In view of the significant changes proposed by the National Advisory Council, it was decided to repeal the Freedom of Information Act 2002 and enact another law for providing an effective framework for effectuating the right of information recognized under Article 19 of the Constitution of India. The Right to Information Act provides for setting out the practical regime of right to information for citizens to secure access to information under the control of public authorities, in order to promote transparency and accountability in the working of every public authority, the constitution of a Central Information Commission and State Information Commission and for matters connected therewith or incidental thereto.

With the advent of internet and digital age, several original works have now been made available online and can be easily accessed by everyone. However, due to easy accessibility, the original literary works, musical compositions, etc. can be copied and claimed by anyone throughout the world without giving due credits to the original author. At international level, attempt has been made to establish a framework which can be used to ensure that the right to freedom of expression and ability to share knowledge and culture are protected from increasing and excessive copyright interests in the digital age. The Right to Share Principles which have been

²⁸⁴ Available at www.indianexpress.com/article/india/india-others/electronicmediamaysooncomunderpresscouncilact (Published on March 13, 2015 by Press Trust of India, New Delhi) (Visited on 23.11.2016)

developed in cooperation with high level experts from around the world also seek to promote positive measures that foster the free flow of information and ideas and allow greater access to information, knowledge and culture on internet and beyond.²⁸⁵

The tension between the right to freedom of expression and copyright is not new. However, over the last ten years, we have seen an alarming expansion of copyright claims at the expense of human rights protection. The Right to Share Principles show that freedom of speech and free flow of information and ideas should not and cannot be marginalized by claims to property. As a part of a series of recommendations, lawmakers should consider scrapping criminal sanctions for non-commercial copyright infringement. It is entirely disproportionate that millions of internet users worldwide face the threat of criminal punishment for personal use of copyrighted material where they seek no commercial gain. Copyright law must keep pace with technological and social change and not stifle creativity in the name of protecting it.²⁸⁶

3.8.5.2 Electronic Media

Electronic media being faster than its previous counterpart, the print media needs stronger regulations considering its speedy broadcast of news and other programs. It is regulated by the following legislations in India:

3.8.5.2.1 Indian Telegraph Act, 1885

Until satellite televisions were setup in the period of 1990s, government enjoyed the monopoly of broadcast sector and the same was also supported by Indian Telegraph Act 1885. The term “telegraph” has been exhaustively defined through various amendments as and when new forms of communication were sent to public domain. Thus, the term “telegraph” includes most modern communication devices irrespective of their underlying technology. The Act defines the term as “any appliance, instrument, material or apparatus used or capable of use for transmission

²⁸⁵ Available at <http://www.article19.org/resources.php/3715/en/article-19-launches-right-to-share> (Visited on 13.11.2016)

²⁸⁶ Agnes Callamard, Executive Director of ARTICLE 19

or reception of signs, signals, writing, images and sounds or intelligence of any nature by wire, visual or other electro magnetic emissions, radio waves or Hertzian waves, galvanic or magnetic waves.” Courts have through several judgments held that the term ‘telegraph’ includes telephone, television, radio, wireless, mobile and video equipment. The Act empowers Central Government to have exclusive privilege of establishing, maintaining and working telegraphs within India. It can also take temporary possession of a telegraph in cases involving public emergencies or public safety. Section 5(2) enables government to legally intercept telegraph messages on grounds involving India’s sovereignty and integrity, state security, friendly relations with foreign states, public order and preventing the commission of an offence. U/s. 8, government may also revoke a telegraph license for breach of any terms and conditions or for a default in making license fee payments.

3.8.5.2.2 The Cinematograph Act, 1952

The Cinematograph Act 1952 is a Central legislation which provides for establishment of competent authorities for the purpose of censorship of movies and preventing screening of films having inappropriate content or content against the cultures prevailing in our society. The term ‘cinematograph’ has been defined u/s. 2(c) of the Act as including any apparatus for the representation of moving pictures or series of pictures. In one case²⁸⁷, it was held that the expression ‘cinematograph’ includes VCR, TV projector as the said equipments serve the same purpose as traditional media, i.e. exhibition of moving pictures. It must be so interpreted to take into account new and subsequent scientific developments in the field as it cannot be confined to traditional interpretation of such apparatus. Under Sec. 3 of the Act, Board of Film Censors is to be constituted which shall sanction the public exhibition of films. The Central Government shall constitute the Board by notification in the official gazette and same shall be known as Board of Film Certification. The Board shall consist of a Chairman and other members which shall be not less than twelve and not more than twenty five. Under Sec. 5B, some principles have been laid down for guidance in certification of films by the Board. Accordingly,

²⁸⁷Samrat Video Parlour vs. State of Haryana AIR 1993 SC 2328

- (a) A film shall not be certified for public exhibition if in the opinion of authority competent to grant certificate, the film or any part of it is against the interests of sovereignty and integrity of India, security of the State, friendly relations with foreign States, public order, decency or morality or involves defamation or contempt of court or is likely to incite commission of any offence.
- (b) The Central Government may issue necessary directions for implementing principles which may guide the competent authority before grant of certificates sanctioning films for public exhibition.

3.8.5.2.3 The PrasarBharati (Broadcasting Corporation of India) Act, 1990

The PrasarBharati Act provides for establishment of PrasarBharati. It is the Public Service broadcaster of the country. The objectives of public service broadcasting are achieved in terms of PrasarBharati Act through All India Radio and Doordarshan. All India Radio is India's national broadcaster and has been functioning to inform, educate and entertain the masses since very beginning. It broadcasts on radio programs on various subjects like farming, women's problems, children, musical programs, plays, etc. Similarly Doordarshan also is Indian public service broadcaster and is one of the largest broadcasting organisations in the world in terms of studios and transmitters. It has a three tier programme service, i.e. National, Regional and Local. The National programmes emphasize on events and issues of national interest like news, current affairs, documentaries on environment, social issues, TV serials, feature films, drama, etc. The Regional programs are telecast at specific time and also on Regional Language satellite channels which cater programs for interests of a particular state in the language of that region. The local programs are area specific and cover local issues featuring local people.²⁸⁸ Some of the major objectives of PrasarBharati Corporation as stated u/s. 12 of the Act are as under:

- (a) To uphold the unity and integrity of country and the values enshrined in Constitution of India;
- (b) To promote national integration;

²⁸⁸ Available at <http://www.ddindia.gov.in> (visited on 22.11.2016)

- (c) To safeguard citizens' rights to be informed on all matters of public interest by presenting a fair and balanced flow of information;
- (d) To pay special attention to the fields of education and spread of literacy, agriculture, rural development, environment, health and family welfare, science and technology;
- (e) To create awareness about women's issues and take special steps to protect interests of children, aged and other vulnerable sections of the society;
- (f) To provide adequate coverage to diverse cultures, sports and games and youth affairs;
- (g) To promote social justice, safeguarding the rights of working classes, minorities and tribal communities;
- (h) To promote research and expand broadcasting faculties and development in broadcast technology.

The Ministry of Information and Broadcasting may suitably amend provisions of PrasarBharati Act but ensure that functional autonomy of the public broadcaster as envisaged in the Act was not diluted and much desired autonomy was secured.²⁸⁹

3.8.5.2.4 The Cable Television Networks (Regulation) Act and Rules 1995

The Cable Television Networks (Regulation) Act 1995 was enacted with the object regulating the ever-increasing cable television networks across the nation which were often showing programs and advertisements inappropriate to the culture of our country. The growing number of satellites had resulted in availability of signals of foreign television networks due to which western programs often adult-oriented and against our tradition were being shown on TV channels in India to people of all age groups without any form of censorship. Also, it was felt that neither the subscribers of such cable television networks nor the cable operators themselves were aware of their rights, responsibilities and obligations regarding quality of service, whether technical or content-wise, use of material protected by copyright, exhibition of uncertified films, etc. Hence, in order to regulate the operation of cable television networks in the entire country so as to bring uniformity in their operation, the said Act was enacted. Accordingly, Section 3 provides for compulsory registration of any

²⁸⁹ Available at <http://Articles.economicstimes.indiatimes.com> (Visited on 22.11.2016)

person who wants to operate a cable television network with the registering authority.

Section 6 of the said Rules which are in consonance to the Cable Television Networks (Regulation) Act 1995 provides for Programme Code under which any program before being telecast to the viewers through any TV channel should fulfil certain conditions. The conditions have been laid down considering the cultural environment of our country and also the fact that certain decency should be maintained in all the programs and neither the dignity of women should be offended nor should the minds of children be negatively affected through whatever they view on their TV sets. Simultaneously, programs affecting national integrity and peace should also be banned. The said section provides that no programme should be carried in the cable service which-

- (a) Offends against good taste or decency;
- (b) Contains criticism of friendly countries;
- (c) Contains attack on religions or communities or visuals or words contemptuous of religious groups or which promote communal attitudes;
- (d) Contains anything obscene, defamatory, deliberate, false and suggestive innuendos and half truths;
- (e) Is likely to encourage or incite violence or contains anything against maintenance of law and order or which promote anti-national attitudes;
- (f) Contains anything amounting to contempt of court;
- (g) Contains aspersions against integrity of the President and Judiciary;
- (h) Contains anything affecting the integrity of Nation;
- (i) Criticizes, maligns or slanders any individual in person or certain groups, segments of social, public and moral life of the country;
- (j) Encourages superstition or blind belief;
- (k) Denigrates women through the depiction in any manner of the figure of a woman, her form or body or any part thereof in such a way as to have the effect of being indecent, or derogatory to women, or is likely to deprave, corrupt or injure the public morality or morals;
- (l) Denigrates children;

- (m) Contains visual or words which reflect a slandering, ironical and snobbish attitude in the portrayal of certain ethnic, linguistic and regional groups;
- (n) Contravenes the provisions of Cinematograph Act;
- (o) Is not suitable for unrestricted public exhibition.

In addition to restrictions of programs in abovementioned nature, an additional point namely Sec. 6(1)(p) has been added by amendment to Cable Television Network Rules last year which came in force in March 2015. Rule 6(1)(p) prohibits live coverage of anti-terrorism activities stating that “no programme should be carried... which contains live coverage of any anti-terrorist operation by security forces wherein media coverage shall be restricted to periodic briefing by an officer designated by the appropriate Government, till such operation concludes.”²⁹⁰ The said section was applied when NDTV channel covered the Pathankot terror attack on 2.1.2016 and government claimed that the coverage gave out sensitive information to the handlers of terrorists. The Ministry of Information and Broadcasting ordered NDTV to go off air for a day in breach of the programme code governing content in news channels. In response to a show cause notice, NDTV stated that its coverage was sober and did not carry any information that had not been covered by the rest of media and was already in public domain. In response to the situation, the Editors Guild of India stated that the decision to take the channel off the air for a day is a direct violation of the freedom of media and amounts to harsh censorship imposed by the government reminiscent of the Emergency. Imposing a ban without resorting to judicial intervention or oversight violates the fundamental principles of freedom and justice.²⁹¹

Also, any film, film song, trailer or music video whether produced in India or abroad can be telecast through cable service only after being certified by the Central Board of Film Certification (CBFC) as suitable for unrestricted public exhibition in India. Likewise, Sec. 7 provides for Advertising Code and states that advertising carried in the cable service shall be so designed as to conform to laws of the country

²⁹⁰Programme and Code: How govt rules TV channels, 8.11.2016 – KrishnKaushik (www.indianexpress.com/article/explained) (Visited on 26.11.2016)

²⁹¹ Editors Guild condemns one-day ban on NDTV India (www.thehindu.com/news/national/) (Visited on 27.11.2016)

and should not offend morality, decency and religious susceptibilities of subscribers or exploit social evils like dowry, child marriage, etc.

Some of the other legislations in respect of electronic media are:

- (i) The Dramatic Performances Act, 1876
- (ii) The Cinematograph (Certification) Rules, 1983
- (iii) Guidelines for Certification of films for Public exhibition
- (iv) The Cine-workers and Cinema Theatre Workers (Regulation of Employment) Act and Rules
- (v) The Cine Workers Welfare Cess Act (1981) and Rules (1984)
- (vi) The Cine Workers Welfare Fund Act (1981) and Rules (1984)
- (vii) The PrasarBharati (Broadcasting Corporation of India) Investment of Money Rules, 2007
- (viii) The Sports Broadcasting Signals (Mandatory Sharing with PrasarBharati) Act and Rules 2007
- (ix) PrasarBharati (Broadcasting Corporation of India) Authorities for Disciplinary Proceedings Regulations 2012
- (x) The Standards of Quality of Service (Broadcasting and Cable Services) (Cable Television-CAS Areas) Regulation 2006

3.8.5.3 Regulatory bodies

Tremendous growth in electronic media as well as availability of almost one television set in every home in the nation and widespread taste of programs through a variety of channels during past two decades has given need for establishing regulatory bodies that could regulate the broadcasting of several programs, news, advertisements and other content on television. Some of the major regulatory bodies are as under:

3.8.5.3.1 Indian Broadcasting Foundation (IBF)

With the growth of television broadcast industry, the commerce between broadcasters, agencies and advertisers had become ever-expanding but still remained complex procedure. Rapid increase in the number of 24 hour entertainment channels

in the past two decades has led to addition of non-news content on Indian television. The television broadcasters needed a credit management mechanism that followed a due process between advertisers, media buying agencies and themselves. The Indian Broadcasting Foundation was established in 1999 to primarily fulfill this object. Being the apex body of broadcasters, the IBF performs the task of framing a set of self-regulating content Guidelines and establishing an independent complaint redressal mechanism for General Entertainment Channels (GECs). The objective was to provide certain guiding principles to entertainment channels for programme content, redressal mechanism for viewer complaints and ensuring that programming creativity flourishes in a free-speech environment without adhoc interventions.²⁹²

The main features of IBF are:

- (a) It identifies and pursues growth opportunities for its members and ensures they present a strong collective voice regionally, nationally and globally.
- (b) It enjoys a unique position as the accredited spokesperson of broadcast industry;
- (c) It plays a significant role in protecting and promoting interests of its members and freedom of electronic media in world's largest democracy;
- (d) It is actively involved in setting up Broadcast Audience Research Council (BARC), a new apex body to provide official measurement of television audiences in India.
- (e) It takes up issues affecting broadcasting industry with authorities and government departments.

3.8.5.3.2 Broadcasting Content Complaints Council (BCCC)

IBF has accomplished the goal of formulating and implementing self-regulatory Guidelines and the complaint redressal system with establishment of Broadcasting Content Complaints Council (BCCC) in June 2011. BCCC is an independent self-regulatory body which examines content-related complaints against GECs. It is a major milestone in the history of Indian television and the initiative signifies the maturity of broadcasters to uphold freedom of speech and expression enshrined as fundamental right in the Indian Constitution. The overwhelming support of IBF

²⁹² Available at <http://www.ibfindia.com/history-vision> (Visited on 23.11.2016)

member channels to the BCCC mechanism has led to constant evaluation of content in line with changing viewer preferences.

In a short time, BCCC has become India's most credible self-regulatory mechanism for non-news television. The Council also articulates its views on various aspects of self-regulation and contributes to the policy-making process. The major guiding principles of BCCC are – (i) Independence, (ii) Neutrality, (iii) Transparency, (iv) Autonomy. BCCC has a democratic structure and functions independently due to which self-regulation is getting established as the best form of regulation for television. All three pillars of Indian democracy – Legislature, Executive and Judiciary, have praised BCCC's work and the Council has also been praised by Civil Society and the Press. The BCCC examines complaints about TV programs from viewers and other sources including the Ministry of Information and Broadcasting, NGOs and residents' welfare associations. Any person who is aggrieved with broadcast of content of following nature may make a complaint to BCCC:

- Content of national interest;
- Racial and religious harmony;
- Children and generally accessible programs;
- Social values;
- Sex and nudity;
- Violence and crime;
- Horror and occult;
- Drugs, smoking, tobacco, solvents, alcohol;
- Libel, slander and defamation;
- Harm and offence

Thus, it is clear that complaints can be made on many of the same grounds for which Article 19(1) provides reasonable restrictions, i.e. maintaining national interest, defamation, etc.

In a recent news report²⁹³ the Council gave details as to its functioning and disposal of complaints. Contrary to general perception, complaints against sex and

²⁹³ Oct 17, 2015 TNN

nudity on TV have declined (only 8%) whereas the highest number of complaints (28% out of 4545 complaints) were related to stereotyping of women, ill treatment of animals, child marriage, etc. 11% of the 4545 specific complaints were related to horror programs while those pertaining to depiction of smoking scenes, consumption of alcohol and drugs were found to be less than 1%. Among complaints related to crime and violence, nearly 11% of specific complaints were not only against crime-based shows but also against violence shown in daily soaps as well as reality shows. This was followed by complaints related to religion and community where viewers had taken exception to representation of mythological figures. The Council received representations from Dalit organizations against a serial on Lord Buddha, complaints against Jodha Akbar with organisations disputing the existence of Jodha and even on the representation of scenes in Mahabharata.

3.8.5.3.3 Broadcast Audience Research Council (BARC)

Broadcast Audience Research Council is a body to design, commission, supervise and own an accurate, reliable and timely television audience measurement system for India. BARC India brings together the three key stakeholders in television audience measurement – broadcasters, advertisers and advertising and media agencies via their apex bodies. BARC India seeks to establish a robust, transparent and accountable governance framework for providing data points required to plan media spends more effectively.²⁹⁴ The major stages of BARC India's research process are as under:

- (1) Establishment Survey;
- (2) Panel locations & identification;
- (3) Panel selection and training;
- (4) Panel Management;
- (5) Measurement and viewing data capture;
- (6) Processing, audience estimation and reporting;
- (7) Analysing and reporting audience data in relevant segments

²⁹⁴ Available at <http://www.barcindia.co.in/about-us.aspx> (Visited on 23.11.2016)

3.8.5.3.4 News Broadcasting Standards Authority (NBSA)

News Broadcasting Standards Authority is an independent body set up by the News Broadcasters Association – an association representing private television news and current affairs broadcasters in India. The main task of this Authority is to consider and adjudicate upon complaints about broadcasts. The objects of Authority are to lay down and foster high standards, ethics and practice in news broadcasting including entertaining and deciding complaints against or in respect of broadcasters in so far as they relate to the content of any broadcast. The other objects of this Authority are:

- (i) Maintaining and improving standards of broadcast and maintaining the independence of broadcasters, television journalists and/or news agencies;
- (ii) Ensuring compliance by broadcasters, television journalists and news agencies with the Code of Conduct and adherence by the said persons to high professional standards;
- (iii) Ensuring maintenance of high standards of public taste and fostering a due sense of both the rights and responsibilities of citizens;
- (iv) Fostering and encouraging the growth of a sense of responsibility and public service among all those engaged in and associated with the profession of television journalism and business of broadcasting;
- (v) Keeping under review and scrutiny any developments likely to or having the tendency to restrict the gathering, supply and dissemination of news of public interest and importance;
- (vi) Such other aspects as are identical, consequential, related and/or otherwise materially concerned with above objects.

3.8.5.3.5 News Broadcasters Association

News broadcasting has changed by leaps and bounds in the past two decades. With several 24x7 news channels running throughout the day with national and international news, political and economic scenario as well as current affairs at international level, science and technology, sports and films, a body had to be formed which would control the broadcast of news at such a vast level. For this

purpose, the News Broadcasters Association (NBA) regulates the private news channels as also the current affairs broadcasting. It is an organization funded entirely by its members. The Association runs with the mission to serve as the eyes and ears of private news and current affairs broadcasters, to lobby on its behalf and to act as a central point of joint action on matters of interest. The main objects of NBA are²⁹⁵:

- (1) To promote, aid, help, encourage, develop, protect and secure the interests of the News Broadcasters in the Indian television industry and other related entities.
- (2) To promote awareness about latest developments in the television industry relating to news broadcasting and to disseminate knowledge amongst its members and general public regarding such developments.
- (3) To provide for members a place of meeting so as to enable them to work in consensus to achieve common goals for the overall betterment of their industry and to have a common platform/forum at which they may air their grievances and arrive at solutions.
- (4) To promote the growth of friendly relations amongst the members and amongst persons engaged in production and broadcasting of television software and especially too encourage cooperation among the members so as to maximize mutual benefits.
- (5) To protect all its members from persons or entities who carry on unfair and/or unethical practices or who discredit the television industry.
- (6) No objects of the company will be carried out without obtaining prior approval from concerned authority wherever required.
- (7) None of the main objects to be carried out on commercial basis.

In May 2017, News Broadcasters Association found Republic TV using allegedly unethical tactics for increasing its viewership. The Association also lodged a complaint with Telecom Regulatory Authority of India (TRAI) claiming that the channel was running multiple feeds on various multi-system operator platforms by listing itself at multiple locations across various genres in electronic program guide of various multi-system operators which is a violation of TRAI rules.²⁹⁶

²⁹⁵ Available at www.nbanewdelhi.com/objectives (Visited on 11.9.2018)

²⁹⁶ Available at <https://www.indiatoday.in/amp/india/story/arnab-goswami-republic-tv-using-multiple-feeds-to-claim-viewership-pulled-up-by-regulator-977226-2017-05-15/> (Visited on 11.9.2018)

3.8.5.3.6 Ministry of Communications and Information Technology

The principal institution in India for information technology is the Ministry of Communications and Information Technology. It has two departments under it namely the Department of Electronics and Information Technology and the Department of Telecommunications. The Department of Electronics and Information Technology formulates policies relating to information technology, electronics and internet. The Department of Telecommunications manages the overall development of telecommunications sector, licenses, internet and mobile service providers and manages spectrum allocation.²⁹⁷

3.8.5.3.7 Telecom Regulatory Authority of India (TRAI)

The Telecom Regulatory Authority of India an independent regulator was created in 1997 to regulate the telecom, broadcasting and cable TV sectors. It mandates transparency in the exercise of its operators, which include monitoring licensing terms, compliance and service quality. Its opinions are generally perceived as independent. TRAI's mission is to create and nurture conditions for growth of telecommunications in the country in a manner and at a pace which will enable India to play a leading role in emerging global information society. One of the main objectives of TRAI is to provide a fair and transparent policy environment which promotes a level playing field and facilitates fair competition.²⁹⁸

3.8.5.4 Unsanctioned Bills

Some major Bills and guidelines related to media regulation of print, electronic and recently even social media were either shelved, withdrawn or are pending till date. Implementation of these Bills may have create new effects on media regulation. However, as of now, they do not carry any effects on the present scenario of media regulation. These Bills and Guidelines are as below:

²⁹⁷ Available at <http://www.dot.gov.in/aboout/us/profile>

²⁹⁸ Available at <http://www.trai.gov.in/aboutus/history> (Visited on 30.11.2016)

3.8.5.4.1 Print and Electronic Media Standards and Regulation Bill, 2012

In April 2012, a Private Member's Bill called the "Print and Electronic Media Standards and Regulation Bill, 2012" was circulated in the Parliament. It was drafted by Congress MP Meenakshi Natarajan but as she was absent the day the Bill was to be introduced in the Parliament, it was not placed before the House and has remained pending till date.

The salient features of this Bill are:

- (a) It seeks to lay down standards to be followed by the media and to establish credible and expedient mechanism for investigating suo motu or into complaints by individuals against print and electronic media.
- (b) Suspension of media organisation's operations for upto 11 months as well as cancellation of its license.
- (c) Establishment of a media regulatory authority which has the power to ban or suspend the coverage of an event or incident that may pose a threat to national security from foreign or internal sources.
- (d) The Regulatory body would comprise of seven members consisting of Supreme Court judge, Minister for Information and Broadcasting and three members appointed by central government. They would have powers equivalent to that of a civil court.
- (e) Proposal of fine upto Rs. 50 lacs on media houses that commit offences specified under the Bill.
- (f) No scope of appeal as no civil court had jurisdiction in any matters which the Authority is empowered to determine.

The Bill was criticized by media and even Parliament for several reasons, some of which are as under²⁹⁹:

- (a) It purported to impose a gag on media and control it from every angle possible.
- (b) The provisions of the Bill were considered draconian and in nature of restriction on media freedom.

²⁹⁹ Available at <http://www.indiatoday.in/magazine/nation/story/20120514-print-and-electronic-media-standards-and-regulation-bill-rahul-gandhi-meenakshi-natarajan-758299-2012-05-04> (Visited on 28.6.2018)

- (c) The language of the draft bill seemed professionally legal even though MeenakshiNatrajan was not an constitutional expert.
- (d) The initiative did not seem to be her own as she was a private member but rather a command performance.

Balveer Arora³⁰⁰ said that timing of the proposed law was significant. According to him, “the Bill has to be viewed as a trial balloon as it comes in the midst of intense debate over guidelines for media and while even the judicial experts are talking about it. It is very clear that unless self-regulatory measures are not adopted by the media, government may try to bring in such a regulation.” Considering these facts, Bill may be most likely shelved and will not see light of the day anymore.

3.8.5.4.2 Self-Regulation Guidelines for Broadcasting Sector (2008)

The Indian Broadcasting Foundation (IBF) has adopted the Ministry of Information & Broadcasting Self Regulation Guidelines for Broadcasting Sector draft version of 2008 which has been formulated after a comprehensive consultative process by over 40 stakeholders from various fields like Government, NGOs, industry, etc. As per the said Guidelines³⁰¹:

- (a) only those cases wherein the Broadcast Regulatory Authority of India (BRAI) takes suomoto action or after receiving a complaint would be considered as violations of the Certification Rules that have repercussions on the security or integrity of the country or contravene restrictions under the Theme 6 (Regulation & Community) or Theme 9 (General Restrictions) of the Certification Rules.
- (b) The BCCCs would have wide-ranging powers including directions to channels not to telecast programmes or advertisement “pending discussion”
- (c) The BCCCs would also be empowered to edit the advertisement or programme, and order any punitive action in accordance with constitution of BCCC of the relevant segments of the industry.

These Guidelines provide the principles, guidelines and ethical practices which shall guide the Broadcasting Service Provider in offering their programming services in

³⁰⁰ Political analyst, former head of Political Science Dept. at JNU

³⁰¹ Available at <http://www.indiantelevision.com/headlines/y2k8/mar/mar256.php> (Visited on 28.6.2018)

India so as to conform to the Programme Code and Certification Rules prescribed under the Cable Television Networks (Regulation) Act 1995 irrespective of medium used for broadcasting of programme. Thus, categories with increasing level were allotted to broadcast of sensitive subjects like crime and violence, sex, obscenity and nudity, horror and occult, defamation, drugs, tobacco and alcohol. Likewise, subject matter treatment as well as manner of audio visual treatment for each sensitive subject was to be followed as per the guidelines.

3.8.5.4.3 Broadcasting Services Regulation Bill, 2007

The Broadcasting Services Regulation Bill 2007 was an attempt to manage and operate the following:

- Teleport/hub/Earth Station;
- Direct-to-Home (DTH) Broadcasting Network
- Multi-system Cable Television Network
- Local Cable Television Network
- Satellite Radio Broadcasting Network
- Such other networks as maybe prescribed by Central Government.

Thus the Bill intended to regulate almost all forms of broadcast. Amongst its many provisions, the major ones included obtaining compulsory license for broadcasting services, registration of channels and compliance with the Content Code and special powers of Central Government in a situation of external threat or war involving India.

The main objects of the Bill were:

- (a) To promote facilitate and develop in an orderly manner the carriage and content of broadcasting;
- (b) To provide for regulation of broadcasting services in India for offering a wide variety of entertainment, news, views and information in a fair, objective and competitive manner and to provide for regulation of content for public viewing and connected matters;

- (c) To provide for establishment of an independent authority to be known as Broadcast Regulatory Authority of India for the purpose of regulating and facilitating development of broadcasting services in India;
- (d) To encourage broadcasting services to be responsive to the educational, developmental, cultural, social and other needs and aspirations of people and include in their programming public service messaging and content.

The Bill was drafted considering that airwaves are public property³⁰² and there could be no monopoly on them and it was necessary to regulate the use of such airwaves in national and public interest particularly with a view to ensuring proper dissemination of content and in the widest possible manner.

Draft of the bill was also put on website of Ministry of Information and Broadcasting inviting comments from stakeholders like industry and media groups, NGOs, Civil Society Organisations and public.

However, the media industry at large felt that the Government intended to infringe on their rights as a free media through this regulation and that such a draconian law will be applied especially against news channel under the ambit of the Bill if it is allowed to go through.³⁰³

Even the Editors Guild of India rejected the Bill stating that it would give the government enormous control and clout over news and current affairs channels. According to them, the proposed Broadcasting Regulatory Authority of India was nothing but a government body as the media had no say in the selection of its members. The Government could misuse provisions of the Bill if it was implemented. The International Federation of Journalists (IFJ) called for broader consultation on the proposed Bill. According to it, if Government was disturbed with injustice inflicted from news and current affairs content on television, their remedy lied not in constraining the right to free speech but in allowing it greater latitude particularly in a country where there were several avenues for redress and judicial remedy.³⁰⁴

³⁰² As per judgment given in Ministry of Information & Broadcasting vs Cricket Association of Bengal 1995

³⁰³ Available at <http://archive.indianexpress.com/news> – Sep. 22, 2007 (Visited on 27.11.2016)

³⁰⁴ www.thehindu.com/todays-paper/ (Editor's Guild Rejects Broadcasting Regulation Bill dtd. 7.9.2007)

The tug of war between the government and the media industry thus resulted in a stalemate and Government kept the said Bill in abeyance.³⁰⁵

3.8.5.4.4 Communications Convergence Bill, 2001

The speedy growth and advancements in field of information technology were bringing new forms of communication in the hands of a common man. The traditional media and communication laws were not sufficient to deal with such advancements and hence it was felt to have a single regulating authority that would have the authority over all forms of communication, whether old or new.

Accordingly, the Communications Convergence Bill, 2000 was drafted which aimed at creating a single regulatory authority namely Communications Commission of India. Once this Act came into force, it would repeal the earlier Acts in this regard namely the Indian Telegraph Act 1885, Indian Wireless Telegraphy Act 1933, Telegraph Wire Unlawful Possession Act 1950 and even the Telecom Regulatory Authority of India Act 1997. The said Bill would take up in its ambit the network infrastructure facilities, network services, application services and content application services. Thus, it would regulate mobile services, satellite broadcasting and even radio communications. Some of the important objectives of the regulation of convergence according to the Act include:

- (a) Establishing modern and effective communication infrastructure taking into account the convergence of information technology, media, telecom and consumer electronics.
- (b) Ensuring development of communication sector in competitive environment and suitable regulation of market dominance.
- (c) Ensuring affordable availability of communication services to remote and rural areas;
- (d) Protecting security interests of the country;
- (e) Ensuring transparency of licensing criteria and providing for open licensing policy

³⁰⁵ Pg. 38 A Broad Overview of Broadcasting Legislation in India – SiddharthNarain, Alternative Law Forum, Bangalore (2008)

- (f) Facilitating introduction of new technologies, investment in services and infrastructure and maximization of communication facilities and services.³⁰⁶

The Bill also proposed creating a single body to monitor both the carriage and content of communication namely the Communications Commission of India. The Commission was empowered to specify program codes and standards:

- (a) To ensure that nothing is contained in any programme which is prejudicial to interests of sovereignty and integrity of India, security of State, friendly relations with foreign states, public order or which may constitute contempt of court, defamation or incitement to an offence;
- (b) To ensure fairness and impartiality in presentation of news and other programs;
- (c) To ensure emphasis on promotion of Indian culture, values of national integration, religious and communal harmony and scientific temper;
- (d) To ensure in all programs, decency in portrayal of women and restrain in portrayal of violence and sexual conduct;
- (e) To enhance general standards of good taste, decency and morality.

The said Bill is still pending and an internal committee at Dept. of Telecommunications has recommended provision of providing telecom, cable and broadcasting services by a single company and paying for the services through a common bill. However, these kinds of provisions will need a new set of regulations that can be introduced only through the new convergence bill.³⁰⁷

3.8.5.4.5 Guidelines on Fake News 2018

The Guidelines on Fake News 2018 were issued by Ministry of Information and Broadcasting sometime during April 2018 through a circular by Minister Smriti Irani. However, the said circular was withdrawn within 24 hours by the Prime Minister Narendra Modi himself who stated that this matter should be addressed only in Press Council of India. The said circular was bad in law and had extremely stringent provisions that attacked the very careers of a journalist under the guise of aiming to

³⁰⁶ Whose Convergence is it anyway? A Critical Introduction to the Convergence Bill 2000 – Lawrence Liang Available at http://www.nwmindia.org/Law/Commentary/Convergence_bill.htm

³⁰⁷ NDA rehashes old convergence bill, plans super regulator for telecom, TV and internet Available at <http://M.firstpost.com/business/corporate-business/> (Published on 8.9.2014)

curb at fake news. As per the circular, once a complaint of fake news was received by regulators, the accreditation of journalist in question would be suspended till such time the determination regarding fake news was made by the Press Council of India for print media and News Broadcasters Association for electronic media. In case the charges were confirmed against such journalist, he would lose accreditation for six months for the violation, one year in case of a second complaint and permanently in case of third complaint. The major flaws of the circular were as under³⁰⁸:

- (a) The meaning, definition or constitution of “fake news” is nowhere available in any law of India. Due to this, the parameters to be used by regulatory agencies for determining the violation itself would be vague and changing as per their own requirements thus leading to arbitrariness and subjective analysis of news items in nature of fake news.
- (b) The cardinal principle of law that a person stands innocent until he is proved to be guilty was nowhere adhered. There was no provision in guidelines whereunder an initial check could be made on the authenticity of charges against the journalist against whom a complaint in regard of fake news was made and he was directly liable for charges mentioned in the circular.
- (c) The circular thus undermined freedom of press that has been since ages come to be considered as intrinsic to freedom of speech and expression guaranteed under Article 19(1)(a) of Constitution.
- (d) Whether the Press Council of India and News Broadcasters Association were consulted in respect of provisions of the said circular was uncertain as the press release for circular nowhere mentioned anything about the same but only that the said bodies would be handling the respective complaints of print and electronic media.
- (e) The provisions of the said circular could be used for making frivolous complaints to harass journalists and organisations for settling personal scores or vague matters.³⁰⁹

³⁰⁸ Available at <http://scroll.in/article/874272/opinion-it-isnt-suprising-that-guidelines-to-tackle-fake-news-were-scrapped-they-were-bad-in-law> (Visited on 29.6.2018)

³⁰⁹ Available at <http://m.economictimes.com/news/politics-and-nation/fake-news-guidelines-would-have-opened-door-for-frivolous-complaints-editors-guild/articleshow/63600680.cms> (Visited on 29.6.2018)

To conclude, as the laws of India have been greatly borrowed from English laws, the freedom of speech and expression has been safeguarded by several reasonable restrictions as in United Kingdom. It is in the interest of each and every citizen of India that freedom of speech and expression may be exercised subject to reasonable restrictions so that no single person can excessively indulge in it nor anyone is refrained from exercise of the same. Likewise, even for media, the freedom of speech and expression has been recognized by implementation of Acts as well as amendments from time to time. Media, which can be said to be the lifeline of imparting information across the nation is responsible for informing the readers and viewers about everything happening in nation and throughout the world. Print media as well as electronic and recently developed social media have been safeguarded by Acts and regulatory bodies which regulate, check and lay down guidelines for newspapers, TV channels, radio channels, social platforms, etc. News channels as also the newspapers are responsible for qualitatively informing the public about current affairs as well as happenings from all the fields without indulging in acts of personal interest. Vices like media trials, paid news and to an extent sting operations must be strictly regulated in order that news channels and newspapers are able to function in a healthy manner. Increasing TRPs and churning out breaking news every hour for attracting audience at the cost of genuine healthy journalism and accurate news seem to be the new-age sole objects of almost all media houses. Since past several decades, Supreme Court as well as High Courts have also been presented with cases which deal with questions related to rights of media, free speech, etc. and the same have been responded to actively by laying down guidelines for media or even by repeal of certain provisions which attempt to hamper the right of free speech of any person. The judicial position is discussed in the next chapter.

3.8.5.4.6 Law Commission Report on Trial by Media: Free Speech and Fair Trial under Criminal Procedure Code 1973

If excessive publicity in the media about a suspect or an accused before trial prejudices a fair trial or results in characterizing him as a person who had indeed committed the crime, it amounts to undue interference with the “administration of

justice” calling for proceedings for contempt of court against the media. In Nov, 2006, former Chief Justice of India Y K Sabharwal expressed concern over the recent trend of media conduct ‘trial’ of cases before courts pronounce judgments and cautioned that “if this continues, there can’t be any conviction. Judges are confused because the media has already given a verdict.” In Chapter 3 of the Report, it has been observed that publications which are prejudicial to a suspect or accused may affect Judges also subconsciously and it can be at the stage of granting or refusing bail or at the trial. In Chapter 9 of the Report, categories of publications in media which are generally recognized as prejudicial to a suspect or accused were enumerated as under³¹⁰:

- Publications concerning the character of accused or previous convictions.
- Publications of confessions by accused as to committing the crime in question
- Publications which comment or reflect upon merits of the case.
- Photographs of accused where identity is likely to be an issue
- Police activities
- Imputation of innocence
- Creating an atmosphere of prejudice
- Criticism of witnesses
- Premature publication of evidence
- Publication of interviews with witnesses

Thus, several laws have been enacted in USA, UK as well as in India which provide for free speech in print as well as in electronic and social media. Likewise, other than USA, UK and India have the similar reasonable restrictions on the right of free speech. Most of the laws and restrictions thereupon have been relating to print media as it was the earliest form of media wherein cases of obscene books, stories and articles were coming up. The same was followed by laws related to electronic media and social media in cases for obscene films, advertisements and songs. The news channels which had only later started mushrooming in 24x7 formats also eventually came to be a subject of freedom of press as they were often found

³¹⁰ Chapter IX, Pg 195 Law Commission of India: 200th Report on Trial by Media Free Speech and Fair Trial under CrPC 1973, August 2006

indulging in media trials, fake news, paid news and sting operations. In other words, electronic media and mostly news channels were found to be misusing the freedom of press by treating every news story or event without respecting the reasonable restrictions to which they were subjected. Judiciary has given several landmark judgments in this regard, originally for print media and eventually for electronic and social media, which have been discussed in next chapter.