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Web Freedom and Criminal Libel in India

A Policy Dialectic

Nikhil Moro

Public Policy Scholar

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Abstract

Statutes of criminal libel are widely considered to be inconsistent with a free society, but India is one of many constitutional republics to have them on the books. Over eighteen months in 2012-13, Indian police arrested numerous bloggers and social media users under umbrella of the Information Technology Act of 2000, the Indian Penal Code of 1860, and the Prevention of Insults to National Honour Act of 1971. Public perception of the executive actions was overwhelmingly negative. This scholarly monograph engaged with theory in freedom of expression and in public policy to frame legal controversy in the arrests. It used a dialectical approach to discuss the Indian media policy in light of constitutional "reasonable restrictions" as interpreted by the Supreme Court of India. Finally, it drew from the discussion a set of ten normative suggestions of structural, content-based, and attitudinal reform for the Indian system of freedom of expression to reconceptualise the freedom, abolish criminal libel, strengthen civil justice, educate police officials, formulate a test of reasonableness, and privilege social media as political.

Keywords

Freedom of Expression; Web Freedom; Facebook, Twitter, Blog; Indian Penal Code; Information Technology Act; Reasonable Restrictions; Prevention of Insults to National Honour Act; Media Policy; Supreme Court of India

Introduction

The price of freedom of religion, or of speech, or of the press, is that we must put up with, and even pay for, a good deal of rubbish.

- Justice Robert H. Jackson, dissenting in *United States v. Ballard*, 322 U.S. 78 (1944), at 95

Freedom in modern society is a political construct, measured primarily by an absence of law that criminalises libellous speech.[1] It is defined in the right of the speaker,[2] whose arrest and imprisonment for pure speech, further, would be legally precluded.[3] Personal reputations would be protected by placing at stake not the speaker's liberty but wallet..

In September of 2011, the human rights committee of the International Covenant on Civil and Political Rights determined that "imprisonment is never an appropriate penalty" for libel,[4] which it implied ought to be regulated by tort law not criminal.[5] Criminal libel was inconsistent with covenant article 19(3)(a) that allowed states to legally restrict freedom of expression "for respect of the rights or reputations of others."[6] Generally, criminal libel affected news media in developing nations more adversely than in others.[7]

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[1] Modernity means to necessarily subject the individual will to institutions of the state, religion, or marketplace. It is operationalised in this paper through institutions of the Indian state, which the Constitution of India limits as follows: "[U]nless the context otherwise requires, 'the state' includes the Government and Parliament of India and the Government and the Legislature of each of the States and all local or other authorities within the territory of India or under the control of the Government of India." Indian Const., part III, art. 12.

[2] A "speaker" is defined in this monograph as an individual that has performed neither action nor symbolic action (such as waving a placard or burning a flag) but pure speech regardless of medium – print, broadcast, cable, Web, email, social media, or oral expression – the content of which is publicly accessible. Examples of speaker are a newspaper reporter, broadcast anchor, blogger, Twitter user, a speaker at a public lectern, etc.

[3] See generally, Robert A. Dahl, *Polyarchy: Participation and Opposition* (New Haven, Conn.: Yale University Press, 1971).

[4] General Comment No. 34, International Covenant on Civil and Political Rights of 1966, p. 12: http://www2.ohchr.org/english/bodies/hrc/docs/GC34.pdf (accessed 1 September 2013); in January 2011, the committee set aside a Filipino radio journalist's conviction for criminal libel. See http://www.mediadefence.org/sites/default/files/uploads/Comm%201815%202008_lo%20res.pdf (accessed 1 September 2013).

[5] A tort is "a civil wrong for which a remedy may be obtained, usu. n the form of damages." Black's Law Dictionary, 7th ed., p. 1496.

[6] Media Legal Defense Initiative, "U.N. Rules Against Criminal Libel in Philippines," 27 January 2012, http://www.mediadefence.org/news-story/un-rules-against-criminal-libel-philippines (accessed 13 March 2013); For the text of article 19(3)(a) of the International Covenant on Civil and Political Rights of 1966, see p. 178: http://treaties.un.org/doc/Publication/UNTS/Volume%20999/volume-999-I-14668-English.pdf (accessed 1 September 2013).

[7] E.g., see Organization for Security and Co-operation in Europe, "Libel and Insult Laws: A Matrix on Where We Stand and What We Would Like to Achieve": http://www.osce.org/fom/41958 (accessed 13 March 2013); in the United States, 17 states have criminal libel statutes on the books, but in *Garrison v. Louisiana*, 379 U.S. 64 (1964), the

India, "the world's largest democracy,"[8] acceded to the covenant in July of 1979, but remained among many constitutional republics with rampant statutes of criminal libel that were founded in its colonial legal heritage as well as later parliamentary acts.[9] The statutes were applied fairly commonly in 2012-13, if news reports were any indication, to arrest if not actually prosecute users of social media applications.[10] The Indian law of libel balanced the fundamental right of free speech not only with that of individual reputation,[11] but also with competing group needs: national security and integrity, public order, dignity of courts, and "decency or morality".[12]

This monograph examined Indian media policy, measured in police actions over eighteen months of 2012-13 targeting blog and social media users, in light of constitutional expressive rights. In doing so, it engaged with theory of freedom of expression to the extent that such theory might emerge in Indian philosophy, rulings of the Supreme Court of India, and the law-enforcement actions of Indian police. Presented as a basic, broad-based, and profusely footnoted dialectic, it sought to explore the nature of the freedom by not eliminating competing arguments but enabling their synthesis into an ever more detailed or nuanced discourse. It aimed towards a syncretic fusion of originally inflectional suppositions. It was intended to help Indian police officials, libel attorneys, and elected representatives cogitate on bridging any gap between constitutional intent and executive enforcement.

U.S. Supreme Court unanimously extended the "actual malice" requirement, by which in order to prevail a state must produce clear and convincing evidence the defendant acted with prior knowledge of falsity or a reckless disregard for the truth, to criminal libel prosecutions.

[8] The claim of largest democracy, presumably referring to population size and cultural diversity, appears in the title of Ramachandra Guha, *India After Gandhi: The History of the World's Largest Democracy* (London: Pan Macmillan, 2008).

[9] Professor H.K. Nagaraj of the National Law School of India University explained, "The United Nations cannot interfere in matters that essentially fall within the domestic jurisdiction of a state." He was referring to the Charter of the United Nations, art. 2, para 7: www.un.org/en/documents/charter/chapter1.shtml (accessed 24 August 2013). Interview with author, Bangalore, 17 June 2013.

[10] Sweeping terms in the Information Technology Act of 2000, Sec. 66A, expose a computer user to arrest and imprisonment for any email or blog or social media post that a complainant states to be false, menacing, or to cause "annoyance or inconvenience." See Appendix A for text of statute; Due to a state "advisory" dated 9 January 2013, the arrest must be advance-approved by an officer of rank of at least inspector general of police in metropolitan areas, deputy commissioner of police in urban areas, and superintendent of police in rural areas. See, "Advisory on implementation of Section 66A of the Information Technology Act, 2000," Department of Electronics and Information Technology notification no. 11(6)/2012-CLFE. http://deity.gov.in/sites/upload_files/dit/files/Advisoryonsection.pdf (accessed 1 September 2013); In addition, the Indian Penal Code (IPC), drafted 1860 by the first Law Commission chaired by Lord Thomas Macaulay starting 1835, remains current although enforced indifferently in many sections. The IPC criminalises seditious libel (Sec. 154A) (except that which, "in good faith," opines on official conduct of a government employee per exception in Sec. 499), hate expression (Sec. 153A), libel (Sec. 499), verbal abuse (Sec. 294), defiling of "sacred" objects (Sec. 295), threatening speech ("intimidation") (Sec. 506), and incitement to riot (Sec. 505).

[11] Libel is used in the monograph as a metonym for all manner of defamation including slander. The distinction of libel from slander has all but disappeared in Indian courts; Indian Const., art. 19(1) guarantees the freedom of "speech and expression"; Article 21 guarantees the right to a good reputation as part of the right to life. Under that article, the Supreme Court has also found in the right to reputation one of the citizenship rights. See, *Board of Trustees of the Port of Bombay v. Diplikumar Raghavendranath Nadkarni*, 1983 AIR 109.

[12] Indian Const., art. 19(2), allows the Indian state to abrogate the freedom of speech and expression "in the interests of the sovereignty and integrity of India, security of the State, friendly relations with foreign States, public order, decency or morality, or in relation to contempt of court, defamation or incitement to an offence."

"Reasonable Restrictions" on Freedom of Expression

The "the world's lengthiest, most complex"[13] Constitution is a 443-page treatise born out of a nearly three-year drafting process.[14] It includes the fundamental right: "All citizens shall have the right to freedom of speech and expression."[15] At the intersection of that precept and another that guarantees "the freedom to practice any profession, or to carry on any occupation, trade or business"[16] is inferred a freedom of press encompassing cognate rights to print, publish, circulate, transmit and propagate.[17]

The Indian press is a political institution,[18]evident in the performance of diverse and thriving news media.[19] To the extent that Facebook, Twitter and other real-time or social media applications are used to express political opinion, report in the public interest, or enable voting decisions, they would implicate the institutional press similar to the older media of print, broadcast, cable and the web. To quote the first Press Commission, the "freedom of the Press, particularly of newspapers and periodicals, is a species of which freedom of expression is a genus."[20] Further, Justice E.S. Venkataramiah has found in freedom of the press "the mother of all other liberties."[21]

The constitutional right to freedom of speech, press, and other expression is not absolute but limited by eight situations of exception[22] -- (1) the sovereignty and integrity of India, (2)

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[13] Burt Neuborne, "The Supreme Court of India," *International Journal of Constitutional Law* 1, 3 (July, 2003), 476-510 at 476; also see generally, Austin Granville, *The Indian Constitution: Cornerstone of a Nation* (New Delhi: Oxford University Press, 2002).

[14] See, generally, The Constitution of India: http://lawmin.nic.in/coi/coiason29july08.pdf (accessed 11 March 2013). In the process of drafting the constitution, the 299 members of the Constituent Assembly of India, chaired for most time by Rajendra Prasad, primarily weighed a Euro-American parliamentary federal model with a Gandhi-style, decentralized or village panchayat model. They eventually opted for the former. See an exhaustive analysis of the ideological complexity of the Indian constitution in S.K. Chaube, *Constituent Assembly of India: Springboard of Revolution*, *2nd ed.* (New Delhi: Manohar, 2000), chaps. 8-10; also see, generally, Granville, *Cornerstone of a Nation*.

[15] "(1) All citizens shall have the right – (a) to freedom of speech and expression . . . ."Indian Const. art.19, sec. 1, cl. a. Further, art. 19(2) contains restrictions on the rights provided in art. 19(1)(a):

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

[16] Indian Const., art. 19(1)(g).

[17] E.g., see *Bennett Coleman & Co. vs. Union of India*, 1973 SCR (2) 757; *Brij Bhushan v. Union Territory of Delhi*, 1950 SCR 605.

[18] See generally, Michael Schudson, "The News Media as Political Institutions," *Annual Review of Political Science* 5 (2002), 249-69.

[19] E.g., the 86,754 publications on record with the Registrar of Newspapers of India as of 31 March 2012 was 5.51% more than a year earlier. See http://rni.nic.in/ (accessed 1 September 2013)

[20] Government of India, *Report of the Press Commission* (New Delhi: Manager of Publications, 1954), Part I, 357.

[21] *Indian Express Newspapers (Pvt.) Ltd vs. Union of India*, 1985 SCC (1) 641, at 664.

[22] Reasonable restrictions for "incitement to an offence," "friendly relations with foreign States," and "public order" were enabled by the Constitution (First Amendment Act) of 1951. See, http://indiacode.nic.in/coiweb/amend/amend1.htm (accessed 26 August 2013); Lawrence Liang notes that while its First Amendment created exceptions to free speech in the Indian constitution, the First Amendment protected the right of speech in the U.S. constitution. See, "Reasonable restrictions and unreasonable speech," *Sarai Reader* 4

security of state, (3) friendly relations with foreign states, (4) public order, (5) decency or morality, (6) contempt of court, (7) defamation, and (8) incitement to an offence.[23] One or more of those situations must justify any statute or executive action that imposes a restriction on expressive freedom. Furthermore, the restriction must be "reasonable."

Even though the Constitution does not explicitly define "reasonable,"[24] the Court has ruled that the reasonableness must be both substantive and procedural, that is reasonable in its intent, content, and application. The test of reasonableness is a singular criterion: the law in question must strike an appropriate balance between individual rights and social control. If it does not, then the law must be set aside as *ultra vires* or beyond the scope of Parliament. In 1951 the Court ruled, "Any law which does not strike a proper balance between the freedoms guaranteed and the social control permitted by the clauses in Art. 19, is an unreasonable restriction."[25] Justice Mehr Chand Mahajan stated unequivocally, "In order to be reasonable, a restriction must have a rational relation to the object which the legislature seeks to achieve and must not go in excess of that object.[26]

Five years later, the Court added that reasonable meant the restriction had been "considered reasonably by a prudent man," but quickly clarified, "What is reasonable in one case may not be reasonable in another."[27] The meaning thus could be situational, but that call is a prerogative of the judge: "Frequently reasonableness belongth to the knowledge of the law, and therefore to be decided by the justices."[28] In 1958 the Court warned, "A prohibition on the fundamental right to carry on occupation, trade or business is not regarded as reasonable if it is imposed not in the interests of the general public but keeping in view the susceptibilities and sentiments of a section of a community."[29]

As part of the test of reasonableness, a court would scrutinise the nature of the right infringed, the purpose of the restriction, the purported "evil" or competing right, and reasonable fit of the law to its purpose. But it would also consider "prevailing conditions," a euphemism for political considerations that allow legal interpretation to be progressive rather than original.[30]

(2004), 434-440. http://www.sarai.net/publications/readers/04-crisis-media/56lawrence.pdf (accessed 8 September 2013)

[23] Consequently, the Indian Penal Code of 1860 and the Information Technology Act of 2000 define numerous situations of speakers' arrest and imprisonment (Ibid., n. 10). For a brief review of court interpretations of the phrase "reasonable restrictions," see Abbas Hoveyda, et al., *Indian Government and Politics* (New Delhi: Pearson,2011), 144-145.

[24] In one case, the Court ruled, "It would be unreasonable to expect an exact definition of the word 'reasonable." *Municipal Corpn. of Delhi v. Jagan Nath Ashok Kumar*, 4 SCC 497 (1987), 504.

[25] *Chintaman Rao vs. State of Madhya Pradesh*, 1950 SCC 118.

[26] *Ibid.*

[27] *Kapur Singh v. Union of India,* 1956 Punjab 58 (66).

[28] Stroud's Judicial Dictionary, 3rd ed., p. 2492. Other legal dictionaries have defined reasonable in the following terms: Sensible, rational, sane, logical, sober, sound, judicious, wise, intelligent, thinking.

[29] *Mohd. Faruk vs. State of Madhya Pradesh*, 1958 SCC 731.

[30] See generally, P.M. Bakshi, *The Constitution of India, 12th ed.* (New Delhi: Universal Law Publishing Co., 2012), 35-43.

Finally, it would scrutinise the restriction for consistency with directive principles of state policy,[31] thus implicating public policy goals in the regulation of freedom of expression.[32]A reasonable restriction may "only be imposed by law, not by executive order. Law means a statute; an ordinance promulgated by the president or governor, or delegated legislation."[33]

Consequently, it is fair to state that the Indian expressive rights are neither absolute nor purely libertarian. They are couched in deference to group sensibilities, which serve as the basis for their regulation. They are subject to social control by instrument of law. As the American jurist Richard A. Posner might put it, Indian constitutional law is "a highly intellectualised branch of politics and social control."[34]

In addition to direct regulation in the eight "reasonable restrictions" situations, the Indian state would be responsible for indirect regulation that is harder to measure. Since 2009, "social advertisements," a moniker for boastful government ads that tout welfare spending, have been the "dominant product category" in print and television advertising.[35] The ads, which are a lifeline for many smaller newspapers, have never been measured for biases they may induce in coverage of government.[36] Prominent politicians' owning of news media organisations is rampant; it would not only further diminish any watchdog expectation but also polarise political coverage and encourage hagiographic coverage at a cost of public affairs coverage.[37]

Further, if news media are to enable or catalyse a marketplace of ideas,[38] then media policy ought to pre-empt concentration of market power or greed for profit that would interfere

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[31] Consistency with the directive principles, which are unenforceable and listed in Part IV of the constitution, is a relevant variable in testing reasonableness of restrictions for constitutionality. See, *State of Gujarat v. Mirzapor Moti Kureshi Kassab Jamat*, AIR 2006 SC 212.

[32] The word "policy" appears on three occasions in Part III (which denotes the fundamental rights). See, Indian Const., art. 31C.

[33]V.S. Mallar, M.K. Nambiar Chair in Constitutional Law, National Law School of India University. Interview with author. Bangalore, 17 June 2013. The professor explained, "Law means a statute, an ordinance promulgated by the president or governor, or delegated legislation." Per the Supreme Court, "In the context of art. 13, 'law' must be taken to mean rules or regulations made in exercise of ordinary legislative power and not amendments to the constitution made in the exercise of constituent power." Thus a constitutional amendment was not "law" under Indian Const., art. 13(2) (which defines law.) See, *Sri Sankari Prasad Singh Deo v. Union of India*, 1951 AIR 458.

[34] Richard A. Posner. "In memoriam: William J. Brennan, Jr." 111 *Harvard Law Review* 9 (November 1997), 9-10.

[35] E.g., see Malini Goyal, "What Trends in Ad World Tell Us About Shifting Landscape of Corporate India," *The Economic Times*, 10 March 2013, http://tinyurl.com/bqnteam (accessed 11 March 2013)

[36] An agency of the Union government is dedicated to routinely "releasing" ads that tout either welfare programs or personalities of prominent politicians such as those of the Nehru family. See generally, Directorate of Advertising and Visual Publicity, http://www.davp.nic.in/History.html. The ads account for a significant portion of newspaper revenue, even more so at smaller papers. See generally, Pritam Sengupta, "Times, Express groups get most anniversary ads," *Sans Serif*, November 19, 2011, http://tinyurl.com/79vyg4s (accessed 11 March 2013)

[37] E.g., in the southern states of Tamil Nadu, Kerala, Karnataka and Andhra Pradesh, many regional politicians hold personal investments in hundreds of newspapers or broadcast networks, which they use to continuously influence voters but seldom identify as partisan organs in cynical cycles of power, profit, and propaganda. E.g., M. Karunanidhi and family (Sun Group and Kalaignar TV), J. Jayalalitha (Jaya TV), M. Kumaraswamy (Kasturi TV), Gali Janardhana Reddy (Janasri TV), Y.S. Jaganmohan Reddy (Sakshi TV); the parties CPM (Kairali TV) and Congress (Jai Hind TV). See, T.J.S. George, "Unbreaking news: Party Channels Coming," http://tinyurl.com/72j6akg (accessed 29 November 2011)

[38] See generally, W. Wat Hopkins, "The Supreme Court Defines the Marketplace of Ideas," *Journalism & Mass Communication Quarterly* 73, 1 (1996), 40-52 (discussing definitions of the marketplace of ideas used by the U.S. Supreme Court in explaining limits on free expression).

with the flow of political ideas. But motivated corporate ownership continues to relegate rural problems, poverty, environment, and labour to sidelines of news coverage but not fashion or fluff.[39] Such interference has been all too evident in recent years in the continuing Indian scandals of "paid news"[40] and blurring of news, views and entertainment. In addition, coercive pressure in frequent acts or threats of vandalism and violence by political-party vigilantes would diminish expectations of a free press.

Regardless of the evidence of direct and indirect interference in the freedom of the press, state interventions may be defended only in situations of reasonable restrictions listed in the Constitution. But a deluge of news media reports of Facebook and Twitter users, all members of civil society, being subjected to criminal-libel arrests, indicates there is a persuasive case to be made that in contemporary urban India an Orwellian state is emerging as an insecure reaction to the raucous democracy of social media. This monograph will not claim to make that case but examine a few recent arrests for lessons they hold in policymakers' comprehension of constitutional law.

Reporters Without Borders, the Paris-based non-profit organisation, stated in January 2013 that Indian "authorities insist on censoring the Web and imposing more and more taboos, while violence against journalists goes unpunished and the regions of Kashmir and Chhattisgarh become increasingly isolated."[41] India's 2013 rank in press freedom fell to 140 from 131 the previous year, its lowest since 2002, partly "because of increasing impunity for violence against journalists and because Internet censorship continues to grow." India saw the steepest decline in Web freedom of 60 nations in 2013, Freedom House, the U.S.-based independent monitoring group, reported in October 2013.[42] Seven news journalists were killed in India from January of 2012 through August of 2013.[43]

An Indian Theory of Freedom

Unlike the Constitution of the United States from whose rights-related provisions it draws inspiration and prose,[44] the Indian Constitution *confers* on citizens the fundamental right to

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[39] E.g., See interviews of P. Sainath, rural affairs editor of *The Hindu* and 2007 winner of the Ramon Magsaysay Award, in *Nero's Guests*, a 2012 documentary by Deepa Bhatia. http://www.youtube.com/watch?v=4q6m5NgrCJs (accessed 1 September 2013).

[40] A report by the quasi-judicial and statutory Press Council of India in July 2010 noted that paid news "destroys the very essence of democracy." *Report on Paid News*, July 30, 2010, p. 3, http://presscouncil.nic.in/HOME.HTM (accessed 11 November 2011). The report stated that candidates that did not acknowledge the payment as election expense violated the Conduct of Election Rules (1961) framed by the Election Commission of India under the Representation of the People Act 1951; media operations that did not disclose the payments violated the Companies Act of 1956, the Income Tax Act of 1961, and possibly other laws.

[41] World Press Freedom Index 2013, http://fr.rsf.org/IMG/pdf/classement_2013_gb-bd.pdf (accessed 11 March 2013)

[42] Freedom on the Net 2013: A Global Assessment of Internet and Digital Media, http://www.freedomhouse.org/sites/default/files/resources/FOTN%202013%20Summary%20of%20Findings.pdf (accessed 18 October 2013)

[43] *Ibid.*, n. 41.

[44] E.g., the phrase, "the equal protection of the laws" in Article 14 of the Indian constitution, is taken from Amendment 14 of the U.S. constitution. In recent years, the international influence of the U.S. constitution has significantly waned in its rights-related and basic structure-related provisions. E.g., see David S. Law and Mila Versteeg. "The Declining Influence of the United States Constitution" 87 *New York University Law Review* 3 (2012). In 1986, one law professor stated about India that "no other nation has had a polity more receptive to the

freedom.[45]Article 19 includes in its title the phrase "protection of certain rights," but in its body states, "all citizens *shall* have the right" to freedom (emphasis added). The choice of words would suggest the Indian framers intended to situate freedom as a grant or conferral rather than a natural right that would render its conferral redundant.[46] In contrast, the U.S. Constitution unequivocally *protects* the freedom of expression as a condition of the person,[47] situating it a natural right to "life, liberty, or property."[48] The terminology appears to place the United States closer to the centre of the natural rights conception than it places India.[49]

Constitutional language is symbolic of intent. It indicates the political influence of legal rhetoric, with words and phrases symbolising a social contract of not only freedom but also of obligation, power and fulfilment. If "rhetoric always is authentic only in its cultural matrix," as the Asian rhetorician Robert Oliver states, then examining legal syntax in a context of the cultural heritage would help ascertain its intent. The German social critic Thomas Mann correctly notes, "The word, even the most contradictory word, preserves contact – it is silence which isolates," until finally, "Speech is civilisation itself."[50] To ancient Indians, rhetoric was not separate inquiry but an aspect of both civilisation and identity: "[The] manner of talk was less an aspect of life than a key revelation of the speaker and of the community's way of life."[51] Yet there appears to be little evidence that hoary rhetorical constructs of Vedic or Panini's Sanskrit, old Tamil, or other classical language of 7000 BC - 2000 BC privileged any political oratory.

Oratory, or effective and precise use of words, has emerged as a necessary instrument in democratic aspiration: the American, British and French systems of democracy are produced from eloquence.[52] The Indians, despite their sophisticated linguistic heritage, however, "developed nothing comparable to the lyceum, the chautauquas, or the commercial lecture

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fundamental rights enshrined in the American Constitution, nor a judiciary more conscientious in its attempt to guard those rights, than India." Robert B. Charles, "American influence on the Indian constitution: Focus on equal protection of the laws." *Columbia Human Rights Law Review,* 17 (1986), 193-204, at 193.

[45] "The State shall not make any law which takes away or abridges the rights *conferred* . . ." (emphasis added.) Indian Const., art. 13(2).

[46] The natural rights were an integral part of the human condition and therefore inalienable by the state. The 17th century political philosopher John Locke conceptualized them in his Second Treatise. See, John Locke, *Two Treatises of Government*, edited by Peter Laslett (Cambridge, U.K.: Cambridge University Press, 1988). For a discussion of the natural rights, see Steven J. Heyman. "The first duty of government: Protection, liberty and the Fourteenth Amendment," *Duke Law Journal* 41 (1991), 507-551.

[47]Unlike in the U.S. First Amendment, whose protections of political and religious freedoms, and the Fourth Amendment, whose protection of privacy, all protect "the people," the fundamental right of freedom in the Indian constitution is conferred on "citizens." For a discussion of the constitutional rights of noncitizens in the United States, see David Cole, "Are foreign nationals entitled to the same constitutional rights as citizens?" *Thomas Jefferson Law Review* 25 (2003), 367-388; also see, generally, Charles, "American influence on the Indian constitution."

[48] U.S. Const., amendments 5 and 14.

[49] In First Amendment jurisprudence that dates to 1919, the U.S. Supreme Court has generally held that the cognate and natural rights of religion, speech, press, assembly and petition may be abridged if subject to a due process of law in four expressive categories: libel, obscenity, "fighting words," and "true threats."

[50] Thomas Mann. *The Magic Mountain*, trans. H.T. Lowe-Porter (New York: Alfred A. Knopf, 1949), 518.

[51] Robert T. Oliver, *Communication and Culture in Ancient India and China* (Syracuse, NY: Syracuse University Press, 1971), p. ix.

[52] For illustrations of oratory as a political instrument in democracy, see Robert T. Oliver, *History of Public Speaking in America* (Boston: Allyn & Bacon, 1965); James H. McBath and Walter Fisher, *British Public Address* (Boston: Houghton Mifflin, 1970); and Timon (Viscount de Commenin), *Noted French Orators* (Chicago: Belford, Clarke, & Co., 1884).

bureaus of the Western world."[53] Precision in use of words and logical felicity appeared to be valued lower than a speaker's *bhaava* or intent, which would disproportionately construct meaning for an audience. For that reason, drafting of the Indian Constitution 1947-49, which necessitated producing precise, rigorous and enduring political prose, was an inflection point even in the new landscape of modernity. It also marked a historical first: an interrogation of Indian political identity as a function of rhetoric.

Western political theory, which was premised primarily on freedom of expression, developed diverse approaches toward proper extent of state intervention in individual autonomy.[54] Since the mid-seventeenth century, the political thought of John Milton,[55] James Madison,[56] John Stuart Mill,[57] Oliver Wendell Holmes,[58] and Alexander Meiklejohn[59] significantly influenced the defence of freedom of expression by the U.S. Supreme Court. The Supreme Court of India, however, was located in a cultural heritage that tended to view freedom in non-political terms.[60] Unlike the Anglo-American claim of freedom situated in political rhetoric, Indian freedom was found almost entirely in the dialectic of Dharma;[61]it focused on liberation

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[53] Oliver, *Communication*, p. 1.

[54] For a review of classical liberal, conservative, utilitarian, critical-cultural and postmodern approaches in freedom of expression theory, see Nikhil Moro and Debashis "Deb" Aikat. "Liberty v. Libel: Disparity and Reconciliation in Freedom of Expression Theory." *First Amendment Studies* 47 (2013): 1-26.

[55] John Milton. *Areopagitica* (Oxford: Oxford University Press, 1954). First published 1644 in Great Britain; Milton's political philosophy, some have suggested, did not include a secular freedom of expression given his commitment to the Reformation. E.g., see Vincent Blasi, "Milton's Areopagitica and the Modern First Amendment." *Yale Law School Occasional Papers*, Second Series, 1 (1995).

[56] Madison, who wrote 26 of the 85 "Federalist Papers" essays that argued in favour of ratification of the federal U.S. constitution in 1787-88, also took the lead in drafting a bill of rights to limit the federal government. On June 8, 1789, he proposed twelve amendments to the constitution that were based on suggestions of several state representatives. His draft included three longer sections to protect religious and communication freedoms, which upon discussion, were reduced to the 45-word First Amendment. For a brief discussion, see Thomas L. Tedford and Dale A. Herbeck, *Freedom of Speech in the United States* (State College, PA: Strata Publishing, 2013), 21-23.

[57] John Stuart Mill. *On Liberty and Utilitarianism* (New York: Bantam, 1993). First published 1859 in Great Britain.

[58] For Holmes, ideals would compete with one another without regard to consequence. He argued that the "theory of our Constitution" was that "the ultimate good desired is better reached by free trade in ideas – that the best test of truth is the power of the thought to get itself accepted in the competition of the market." *Abrams v. United States*, 250 U.S. 616 (1919), 630.

[59] Meiklejohn, the leading American free-speech theorist, developed a position that provided for absolute protection of political expression, which was essential to self-government. Not every person would be heard, but "everything worth saying shall be said." Noting that Article I, Section 6 of the U.S. constitution gave members of Congress an absolute privilege of speaking on the floors of the House and Senate, Meiklejohn sought that privilege to be extended to political debate in general. His position provided for non-political expression to be regulated by due process of law. See, Alexander Meiklejohn. *Free Speech and its Relation to Self-government* (New York: Harper & Row, 1948), 25.

[60] For a comprehensive, empirical analysis of the Indian Supreme Court decision-making process, see, Abhinav Chandrachud, "Speech, structure, and behavior on the Supreme Court of India," *Columbia Journal of Asian Law* 25, 2 (Spring 2012), 222-274.

[61]Dharma held multifaceted meanings in Vedic and later Smriti and Buddhist narratives including law, righteousness, ethical decision-making, duty, custom, morality, and the Buddha's teaching. See generally, Alf Hiltebeitel. *Dharma: Its Early History in Law, Religion, and Narrative* (New York: Oxford University Press, 2011); M. Rama Jois, a former chief justice of the Punjab and Haryana High Court, has found in Mahabharata and other mostly *Smriti* texts that Dharma encompassed attributes that sustained society, maintained social order, and ensured well-being and progress of humanity. In Jois' discussion, Dharma appears to be more consistent with social responsibility than with self-fulfilment. E.g., see, *Legal and Constitutional History of India* (New Delhi: Universal Law Publishing Co., 2010), 3-9; for a discussion of Dharma as protection of civil rights, see, M. Rama Jois, *Be Immortal* (Bangalore, India: Canara Press,

not from external intervention but one's own sensory bondage.[62] Primarily the theory of freedom was located in the Upanishads, which were of primitive antiquity and constituted an elaborate metaphysical treatise about freedom.[63]

For Radhakrishnan, the Upanishads represented "the highest and purest expression of the speculative thought of India."[64] Upanishadic dialectic discussed freedom in terms of emancipation not of the senses but *from* the senses. It emphasised synthesis; it presupposed experience as personal. It recognised little space for exclusive binaries and none to convert the "other," which theoretically did not exist. It deeply and uniquely influenced diverse later Indian philosophical approaches to freedom.[65]

The dialectic developed in a syllogistic refrain of three beliefs: First, a belief in *karma*, or conduct as a determinant, for its doer, of consequence in the current birth or next; it meant, among other things, an eschewal of distracting attachments to sensory or temporal pleasure. Second, a belief that a permanent local entity termed *Atman* (loosely defined, "soul") existed in living things as a microcosm of a universal entity termed *Brahman* (loosely, "God"), which could therefore be hailed in any preferred deity. Third was a belief in *mukti* or freedom, which was attained when a highly favourable *karmic* equation enabled *Atman* to be liberated from the otherwise eternal cycle of births to unite with *Brahman*, of which it was all along an estranged part.[66]

In that emancipatory narrative, freedom was intrinsic to the human condition. Its realisation was the ultimate goal of human existence; individuals were perpetually evolving in some stage of freedom. The unit of analysis of the freedom was not a society or community but the autonomous individual, whose apolitical nature, however, precluded the Upanishads from political theory. At the same time, the individual was not a permanent distinction but intrinsic to a universal whole, which, aptly, meant the theory would synthesise the political *and* apolitical: Unlike later Western jurisprudence, in classical Indian law "the focus is on rights, not on duties."[67]Oliver put it succinctly, "More than loving one's neighbour as ourselves, [the individual was] actually one with the neighbour—blood of his blood, spirit of his spirit. The destiny of all is

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2013), 48-65; Sarvepalli Radhakrishnan, among others, has found Dharma to emphasise a rule of law in that a king was subordinate to Dharma. See generally, S. Radhakrishnan, ed. *The Principal Upanisads* (London: George Allen & Unwin, 1968); Dharma is a "guide to life . . . whatever brings society together is dharma; what divides is adharma," stated T.V. Subba Rao, visiting professor, National Law School of India University, in lecture to Indian Police Service probationers attended by author. Bangalore, 17 June 2013.

[62] See generally, Vedanta Kesari, *Facets of Freedom* (Chennai: Sri Ramakrishna Math, 2011).

[63] For a translation of eleven principal Upanishads accompanied by a detailed commentary in the Advaita Vedanta school of interpretation, see Swami Nikhilananda. *The Upanishads*, vols. 1-4 (New York: Harper & Bros., vol. 1, 1949; vol. 2, 1952; vol. 3, 1956; vol. 4, 1959). The essence of the Upanishads was offered by Edmond Holmes as follows: "They are dominated by one paramount conception, that of the ideal oneness of the soul of man with the soul of the universe." To realise that syncretic oneness was the meaning of freedom. See, Introduction to S. Radhakrishnan's *Philosophy of the Upanisads* (London: George Allen & Unwin, 1924), p. 4.

[64] S. Radhakrishnan. *Philosophy of the Upanisads* (London: George Allen & Unwin, 1924), p. 18.

[65] In the judgment of Ramachandra Dattatreya Ranade, the eminent Sanskritist, "the Upanishads occupy a unique place in the development of Indian thought. All the later systems of Indian philosophy . . . have been rooted in the Upanishads." R.D. Ranade, *A Constructive Survey of Upanishadic Philosophy* (Poona, India: Oriental, 1926), ch. II, 3.

[66] See, Radhakrishnan, *The Principal Upanisads*, 48-146; also see generally, S. Radhakrishnan, *Indian Philosophy* (New Delhi: Oxford University Press, 2008) and Arvind Sharma (ed.) *The Study of Hinduism* (Columbia, SC: University of South Carolina Press, 2003).

[67] T.V. Subba Rao, visiting professor, National Law School of India University, in lecture to Indian Police Service probationers attended by author. Bangalore, 17 June 2013.

so intertwined that there can be no separate salvation or separate damnation. Whoever scorns or harms or loves or helps another, so he also does to himself. This is the light that shines through those gospels which the Indians call Upanishads."[68]

Consequently, the Indian idea of freedom in a libertarian or classical liberal tradition was not consistent with American constitutional dichotomy. Thomas Jefferson's modernist metaphor of "building a wall of separation between church and state" was futile, dissonant or incongruous to the Indian idea of syncretic oneness. A church-state separation would fall outside the normative conditions of the Indian freedom theory, which anointed an exclusive distinction and therefore supremacy of no church, book, or individual over any other. The Upanishadic dialectic de-emphasised any dualistic, good/light versus evil/dark, ontology as a rational framework of freedom. Consequently, it would not compete with state theory in a manner of Semitic religion.[69]

The Constituent Assembly of India, however, rejected the Upanishadic pursue-philosophical-synthesis approach in favour of a Semitic lens to view the meaning and pursuit of freedom. The resulting Constitution legitimised Dharma, the aggregation of the Indian theory of freedom, as religion. Yet given the Indian heritage of freedom, the secular state turned away from the Jeffersonian wall and toward *sarva dharma samabhava*,[70]a Gandhian principle that informed the construction of Indian constitutional secularism.[71]*Sarva dharma samabhava* appeared to bridge the apolitical theory of freedom with political exigencies. It meant the state would adopt an attitude of not rejection but equidistance from all religion including Dharma, which *sarva dharma samabhava* incorrectly subjected to the presumptions of Semitic religion.[72]

Sarva dharma samabhava appeared to have roots in the Indian theory of freedom, from which it nevertheless made a pragmatic departure. It enabled sameness in state attitude toward multiple religious groups but in doing so, it departed from the claim of their inherent sameness. As a result, *sarva dharma samabhava* muddled secularism into a nebulous notion of extraordinary use to politicians but none to jurists.[73] First, it introduced a Dharma bias into the notion of secularism, enabling incorrect perceptions that state actions based in it would materially favour

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[68] Oliver, *Communication*, pp. 44-45.

[69] State theory has evolved in competing material and political traditions. E.g., Marxist conceptualizations of the state as an "illusory community," as a committee to implement the common interest of the bourgeoisie, and so on, are discussed in Martjin Konings, "Renewing state theory," *Politics* 30, 3 (2010), 174-182.

[70] Jawaharlal Nehru, the first Indian prime minister, wrote about the principle of *sarva dharma samabhava* in 1961: "We talk about a secular state in India. It is perhaps not very easy even to find a good word in Hindi for 'secular.' Some people think it means something opposed to religion. That obviously is not correct. . . . It is a state which honours all faiths equally and gives them equal opportunities." S. Gopal, ed. *Jawaharlal Nehru: An Anthology* (New Delhi: Oxford University Press, 1980), 330.

[71] For a review of Indian constitutional secularism, see Thomas Pantham, "Indian secularism and its critics: Some reflections," *The Review of Politics* 59, 3 (Summer 1997), 523-540; also see, Badrinath Rao, "The variant meanings of secularism in India: Notes toward conceptual clarifications," *Journal of Church and State* 48, 1 (Winter 2006), 47-81.

[72] An exclusive church, holy book, or hagiography, all of which were necessary presumptions of Semitic religion, had no parallels in Dharma. See generally, Will Durant. *Our Oriental Heritage*, 11 vols. (New York: Simon and Schuster, 1942), I.

[73] S.L. Verma offers bluntly that "the popular version of Indian secularism as 'sarva dharma samabhava' . . . simply leads to anti-secularism, as it goes, on the one hand, against modernisation and national integration, and, on the other, strengthens the existing socio-cultural structures." *Towards a Theory of Positive Secularism* (New Delhi: Rawat, 1986), 33.

Hindu, Buddhist, Sikh and Jain groups.[74] Second, it imposed on those groups a legal obligation toward a syncretic or inclusive society that, paradoxically, was inherent in Dharma,[75] thus unravelling a patronising state or indicating an impossible ignorance of Dharma or indulging the false analogy of Dharma with proselytising religion.

By thus disparaging the inclusive Indian theory of freedom and therefore Dharma, law founded in *sarva dharma samabhava* weakened but not strengthened the conditions of secularism. It insidiously defended the tenor of a "secular" aspiration, which later in 1976, undefined, was amended into the preamble.[76] Finally, there was a strong case to be made that it also triggered the rise of illiberal electoral politics.

Some philosophers speculated that a purpose of the Upanishads was to offer motivation or therapy, to explore reasons why humans believed, felt or acted as they did, rather than attempt any disinterested search for truth.[77] Radhakrishnan opined: "The aim of the Upanishads is not so much to reach philosophical truth as to bring peace and freedom to the anxious human spirit."[78] The constitutional framers evidently folded into democratic aspiration that aim and purpose, but they still failed to enable a political identity located in the Indian theory of freedom. It appears that the framers passed a historic opportunity to appropriate into the political discourse a pioneering libertarian approach found in the Upanishadic theory of freedom. Instead, they

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[74] The reference to "Hindu" that appears in Indian Const., art. 25(b)(2), "shall be construed as including a reference to persons professing the Sikh, Jaina or Buddhist religions." *Shastri Yagnapurushdasji v. Muldas Bhundardas Vaishya*, AIR 1966 SC 1119, 1131; A legal meaning of Hindu has been discussed by the Indian Supreme Court in several cases: *Perumal Nadar v. Pnuswami*, 1 SCC 605 (1970); *C.W.T. v. R. Sridharan,* 4 SCC 489 (1976), *Punjabrao v. Dr. D.P. Meshram*, AIR 1965 SC 1179, 1184; and *C.H. R.E. v. Ratnavarma Heggade,* 1 SCC 525 (1977).

[75] Indologists are nearly unanimous that "Hinduism" is a descriptive label coined in Orientalist scholarship; it lacks universal validity and has little explanatory or analytical potential. A more useful term for Indian philosophical practice would be *Vaidika Dharma* or *Sanatana Dharma*: a Dharma purportedly with no beginning, end, or hagiography. E.g., for an etymological discussion, see Robert E. Frykenberg. "The emergence of modern 'Hinduism' as a concept and as an institution: A reappraisal with special reference to South India," in Gunther D. Sontheimer and Kermann Kulke, eds., *Hinduism Reconsidered* (Delhi: Manohar Press, 1989).

[76] The forty-second amendment, which was moved and enacted in 1976 by the Indira Gandhi government upon declaration of an internal emergency, revised the preamble label from the original "sovereign democratic republic" to "sovereign socialist secular democratic republic." The eminent constitutional expert, Durga Das Basu, among others, has described the expression "secular" as vague. See B.M. Gandhi and B.P. Banerjee, eds.,*Constitutional Law of India* (Nagpur, India: Wadhwa, 1988), p. 4 footnote; In two 2005 cases, *Bal Patil v. Union of India* and M.P. *Gopalakrishnan Nair v. State of Kerala*, the Indian Supreme Court interpreted secularism to mean the state had no religion but would not establish an atheist society; The court ruled that the preamble provided the basic structure of the constitution and therefore also a context to interpret the fundamental rights and the directive principles of state policy. See, *Keshavananda Bharati v. State of Kerala*, AIR 1973 SC 1461, para. 292, 599, 682, 1164, 1437 (regarding the preamble as basic structure); *Keshavananda Bharati v. State of Kerala*, AIR 1973 SC 1461 (regarding the preamble providing context to interpret the fundamental rights); *Chandra Bhavan v. State of Mysore*, AIR SC 2042 (regarding the preamble providing context to interpret the directive prrinciples); An eminent constitutional expert has opined, "The Preamble is the basic structure of the Constitution." P.M. Bakshi, *The Constitution of India* (New Delhi: Universal Law Publishing Co., 2012); According to Professor V.S. Mallar of the National Law School of India University, the basic structure "includes judicial review, purity of election, equality, freedom of speech and expression, balance and harmony between fundamental rights and directive principles." Interview with author, Bangalore, 13 June 2013.

[77] E.g., Oliver, *Communication,* pp. 44-60.

[78] Radhakrishnan, *Philosophy of the Upanisads*, p. 14. For Mohandas K. Gandhi, whose politics showed an imprint of the renunciative freedom of the Vedic, Buddhist and Jain traditions, the conception of truth evolved not in philosophy as much as in experience: "Truth became my sole objective. It began to grow in magnitude every day, and my definition of it also has been ever-widening." *An Autobiography* (Ahmedabad: Navjivan Publishers, 1927), 29.

indulged a less daring, but messy, experiment in civic-liberal constitutional freedom, which later tended to be abused by cynical electoral politicians to fashion illiberal campaign agendas.

Criminal Libel in the Indian Legal Heritage

What effect if any did the constitutional experiment have on expressive freedom? For one, it enabled direct state intervention in speech disputes. For another, it obligated political responsibility in expression. As opposed to tort actions that would enable a libel victim to sue for damages criminal law enabled the state to arrest and prosecute the alleged libeler.

The American jurist William J. Prosser observed in a classic tort treatise, "Perhaps more than any other branch of the law, the law of torts is a battleground of social theory."[79] But the law of torts was relatively weak in India unlike in the United States, where libel was overwhelmingly litigated in civil court not criminal. In addition, in recent years the Indian criminal law was fairly commonly applied, as news reports suggested, on users of social media and blogs. Numerous bloggers, Twitter users, and Facebook posters were arrested, if not prosecuted, on charges of criminal libel.

Sixty years ago, Jawaharlal Nehru wrote that telegraphy had "progressively altered the very texture of human life."[80] His statement could apply to Internet communication in 2013, although Indians who used Facebook, Twitter and blogs still represented a relatively small and urban elite. Approximately 11.5% of Indians had home or workplace access to the Internet, but their number was rising rapidly. Indian bloggers already accounted for the third largest online population.[81]

Bloggers, Twitter and Facebook users were part of an English-speaking elite in popular perception. More traditional English-language publications accounted for a relatively small slice of the Indian circulation and readership pies, but it was fairer than ever to claim that "India's English language press is the only national press and it is paramount in the world of Indian [news] journalism."[82]

It is a fact of history that the first Indian newspaper published in 1780 was in English.[83] Its editor James Augustus Hicky called it "a weekly political and commercial paper, open to all parties, but influenced by none."[84] Hicky was a self-taught printer but hardly a dedicated one.[85]

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[79] William J. Prosser, *Handbook of the Law of Torts*, 3rd. ed. (St. Paul, MN: West Publishing Co., 1964), 14.

[80] Jawaharlal Nehru. Foreword to Krishnalal Shridharani, *Story of the Indian Telegraphs: A Century of Progress* (New Delhi: Posts and Telegraphs Department, 1953), vi.

[81] ComScore, "India: Digital Future in Focus 2013," http://www.slideshare.net/vikrantmudaliar/2013-india-digital-future-in-focus (accessed 1 September 2013).

[82] Windmiller (1954), p. 315.

[83] Further, "[t]hefirst non-English journal to be published [in India] was not in any Indian language but the Armenian *Azdarar* in 1794 in Chennai." Prasun Sonwalkar, "'Murdochization' of the Indian press: from by-line to bottom-line." *Media Culture & Society* 24, 6 (2002), 821-834 at 821.

[84] Rau, Chalapathi (1974), 10.

[85] An English lawyer and memoirist of late 18th-century Calcutta wrote, "Resolving also to have two strings to his bow, [James Augustus Hicky] at the same time gave orders for a quantity of medicine, as he proposed to exercise the business of physician, surgeon, and apothecary, as well as that of printer." William Hickey, "The first Calcutta

He was aggrieved with his employer, the Calcutta-based East India Company, evident in his "possessing [of] a fund of low wit."[86] He was said to have turned his paper, titled *Bengal Gazette or the Original Calcutta General Advertise*r, into a "channel of personal invective and the most scurrilous abuse of individuals of all ranks, high and low, rich and poor, many were attacked in the most wanton and cruel manner."[87] A target of his libels was governor general Warren Hastings; another was Lady Hastings. Unsurprisingly, in June of 1781, Hicky was prosecuted and jailed for libel. Undeterred, he continued to pen columns from jail until a second prosecution the next year put paid to his printing and editorial career.[88] In its 26 months of existence, however, his weekly had set an agenda for Indian journalism for many centuries ahead, successfully demonstrating that journalists could expose corruption, cause scandal, destroy reputation, earn a profit, and shake up government. They could also be jailed and their careers terminated by the law of criminal libel.

Thus in a historical sense, Indian English-language journalism was founded in the law of criminal libel, which in 1782 ended the career of a pioneering editor.[89] After it became a republic in 1945, India was one of many aspiring democracies that continued to have criminal libel on their statute books.

Earnest if rare calls were made in favour of criminal libel,[90] but the near consensus among legal scholars was that criminal libel served no purpose if libel victims could seek justice in civil court. David Pritchard, who supported a "rethinking" of American criminal libel law, noted: "Criminal libel is the black sheep of communication law – so much so that some recent communication law textbooks do not even mention it. Authors who do refer to criminal libel frequently disparage it as 'ancient,' 'archaic,' 'antiquated,' 'obsolete,' 'outdated,' and 'undemocratic.' Prosecutions are thought to be extremely rare, a state of affairs that provides solace to free-speech advocates who believe that the principal use of criminal libel is to punish political dissent."[91]

Incarcerating inconvenient or offensive speakers was legitimised in the early 16th century when English judges imagined four libels enabled by the new technology of the printing press: Blasphemous libel, primarily expressions that reviled Christianity or questioned claims of the church; obscene libel, including literature that routinely included content considered indecent, "disgusting," "immoral," "lewd," profane or lascivious; seditious libel, which meant messages with a tendency to bring the government or its officials or policies, or resident foreign diplomats, into public contempt; and private libels that targeted other persons.[92] Until at least the seditious

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newspaper," in *Memoirs of William Hickey* (1775-1782), vol. 2, 7th edition (London: Hurst & Blackett, 1925), 175-176 at 175.

[86]Hickey, 175.

[87]Hickey, 175.

[88] N.S. Jagannathan, *Independence and the Indian Press, Heirs to a Great Tradition* (Delhi: Konark Publishers, 1999).

[89]Hicky's paper lasted a little more than two years: from January 29, 1780, through March 23, 1782.

[90] E.g., David Pritchard. "Rethinking criminal libel: An empirical study," *Communication Law and Policy* 14, 3 (2009), 303-339; Susan W. Brenner, "Should online defamation be criminalized?" *Mississippi Law Journal* 76, 706 (2007); Robert A. Leflar, "Social utility of the criminal law of defamation," *Texas Law Review* 34 (1955-56) 984.

[91] Pritchard. "Rethinking criminal libel," at 303-304. Citations omitted. The author found that "criminal libel can be a legitimate way for the law to deal with expressive deviance that harms the reputations of private figures in cases that have nothing to do with public issues" (at 303).

[92] For a summary of the four libels of the Anglo-American legal tradition, see Tedford and Herbeck, *Freedom of Speech*, 7-11.

libel trial of John Peter Zenger in New York in April of 1735, truth was not a defence; as a matter of law, greater the truth, the greater was the liability and therefore sanction.

English common law came to India in the early 17th century with the East India Company. But it was widely applied beginning with the British Raj, the period after 1858 when the queen assumed the colonial government. After independence, the Indian courts recognised criminal libel in English common law, but prosecution at common law was rare. Criminal libel prosecutions invariably originated in statute, primarily the Indian Penal Code of 1860[93] but in later years also the Information Technology Act of 2000.

Indian jurists historically used a three-fold basis to defend a distinction between civil and criminal libel. First, the consequence but not character of the act was the focus of the prosecution. Any consequence of a breach of the peace implicated society beyond the targeted individual. To quote a criminal law textbook, "The crime of libelling a private person consists in the malicious publication of any writing, sign, picture, effigy, or other representation, tending to expose any person to hatred, contempt, or ridicule. The gist of the offense is its tendency to provoke a breach of the peace."[94] Consequently, in addition to injury of the victim (which would be sufficient in a civil case), the prosecutor would show a further possibility of injury to society beyond reasonable doubt.

Second, Indian libel litigants were too often indigent: a civil plaintiff may not have enough to pay court costs or attorney fees. A prominent constitutional attorney in New Delhi stated, "The court fee in civil libel cases is 7%, so if you ask for damages of one crore [10 million rupees], you'd have to come up with 7 lakh [0.7 million rupees]. How many could afford that?"[95] In addition, a defendant may not be wealthy enough to make a civil lawsuit meaningful or worth the plaintiff's while. Criminal libel law, which allowed injured plaintiffs use of not only the good offices of the courts but also state prosecutors, consequently was the alternate and utilitarian option to seek justice. A litigious society, in which litigants approached seemingly ever-higher courts, positively correlated with high confidence in the rule of law.

The third presumption for the distinction between civil and criminal libel was, as discussed earlier, the Indian Supreme Court's rather fragmented stance on the meaning of freedom of expression. A comprehensive theory of freedom of expression was elusive in the court decisions, which on the one hand departed from the classical liberal lineage of the U.S. First Amendment to take a communitarian or progressive interpretation, especially with regard to seditious libel, but on the other hand, occasionally adopted the U.S. actual-malice doctrine that created legal tolerance even for a level of false expression in the interest of a marketplace of

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[93] The Indian Penal Code, which is variously dated to 1860, 1861 and 1862, has been described as "a superb piece of penal legislation" containing "a rich lode of progressive law." See, Stanley M.H. Yeo, "Lessons on provocation from the Indian Penal Code," *The International and Comparative Law Quarterly* 41, 3 (1992), 615-631 at 615. For a critical review of the Indian Penal Code, see David Skuy, "Macaulay and the Indian Penal Code of 1862: The myth of the inherent superiority and modernity of the English legal system compared to India's legal system in the nineteenth century," *Modern Asian Studies* 32, 3 (1998), 513-557.

[94] Justin Miller, *Handbook of Criminal law* (St. Paul, MN: West Publishing Co., 1934), 492.

[95] Name withheld on subject's request. Consequent to his observation about indigent litigants, the attorney expressed support for criminal libel, adding, "Yes, criminal libel laws are consistent with a free society," if they "should be reasonable under [Article] 19(2)." Notes from the interview, which occurred the evening of August 5, 2013, are available with the author.

ideas that was "uninhibited, robust, and wide-open."[96]

Public Policy as a Function of Criminal Law

The theory of freedom of expression provides the conditions for a regulatory framework, which in turn operates in regulation theory.[97] Ithiel de Sola Pool, the MIT scholar who coined the term "convergence," has observed that the regulatory response to a technology is not entirely driven by the technology but also by a host of seemingly peripheral considerations such as stakeholder interests, prevailing or imagined business models, and political ideologies. Those considerations are evident in environments through which the regulatory response is applied, such as, (1) Law; (2) public policy; (3) market; (4) culture; or (5) self.

In a rule of law, regulation through law and policy would have unquestionable legitimacy and relatively high social expectation. Market-based regulation sounds paradoxical but occurs by default; it tends to be legitimate until it trumps either law or public policy. It tends to favour high-quality content and low price; it bankrupts vendors that do not compete on those terms. As a result, the free marketplace necessarily tends toward an oligopoly from mergers, acquisitions and bankruptcies. That would be, however, socially undesirable in media industries given the democratic need for simultaneously competing ideas. Therein government is justified. The government enables antitrust laws to protect a minimum number of vendors in order to ensure choice for citizens. Regulation by culture, on the other hand, would have little legitimacy for its claims are extra-judicial or based in shifting scales of taste and fashion, too similar to moral policing or vigilantism. Finally, self-regulation, which is a function of both market and culture, occurs in ethical decision-making and in libertarian or classical liberal assumptions of individual obligation. Regardless of its environment, regulation must compete with disparate variables for legitimacy. Consequently, the variety of media – print, Web, social, broadcast, cable, social – presents a plethora of directions and opportunities for the media regulator.

Public Policy and Regulatory Response

Public policy is an integral part of regulation theory. It consists of the "principles and standards regarded by the legislature or the courts as being of fundamental concern to the state and the whole of society."[98] Public policy declaration is a legislative function to the extent the legislature makes law, but policy formulation, application and evaluation are prerogatives of the executive branch. Public policy essentially advances the legal intent. In Indian media regulation, police almost always represent the executive branch.

When legislature declares the policy and the executive applies it and there is no constitutional impediment, the question of the wisdom, fairness or expediency of the policy is

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[96] Justice William J. Brennan's opinion for the U.S. Supreme Court in *New York Times v. Sullivan*, 376 U.S. 254 (1964), at 270.

[97] Robert Hassan of the University of Melbourne describes regulation theory as follows: "Regulation theory discusses historical change using two central concepts: Regimes of Accumulation (ROA) [of capital] and Modes of Regulation (MOR). ROAs are particular forms in which capital organizes and expands for a period of time, exhibiting some degree of stability. A key example of an ROA from the work of the Regulation theorists is 'Fordism'. MORs are those constructs of law, customs, forms of state, policy paradigms and other institutional practices which provide the context of the ROA's operation. Generally speaking, MORs support ROAs by providing a conducive and supportive environment. But sometimes there is tension between the two, and this means that something must give. The change to and from Fordism is explained by the School in these terms." *The Information Society* (Cambridge, U.K.: Polity Press, 2011), p. 235.

[98] Black's Law Dictionary, 7th ed., p. 1245.

for the executive and not for the courts. Consequently, public policy would provide significant power to the executive to advance a substantive political agenda. It represents a flexible tool for government to touch the lives of citizens.

For the Indian media regulator, issues "of fundamental concern to the state and the whole of society" would include equitable development, accessible justice, and effective public services. Policy prescriptions founded on understanding the issues would draw from policy studies. The American media economist, Alan Albarran, observes that policy studies offer a macroeconomic approach to examining "the impact of regulatory actions and decision-making on existing markets and industries."[99] He calls policy studies a "natural area of enquiry" for when media industries are regulated by governments, "actions by policymakers impact markets in terms of their economic structure and potential." Public policy research tends to view it as an agent of either social control or social change, the latter more evident in India, where economic inequities are often a function of social inertia or regulatory corruption. Indian public policy emerges in complex interactions among policymakers and other political actors including legislators, executive agencies, social groups, and news media. The "art and craft of policy analysis,"[100] more than the science, enables scholars to measure policy prescriptions for empathy. Policymakers would have a finger of the pulse of industries, consumers, and the larger public interest. They would be ever cognizant of the legal intent, as well as administrative and legal techniques available to the media regulator.

Consequently, Indian media policy regulating Facebook, Twitter and blog activity, which is enforced by police, would demonstrate empathy with the law ("reasonable restrictions") but simultaneously also to distinct constituencies: industry (e.g., social media innovation); consumers (citizens that use Facebook, Twitter, blogs); public interest (represented in a marketplace of ideas that ought to be, to quote U.S. Justice William Brennan, "uninhibited, robust, and wide-open"); parliamentary intent (measured in public attitudes of legislators, who, in the Westminster parliamentary setup, can double as cabinet ministers); and powers vested in the police (practically, the police in India are not autonomous, for there exists the Westminster legislative-executive overlap but also in many local legislators a perceived sense of entitlement to interfering: "Self-evidently the process of producing public policy [is] very different in a country with a Westminster-type Constitution and one with a U.S.-type Constitution with its multiple veto points."[101]) To conclude with the policy professor Iris Geva-May's cautionary note, "Policy analysis is done in a great many settings and under many auspices: settings and auspices have an important bearing on what is expected of the analyst. Consequently, as context and culture are all important when attempting to decide what best practice requires, particular principles may negate or acutely modify each other, or may oblige cultural adaptation."[102]

Some economists have found policymakers to use "mental models" that "provide both an interpretation of the environment and a prescription as to how that environment should be

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[99] Alan B. Albarran, *The Media Economy* (New York: Routledge, 2010), p. 24.

[100] The phrase indicates an approach and appears in the title of a book by Berkeley political scientist Aaron B. Wildavsky. *The Art and Craft of Policy Analysis* (New York: Palgrave Macmillan, 1980).

[101] Rudolf Klien and Theodore R. Marmor, "Reflections on policy analysis: Putting it together again," in Michael Moran, Martin Rein and Robert E. Goodin, eds.,*Oxford Handbook of Public Policy* (New York: Oxford University Press, 2008), 892-912 at 893.

[102] Iris Geva-May, *An Operational Approach to Policy Analysis: The Craft* (New York: Springer, 1997), p. xxvii.

structured."[103] Thus those regulating expressive freedom on the ground, such as a police superintendent, could use any of the four premises of that freedom as a mental model: the freedom as a means to assure "individual self-fulfilment;" to discover truth; to provide for participation in decision-making; and, finally, to achieve communal stability by ensuring "the precarious balance between healthy cleavage and necessary consensus."[104] The mental model would have a normative component to it, depending on the superintendent's assumptions about Indian democracy, proper role of government, and approach to justice. Consequently, policymakers could use an abiding education in civics in order to effectively analyse and apply public policy toward, say, protection of "public order," (Article 19(2)), the "sacred" (IPC Section 295), and other nuances of constitutional restriction.

Content regulation, as reprehensible as it is to the marketplace of ideas, can be a means to advance issues "of fundamental concern to the state and the whole of society." Among those issues is encouraging creative expression in the interest of democratic aspiration. Public policy would protect and privilege such expression. The content itself would not need protection, but social media users who created or received it individually or collectively would. Thus public policy could go beyond protecting the powerless to empowering them. Facebook and Twitter offer policymakers an unprecedented opportunity to enhance their communication with citizens consistently with an affirmative access-driven appreciation of Article 19.[105]

Escalating Police Actions

An Indian libel complaint is typically processed by a cyber-crime investigation cell that is usually part of the state criminal investigation department (CID). Every tier-1 and tier-2 city, which means all of the sixty most populous cities in India, has a cyber-crime cell office.

If news stories are any indication, then the Indian police since March 2012 stepped up enforcement actions against speakers under umbrella of many criminal statutory provisions prohibiting defiling of "sacred" objects (Indian Penal Code of 1860, Sec. 295), "criminal intimidation" (Sec. 506), and "annoyance or inconvenience" in online posts (Information Technology Act of 2000, Sec. 66A). Public perception of such police actions, as reported in the news media, was overwhelmingly and strongly negative. The police actions evoked important policy questions: were they consistent with the letter and intent of the statutes on which they were based? Further, were the police actions, and the respective statutes, congruous with the "reasonable restrictions" of established law?

The police actions, widely perceived as misguided, zealous or simply illegal, were discussed extensively in the blogosphere[106] and news media.[107] A short list of examples:

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[103] Arthur Denzau and Douglass C. North, "Shared mental models: Ideologies and institutions," *Kyklos* (February 1994) 47, 1: 3-31, at 4.

[104] Thomas I. Emerson, *The System of Freedom of Expression* (New Haven, CT: Yale University Press, 1970), 6-7.

[105]Thomas I. Emerson, "Toward a general theory of the First Amendment," *The Yale Law Journal*, 72: 5, pp. 877-956.

[106] E.g., see Sans Serif, "Free Speech Gets a Major Boost (in the A**), http://wearethebest.wordpress.com/2013/01/30/free-speech-gets-a-major-boost-in-the-a/ , 30 January 2013 (accessed 13 March 2013)

[107] E.g., see Chinmayi Arun, "Freedom of Expression Gagged," 15 February 2013, http://www.thehindubusinessline.com/opinion/freedom-of-expression-gagged/article4419285.ece?homepage=true (accessed 13 March 2013)

- Mumbai Police obtained a warrant for Sanal Edamaruku, president of Rationalist International, upon a complaint filed by representatives of the local Catholic Church after he challenged a "miracle" in an interview.[108]

- Mumbai Police arrested 25-year-old Aseem Trivedi, political cartoonist, on a charge of seditious libel after he negatively depicted national emblems.[109]

- Mumbai Police arrested two college students, one for posting on Facebook and the other for "liking" the post, upon complaint by a political leader.[110]

- The Government of Tamil Nadu banned the screening of *Vishwaroopam*, a feature film cleared by the Central Board of Film Certification, upon complaints from some Muslim groups.[111]

- A warrant was issued (but suspended) for Ashis Nandy, notable sociologist, for public remarks made on a discussion stage.[112]

Research Questions

The author set out not to test the Indian theory of freedom, or any other, in Article 19 jurisprudence but to seek any pattern in court interpretations of "reasonable restrictions." He took an inductive approach to examining media policy, as measured in recent arrests, in light of any such pattern. Because constitutional law determined the conditions under which all other decision-making took place, policies must be continuously measured for consistency with the Constitution.[113] Policymaking and execution were subject to judicial review for consistency with both ordinary law (in statutes) and constituent law (the Constitution.) They were a prerogative of the executive branch, which used them to manage or distribute public resources within limits placed by law.

To the extent that the Indian police actions represented the state prioritising the use or distribution of public resources under the presumed authority of the respective statute, they

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[108] Meredith Bennett-Smith, "Sanal Edamaruku, Indian Rationalist, Proves 'Weeping Christ' Miracle a Hoax, Now Faces Years in Jail," *The Huffington Post*, 28 November 2012, http://www.huffingtonpost.com/2012/11/28/sanal-edamaruku-indian-rationalist-weeping-christ-miracle-hoax-faces-jail_n_2201897.html (accessed 11 March 2013)

[109] Harmeet Shah Singh, "Arrest of 'Toilet' Cartoonist Triggers Free Speech Debate in India," *CNN*, 11 September 2012, http://www.cnn.com/2012/09/11/world/asia/india-cartoonist (accessed 11 March 2013)

[110] Jim Yardley, "A Mumbai Student Vents on Facebook, and the Police Come Knocking," *The New York Times*, 20 November 2012, http://www.nytimes.com/2012/11/21/world/asia/india-police-arrest-student-over-facebook-post.html?_r=0 (accessed 11 March 2013)

[111] Dilip D'Souza, "India Bans Kamal Haasan's Movie 'Vishwaroopam,'" *The Daily Beast*, http://www.thedailybeast.com/newsweek/2013/02/11/india-bans-kamal-haasan-s-movie-vishwaroopam.html (accessed 11 March 2013)

[112] J. Venkatesan, "SC Stays Arrest but Nandy Should Not 'Disturb' Others," *The Hindu*, 1 February 2013, http://www.thehindu.com/news/national/sc-stays-arrest-but-nandy-should-not-disturb-others/article4368462.ece (accessed 13 March 2013)

[113] Indian Const., art. 124, establishes the Union judiciary, including the Supreme Court of India; art. 131A, inserted by the 43rd amend., establishes "exclusive jurisdiction of the Supreme Court in regard to questions as to constitutional validity of Central laws." The Constitution of India, http://lawmin.nic.in/coi/coiason29july08.pdf (accessed 11 March 2013)

constituted public policy. This monograph, presented as a policy study, may help understand the impact of those regulatory actions and decisions on the fundamental expressive rights.

The author operationalised media policy in police actions that, presumably, fell within the meaning and intent of "reasonable restrictions." He covered police actions reported in *The Hindu* over eighteen months, March 2012 through August 2013, in which a Facebook, Twitter or blog user was the subject of a First Information Report (FIR), or a prior restraint (such as a censorship order, license, discriminatory tax, or injunction) or an arrest warrant.

The discussion examined four research questions:

RQ1: In cases of executive action against Indian social media and blog users in 2012-13, under what specific statutes were (a) FIRs registered, (b) prior restraints applied, and (c) arrest warrants sought?

RQ2: Which of those state actions, if any, was consistent with "reasonable restrictions" as interpreted by the Supreme Court of India?

RQ3: Which of the statutes, if any, on which the executive actions were based, was consistent with "reasonable restrictions" as interpreted by the Supreme Court of India?

RQ4: What are possible effects of those executive actions on press freedom, obligation and responsibility?

Method and Procedure

The author applied legal analysis as described by Ugland, et al.[114] to the primary sources of evidence, which were as follows: Relevant articles in Part III of the Constitution of India (see Appendix A); sixteen Indian Supreme Court cases relevant to "reasonableness" or "reasonable restrictions;" the texts of Articles 19(1)(a) and 19(2); and the texts of several antecedent criminal statutes used to target Facebook, Twitter and blog users. He examined those documents, in their key words and phrases, for specific meanings that reflected intent, attitudes or beliefs of those that crafted them. Rhetoric-analytical approaches commonly focus on the effect of the prose on the readers; this one focused instead on the writers, given the task of examining the chosen texts for intended meaning or for legal culture of the individuals that produced the chosen Constitution, statutes and opinions. (See Appendix C for sources of the evidence.)

Secondary sources included commentaries by the eminent constitutional experts V.N. Shukla, P.M. Bakshi and D.D. Basu, other textbooks, scholarly books, law reviews, various editions of Black's Law Dictionary and Stroud's Judicial Dictionary, and news articles in the archives of *The Hindu* newspaper. In addition, interviews with 12 constitutional attorneys or experts in New Delhi, Bangalore and Mysore between 26 May and 8 August 2013, were used as secondary evidence. The interviews, which lasted between 8 minutes (one) to 95 minutes (one other), were partially structured using the RQs. Their object was to access the subjects' insights related to the RQs but also get a sense of current priorities or directions in Indian constitutional thought.

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[114] Erik Ugland, Everette E. Dennis, and Donald M. Gillmor. "Legal Research in Mass Communication," *Mass Communication Research and Theory* (Guido H. Stempel III, David H. Weaver, and G. Cleveland Wilhoit, eds.) (2003), 386-405.

The procedure included the following steps. First, the news articles were examined for facts of dispute, arrest and prosecution. The stories were limited to those published over eighteen months between 1 March 2012 and 31 August 2013. They were found using the search terms, "66A," "66-A" and "66 A," in reference to the section of the Information Technology Act of 2000 that was most likely to be applied to justify arrests of Facebook, Twitter and blog users. They were located in *The Hindu* Archives electronic (most) and online and newsprint issues of the Chennai edition (stories of July-August 2013). Second, and simultaneously, the Constitution of India was analysed for relevant portions in Part III (fundamental rights). Third, upon determining the facts of arrests, the statutes and the chosen Supreme Court cases were analysed. Fourth, the secondary literature was examined and interviews conducted.

The author took a dialectical approach toward describing the research findings. His general attitude was for exploring a basic, broad-based dialectic about Web freedom in India. The dialectic would place reasoned arguments next to one another as it explored a relevant propositional claim. It would be distinct from debate in that its goal was not to identify a winner: the goal was not to eliminate competing arguments but to synthesise them into an ever more detailed, nuanced discourse. Syncretic fusion of originally inflectional arguments or suppositions would be its normative outcome.

The stakes of the dialectic, thus, were unique; its purpose was to generate rich discourse to explore a theoretical area rather than score competitive points to win any single argument. A dialectic, for that reason, was more useful in pedagogy and discourse than in assessment. It was more useful as method rather than as resource of theory.[115] In both its major historical traditions, ancient Indian and Greek, the dialectic would equally offer a key to unlock the philosophic thought inherent in rich documents and unveil the linguistic-aesthetic productions of philosophers.[116]

In that vein, the focus of this monograph is to engage with the RQs not empirically but dialectically with emphasis on attempting to synthesise disparate suppositions toward a basic discourse about Web freedom. It intends partially to record the author's internal discourse about several legal and social themes relevant to the RQs. In addressing the first three RQs, rulings of the Supreme Court of India were surveyed for the meaning, nature and intent of the Article 19 phrase "reasonable restrictions." More than 16 Court cases, all decided after the adoption of the Constitution in 1950, and all relating to the freedom of speech and expression, were examined.[117] Next, executive attitude toward speech and expression was examined, as evident in media policy

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[115] E.g., Karl Popper, the preeminent philosopher of science, has pointed out that the dialectic of historical materialism is deficient as theory for it is not falsifiable. See, *The Poverty of Historicism* (New York: Routledge, 2002). Originally published 1957 in New Zealand.

[116] For a cogent discussion of the use of dialectic in philosophy and linguistics, especially in Marxian materialism, see Wolfgang Fritz Haug, "Dialectics," *Historical Materialism* 13, 1 (2005), 241-265; For a dialectic about secular reason providing sufficient conditions for a democratic constitutional state, see Florian Schuller (ed.), trans. Brian McNeil, *Dialectics of Secularization: On Reason and Religion* (San Francisco: Ignatius Press, 2006).

[117] The cases examined, listed in chronological order: *Brij Bhushan v. Union Territory of Delhi*, 1950 SCR 605; *Romesh Thappar v. State of Madras*, 1950 SCR 59; *State of Bihar v. Sailabala Devi*, 1952 SCC 329; *Saibal Kumar Gupta v. B.K. Sen*, 1961 SCR (3) 460; *Sakal Papers (P) Ltd. V. Union of India*, 1962 SCR (3) 842; *Bennett Coleman & Co. vs. Union of India*, 1973 SCR (2) 757; *Indian Express Newspapers (Bombay) (P) Ltd. v. Union of India*, 1986 SCC (1) 259; *S. Rangarajan vs. P. Jagjivan Ram*, 1989 SCC (2) 574; *Printers (Mysore) Ltd. v. CTO*, 1994 SCC (2) 434; *R. Rajagopal v. State of Tamil Nadu*, 1994 SCC (6) 632; *Papnasam Labour Union v. Madura Coats Ltd*., 1995 SCC (1) 501; *D.C. Saxena (Dr.) v. Chief Justice of India*, 1996 SCC (7) 216; *Union of India v. Assn. for Democratic Reforms*, 2002 SCC (5) 294; *Rajendra Sail v. M.P. High Court Bar Assn*., 2005 Insc 272; and *M.P. Lohia vs. State of West Bengal*, 2005 SCC (2) 686.

identified in the chosen police actions that implicated "reasonable restrictions" and in the statutes upon which those actions were based.

Finally, the police interpretation of reasonable was distinguished with the Supreme Court's and assessed for any misunderstanding of "reasonable restrictions" or regulatory zeal inconsistent with established law. Addressing the fourth RQ, the author hoped, would help produce normative commentary about reasonable restrictions on freedom of expression.

Limitations

One of the limitations of the study was that news stories unavailable in The Hindu Archives or site were excluded. It was possible but unlikely that the Chennai edition of *The Hindu*, whose content populates the archive, did not report some Section 66A arrests, which then would be unavailable for this study. Another limitation was that the search terms for the news reports were limited to Section 66A on a reasonable presumption that RQ1 would necessarily if not sufficiently implicate that section, which specifically addresses computer users. Consequently, RQ1 was examined through statutes additional to 66A that were used in the arrests; conversely, arrests that did not implicate 66A, if any, were not found.

Another limitation could be that the legal evidence was accessed exclusive in opinions published in JUDIS, or the Judgment Information System of the Supreme Court of India: http://judis.nic.in/supremecourt/chejudis.asp) and by texts of statutes published in India Kanoon: www.indiakanoon.org. The latter site was also used as a backup for accessing the court opinions.

Regardless of source, some of the case reporting appeared to have poor usability with confusing, haphazard or inadequate distinctions between head notes, statements of the facts, the court's vote and opinion and any concurring and dissenting opinions. Currency of an Indian law or legal doctrine was not easy to ascertain.[118]

Yet another limitation was the author's presumption that officials' policy decisions were a significant predictor of executive attitude. While that claim is supported in policy literature, it may be weak in the Indian context: Indian police are too often perceived as subservient to whims or opinions of local legislators; at least some of their decisions would not genuinely implicate the larger executive's attitude toward the issue. In addition, the study examined arrests, but not any following prosecutions. It was unclear how many arrests would end in prosecutions or case closures, and how many of the suspects would be convicted. Suffice it to say, when the arrests made national news a surge of negative public opinion rendered a non-justiciable aura unto the cases.

Finally, the dialectical approach would offer a limitation in itself: It placed a higher value on rational and experiential forms of truth, including argument, insight and perspective, than on

[118] In a *stare decisis* system, legal precedent influences future legal outcomes and therefore guides current executive decisions. Consequently, policymakers would need access to citators such as Shepard's Citations, first printed 1873 in the United States, to determine whether a given case continues to be good law (that is, a case whose precedential value is not diminished or negated by a later case), to analyze legal decisions through comments made by other judges on those decisions, and to trace, over time, discussions of specific points of law. Shepard's was available online in the United States through LexisNexis Academic. A comparable citation index was unavailable to legal researchers in India.

empirical. Its non-polemical experience could, potentially, be perceived as de-emphasising the findings and the conclusion.

Findings

The public-interest litigation petition of New Delhi student Shreya Singhal, 21, which challenged the constitutionality of Section 66A in light of Articles 14, 19 and 21, was admitted by the Supreme Court of India on November 29, 2012.[119] Part of the strength of her petition was a media-enabled perception of widespread application, in additional to unconstitutionality, of Section 66A.

Even though the National Crime Records Bureau failed to publish the number of cases that Indian police registered under Section 66A in 2012,[120] news media reports suggested the number could be in many hundreds.[121] A search for 66A arrests in *The Hindu* Archives, which limited it to the Chennai edition, produced more than 100 news stories published between March 1, 2012, and August 31, 2013. Of them, 94 stories were used for this report: the rest were either repeats or jumps from page 1 and so discarded.

Significant findings were as follows:

1. The stories recorded 24 distinct incidents where Section 66A was invoked in India during the eighteen months covered by the study. The earliest report on March 1, 2012, was of a man who was accused of creating a phony Facebook profile of his estranged wife; the last on August 16, 2013, was of the Supreme Court of India calling for the Uttar Pradesh government to explain a writer's arrest after he tweeted a political protest.

2. The respective State police executed the arrests.

3. Three statutes were cited by Indian police to make all of the arrests: Information Technology Act of 2000, The Indian Penal Code of 1860, and the Prevention of Insults to National Honour Act of 1971, in order of prevalence.

4. Seventeen distinct provisions of those statutes were used to register FIRs or to seek or make arrests. They were as follows: IPC Sections 124A: Sedition; 153: Wantonly giving provocation with intent to cause riot; 290: Punishment for public nuisance in

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[119] *Shreya Singhal v. Union of India*. Writ Petition (CRL.) No.167 of 2012. http://www.scribd.com/doc/115026626/Shreya-Singhal-v-Union-of-India-WP-FINAL (accessed 30 August 2013).

[120] Across all 124 sections of the IT Act, 2,876 cases were registered in 2012 of which 1,875 fell under Section 66 ("hacking with computer systems"), the original section before Parliament appended 66A in 2008 to regulate electronically transmitted content for "annoyance or inconvenience." See National Crime Records Bureau, "Cyber crime: Cases registered under IT Act and cyber crime related sections of IPC during 2012." http://ncrb.gov.in/index.htm (accessed 30 August 2013).

[121] E.g., Petlee Peter, "Rise in social network crimes worrying: police." *The Hindu*, 11 February 2013. That report stated, "The [Chennai] cyber cell department, part of the Central Crime Branch (CCB) has upped the ante against miscreants who use Facebook and Twitter to defame or abuse individuals. . . . In 2010, 19 cases were registered in Chennai on Facebook-related complaints. This went up to 35 in 2011 and dipped to 29 in 2012. However, the rate of conviction remains low with just four arrests each in the past two years." The report quoted an investigating officer to state, "More than 80 per cent of complaints are withdrawn by the victims once they learn the identity of the miscreants. In most cases, the culprit is a relative or acquaintance."

cases not otherwise provided for; 294: Obscene acts and songs; 295: Injuring or defiling place of worship with intent to insult the religion of any class; 295A: Deliberate and malicious acts intended to outrage religious feelings of any class by insulting its religion or religious beliefs; 499: Defamation; 500: Punishment for defamation; 504: Intentional insult with intent to provoke breach of the peace; 505: Statements conducting public mischief; 506 (called 506 of the Ranbir Penal Code in Jammu & Kashmir): Punishment for criminal intimidation; 509: Word, gesture or act intended to insult the modesty of a woman; Prevention of Insults to National Honour Act of 1971, Section 2: Insult to Indian National Flag and Constitution of India; Information Technology Act of 2000 Sections 66A: Punishment for sending offensive messages through communication service, etc.; Section 66B: Punishment for dishonestly receiving stolen computer resource or communication device; and Section 66E: Punishment for violation of privacy.

5. In addition, the following provisions were referred to in the news coverage, either by a critic of the arrests or by a complainant, but not applied to make any arrest: Indian Penal Code Sections 114: Abettor present when offence is committed; 169: Public servant unlawfully buying or bidding for property; 341: Punishment for wrongful restraint; Section 342: Punishment for wrongful confinement; and Information Technology Act of 2000 Section 79: Intermediaries not to be liable in certain cases.

6. Five of the 66A incidents accounted for 74 of the stories.[122] Those incidents were:

    a. Aseem Trivedi arrested in Mumbai the night of September 8, 2012.[123] Charged with IPC Section 124A and Prevention of Insults to National Honour Act Section 2.

    b. Ambikesh Mahapatra and Subrata Sengupta arrested in Kolkata the night of April 13, 2012.[124] Charged with Indian Penal Code Sections 114, 500 and 509 and Information Technology Act Sections 66A and 66B.

    c. K.V. Jaganatharao and Mayank Sharma were arrested in Mumbai, Maharashtra, in the wee hours of May 11, 2012.[125] Both charged with Indian Penal Code Section 506; Information Technology Act Sections 66A and 67; and Prevention of Insults to National Honour Act Section 2.

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[122] See Appendix II for the annotated news stories.

[123] Special correspondent, "Mumbai police arrest cartoonist, slap sedition, cybercrime charges on him." *The Hindu*, 10 September 2012 (accessed in The Hindu Archives 20 June 2013).

[124] Shiv Sahay Singh, "Professor earns Mamata's wrath, held." *The Hindu*, 14 April 2012 (accessed in *The Hindu* Archives 20 June 2013).

[125] Meena Menon. "In midnight drama, 2 AI crew members were held under IT Act." *The Hindu*, 25 November 2012 (accessed in *The Hindu* Archives 20 June 2013). On November 30, 2012, Mumbai police arrested the complainant, Sagar Karnik, under Section 66A. See, Press Trust of India, "66A book on accuser foot." http://www.telegraphindia.com/1121203/jsp/nation/story_16268058.jsp (accessed 24 August 2013).

d. Tariq Majid Khan, Irshad Ahmad Chara, and Rameez Shah, were arrested in Srinagar, Jammu and Kashmir.[126] All charged with Indian Penal Code Section 66A and Ranbir Penal Code Section 506.[127]

e. Shaheen Dhada and Rinu Srinivasan were arrested in Palghar, Maharashtra, on the night of November 18, 2012.[128] They were charged with Indian Penal Code Section 295A.

7. There was no evidence that Indian police or other law-enforcement authorities threatened or applied prior restraints including any censorship, license, injunction or discriminatory tax.

8. There was no evidence that officers who made arrests under 66A, 295A or Section 2 (under all of which offences are cognizable) were aware of Supreme Court jurisprudence surrounding "reasonable restrictions." They exercised their judgment to make the arrest based on facts alleged in the respective complaint. In the arrests of at least Trivedi, Mahapatra and Sengupta, Jaganatharao and Sharma, and Dhada and Srinivasan, the officers appeared to display an unusual regulatory zeal.

9. In at least 16 arrests, supervising officers offered media statements defending their subordinates' judgments or stating that the arrests were lawful.[129]

10. The prospect of police being unaware of the law was incredible to 8 of the 12 jurists the author interviewed for perspective; the rest chose to not share an opinion. (See list of interviewees in Appendix C). Asked if police officials were likely to be unaware of legal intent, Ram Jethmalani, the redoubtable constitutional attorney, stated bluntly, "No, it is a deliberate defiance of law as a result of corrupt motives."[130] Prashant Bhushan, the eminent public-interest litigation attorney and author, stated: "Of course they don't understand the nuances of freedom of expression," adding that it would be unreasonable to expect them to do so.[131] Another attorney and author renowned for pro bono public-interest litigation agreed: "Why should the police officer be burdened with the Supreme Court judgment? Otherwise he won't be able to do his duty."[132] Sudarshan Ramaswamy, dean of the school of government and public policy at O.P. Jindal University, offered: "The police are very aware of the

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[126] Ahmed Ali Fayyaz. "3 Facebook abusers arrested, remanded in police custody." *The Hindu*, 8 February 2013 (accessed in The Hindu Archives 20 June 2013).

[127] The IPC is "known in [the state of Jammu and Kashmir] as the Ranbir Penal Code (RPC)." See, About the Indian Penal Code, http://www.ipc.in/ (accessed 1 September 2013).

[128] Julie McCarthy. "Facebook arrests ignite free-speech debate in India." National Public Radio, 29 November 2012. http://www.npr.org/2012/11/29/166118379/arrests-ignite-free-speech-debate-in-india (accessed 1 September 2013)

[129] E.g., see C. Jaishankar. "Puducherry IG defends case against IAC activist." *The Hindu*, 7 November 2012. The report quoted Puducherry inspector general of police, law and order, R.S. Krishnia, to state that "the Puducherry police could not be faulted for filing an FIR against India Against Corruption activist Ravi Srinivasan for making objectionable remarks, in a tweet, against Union finance minister P. Chidambaram's son Karti P. Chidambaram" because "we have acted purely on the basis of the merit of the complaint, in according with the rule of law."

[130] Interview with author. New Delhi, 7 August 2013.

[131] Interview with author. New Delhi, 7 August 2013.

[132] Interview with author. New Delhi, 5 August 2013. The attorney requested not to be overtly or directly identified for "I do not trust reporters to quote me accurately."

law. But they use the law as a weapon, because the laws being what they are, there is always someone that has violated the law. . . . The knowledge of the law is the basis of *hafta* [bribes]."[133]

11. There was no evidence that the police officials acted consistently with any predictable criterion of reasonableness.

12. Of the 12 jurists interviewed for perceptions, five agreed with a stated proposition that Indian criminal libel statutes had succeeded in advancing the basic structure of the Constitution or any democratic aspiration; the rest disagreed. The seven in the latter group, however, supported the presence of criminal libel statutes limited by the reasonable restrictions, citing or indicating several rationalisations: Unreliable or tardy access to civil justice, sparsely developed tort law, rhetoric-cultural attitude toward precise words and logical felicity, indigent litigants, and welfare-state expectations.

13. The case analysis produced no evidence of any pattern in Supreme Court interpretations of "reasonable restrictions." Similarly, there was no evidence of any comprehensive theory of freedom of expression emerging in the opinion discourse. Further, there was no evidence that the court took a categorical approach to identify categories of expression or media to determine any unconstitutional expression. Rather, Article 19 law seemed to have evolved in the wisdom of individual judges, almost as much in kindly assertions and social commentary as in hard-nosed legal argumentation.

Conclusion: A Ten-point Prescription

In modern India, a complex network of interrelated rights, principles, practices, and institutions constituted the system of freedom of expression.[134] Together, those constituents conferred a set of core allowances for citizens to form opinions, hold beliefs, and communicate both via acts of writing, blogging, dance, painting, singing, and oral expression; in any medium: print, broadcast, cable, Web, and real-time and social media. Democratic aspiration was increasingly reflected in posts on Facebook, Twitter and blogs, which together seemed to mediate an emancipatory citizenship in a raucous semblance of democracy that transcended geographical and cultural boundaries.

The review of the legal and policy literature showed lacunae that inhibited or undermined the libertarian premise of the Constitution. The system appeared to be ripe for reform of structure, content and attitude, all based in communication law and policy. A broad-based normative commentary, consistent with RQ4, that emerged in the literature review and findings is offered in the following pages, which briefly discuss ten positive steps the Supreme Court of India may consider toward reforming Article 19(1) jurisprudence. The steps all would implicate media policy.

1. Stating a natural right

[133] Interview with author. Sonipat, 5 August 2013.

[134] See, Emerson, *System*.

First, the justices may wish to explicitly declare the freedom of expression a natural right by applying a synthesis of the "conferral" and "protection" descriptions of Article III with the semblance of Article 19 theory that has evolved since 1950. In a natural rights conception, the freedom would presuppose citizenship, thus limiting if not preempting its alienation by the state. As discussed, the natural rights dialectic is available in the Upanishads as well as in much-later libertarian writings of John Locke.

Protection of expressive freedom was, plausibly, implied. M.N. Krishnamani, president of The Supreme Court Bar Association, opined: "Fundamental rights, including those of speech and expression, are protected after the basic structure ruling in *Keshavananda Bharati*."[135] The court ought to not imply but unequivocally pronounce its conceptual position in order to enable a clear, determinate and orderly development of Article 19(1) law.

2. Developing a comprehensive theory of freedom of expression

Upon clarifying the natural right, the court may then choose to systematically develop comprehensive theory in freedom of expression through Article 19(2) litigation. Such theory would make lawmaking and legal interpretation more predictable, which in turn would strengthen rule of law. The author's case analysis suggested there was little if any systematic development of freedom of expression law in India.

The freedom of expression more than any other complicates legal epistemology; it is a metric of the nature and authority of law. The supreme court rulings examined indicated justices' earnestness to identify a framers' intent, libertarian and social justification, and legal purpose in defending the "freedom of speech and expression," but none offered a categorical approach as in legal tests of content or media to identify any expressive rights that fell outside the conferral of Article 19(1).[136] Instead, Article 19 law seemed to have evolved in the respective wisdom of individual judges.

Jindal policy dean Ramaswamy put it curtly: "The problem with our supreme court is there is no institutional coherence" because the justices tended to opine in an idiosyncratic manner. "The notion of settled law is an unsettling idea for our judges," and in that sense, "there is no supreme court" for "it is very difficult to generate a body of law based on supreme court rulings."[137]

Eminent constitutional attorney Prashant Bhushan agreed in that criticism. Referring to judicial interpretation of Section 66A, Bhushan stated: " It is totally subjective . . . depends upon the individual judges."[138]

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[135] Interview with author. New Delhi, 8 August 2013.

[136] The U.S. Supreme Court has excluded four categories: defamation, obscenity, "fighting words," and "true threats," from First Amendment protection. It has also upheld ad-hoc regulations based on time, place or manner, as well as judicial gag orders, broadcast indecency, and false and misleading advertising.

[137] Interview with author. Sonipat, 5 August 2013.

[138] Interview with author. New Delhi, 7 August 2013.

Social and other Internet media have emphasized a dual role for law, which acts as an instrument of social control but also self-fulfillment.[139] Polemical commentary about incompatibility between those two roles would be less useful than striving toward their substantive synthesis. A Holy Grail of such synthesis would offer to reconcile diverse approaches to freedom of expression within conditions of the information society.

The author attempted such synthesis in earlier work.[140] His normative approach toward theorizing freedom of expression in the information society called for plaintiffs to meet a relatively high fault standard, "actual malice,"[141] in order to prevail in most disputes involving Internet speech; it suggested proving online injury in order to collect compensatory damages (punitive or exemplary damages were abolished); it privileged retractions, replies and declaratory judgments over trials. That inclusive approach, or another that similarly protected the libertarian ethic, would be compatible, perhaps even consistent, with the grain of the Indian theory of freedom. On the other hand, the Indian theory in itself offered an original, indigenous, inclusive, and compelling libertarian approach that, to boot, was also symptomatic of Indian legal rhetoric and of classical Indian notions of justice. The Upanishads thus would offer an effective and liberating framework to comprehend, unify, and synthesize or syncretize the un-patterned history of Article 19 interpretation.

The court's object in the theoretical explication would be to necessarily repair and reiterate the libertarian premise of Indian democracy and, in the event of conflict, to de-emphasize the communitarian or social premise.

Legal sanctions ought to target the acts of citizens rather than their neglects, but there was something to be said for positive law providing not only due process but hope for the individual, especially in a post-national society mediated by Internet media. Libertarian or classical liberal theory, which celebrated individual will and obligation, thus focused on individual freedom and liability: it represented a culmination of the progressive thought that, since 1950, has often shined in the court rulings on Article 19(1).

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[139] The sociologist Shiv Visvanathan stated his opinion dramatically: "The hacker is the original definition of citizenship . . . The ideal citizen of a network is a hacker." He called for "bracketing of social media applications from criminal law." Interview with author, Sonipat, 5 August 2013.

[140] See, Nikhil Moro. "Proposal for a Model Law to Prosecute Internet Libel." *Journal of Internet Law* 16, no. 2 (August 2012): 1, 19-34; also see, Nikhil Moro. "Normative Theory for the Information Society." *Southwestern Mass Communication Journal* (Spring 2011): 53-73. A statement of Moro's theoretical approach was as follows: "Internet expression other than child pornography shall not be restrained, abridged or transgressed unless the plaintiff proves actual malice when the plaintiff is a corporation or a public plaintiff, or at least negligence when the plaintiff is a nonmedia or media plaintiff, both by a clear and convincing standard; A successful plaintiff, in order to claim compensatory damages (punitive damages are disallowed), shall prove online injury such as a decline in Internet traffic or e-commercial losses; If the plaintiff preempts trial by requesting a declaratory judgment or retraction or reply, such a judgment if procured shall be published in the original form of publication of the libel as well as in the forum of an republications that have not been deleted, and not doing so will be a co-liability of the speaker, forum moderator or host, Web master and Internet service provider in that order."

[141] Actual malice was a fault standard created by the U.S. Supreme Court in *New York Times v. Sullivan*, 376 U.S. 254 (1964), at 279-80. If the defendant made a libelous statement with "knowledge that it was false or with reckless disregard for whether it was false or not," then the defendant acted in actual malice. In the United States, public plaintiffs in civil libel lawsuits and the state in criminal libel prosecutions must show clear and convincing evidence of actual malice in order to prevail.

3. Abolishing criminal libel

An approach to justice grounded in that theory would enable a system in which criminal libel was abolished. There would be no place for Section 66A of the Information Technology Act, Section 124 of the Indian Penal Code, or any other section founded in non-libertarian, or vague and imprecise terms, especially those that fell outside of legal doctrine.[142] Similarly, all Indian Penal Code sections that enabled criminal libel would be abolished. (See Appendix A for a list of criminal libel statues the Indian state applied on social media users in 2012-13).

N. Ravi, India chair of the International Press Institute, stated, "Sec. 66A is all encompassing and vague, using such terms as 'grossly offensive,' 'annoyance' and 'inconvenience,' 'menacing character' and 'insult' which are not established legal concepts and are undefined. The sense of these words is left to the interpretation of the police and this coupled with the fact that the offence is regarded as serious (it carries a penalty of imprisonment up to three years and fine) leads to pre-trial arrests. Generally in such cases, non-journalist users of the social media and social political activists campaigning for specific causes have been subject to arrest and prosecution. . . . Sec. 66A by itself is the problem, not just its application though confining its reach and applicability would be of some help."[143]

K.K. Venugopal, the eminent constitutional attorney, stated he did not expect Section 66A to hold up to judicial scrutiny.[144] Another prominent constitutional attorney said he expected 66A to be "struck down" by the Supreme Court but in the mean time, "Policy scholars should work on a one-page tabulation for people who are deciding the meaning of those terms."[145]

V.S. Mallar, who holds an endowed chair in constitutional law at the National Law School of India University, pointed out, "The words used in the law should fall within grounds stated in Article 19(2), otherwise the law is invalid."[146] Section 66A phrasing that was neither narrow nor limited rendered it unreasonable and excessive of the constitutional grounds and thus ultra vires. Further, police actions based on the vague phrasing required a level of officer discretion that would open those actions to confusion as to whether the reasonable restriction was being imposed by law or executive action. In the latter case, the police action would be ultra vires in light of parliament's plenary power to make law, which necessarily precludes the executive power to make law. The plenary power is based on a presumption that it would be used judiciously; even accounting for the parliamentary-system overlap of legislative and executive powers, the poor wording of Section 66A would gut that presumption.

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[142] E.g., Section 66A(a): "annoyance, inconvenience, danger, obstruction"; Section 66A(b), "annoyance or inconvenience." See Appendix A for full text of this and other statutes; M.N. Krishnamani, president of The Supreme Court Bar Association, however opined that "annoyance" and "inconvenience" were "normally used legal terms." Interview with author. New Delhi, 8 August 2013.

[143] E-mail communication shared with author. 29 May 2013.

[144] Interview with author. New Delhi, 6 August 2013.

[145] Interview with author. New Delhi, 5 August 2013. The attorney requested not to be overtly identified.

[146] Interview with author. Bangalore, 17 June 2013.

The executive "advisory" of 9 January 2013,[147] by which an arrest under Section 66A must be approved in advance by at least an inspector general of police in metropolitan areas, deputy commissioner of police in urban areas, and superintendent of police in rural areas, further complicated the criminal-libel terrain. It implied that non-66A arrests were to be excluded from prior approval by the senior ranks, when the legal expectation ought to be, and in fact was, that the senior officers were accountable for every arrest and liable for any wrongful arrest. The implication would have dire consequences for public expectations of senior officers' accountability, but it would also fail to enable any orderly development of the law. Further, the "advisory" was a policy decision without the authority of an amended statute; it was not binding in law. Consequently, it indicated the state's deceptive, firefighting or kneejerk response to overwhelming negative public opinion more than any serious intent to discard bad law. Finally, as the news reports indicated, the advisory did little to repair perception that an insecure Orwellian state represented in the executive branch or in mobs of party workers had reacted to snarky blog, Facebook, or Twitter posts that railed against bribery, bungling, or pandering.

Ravi was quoted after Mr. Trivedi's seditious-libel arrest under Section 124 as follows: "The supreme court has approved the position that [political cartooning] must be judged from the standpoint of reasonable, strong-minded, firm and courageous men, and not those 'of weak and vacillating minds, nor of those who scent danger in every hostile point of view' . . . It is shocking that in cases like this involving basic freedoms, the police should act mechanically on a complaint and arrest the cartoonist, ignoring the law as laid down by the courts."[148] Back in 1960, the Indian Supreme Court held that "the determination by the legislature of what constitutes a reasonable restriction is not final and conclusive. The supreme court has power to consider whether the restrictions imposed by the legislature are reasonable within the meaning of Art. 19, cl. (6) and to declare the law void if in its opinion the restrictions are not reasonable."[149] Given the vague terminology of 66A, which lent the provision to repeated abuse, and the irrelevance and abuse of IPC criminal libel provisions in the information society where counter-speech was a readily available option, the court would find the provisions unconstitutional. Overall, citizenship of the Indian republic as premised in the basic structure of the Constitution would not be complete until criminal libel law was dumped in the bin of colonial history.

The presumptive syncretism of diverse legal theory would, consequently, enable a post-national law that privileged crisp wording and inclusive intent, but also moved the information society toward transcending civic-liberal national boundaries. It would represent a legal redemption of the inclusive embrace of Indian philosophical freedom.

4. Fixing legal rhetoric

Section 499 of the Indian Penal Code that criminalizes private libel, or the criticism of one citizen by another, offers another example of problematic wording. It is a relatively lengthy provision of 1,565 words including ten "exceptions," or situations to preclude liability. The text

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[147] "Advisory on implementation of Section 66A of the Information Technology Act, 2000," Department of Electronics and Information Technology notification no. 11(6)/2012-CLFE. http://deity.gov.in/sites/upload_files/dit/files/Advisoryonsection.pdf (accessed 1 September 2013).

[148] Mumbai bureau, "Aseem sees beginning of debate on sedition charge." The Hindu, 13 September 2012.

[149] *Chintaman Rao v. State of Madhya Pradesh*, 1951 AIR 118.

of Section 499 might reflect Victorian eloquence but elicit odd interpretations. For example, to criminalize expression that is "spoken or intended to be read" would burden the state with proving intent of publication if the expression was libellous (written or otherwise recorded in a tangible medium) but not slanderous (uttered merely verbally). In corollary, publication would be presumed in spoken expression but not, say, in print, where it must be proved. That would seem odd: if at all there should be a presumption of publication, it ought to favour libel rather than slander. In any case, in a mass-mediated society, publication – that is dissemination to a third party other than the plaintiff and defendant – ought to be determined by a mass medium vehicle such as a Web page or newspaper or broadcast channel. In the United States, the distinction between libel and slander has all but disappeared after the American Law Institute in 1977 took the position that defamatory remarks that were broadcast should be treated as libel rather than slander.[150] In corollary, if the expression appeared in, say, print, publication would be presumed.

Further, Section 499 is about words that directly offend or hurt, but also about "imputation," which would implicate symbolizing. Black's Law Dictionary states that imputation "means the act or an instance of imputing something, esp. fault or crime, to a person; an accusation or charge (an imputation of negligence)."[151] Imputed, the adjective, means "attributed vicariously; that is, an act, fact, or quality is said to be 'imputed' to a person when it is ascribed or charged to him, not because he is personally cognizant of it or responsible for it, but because another person is, over whom he has control or for whose acts or knowledge he is responsible."[152] Among other arguable consequences, the section might, correctly, make a reporter liable for republishing libellous statements supplied by a professional source.

5. Presuming social media expression as necessarily political

The syncretic, libertarian approach described in the earlier sections would privilege political expression over every other; it would presume all Web expression to be political unless a libel plaintiff proved otherwise.

It would adopt American jurist Alexander Meiklejohn's idea to extend parliamentary privilege to political debate outside of the Lok Sabha and the Rajya Sabha; the banter of social media users would have absolute privilege on presumption of its political value unless successfully challenged by a libel victim. It would thus take Indian society closer toward, to quote U.S. justice William J. Brennan, an "uninhibited, robust, and wide-open" marketplace of ideas to allow a cream of political thought to emerge and thereby also finer politicians.

Such theory would also enable the court to develop categories of speech and of media that would *not* be protected by Article 19(1); currently, the reasonable restrictions of Article 19(2) included both categories and situations.

6. Strengthening the civil justice system

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[150] Fewer than a dozen American states continue to distinguish a scripted broadcast (libel) from one that is adlibbed (slander); as early as 1962, an appellate court in Georgia labeled broadcast slander as "defamacast."

[151] Black's Law Dictionary, 7th ed., p. 761.

[152] Black's Law Dictionary, 2nd ed., "impute," http://blacks.worldfreemansociety.org/2/I/i0599.jpg (accessed 1 September 2013)

"Civil defamation is useless in India . . . it is all humbug!" was a vehement opinion expressed by a senior constitutional attorney who requested not to be named.[153] The opinion unwittingly framed a widely acknowledged need to strengthen and expand the civil justice system simultaneously with the proposed dismantling of criminal libel.

An effective civil justice system, especially one strong in tort law, is a better indicator of an evolved democracy than a criminal justice system is. There is an urgent need to strengthen Indian civil law, especially that of torts. Codified tort law supplemented by common-law precedents, if judiciously embraced by the courts, would elevate justice, restore faith in the rule of law, and save scarce resources for the Indian taxpayer, all without implicating the executive. Besides, counter speech and not criminal prosecution ought to be the essential democratic response to any criticism.

The executive would do well to create dedicated constitutional courts for cases where the legal question was about free speech, if not other fundamental rights. Free speech cases may initially appear to be too few to warrant exclusive courts, but their number would grow to fill space vacated by the proposed abolishing of criminal libel. They would also grow when victims of libel realized that civil justice, with potential damages, was easily accessible.

As a fundamental principle of democracy, the Indian state ought not to interfere in free speech disputes except to provide good offices of its courts for plaintiffs to seek damages from libellers and others. The civil courts would effectively curtail adjournments sought purely for plaintiff's convenience or for a reason other than factual or legal. Trials would occur in high technology-mediated settings in which litigants would appear, say, by videoconference. All of those reforms would directly implicate the Indian judiciary.

The Indian parliament reinforced expectation of judicial services as an aspect of the welfare state when it amended the Constitution in 1976 to recognize "equal justice" and "free legal aid" as directive principles of state policy.[154] The Law Commission of India, on its part, "frankly stated that while population may be a demographic unit, it is also a democratic unit. In other words, we are talking of citizens with democratic rights including the right to access to justice which it is the duty of the State to provide."[155] But the justice system, civil and criminal, remained relatively lethargic from a litigant perspective. In 2013, there served, by varying accounts, either 15.47 or 13 judges per million Indians, one of the lowest ratios in any constitutional republic.[156]

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[153] Interview with author. New Delhi, 5 August 2013.

[154] Indian Const., art. 39A, which resulted from the amendment, read as follows: "The State shall secure that the operation of the legal system promotes justice, on a basis of equal opportunity, and shall, in particular, provide free legal aid, by suitable legislation or schemes or in any other way, to ensure that opportunities for securing justice are not denied to any citizen by reason of economic or other disabilities."

[155] D.A. Desai, S.C. Ghose, and V.S. Rama Devi, "Manpower Planning in Judiciary: A Blueprint," *120th Report* (New Delhi: Law Commission of India, 1987), p. 120.6.

[156] The former figure, sourced to the former Chief Justice of India Altamas Kabir, was offered by Ashwani Kumar, cabinet minister for law and justice, to the Rajya Sabha 29 April 2013. See, http://164.100.47.5:8080/members/Website/quest.asp?qref=191713 (accessed 1 September 2013). The latter

Back in 1987, the law commission found the judge-population ratio to be 10.5 when it ought to have been at least 50. It had advised the Union cabinet to increase the ratio to 107 judges per million people by the year 2000 in order to keep pace with judge-population ratios in Australia, Canada, England and the United States.[157] The cabinet failed to act and by April 2008, the judge-population ratio was still 14 per million.[158]

Former Chief Justice of India K.G. Balakrishnan identified inadequate number of judges as one of three reasons for delays in case disposal, the others being failure of Parliament to perform "judicial impact assessment" prior to enacting new laws and to set up new courts via Article 247. Union laws, the chief justice stated, caused more than half of trial litigation.[159]

In addition, Indian governments seldom accepted lower civil court pronouncements that did not go in their favor. "The biggest litigant in this country is the state. . . . This whole [legal] system is a theater," stated Jindal policy dean Sudarshan Ramaswamy.[160]

7. Strengthening progressive judicial interpretation

To be fair, Indian Supreme Court justices were relatively hard placed to attempt a strict-constructionist interpretation of constitutional text. There was little and seldom evidence of any homogeneous intent in the 299-member Constituent Assembly or the continuing 802-member Parliament, or in fragmented statutory and common-legal rhetoric, and besides, the justices got no formal training in methods of history or psychology. Strict constructionism, which tended to produce absolute positions, was consequently harder than progressive interpretation, which was par for the course.

Progressive interpretation would enable the justices to muckrake in favour of historically vulnerable groups such as Dalits, women, and children, using those groups as units to measure emancipation, and gradually move toward the individual as the unit of the analysis. The progressive approach, which is ultimately consistent with the Indian theory of freedom, would extend the fundamental rights from citizens to all "persons" over whom Indian courts may assert personal jurisdiction.

Consequently, the constitutional rhetoric would acquire a foundation of privileging the freedom of expression in a frame of natural rights abrogable via due process to balance Article

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figure, sourced to the Parliamentary Committee on Empowerment of Women, was reported by the Press Trust of India. See, "Only 13 judges for every ten lakh people in India," 9 May 2013, http://articles.economictimes.indiatimes.com/2013-05-09/news/39144068_1_judges-high-courts-justice (accessed 1 September 2013)

[157] Desai, "Manpower," p. 120.5.

[158] Statement of H.R. Bhardwaj, cabinet minister for law and justice, to the Rajya Sabha 28 April 2008. See, http://pib.nic.in/newsite/erelease.aspx?relid=38105 (accessed 1 September 2013)

[159] See, Satya Prakash, "CJI blames govt. for poor judge-population ratio," *Hindustan Times*, 8 April 2007. http://www.hindustantimes.com/India-news/NewDelhi/CJI-blames-Govt-for-poor-judge-population-ratio/Article1-214413.aspx (accessed 1 September 2013); Article 247 states in part, "Parliament may by law provide for the establishment of any additional courts for the better administration of laws made by Parliament or of any existing laws with respect to a matter enumerated in the Union List."

[160] Interview with author. Sonipat, India, 5 August 2013.

19(2) priorities such as reputation, public order, and security of state. Doing so would, in corollary, necessarily weaken the criminal law of libel.

8. Formulating a test for reasonableness

The court ought to evolve a doctrine of reasonableness with measurable indices to assist police officials and other policy enforcers make constitutional decisions. Such a doctrine would emphasize, and lay out, necessary and sufficient conditions of any "reasonable restriction" as follows.

First, the restriction must be neutral of content; it would not be lawful if motivated by the police official's disagreeing with the subject or content of the message. Second, the restriction must serve a substantial state interest, which must be described or explained by the police official during the time of applying the restriction. A substantial state interest would necessarily implicate national security, rule of law, or protecting individual reputations, the integrity of public institutions, or free-market competition. Any action based on a non-substantial, non-government or arbitrary motivation would make a speech restriction unlawful. Third, the restriction must not be overbroad but narrowly fit the substantial state interest at stake. Finally, there would not be a total ban on the communication; the prohibition must be limited by time, locality or manner. Web speech, consequently, would be especially difficult to muzzle given significant difficulties in determining the personal jurisdiction or time of Web publication.

A framework for an Indian reasonableness doctrine including several case-law lessons is available in United States prior restraint law that has evolved since *Near v. Minnesota* was decided in 1931.[161]

9. Educating police officials in fundamental rights

Lawful policy would be narrowly tailored to fit the reasonable restriction, which, as discussed earlier, may be imposed by law but not executive order. Arrests that rely on a police officer's discretion, sense of equity, or subservience to a local politician, all would run a relatively high risk of being unlawful if the officer was inadequately educated in the intent of the "ordinary law" (statute, ordinance, or delegated legislation) that imposed a reasonable restriction consistent with "constituent law" (Article 19(2).)

Police literacy about Article 19 is widely perceived to be far from optimal. "There is an expanding jurisprudence of Article 19, but it is not translating into awareness in police," stated Professor R. Venkata Rao, vice chancellor of the National Law School of India University.[162] Indian police officers were "not able to appreciate the contours of reasonable restrictions," but instead committed "overzealous [and] moral policing," he noted, correctly.

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[161] In this case, Chief Justice Charles Evans Hughes held in the majority opinion that the First Amendment of the U.S. constitution prohibited the practice of prior restraint except in rare instances (which were elaborated in subsequent cases.) See, 283 U.S. 697 (1931). The vote in the case was 5-4 in favor of declaring a Minnesota prior-restraint statute unconstitutional. After that ruling, the U.S. prior-restraint doctrine was clarified in subsequent cases: *Tinker v. Des Moines* (1969), *Hazelwood School District v. Kuhlmeier* (1988), *Lee v. ISKCON* (1992), *Boos v. Barry* (1988), *Frisby v. Schultz* (1988), *Texas v. Johnson* (1989), *U.S. v. Eichman* (1990), *Virginia v. Black* (2003), *Cohen v. California* (1971), *Cox v. Cohn* (1975), and *McIntyre v. Ohio* (1995).

[162] Interview with author. Bangalore, 19 June 2013.

Regular refresher courses would be essential for police officers to be exposed to the latest judicial thought in interpretations of ordinary law as well as constituent law (specifically, the fundamental rights in Article 19.) Such courses would emphasize civics education focused on supreme court rulings concerning checks and balances, judicial review,[163] justification of the state, and goals of public policy in order to help police officials effectively analyze and apply policy toward, say, protection of "public order," (Article 19(2)), the "sacred" (IPC Section 295), and other nuances of constitutional restriction. The courses would also represent morale-boosting reminders about the unique role police officers play in sustaining democratic aspiration and rule of law.

Police officers ought to have strong job incentives to procure such civics education on a regular basis at any of the 709 law colleges or departments and 13 legal universities that the Bar Council of India recognized in January 2013. By enhancing police literacy of Article 19 jurisprudence, those educational institutions could be coopted into the system of freedom of expression, consequently, to directly advance the rule of law.

10. Awarding punitive damages for wrongful arrests

Finally, in cases of wrongful arrests, strict liability ought to be used for compensation in the form of punitive (that is exemplary) damages.[164] If the welfare state had the resources to arrest individuals, surely it also could compensate for wrongful arrests. To quote English judge Cutis-Raleigh from 1972, "The law should not be seen to sit by limply, while those who defy it go free, and those who seek its protection lose hope."[165] Wrongful arrests ought to be determined by any of the following occurrences: the police officer exhibiting an unusual zeal or unlawful subservience to a local legislator, making a warrantless arrest for a non-cognizable offense, or declining to accept bail or legally produce a suspect before a magistrate resulting in the charge being eventually dismissed or closed per Section 169 of the Criminal Procedure Code.

In conclusion, social media users, policymakers, legislators, and jurists all are significant if not equal stakeholders in the discourse of policy reform. Their harmonic contribution toward a structural, content-based and attitudinal reclamation of the Indian system of freedom of expression is crucial to addressing Facebook, Twitter, and blog users' socio-legal feuds with Article 19(2).

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[163] The power of judicial review in India is limited to "courts of record," that is "the high courts, tribunals established to replace the high courts, and the Supreme Court," stated T.V. Subba Rao, visiting professor, National Law School of India University. Interview with author. Bangalore, 17 June 2013.

[164] The state has periodically claimed that "under the Indian legal system, there is no enforceable right to compensation for persons claiming to be victims of unlawful arrest or detention against the state." E.g., see declaration of the Union government to the International Covenant on Civil and Political Rights. 4 October 1979. http://www.geneva-academy.ch/RULAC/international_treaties.php?id_state=107 (accessed 1 September 2013); The Supreme Court has however ruled, "A claim in public law for compensation for contravention of human rights and fundamental freedoms, the protection of which is guaranteed in the Constitution, is an acknowledged remedy for enforcement and protection of such rights, and such a claim based on strict liability made by resorting to a constitutional remedy provided for the enforcement of a fundamental right is 'distinct from, and in addition to, the remedy in private law for damages for the tort' resulting from the contravention of the fundamental right." *Nilabati Behra v. State of Orissa*, 1993 AIR 1960.

[165] As quoted in *Jennison v. Baker,* 4 SCC 1991, at 406.

Communication law and policy reformed in the inductive discourse would privilege a libertarian agenda for the jurisprudence of not only Indian but also post-national freedom, consistent with the International Covenant on Civil and Political Rights. The reform would retrieve expressive freedom from the law of criminal libel by dispelling dissonance in the theory; it would unify the apolitical theory of freedom in the Upanishads with the libertarian premise of the Constitution. In emancipating Web communicators and strengthening civil justice, it would emphasize the marketplace of ideas over the ubiquitous state; Indian modernity would be reshaped in favour of the individual. Finally, in making participatory democracy meaningful, the reform would also vindicate, and thus fortify, the basic structure of the Indian Constitution.

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Appendix A

Criminal Libel Statutes in Force in India, August 2013

o The Indian Penal Code of 1860

(The Indian Penal Code, 1860. http://bombayhighcourt.nic.in/libweb/oldlegislation/ipc1860/; accessed 1 September 2013)

Section 114. Abettor present when offence is committed.

Whenever any person who if absent would be liable to be punished as an abettor, is present when the act or offence for which he would be punishable in consequence of the abetment is committed, he shall be deemed to have committed such act or offence.

Section 124A. Sedition.

1[Sedition. — Whoever by words, either spoken or written, or by signs, or by visible representation, or otherwise, brings or attempts to bring into hatred or contempt, or excites or attempts to excite disaffection towards, 2[the Government established by law in 3[India], a 4[shall be punished with 5[imprisonment for life], to which fine may be added, or with imprisonment which may extend to three years, to which fine may be added, or with fine.

Explanation 1 — The expression "disaffection" includes disloyalty and all feelings of enmity.
Explanation 2 — Comments expressing disapprobation of the measures of the Government with a view to obtain their alteration by lawful means, without exciting or attempting to excite hatred, contempt or disaffection, do not constitute an offence under this section.
Explanation 3 — Comments expressing disapprobation of the administrative or other action of the Government without exciting or attempting to excite hatred, contempt or disaffection, do not constitute an offence under this section.]

Section 153. Wantonly giving provocation with intent to cause riot — if rioting be committed; if not committed.

Whoever malignantly, or wantonly by doing anything which is illegal, gives provocation to any person intending or knowing it to be likely that such provocation will cause the offence of rioting to be committed, shall, if the offence of rioting be committed in consequence of such provocation, be punished with imprisonment of either description for a term which may extend to one year, or with fine, or with both, and if the offence of rioting be not committed, with imprisonment of either description for a term which may extend to six months, or with fine, or with both.

Section 169. Public servant unlawfully buying or bidding for property.

Whoever, being a public servant, and being legally bound as such public servant, not to purchase or bid for certain property, purchases or bids for that property, either in his own name or in the name of another, or jointly, or in shares with others, shall be punished with simple imprisonment for a term which may extend to two years, or with fine, or with both; and the property, if purchased, shall be confiscated.

Section 290. Punishment for public nuisance in cases not otherwise provided for.

Whoever commits a public nuisance in any case not otherwise punishable by this Code, shall be punished with fine that may extend to two hundred rupees.

Section 294. Obscene acts and songs.

Whoever, to the annoyance of others,

(a) does any obscene act in any public place, or

(b) sings, recites or utters any obscene song, ballad or words, in or near any public place, shall be punished with imprisonment of either description for a term which may extend to three months, or with fine, or with both.]

Section 295. Injuring or defiling place of worship with intent to insult the religion of any class.

Whoever destroys, damages or defiles any place of worship, or any object held sacred by any class of persons with the intention of thereby insulting the religion of any class of persons or with the knowledge that any class of persons is likely to consider such destruction, damage or defilement as an insult to their religion, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both.

Section 295A. Deliberate and malicious acts intended to outrage religious feelings of any class by insulting its religion or religious beliefs.

Whoever, with deliberate and malicious intention of outraging the religious feelings of any class of 6[citizens of India], 7[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 of either description for a term which may extend to 8[three years], or with fine, or with both.

Section 341. Punishment for wrongful restraint.

Whoever wrongfully restrains any person shall be punished with simple imprisonment for a term, which may extend to one month, or with fine, which may extend to five hundred rupees, or with both.

Section 342. Punishment for wrongful confinement.

Whoever wrongfully confines any person shall be punished with simple imprisonment of either description for a term, which may extend to one year, or with fine, which may extend to one thousand rupees, or with both.

Section 499. Defamation.

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, except in the cases hereinafter excepted, to defame that person.

Explanation 1 — It may amount to defamation to impute anything to a deceased person, if the 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.

Explanation 2 — It may amount to defamation to make an imputation concerning a company or an association or collection of persons as such.
Explanation 3 — An imputation in the form of an alternative or expressed ironically, may amount to defamation.
Explanation 4 — 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.

Illustrations:

(a) A says: "Z is an honest man; he never stole B's watch", intending to cause it to be believed that Z did steal B's watch. This is defamation, unless it falls within one of the exceptions.

(b) A is asked who stole B's watch. A points to Z, intending to cause it to be believed that Z stole B's watch. This is defamation, unless it falls within one of the exceptions.

(c) A draws a picture of Z running away with B's watch, intending it to be believed that Z stole B's watch. This is defamation, unless it falls within one of the exceptions.

First Exception — Imputation of truth which public good requires to be made or published — It is not defamation to impute anything which is true concerning any person, if it be for the public good that the imputation should be made or published. Whether or not it is for the public good is a question of fact.

Second Exception — Public conduct of public servants — It is not defamation to express in good faith any opinion whatever respecting the conduct of a public servant in the discharge of his public functions, or respecting his character, so far as his character appears in that conduct, and no further.

Third Exception — Conduct of any person touching any public question — It is not defamation to express in good faith any opinion whatever respecting the conduct of any person touching any public question, and respecting his character, so far as his character appears in that conduct, and no further.

Illustration: It is not defamation in A to express in good faith any opinion whatever respecting Z's conduct in petitioning Government on a public question, in signing a requisition for a meeting on a public question, in presiding or attending at such meeting, in forming or joining any society which invites the public support, in voting or canvassing for a particular candidate for any situation in the efficient discharge of the duties of which the public is interested.

Fourth Exception — Publication of reports of proceedings of courts — It is not defamation to publish a substantially true report of the proceedings of a Court of Justice, or of the result of any such proceedings.

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

Fifth Exception — Merits of case decided in Court or conduct of witnesses and others concerned — It is not defamation to express in good faith any opinion whatever respecting the

merits of any case, civil or criminal, which has been decided by a Court of Justice, or respecting the conduct of any person as a party, witness or agent, in any such case, or respecting the character of such person, as far as his character appears in that conduct, and no further.

Illustrations:
(a) A says: "I think Z's evidence on that trial is so contradictory that he must be stupid or dishonest." A is within this exception if he says this in good faith, inasmuch as the opinion which he expresses respects Z's character as it appears in Z's conduct as a witness, and no further.

(b) But if A says "I do not believe what Z asserted at that trial because I know him to be a man without veracity"; A is not within this exception, inasmuch as the opinion which expresses of Z's character, is an opinion not founded on Z's conduct as a witness.

Sixth Exception — Merits of public performance. — It is not defamation to express in good faith any opinion respecting the merits of any performance which its author has submitted to the judgment of the public, or respecting the character of the author so far as his character appears in such performance, and no farther.

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

Illustrations:

(a) A person who publishes a book, submits that book to the judgment of the public.

(b) A person who makes a speech in public, submits that speech to the judgment of the public.

(c) An actor or singer who appears on a public stage, submits his acting or singing to the judgment of the public.

(d) A says of a book published by Z— "Z's book is foolish; Z must be a weak man. Z's book is indecent; Z must be a man of impure mind." A is within the exception, if he says this in good faith, inasmuch as the opinion which he expresses of Z respects Z's character only so far as it appears in Z's book, and no further.

(e) But if A says: "I am not surprised that Z's book is foolish and indecent, for he is a weak man and a libertine." A is not within this exception, inasmuch as the opinion which he expresses of Z's character is an opinion not founded on Z's book.

Seventh Exception — Censure passed in good faith by person having lawful authority over another — It is not defamation in a person having over another any authority, either conferred by law or arising out of a lawful contract made with that other, to pass in good faith any censure on the conduct of that other in matters to which such lawful authority relates.

Illustration:

A Judge censuring in good faith the conduct of a witness, or of an officer of the Court; a head of a department censuring in good faith those who are under his orders; a parent censuring in good faith a child in the presence of other children; a schoolmaster, whose authority is derived from a parent, censuring in good faith a pupil in the presence of other pupils; a master censuring a

servant in good faith for remissness in service; a banker censuring in good faith the cashier of his bank for the conduct of such cashier—are within this exception.

Eighth Exception — Accusation preferred in good faith to authorised person. — It is not defamation to prefer in good faith an accusation against any person to any of those who have lawful authority over that person with respect to the subject-matter of accusation.

Illustration: If A in good faith accuses Z before a Magistrate; if A in good faith complains of the conduct of Z, a servant, to Z's master; if A in good faith complains of the conduct of Z, a child, to Z's father — A is within this exception.

Ninth Exception — Imputation made in good faith by person for protection of his or other's interests. — It is not defamation to make an imputation on the character of another provided that the imputation be made in good faith for the protection of the interest of the person making it, or of any other person, or for the public good.

Illustrations:

(a) A, a shopkeeper, says to B, who manages his business — "Sell nothing to Z unless he pays you ready money, for I have no opinion of his honesty." A is within the exception, if he has made this imputation on Z in good faith for the protection of his own interests.

(b) A, a Magistrate, in making a report to his own superior officer, casts an imputation on the character of Z. Here, if the imputation is made in good faith, and for the public good, A is within the exception.

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

Section 500. Punishment for defamation.

Whoever defames another shall be punished with simple imprisonment for a term which may extend to two years, or with fine, or with both.

Section 504. Intentional insult with intent to provoke breach of the peace.

Whoever intentionally insults, and thereby gives provocation to any person, intending or knowing it to be likely that such provocation will cause him to break the public peace, or to commit any other offence, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both.

Section 505. Statements conducting public mischief.

(1)] Whoever makes, publishes or circulates any statement, rumour or report, —

(a) with intent to cause, or which is likely to cause, any officer, soldier, 3[sailor or airman] in the Army, 4[Navy or Air Force] 5[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 tranquillity; or

1. Subs. by Act 4 of 1898, s. 6, for the original section.

2. Renumbered by Act 35 of 1969, s. 3.

3. Subs. by Act 10 of 1927, s. 2 and Such. I, for "or sailor".

4. Subs. by s. 2 and Sch. i. ibid., for "or navy".

5. Subs. by the A. O. 1950, for "of Her Majesty or in the Imperial Service Troops". The words "or in the Royal Indian Marine" occurring after the word "Majesty" were rep. by Act 35 of 1934.

(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 1[three years], or with fine, or with both.

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

(3) Offence under sub-section (2) committed in place of worship, etc. — Whoever commits an offence specified in sub-section (2) in any place of worship or in any assembly engaged in the performance of religious worship or religious ceremonies, shall be punished with imprisonment which may extend to five years and shall also be liable to fine.] Exception. — It does not amount to an offence, within the meaning of this section, when the person making, publishing or circulating any such statement, rumour or report, has reasonable grounds for believing that such statement, rumour or report is true and makes, publishes or circulates it 2[in good faith and] without any such intent as aforesaid.]

Section 506 (called Section 506 of the Ranbir Penal Code in Jammu & Kashmir). Punishment for criminal intimidation.

Whoever commits the offence of criminal intimidation shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both; If threat be to cause death or grievous hurt, etc. If threat be to cause death or grievous hurt, etc. — and if the threat be to cause death or grievous hurt, or to cause the destruction of any property by fire, or to cause an offence punishable with death or 3[imprisonment for life], of with imprisonment for a term which may extend to seven years, or to impute unchastity to a woman, shall be punished with imprisonment of either description for a term which may extend to seven years, or with fine, or with both.

Section 509. Word, gesture or act intended to insult the modesty of a woman.

Whoever, intending to insult the modesty of any woman, utters any word, makes any sound or gesture, or exhibits any object, intending that such word or sound shall be heard, or that such gesture or object shall be seen, by such woman, or intrudes upon the privacy of such woman, shall be punished with simple imprisonment for a term which may extend to one year, or with fine, or with both.

- **Prevention of Insults to National Honour Act of 1971.**

  Insult to Indian National Flag and Constitution of India.

  (Prevention of Insults to National Honour Act, 1971; the section was amended 2005. http://mha.nic.in/pdfs/Prevention_Insults_National_Honour_Act1971.pdf; accessed 1 September 2013)

Section 2.

Whoever in any public place or in any other place within public view burns, mutilates, defaces, defiles, disfigures, destroys, tramples upon or otherwise brings into contempt (whether by words, either spoken or written, or by acts) the Indian National Flag or the Constitution of India or any part thereof, shall be punished with imprisonment for a term which may extend to three years, or with fine, or with both.

Explanation 1 — Comments expressing disapprobation or criticism of the Constitution or of the Indian National Flag or of any measures of the Government with a view to obtain an amendment of the Constitution of India or an alteration of the Indian National Flag by lawful means do not constitute an offence under this section.

Explanation 2 — The expression "Indian National Flag" includes any picture, painting, drawing or photograph, or other visible representation of the Indian National Flag, or of any part or parts thereof, made of any substance or represented on any substance.

Explanation 3 — The expression "public place" means any place intended for use by, or accessible to, the public and includes any public conveyance.

- **Information Technology Act of 2000.**

  Section 66A. Punishment for sending offensive messages through communication service, etc.

  (The section was inserted in a 2008 amendment that received presidential assent February 5, 2009. See, Ministry of Law and Justice. *The Gazette of India*. 5 February 2009. http://deity.gov.in/sites/upload_files/dit/files/downloads/itact2000/it_amendment_act2008.pdf (accessed 1 September 2013))

Any person who sends, by means of a computer resource or a communication device,—

(a) any information that is grossly offensive or has menacing character; or

(b) 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;

(c) 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 the origin of such messages, shall be punishable with imprisonment for a term which may extend to three years and with fine.

Explanation — For the purpose of this section, terms "electronic mail" and "electronic mail message" means a message or information created or transmitted or received on a computer, computer system, computer resource or communication device including attachments in text, images, audio, video and any other electronic record, which may be transmitted with the message.

Section 66B. Punishment for dishonestly receiving stolen computer resource or communication device.

The section was inserted in a 2008 amendment that received presidential assent February 5, 2009. See, Ministry of Law and Justice. *The Gazette of India*. 5 February 2009. http://deity.gov.in/sites/upload_files/dit/files/downloads/itact2000/it_amendment_act2008.pdf (accessed 1 September 2013))

Whoever dishonestly receives or retains any stolen computer resource or communication device knowing or having reason to believe the same to be stolen computer resource or communication device, shall be punished with imprisonment of either description for a term which may extend to three years or with fine which may extend to rupees one lakh or with both.

Section 66E. Punishment for violation of privacy.

Whoever, intentionally or knowingly captures, publishes or transmits the image of a private area of any person without his or her consent, under circumstances violating the privacy of that person, shall be punished with imprisonment which may extend to three years or with fine not exceeding two lakh rupees, or with both.

Explanation — For the purposes of this section —

(a) "Transmit" means to electronically send a visual image with the intent that it be viewed by a person or persons;

(b) "Capture", with respect to an image, means to videotape, photograph, film or record by any means;

(c) "Private area" means the naked or undergarment clad genitals, pubic area, buttocks or female breast;

(d) "Publishes" means reproduction in the printed or electronic form and making it available for public;

(e) "Under circumstances violating privacy" means circumstances in which a person can have a reasonable expectation that–

(i) He or she could disrobe in privacy, without being concerned that an image of his private area was being captured; or

(ii) Any part of his or her private area would not be visible to the public, regardless of whether that person is in a public or private place.

Section 79. Intermediaries not to be liable in certain cases.

(1) Notwithstanding anything contained in any law for the time being in force but subject to the provisions of sub-sections (2) and (3), an intermediary shall not be liable for any third party information, data, or communication link made available or hasted by him.

(2) The provisions of sub-section (1) shall apply if—

(a) the function of the intermediary is limited to providing access to a communication system over which information made available by third parties is transmitted or temporarily stored or hasted; or

(b) the intermediary does not—

(i) initiate the transmission,

(ii) select the receiver of the transmission, and

(iii) select or modify the information contained in the transmission;

(c) the intermediary observes due diligence while discharging his duties under this Act and also observes such other guidelines as the Central Government may prescribe in this behalf.

(3) The provisions of sub-section (1) shall not apply if—

(a) the intermediary has conspired or abetted or aided or induced, whether by threats or promise or otherwise in the commission of the unlawful act;

(b) upon receiving actual knowledge, or on being notified by the appropriate Government or its agency that any information, data or communication link residing in or connected to a computer resource controlled by the intermediary is being used to commit the unlawful act, the intermediary fails to expeditiously remove or disable access to that material on that resource without vitiating the evidence in any manner.

Explanation —For the purposes of this section, the expression "third party information" means any information dealt with by an intermediary in his capacity as an intermediary.

Appendix B

Annotated List of News Reports of Criminal Libel Arrests in India

(From The Hindu Archives, 1 March 2012 through 31 August 2013. The author gratefully acknowledges V. Ganesan, deputy chief librarian, Kasturi & Sons Ltd., for archival assistance.)

"SC seeks UP govt response on Dalit scholar's arrest." *The Hindu*, 16 August 2013. (A Supreme Court bench headed by Justice H.L. Gokhale ordered the government of Uttar Pradesh to explain its arrest of Kanwal Bharti, "author of various books dealing with problems faced by Dalits," after he posted on Facebook in support of Durga Shakti Nagpal, the suspended Indian Administrative Service officer.)

"FIR against Facebook," *The Hindu*, 21 May 2013. (Lucknow police accepted a complaint by Indian Police Service officer Amitabh Thakur and wife Nutan "for not removing an online community page created by some persons who have been using it to 'glorify' cow slaughter." The complaint was lodged under IPC Sections 153, 290, and 504. Ms. Thakur said Facebook was criminally liable under Section 79 of the IT Act for failure to take precautions.)

"Actor Shantanu victim of fake FB page, fraud," *The Hindu*, 30 May 2013. (Chennai police cybercrime cell accepted a complaint by a Chennai cinema actor alleging unidentified individuals abused his identity on Facebook and collected money from his friends.)

Venkatesan, J. "No blanket ban on arrests for Facebook posts but States should follow norms: SC," *The Hindu*, 17 May 2013 (A vacation bench of Justices B.C. Chauhan and Dipak Mishra declined to prohibit arrests under IT Act Section 66A as requested by petitioner Shreya Singhal, but they order states to comply a January 9 directive from the Union government by which a police officer of the rank of inspector-general in metropolitan cities and deputy commissioner or superintendent in other areas would necessarily give prior approval of such arrests. Ms. Singhal's petition is available on the Web: http://www.scribd.com/doc/115026626/Shreya-Singhal-v-Union-of-India-WP-FINAL (accessed 30 August 2013)

"PUCL leader gets bail," *The Hindu*, 15 May 2013 (Andhra Pradesh president of People's Union of Civil Liberties Jaya Vindhyala, was placed under arrest for "objectionable postings" on Facebook targeting the Tamil Nadu governor and a member of the Tamil Nadu Legislative Assembly, was freed on furnishing two bonds of Rs. 10,000 each.)

Murali, S. "Facebook post on T.N. governor lands PUCL activist in custody," *The Hindu*, 14 May 2013 (Andhra Pradesh president of People's Union of Civil Liberties Jaya Vindhyala was placed under arrest for "objectionable postings" on Facebook targeting two prominent Tamil Nadu politicians including the governor.)

"No compensation," *The Hindu,* 7 May 2013. (The West Bengal government declined to act on a recommendation of the West Bengal Human Rights Commission to compensate Ambikesh Mahapatra, a physical chemistry professor at Jadavpur University who was arrested after he circulated "an e-mail containing graphics of Chief Minister Mamata Banerjee.")

Vijay Kumar, S. "Facebook, Twitter come under police scanner." *The Hindu*, 2 May 2013. ("For the first time, the Chennai police have formed a core team [headed by a joint

commissioner] to exclusively monitor activity in the social media, particularly Facebook and Twitter.")

Menon, Meena. "After sexual harassment at workplace, woman faces online slander." *The Hindu*, 12 April 2013. (Former employee of auditing firm expressed disappointment with cybercrime cell of Mumbai police for alleged inaction after she complained of sexual harassment and libel directed at her on several Web sites.)

Jha, Prashant. "Alarm over charges against Twitterati." *The Hindu*, 21 March 2013. (A magistrate ordered the economic offenses wing of Delhi police to register a first information report against "unknown persons" on a compliant of harassment using Twitter by Zee TV journalist Sudhir Chaudhary. The magistrate's order was criticised by several sources quoted in the story. One of the sources, identified as cyber law expert Pavan Duggal, was quoted to say about Section 66A: "This is a defective law which undermines the constitutional right to free speech by making annoyance and inconvenience grounds for restriction. But till it is struck down, repealed or amended, the lower courts will exercise discretion and apply it.")

"Reinstate cops suspended over Facebook arrests: Sena." *The Hindu*, 15 March 2013. (Shiv Sena members of the Maharashtra legislative council Diwakar Raote and Ramdas Kadam sought reinstatement of Thane superintendent of police (rural) Ravindra Sengaonkar and Palghar senior inspector Srikant Pingale, both of whom were suspended the previous November for allegedly "applying wrong sections and disobeying the orders of their superior officers, while arresting Shaheen Dhada and Renu Srinivasan;" the latter women had used a Facebook post to question the Mumbai bandh called by the Sena in the wake of its leader Bal Thackeray's death.)

"Kerala police identify cyber culprit." *The Hindu*, 26 February 2013. (Thiruvananthapuram police succeeded in determining "the real world identity of the person who posted defamatory comments against State Mahila Congress chief Bindu Krishna on February 4 using his account on a popular social networking site.")

Peter, Petlee. "Rise in social network crimes worrying: police." *The Hindu*, 11 February 2013. ("The [Chennai] cyber cell department, part of the Central Crime Branch (CCB) has upped the ante against miscreants who use Facebook and Twitter to defame or abuse individuals. . . . In 2010, 19 cases were registered in Chennai on Facebook-related complaints. This went up to 35 in 2011 and dipped to 29 in 2012. However, the rate of conviction remains low with just four arrests each in the past two years." An investigating officer was quoted to state, "More than 80 per cent of complaints are withdrawn by the victims once they learn the identity of the miscreants. In most cases, the culprit is a relative or acquaintance.")

Fayyaz, Ahmed Ali. "3 Facebook abusers arrested, remanded in police custody." *The Hindu*, 8 February 2013. (Srinagar police identified and placed under arrest three youths allegedly "abusing and intimidating teenage members of Kashmir's all-girl band Pragaash.")

"Two held for abusing Pragaash online." *The Hindu*, 07 February 2013. (Two youths placed under arrest by Jammu and Kashmir police, one in a town in south Kashmir and the other central Kashmir, "in connection with the online abuses and threats to Pragaash -- the all-girl rock band from Kashmir -- that forced it to disband." They were charged under Section 66A of the IT Act and Sec 506 (criminal intimidation) of the Ranbir Penal Code.)

"Facebook comment: charges against girls scrapped." *The Hindu*, 1 February 2013. ("A court in Palghar on [January 31] scrapped all charges against Shaheen Dhada and Renu Srinivasan, who were arrested for posting a comment on Facebook against the shutdown of the city after the death of Shiv Sena chief Bal Thackeray in November last.")

"I stand by my message, says Palghar girl." *The Hindu*, 21 January 2013. (Shaheen Dhada of Palghar tehsil, Thane district, was quoted to say, "Even today I stand by what I had written as a status message on my Facebook page. I only apologised to those who were hurt by that comment and hence I removed it. We have to keep expressing what we feel irrespective of efforts to curb our freedom of expression." In a Facebook post on November 18, 2012, Dhada wrote "Every day thousands of people die, but still the world moves on. . . . Today, Mumbai shuts down out of fear, not out of respect." Within a few minutes, the police came and asked her to go to the police station, where she had to apologise in a written statement. She was held until 2 a.m. and then released on bail. Her friend Renu Srinivasan, who "liked" the post, had been detained with her.)

Singh, Shiv Sahay. "Complaint against student for sharing Mamata cartoon." *The Hindu*, 19 January 2013. (A Kolkata college student, Ram Nayan Chowdhury, was allegedly threatened by political workers of the Trinamool Congress student wing for sharing on Facebook a caricature of West Bengal chief minister Mamata Banerjee. Mr. Chowdhury said one of those workers, Subhakhon Dutta, lodged a complaint with the Bidhannagar North police station.)

"Justice eludes AI staff booked under IT Act." *The Hindu*, 18 January 2013. (Two Air-India officials, K.V. Jaganathrao and Mayank Sharma, sought charges under Section 66A to be dismissed consistent with the dismissal of identical charges in the earlier Palghar case. The two were "were booked for uploading allegedly lascivious and defamatory content on Facebook and Orkut against a local [Mumbai] politician and for threatening him with death. They were also booked for insulting the national flag.")

Venkatesan, J. "Section 66A not bad in law after all: Centre." *The Hindu*, 12 January 2013. (Responding to Shreya Singhal's public-interest litigation petition, the Union government stated in the Supreme Court of India, "The alleged high-handedness of certain authorities in arresting some accused does not mean that Section 66A is bad in law. The possibility of abuse does not render it unconstitutional. Further, Section 66A is very similar to enactments prevailing in other jurisdictions." Ms. Singhal's petition was available online: Shreya Singhal v. Union of India. Writ Petition (CRL.) No. 167 of 2012. http://www.scribd.com/doc/115026626/Shreya-Singhal-v-Union-of-India-WP-FINAL (accessed 30 August 2013).)

Deshpande, Vinaya. "Charges dropped against girls held for FB post on Thackeray." *The Hindu*, 19 December 2012. (Reporting that the Boisar police in the state of Maharashtra filed a closure report per Section 169 of the Criminal Procedure Code. The report stated that the complaint against the Palghar women, Shaheen Dhada and Rinu Srinivasan, who had posted and liked a message on Facebook after Shiv Sena politician Bal Thackeray's death, was false.)

Venugopal, Vasudha. "Misfortune, now fame via Facebook." *The Hindu*, 16 December 2012. (Rinu Srinivasan was to star in a song in Tamil celebrating the magic of Facebook recorded in Thirumangalam, Tamil Nadu; the song was to be titled "Facebook Mania" in an album, "One Roof.")

Balchand, K. "Centre to send advisory to States on Section 66(A)." *The Hindu*, 15 December 2012. (The Union government would ask states to "check the misuse" of the IT Act of 2000 by disallowing police sub-inspectors to invoke Section 66A, minister for communications and information technology Kapil Sibal stated in the Rajya Sabha in response to a question by member Jai Prakash Narayan.)

"Facebook causes tension in Mumbai area." *The Hindu*, 13 December 2012. (A Facebook post targeting the Prophet prompted nearly 1,000 people to gather in the Malwani area near Mumbai urging police to act against the user responsible for the post. The police had blocked the post and registered a case under IPC Section 295 relating to hurting religious sentiments.)

"Man dupes girl on Facebook," *The Hindu*, 11 December 2012. (A 19-year-old autorickshaw driver and school dropout wooing a dental student allegedly told her on Facebook that he was a software engineer; police were seeking him on charges of kidnapping her.)

Venugopal, Vasudha. "Debate on Section 66A rages on." *The Hindu*, 10 December 2012. (A roundup of recent arrests, protests and concerns relating to Section 66A of the IT Act.)

Singh, Shalini. "December to see fight to protect free speech, online freedom." *The Hindu*, 3 December 2012. (Roundup of the online speech debate in India as well as in the International Telecommunications Union, which was to meet December 24 "to review the International Telecom Regulations (ITRs) after 24 years, which it is believed will have a serious impact on free speech and online freedom.")

"Cyber police station files FIR under 66A against Sagar Karnik." *The Hindu*, 2 December 2012. (Mumbai police lodged a complaint against Air India Cabin Crew Association official Sagar Karnik for allegedly abusing a union rival on Facebook in several posts March 2011 through June 2012, in the wake of the union election. Mr. Karnik, who was the complainant in the case leading to the arrests of K.V. Jaganatharao and Mayank Sharma on May 11, 2012, was arrested under Section 66A, which had been applied on the two earlier.)

"Raj children's Facebook, Twitter accounts hacked." *The Hindu*, 2 December 2012. (Mumbai police blocked two accounts on Facebook and Twitter after Maharashtra Navnirman Sena workers complained that the accounts, allegedly operated by Maharashtra politician Raj Thackeray's son and daughter, were hacked and abused.)

"Another Facebook post against Bal Thackeray surfaces in Palghar." *The Hindu*, 1 December 2012. ("Police wary of filing complaint or making arrest.")

Venkatesan, J. "Facebook arrests unjustifiable, but law not *ultra vires*." *The Hindu*, 1 December 2012. (A Supreme Court bench of Chief Justice Altamas Kabir and J. Chelameswar sought the Union government's response to a petition challenging the constitutionality of IT Act Section 66A.)

Venkatesan, J. "Section 66A of IT Act susceptible to wanton abuse." *The Hindu*, 30 November 2012. (Public-interest litigation petitioner Shreya Singhal claimed that Section 66A had a "chilling effect on her and crores of other Internet users." The petitioner stated the language of the section "was so wide and vague and incapable of being judged on objective standards that it was susceptive to wanton abuse. Contending that it was violative of freedom of speech and expression guaranteed by Article 19(1)(a) of the

Constitution, she wanted it declared unconstitutional, and an interim stay [issued] on its operation." Her petition was available online: Shreya Singhal v. Union of India. Writ Petition (CRL.) No. 167 of 2012. http://www.scribd.com/doc/115026626/Shreya-Singhal-v-Union-of-India-WP-FINAL (accessed 30 August 2013)

"No charge sheet, says DGP." *The Hindu*, 30 November 2012. (Maharashtra police stated they would not charge the two women, Shaheen Dhada and Renu Srinivasan, recently arrested but file a closure report on the case.)

Venkatesan, J. "Court takes note of outrage over Palghar arrests." *The Hindu*, 30 November 2012. (The Supreme Court agreed to examine the constitutional validity of Section 66A of the IT Act after senior counsel Mukul Rohatgi," appearing for petitioner Shreya Singhal, "explained how the law was being misused for sharing messages on websites." On the bench sat Chief Justice Altamas Kabir and Justice J. Chelameswar.)

"Palghar shuts down as Sena protests suspension of cops." *The Hindu*, 29 November 2012. (Shiv Sena workers enforced a "shutdown" in Thane district after "the government suspended Thane superintendent of police (rural) Ravindra Sengaonkar and senior police inspector of Palghar police station Srikant Pingale for apply wrong sections of the IPC and disobeying the orders of superiors in arresting Shaheen Dhada and Renu Srinivasan for putting up a Facebook post questioning the bandh following Bal Thackeray's death.")

Singh, Shalini. "Civil society seeks serious relook at law." *The Hindu*, 29 November 2012. ("While civil society [members had] indicated its keenness to attend the meeting, it was unsure whether it would be allowed to participate." The meeting, to be held the same day the report was published, was that of the Cyber Regulation Advisory Committee chaired by minister for communications and information technology Kapil Sibal.)

"My FB account was hacked, says youth." *The Hindu*, 29 November 2012. (Maharashtra Navnirman Sena workers complained to the Thane cyber crime investigation cell that Sunil Vishwakarma, 19, wrote a Facebook post that "vehemently abused" their party president, Raj Thackeray. The police investigated the complaint but did not register a case or arrest Mr. Vishwakarma after hearing from him that the abusive post was uploaded by a hacker who had created a phony account in his name.)

Venugopal, Vasudha. "'FB arrest' girl to study in City College." *The Hindu*, 29 November 2012. (Rinu Srinivasan, 20, a botany graduate living in Mumbai, applied for admission into a "two-year course in sound engineering at Muzik Lounge School of Audio Technology in Vadapalani [in Chennai].)

Singh, Shalini. "IT Act: government may limit who can use route 66." *The Hindu*, 29 November 2012 (The Union government stated it was "open to taking key objections on board and evaluating amendments to the IT Act if merited. So far, the government has been maintaining that misuse of the IT Rules has been on account of overreach by law enforcement agencies and not necessarily on account of faulty language in the legislation.")

"Teenager quizzed for FB post against Raj." *The Hindu*, 29 November 2012. (Maharashtra police interviewed Sunil Vishwakarma, 19, after a Maharashtra Navnirman Sena complaint.)

"Women's Facebook comment echoed court ruling: Katju." *The Hindu*, 28 November 2012. (Press Council of India chairman Markandey Katju appreciated the government of

Maharashtra placing under suspension police officers that had arrested two women for a Facebook post.)

"No proof cops were influenced, says Patil." *The Hindu*, 28 November 2012. (The Maharashtra Home Minister stated there was "no evidence that the suspended officers acted under pressure or influence from any external group or political party.")

"Two police officials suspended for Facebook arrests," *The Hindu*, 28 November 2012. (Thane superintendent of police (rural) Ravindra Sengaonkar and senior police inspector of Palghar police station Srikant Pingalore were suspended and Thane (rural) deputy superintendent of police Samrat Nishandar issued a warning.)

Menon, Meena. "AI takes back suspended crew." *The Hindu*, 27 November 2012. (Flight stewards K.V. Jaganatharao and Mayank Sharma were recalled for duty "six months after being jailed and let out on bail for allegedly posting offensive content on social networking sites.")

Venugopal, Vasudha. "IT Act spawns online protest forums." *The Hindu*, 26 November 2012. (The Palghar arrests, and the arrest of small industrialist Ravi Srinivasan, who posted a snarky tweet about Karti Chidambaram, son of the Union finance minister, had "led to massive outrage all over the country," and "a Facebook page, 'Chennaites for Internet Democracy (CID)' had sprung up.)

"Vendetta for trade union rivalry?" *The Hindu*, 25 November 2012). (Listing the sections under which Air India crew members K.V. Jaganatharao and Mayank Sharma were charged upon their arrest at about 7.30 a.m. on May 11, 2012.)

"Women's Commission notice to police on Palghar." *The Hindu*, 25 November 2012. (The Maharashtra State Commission for Women asked Thane rural district police to submit documents relating to the complaint filed against two women for Facebook posts following a complaint to the commission by former Indian Administrative Service officer Abha Singh.)

Menon, Meena. "In midnight drama, 2 AI crew members were held under IT Act." *The Hindu*, 25 November 2012. (Mayank Sharma, 31, and K.V. Jaganatharao, 50, were arrested and charged May 11, 2012; they were jailed for 12 days before being released on bail.)

"Cops will be punished if found guilty, says R.R. Patil." *The Hindu*, 24 November 2012.

"Police report recommends action against Palghar cops." *The Hindu*, 24 November 2012.

"10 Sainiks arrested for hospital attack." 21 November 2012.

Singh, Shiv Sahay. "Kolkata professor yet to receive compensation." *The Hindu*, 20 November 2012.

"Katju blasts arrest of women." *The Hindu*, 20 November 2012. ("Does freedom of speech, guaranteed by Article 19(1)(a), exist in Maharashtra, Mr. Katju asked" Chief Minister Prithviraj Chavan in a letter, in which he also pointed out, "In fact, this arrest itself appears to be a criminal act, since under Sections 341 and 342 it is a crime to wrongfully arrest or wrongfully confine someone who has committed no crime.")

"'Mumbai shuts down due to fear, not respect.'" *The Hindu*, 20 November 2012.

Jaishankar, C. "Puducherry IG defends case against IAC activist." *The Hindu*, 7 November 2012. (Puducherry inspector general of police, law and order, R.S. Krishnia, stated that "the Puducherry police could not be faulted for filing an FIR against India Against Corruption activist Ravi Srinivasan for making objectionable remarks, in a tweet, against Union finance minister P. Chidambaram's son Karti P. Chidambaram" because "we have acted purely on the basis of the merit of the complaint, in according with the rule of law.")

"Woman pays price for jealousy." *The Hindu*, 7 November 2012. (Chennai fiancée was arrested after she created an allegedly false Facebook profile targeting a perceived romantic rival).

"TV channel office attacked; case booked against 8 RPI activists." *The Hindu*, 2 November 2012.

"Bail for one in Chinmayi case." *The Hindu*, 2 November 2011. (Bail was granted for Sarvana Kumar Perumal, assistant professor at the National Institute of Fashion Technology, Chennai, in a case of tweets targeting Tamil singer Chinmayi Sripada).

Jebaraj, Priscilla. "IAC volunteer tweets himself into trouble, faces three years in jail." *The Hindu*, 1 November 2012. (Ravi Srinivasan, 45, a supplier of plastic parts to telecommunication companies and a volunteer with India Against Corruption, tweeted to his 16 followers on October 20, "got reports that Karti Chidambaram has amassed more wealth than Vadra," for which he was arrested: "At 5 a.m. on Tuesday [October 23] morning, I was woken up and pulled out of my house by CBCID men and told I was under arrest because of my tweets.")

"Singer harassment: court orders interrogation of accused." *The Hindu*, 1 November 2012. (Regarding case against two individuals, including a fashion instructor, who tweeted about the singer Chinmayi Sripada. The singer made a police complaint on October 18, 2012, that "a few individuals were tweeting about her and her mother and making 'casteist' and 'vulgar' remarks.")

Narayanan, Vivek. "Cops clip tweeters' wings for harassing singer." *The Hindu*, 23 October 2012. (Two individuals, including a fashion instructor from Chennai, were arrested "for harassing singer Chinmayi Sripada on Twitter." The report stated the police action "can be termed as a stern warning to people who harass women on social media.")

"Government 'colluding with cartoonist.'" *The Hindu*, 14 October 2012. ("Hanumant Upre, who had filed a case against Kanpur-based cartoonist Aseem Trivedi in Beed district for insulting national symbols, criticized the Maharashtra government's decision to drop the charge of sedition. 'By removing Section 124(A) on sedition, the state is acting in cahoots with Mr. Trivedi,' he said.")

Singh, Shiv Sahay. "Some allegations against Mahapatra dropped." *The Hindu*, 13 October 2012. (The West Bengal government dropped charges under Sections 509 and 500 slapped against "Professor Ambikesh Mahapatra and his neighbour Subrata Sengupta for circulating an e-mail containing graphics of Chief Minister Mamata Banerjee in April." The other charges, under Sections 66A and 66B of the IT Act, remained. All charges were filed by Kolkata police on July 19, 2012).

"Sedition charge against cartoonist to be revoked." *The Hindu*, 13 October 2012. (The Maharashtra government stated in the Bombay High Court, "Pursuant to legal opinion, it has been decided to drop the invocation of Section 124(A) of the Indian Penal Code" against cartoonist Aseem Trivedi, but not the other charges under Section 2 of the

Prevention of Insults to National Honour Act and Section 66A of the Information Technology Act. Responding to a public interest petition filed by Sanskar Marathe, the government said that three of Trivedi's seven cartoons in question would be "dealt with in accordance with law.")

"Teacher held for 'uploading' doctored video." *The Hindu*, 21 September 2012. (The cyber cell of the Pune police arrested Ahmed Bashir Siddiqui, 38, a school teacher and resident of Malad, Mumbai, "for allegedly uploading a doctored and hateful video titled 'Burma riots – thrilling pictures 2012' on YouTube, which led to attacks on students from the north-east.")

"Inquiry into lapses in police action against cartoonist." *The Hindu*, 16 September 2012. (Additional police commissioner Vishwas Nangre Patil ordered a deputy police commissioner to examine Mumbai police lapses in the case of cartoonist Aseem Trivedi after the Bombay High Court "severely criticized the police for arresting Mr. Trivedi").

"Court to police: sedition is pre-Independence law." *The Hindu*, 15 September 2012. (The Bombay High Court criticised Mumbai police for arrest of cartoonist Aseem Trivedi under a sedition law: "Why didn't you apply your mind before charging him with sedition and arresting him? Today you arrested a cartoonist. Tomorrow it will be a filmmaker or a screenplay writer. We live in a free society and enjoy freedom of speech and expression. Sedition is a pre-independence [law]," a division bench of Justices D.Y. Chandrachud and Amjay Sayyed stated during the hearing of a public interest petition filed by lawyer Sanskar Marathe. The court stated, "Someone has to take political responsibility" for the unlawful arrest.)

Singh, Shiv Sahay. "U.S.-based cartoonists' forum appeals to Pranab, PM." *The Hindu*, 11 October 2012. (In a September 26, 2012, letter, the U.S.-based Cartoonists Rights Network International (CRNI) asked the Indian President and Prime Minister to "do everything in your power to amend the laws so that a private person can never again hijack criminal justice for purely partisan purpose." It was in context of the arrest and prosecution of Professor Ambikesh Mahapatra and his neighbour Subrata Sengupta for circulating an email lampooning West Bengal Chief Minister Mamata Banerjee.)

"ACP-led team to verify entire case against Aseem." *The Hindu*, 14 September 2012. (An assistant commissioner of Mumbai police and a team of three other officers would review the charges slapped on Aseem Trivedi and "the main purpose of the team was to verify the cartoonist's intention behind drawing the cartoons.")

"Aseem sees beginning of debate on sedition charge." *The Hindu*, 13 September 2012. (Cartoonist Aseem Trivedi, out on bail on a charge of sedition under Section 124(A) of the Indian Penal Code, quoted the past abuse of that section against Gandhi, Nehru, Tilak and Savarkar to call for its abolition).

"Aseem gets a hero's welcome." *The Hindu*, 13 September 2012. ("A shower of flowers greeted cartoonist Aseem Trivedi on Wednesday as he emerged from the Arthur Road Jail [in Mumbai] following the grant of bail by the Bombay High Court [the previous day]. . . . Mr. Trivedi led a sizeable crowd to the nearby Buddha Vihar, where he lit a lamp before the statues of Dr. B.R. Ambedkar and Gautam Buddha and paid his respects.")

"Aseem Trivedi accepts bail, to be released today." *The Hindu*, 12 September 2012. (The jailed cartoonist earlier "refused to accept bail granted by the High Court till the charges of

sedition were dropped." But he "agreed to accept bail late on [September 11, 2012] night after Maharashtra home minister R.R. Patil's assurance that he would examine the case against him, and also respecting the views of the Bombay High Court, according to a statement by India Against Corruption (IAC) spokesperson Preeti Sharma Menon.")

"Sedition charge will be rolled back, says R.R. Patil." *The Hindu*, 12 September 2012. (The Maharashtra Home Minister was reported to state, "The investigation is under way at the highest level. We will do everything possible according to law and try to close this case as soon as possible. We do not wish to do injustice to anybody. The investigation officer will assess all the charges.")

"BJP: how can a cartoonist be a threat to national security?" *The Hindu*, 11 September 2013. (BJP, CPI, India Against Corruption expressed disapproval of Aseem Trivedi's arrest; the Congress' criticism was "expectedly milder.")

"Sedition charge against cartoonist 'ridiculous.'" *The Hindu*, 11 September 2012. (Senior advocates Mahesh Jethmalani, Mihir Desai, Amit Desai express disapproval of Aseem Trivedi's arrest).

"No grounds for Trivedi to be taken into custody: R.R. Patil." *The Hindu*, 11 September 2012. (The Maharashtra Home Minister stated, "The government is trying to get him released as soon as possible. I am personally looking into the matter." The Press Club of Bombay was to meet September 11, 2012, to discuss implications of the arrest, a meeting to which retired Bombay High Court judge Hosbet Suresh and civil rights activist Binayak Sen were to be invited.)

"I've full faith in constitution, says cartoonist." *The Hindu*, 11 September 2012. (Aseem Trivedi was reported to state through his friend Alok Dixit, "My full faith rests in the Indian Constitution and its maker Dr. Ambedkar. . . . Art and literature mirror society. I have depicted in my cartoons what I have seen all around me.")

"Aseem won't seek bail till sedition charge is dropped." *The Hindu*, 11 September 2012. (Jailed cartoonist wrote and released a statement from police lock-up: "I will do this again and again.")

Jebaraj, Priscilla. "Katju condemns arrest of cartoonist." *The Hindu*, 10 September 2012. (Press Council of India chairperson Markandey Katju stated, "Police officers who obey such illegal orders should e put on trial and given harsh punishment, just like the Nazi officials at the Nurenberg War Crimes Tribunal." Fellow cartoonists in India and outside, including E.P. Unny and members of the Cartoonists Rights Network International (CRNI) expressed support for Aseem Trivedi. CNN-IBN editor-in-chief Rajdeep Sardesai stated, "I find it amusing but also very dangerous that you can get away with hate speech in this country, but parody and political satire leads to immediate arrest." Another journalist, Shivam Vij, tweeted, "Sedition is the highest moral duty of a citizen." – M.K. Gandhi who said those words would be proud of #AseemTrivedi".)

"Says complainant: Trivedi's cartoons insult constitution." *The Hindu*, 10 September 2012. (A third-year law student in Navi Mumbai, Amit Arvind Katarnaware, who filed the complaint against cartoonist Aseem Trivedi leading to the latter's arrest, stated he was offended by the cartoonist's insults of the Constitution and the Ashoka pillar, which also symbolised Emperor Ashoka who is revered by Buddhists. Mr. Trivedi's reported friend Alok Dixit stated that "Mr. Trivedi was to go to Washington DC to accept [an award

from the Cartoonists Rights Network International] but was denied a visa." Mr. Trivedi's offensive cartoons were available on his new Web site, "The dirty picture of India.")

"Mumbai police arrest cartoonist, slap sedition, cybercrime charges on him." *The Hindu*, 10 September 2012. ("Award-winning political cartoonist and anti-corruption and Internet freedom crusader Aseem Trivedi (25) was remanded in police custody till September 16 by a holiday court in Bandra on [9 September 2012].")

"Will continue to circulate cartoons that interest me, says professor." *The Hindu*, 15 August 2012. ("Cartoons are a medium to express humour," stated chemistry Professor Ambikesh Mahapatra, one of two individuals the West Bengal Human Rights Commission recommended for compensation of Rs. 50,000 following their arrests for emailing cartoons lampooning chief minister Mamata Banerjee. The professor was reported to state that "even during emergency (1975-77) when pre-censorship of the press was imposed, pre-censorship of cartoons was lifted after the first three months.")

"Professor's cartoon was murder threat: Mamata." *The Hindu*, 12 May 2012. (The West Bengal Chief Minister "gave a new twist to the controversy" by stating the cartoon circulated by arrested chemistry professor Ambikesh Mahapatra "wasn't a cartoon" but an attempt at "character assassination" and a "cyber crime." She said "the graphic used the word 'vanish,' which implied 'murder'" purportedly from the Satyajit Ray film *Sonar Kella*.)

"'Mamata's behaviour is immature.'" *The Hindu*, 19 April 2012. (Press Council of India chairperson Markandey Katju stated, after the arrest of a Jadavpur University professor and a secretary of a Kolkata housing society for forwarding an email lampooning Mamata Banerjee, that the Chief Minister "must learn to grow up now. . . . she is no longer a street-fighter but holds the responsible position of a Chief Minister.")

"Another police complaint for posting cartoons of Mamata." *The Hindu*, 23 April 2012. ("[A]n associate professor of the Midnapore medical college in [West Bengal's] Paschim Medinipur district, Bikram Saha, has filed a complaint with the police against a person for posting cartoons of [Chief Minister Mamata Banerjee] on a social networking site." The report did not identify the individual that Dr. Saha's complaint targeted.)

"Mahapatra fears for family." *The Hindu*, 17 April 2012. (Massachusetts Institute of Technology don Noam Chomsky joined some "50 academicians from national and international universities, social activists and human rights lawyers" to send a letter to Prime Minister Manmohan Singh seeking his intervention to drop the "dubious charges" applied on Jadavpur University chemistry professor Ambikesh Mahapatra and another individual.)

Dutta, Ananya. "Cartoon row: Ministers defend professor's arrest." *The Hindu*, 16 April 2012. (Citizens took out protest march against arrest of two individuals for forwarding cartoons lampooning Chief Minister Mamata Banerjee. West Bengal Minister for Urban Development Firhad Hakiim and Minister for Rural Development Subrata Mukherjee offered statements that defended the government position. CPM leader Benoy Konar stated, "Once Rajiv Gandhi's role in the Bofors scam was shown in a strip, with his nose becoming increasingly elongated in every panel. Even this had not prompted any such arrests.")

"Four assaulted for assault on professor get bail." *The Hindu*, 15 April 2012. (Four individuals "associated with the Trinamool Congress" party, Amit Sardar, Arup Mukherjee, Sheikh Mustafa and Nishikanta Gorai, were arrested and "charged with criminal intimidation,

causing hurt and wrongful restraint, all of which are bailable offences under the Indian Penal Code" in connection with a physical attack on Jadavpur University professor Ambikesh Mahapatra after the professor and another individual had forwarded cartoons lampooning Chief Minister Mamata Banerjee. The professor stated, "I had to spend a night in custody while those who assaulted me were granted bail shortly after they were arrested. I have nothing to say in this regard.")

Singh, Shiv Sahay. "They targeted me for resisting Trinamool-run syndicate, says professor." *The Hindu*, 15 April 2012. ("The e-mails were just a pretext for harassing me. Some locals who claim to be Trinamool Congress leaders were upset with me as I tried to stop their unfair practices in the [New Garia Development Cooperative Housing Society]" of which professor Mahapatra was assistant secretary.)

"I fear for my life, says professor." *The Hindu*, 15 April 2012. (Jadavpur University physical chemistry "[p]rofessor Ambikesh Mahapatra, who is out on bail after his arrest for posting a cartoon on the internet showing West Bengal Chief Minister Mamata Banerjee in poor light, said on Saturday that he feared for his life. On his complaint, four persons were held.")

Dutta, Ananya. "Arrest of professor termed 'laughable.'" *The Hindu*, 14 April 2012. (Leader of the opposition in the West Bengal legislative assembly, Surya Kanth Mishra, stated, "Such a measure [arrest of Jadavpur University professor Ambikesh Mahapatra] is laughable, childish and certainly points to an authoritarian trend of the state government.")

"Mamata ticks off 'conspirators.'" *The Hindu*, 14 April 2012. (West Bengal Chief Minister Mamata Banerjee responded to public outcry following arrest of a Jadavpur University physical chemistry professor who forwarded cartoons lampooning her: "I am not engaged in any wrongdoing, but I do not tolerate any wrongdoing either. . . . I am not bothered about who is saying what to increase their TRP ratings.")

Singh, Shiv Sahay. "Professor earns Mamata's wrath, held." *The Hindu*, 14 April 2012. (Jadavpur University physical chemistry professor Ambikesh Mahapatra and his neighbour Subrata Sengupta were arrested for "allegedly circulating defamatory e-mails directed at Chief Minister Mamata Banerjee among others." The report was accompanied by a four-column cartoon signed Surendra that depicted Ms. Banerjee's long arm telescoping out of a newspaper cartoon to strangle the utterly shocked newspaper reader. Caption: "How dare you laugh at this cartoon!")

"Held for posting offensive photos of wife." *The Hindu*, 1 March 2012. (Sivakumar, 28, was arrested by Madurai police on "charges of harassing his wife and pasting her photographs on Facebook by creating a fake identity." The charges were under the IT Act Sections 66C, 66E and 66A; with Section 4 of Women's Harassment Act; and Sections 418 and 420 of the IPC.)

Appendix C

Sources of Evidence

I. Primary sources

1. The Constitution of India

Accessed via the Ministry of Law and Justice, Government of India.

http://india.gov.in/my-government/constitution-india/constitution-india-full-text (last accessed 1 September 2013)

2. Supreme Court of India opinions

Accessed via the Judgment Information System (JUDIS) and India Kanoon. http://judis.nic.in/supremecourt/chejudis.asp (last accessed 15 August 2013) and http://www.indiakanoon.org (last accessed 1 September 2013)

A.K. Gopalan v. State of Madras, 1950 SCR 88*; Chintaman Rao vs. State of Madhya Pradesh*, 1951 SCC 118; *State of Bihar v. Sailabala Devi*, 1952 SCC 329; *State of Madras v. V.G. Rao*, 1952, SCR 597; *Saibal Kumar Gupta v. B.K. Sen*, 1961 SCR (3) 460; *Sakal Papers (P) Ltd. V. Union of India*, 1962 SCR (3) 842; *Bennett Coleman & Co. vs. Union of India*, 1973 SCR (2) 757; *Indian Express Newspapers (Bombay) (P) Ltd. v. Union of India*, 1986 SCC (1) 259; *S. Rangarajan vs. P. Jagjivan Ram*, 1989 SCC (2) 574; *Printers (Mysore) Ltd. v. CTO*, 1994 SCC (2) 434; R. *Rajagopal v. State of Tamil Nadu*, 1994 SCC (6) 632; *Papnasam Labour Union v. Madura Coats Ltd.*, 1995 SCC (1) 501; *D.C. Saxena (Dr.) v. Chief Justice of India*, 1996 SCC (7) 216; *Union of India v. Assn. for Democratic Reforms*, 2002 SCC (5) 294; *Rajendra Sail v. M.P. High Court Bar Assn.*, 2005 Insc 272; and *M.P. Lohia vs. State of West Bengal*, 2005 SCC (2) 686.

3. Statutory texts

The Indian Penal Code of 1860 accessed via Bombay High Court. http://bombayhighcourt.nic.in/libweb/oldlegislation/ipc1860/ (last accessed 15 August 2013); Sections 114, 124A, 153, 169, 290, 294, 295, 341, 342, 499, 500, 504, 505, 506, and 509.

Insult to Indian National Flag and Constitution of India. http://mha.nic.in/pdfs/Prevention_Insults_National_Honour_Act1971.pdf (last accessed 12 August 2013); Section 2.

Information Technology Act of 2000. http://deity.gov.in/sites/upload_files/dit/files/downloads/itact2000/it_amendment_act2008.pdf last accessed 1 September 2013); Sections 66A, 66B, 66E, and 79.

II. Secondary sources

1. Constitutional commentaries

See Bibliography.

2. Academic books and law reviews

See Bibliography.

3. Legal dictionaries

See Bibliography.

4. News articles

See Appendix B.

5. Interviews (all conducted via meetings)

a. C.K.N. Raja, professor and dean (retired), faculty of law, University of Mysore (May 26, 2013; Mysore; 75 minutes)

b. T.V. Subba Rao, visiting professor, National Law School of India University (June 17-18, 2013; Bangalore; total 95 minutes)

c. V.S. Mallar, M.K. Nambiar Chair in Constitutional Law, National Law School of India University (June 17, 2013; Bangalore; 75 minutes)

d. R. Venkata Rao, vice chancellor, National Law School of India University (June 19, 2013; Bangalore; 15 minutes)

e. H.K. Nagaraja, adjunct professor, National Law School of India University (June 19, 2013; Bangalore; 20 minutes)

f. Sudarshan Ramaswamy, dean, school of government and public policy, O.P. Jindal Global University (August 5, 2013; Sonipat; 60 minutes)

g. Shiv Visvanathan, professor, school of government and public policy, O.P. Jindal Global University (August 5, 2013, Sonipat; 60 minutes)

h. Anil B. Divan, constitutional attorney (August 5, 2013, New Delhi; 50 minutes)

i. K.K. Venugopal, constitutional attorney (August 6, 2013; New Delhi; 55 minutes)

j. Ram Jethmalani, constitutional, criminal, civil attorney (August 7, 2013; New Delhi; 8 minutes)

k. Prashant Bhushan, constitutional attorney (August 7, 2013, New Delhi; 20 minutes)

l. M.N. Krishnamani, president, The Supreme Court Bar Association (August 8, 2013; New Delhi; 75 minutes)