

# IMPOSING SILENCE



**THE USE OF INDIA'S LAWS  
TO SUPPRESS FREE SPEECH**



UNIVERSITY OF TORONTO  
FACULTY OF LAW

INTERNATIONAL  
HUMAN RIGHTS  
PROGRAM

Cover photo: Protestors at India Gate 2012. Dave Gill

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PEN Canada is a nonpartisan organization of writers that works with others to defend freedom of expression as a basic human right at home and abroad. PEN Canada promotes literature, fights censorship, helps free persecuted writers from prison, and assists writers living in exile in Canada.

PEN International promotes literature and freedom of expression and is governed by the PEN Charter and the principles it embodies: unhampered transmission of thought within each nation and between all nations. Founded in 1921, PEN International connects an international community of writers from its Secretariat in London. It is a forum where writers meet freely to discuss their work; it is also a voice speaking out for writers silenced in their own countries. Through centres in over 100 countries, including PEN Canada, PEN operates on five continents. PEN International is a non-political organisation which holds Special Consultative Status at the UN and Associate Status at UNESCO.

The IHRP enhances the legal protection of existing and emerging international human rights obligations through advocacy, knowledge-exchange, and capacity-building initiatives that provide experiential learning opportunities for students and legal expertise to civil society.

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# LIST OF ACRONYMS

<b>BJP</b>	Bharatiya Janata Party
<b>CBFC</b>	Central Board of Film Certification
<b>CCP</b>	Code of Criminal Procedure
<b>CMS</b>	Central Monitoring System
<b>FIR</b>	First Information Report
<b>FCRA</b>	Foreign Contribution (Regulation) Act
<b>HRC</b>	Human Rights Committee
<b>HRW</b>	Human Rights Watch
<b>ICCPR</b>	International Covenant on Civil and Political Rights
<b>ICESCR</b>	International Covenant on Economic, Social and Cultural Rights
<b>INSAF</b>	Indian Social Action Forum
<b>IPC</b>	Indian Penal Code
<b>ITA</b>	Information Technology Act
<b>NGO</b>	Non-Governmental Organisation
<b>UN</b>	United Nations
<b>UPR</b>	Universal Periodic Review
<b>PIL</b>	Public Interest Litigation
<b>PUCL</b>	People's Union for Civil Liberties
<b>RSS</b>	Rashtriya Swayamsevak Sangh

# INTRODUCTION

In India today it is surprisingly easy to silence people with whom you disagree. An overlapping network of vague, overbroad laws and a corrupt and inefficient justice system have given rise to an environment in which speech can quickly be censored. Legislative overreach and problems with the police, courts and judiciary reinforce one another, creating cumbersome, complicated and time-consuming legal processes that deter many citizens from exercising their right to free expression. The resulting chill silences many who might otherwise have spoken out, often those with marginal voices, or critics of incumbent politicians.

This is a shameful state of affairs for the world's largest democracy. Yet, when it is held to account at the United Nations for freedom of expression concerns, India downplays their seriousness and refuses to adopt reforms that would bring its Constitution and censorship laws in line with its international obligations.

In 2013, PEN and the International Human Rights Program at the University of Toronto Faculty of Law (IHRP) began to study the various threats to freedom of expression in India. As a rising global superpower, with a US\$1.9 trillion Gross Domestic Product,<sup>1</sup> India has the world's seventh largest economy and, with a 7 per cent projected economic growth rate, it is currently the only BRICS country with an upward growth trajectory.<sup>2</sup> With more than 1.2 billion citizens it is also the second most populous nation on earth. Consequently, India's political freedoms are some of the most important in the world.

When PEN and the IHRP began this project, despite its frequently cited commitments to democracy India was increasingly in the news for issues related to free expression. These issues ranged from writers being charged with sedition to young people being arrested for Facebook posts. Publishers were withdrawing books in response to myriad charges, even before the cases were brought to court. With an election on the horizon in the spring of 2014, there was also debate about the extent to which journalists could criticise political candidates.

With the help of the newly established PEN Delhi Centre and the All-India PEN Centre, PEN Canada and the IHRP completed a research mission to Delhi and Mumbai in February 2014, followed by an examination of the legal framework used to censor and silence expression. This report, issued jointly with PEN International, covers the period immediately prior to Narendra Modi's election, on 16 May 2014, and assesses the challenges to freedom of expression that remain one year after he took office.

Challenges to freedom of expression in India are as diverse and complex as the society that produces them. This report focuses on the legal and regulatory environment that facilitates censorship by government actors, aggrieved individuals, and religious or political groups. We focus on the law because it is an area where the government can act directly to ensure that the Constitution, criminal laws and regulatory regimes cannot be used to limit freedom of expression arbitrarily. Taking action to repeal or amend the laws that are used to censor expression would be an important first step for India to signal its commitment to human rights obligations under the International Covenant on Civil and Political Rights.

Furthermore, the Supreme Court of India's recent decision to strike down a vague and overbroad provision criminalising the transmission of offensive online content offers courts and legislators an ideal opportunity to further review laws that are used to silence dissent.

# IN FOCUS

## CHARLIE HEBDO IN INDIA

The 7 January 2015 attack on the offices of French satirical magazine Charlie Hebdo brought questions about freedom of expression, and its limits, into the spotlight. The tragedy sparked global debate about whether some expressive content should be censored, and if so, to what end.

Ironically, India's conversation about Charlie Hebdo was itself subject to censorship.

Ten days after the Paris attacks, the Mumbai edition of the Urdu language newspaper Avadhnama published a 2006 Charlie Hebdo caricature of the Prophet Muhammad on its front cover. Within days, the office was closed, staff laid off, and complaints filed against editor Shirin Dalvi.<sup>3</sup> Dalvi was later arrested by police in Mumbai and charged with the criminal offence of deliberately or maliciously insulting religion (IPC s.295A).<sup>4</sup>

Despite issuing a written apology, Dalvi continues to receive death threats and lives in fear.<sup>5</sup> She told the Indian Express, "My children have my old phone and they told me that someone has been sending messages through WhatsApp, saying "*Maafi nahin milegi*" (or "You won't get forgiveness").<sup>6</sup> While living in secret, Dalvi wears a burqa to safeguard her identity.<sup>7</sup>

*Mint* – one of the few other newspapers to reprint Charlie Hebdo images – published some of the cartoons on its January 8 front page. Shortly afterwards the cartoons were removed. Readers were advised that "The front page visual capturing the unfortunate terrorist attack in Paris was carried in the best traditions of journalism. However, we have received feedback that it has offended some people. Since that was never the intention, we have removed the same. *Mint* stays committed to the principles of responsible journalism."<sup>8</sup> The pressure on the newspaper is another instance of how readily self-censorship can be conflated with responsible journalism.

Discussions and arguments are critically important for democracy and public reasoning. They are central to the practice of secularism and for even-handed treatment of adherents of different religious faiths (including those who have no religious beliefs). Going beyond these basic structural priorities, the argumentative tradition, if used with deliberation and commitment, can also be extremely important in resisting social inequalities and in removing poverty and deprivation.

**Amartya Sen, Introduction to  
*The Argumentative Indian***

# EXECUTIVE SUMMARY AND KEY FINDINGS

The democratic freedoms enshrined in India's Constitution set out a political vision that was forged in the crucible of Partition. This vision has informed India's complex postcolonial history and held the nation together despite its manifold religious, regional, linguistic and caste tensions. The Constitution recognises freedom of expression as a cornerstone of India's democracy and its enduring importance has helped preserve the country's fractious public sphere and to sustain its secular, multicultural character. The resulting cultural dynamism has produced, in the words of one observer, "a society of swiftly inflating expectations, where old deference crumbles before youthful impatience," where "capital is restless [and] new, unforeseen threats and risks are facts of life."<sup>9</sup>

Despite its Constitutional commitment to free speech, India's legal system makes it surprisingly easy to silence others. Routine corruption, inefficiency, and the selective enforcement of vague and overbroad laws allow individuals, or small groups, to censor opinions they find distasteful. The Indian Penal Code (IPC) offers would-be censors a wide range of potential offences, many of which do not require malevolent intention on the part of the communicator. If you disagree with something that can be said to promote "enmity," jeopardise "national integration," "maliciously" insult religion, or foster "enmity between groups," it is not difficult to invoke censorship.

India inherited many forms of censorship from the British but it has also "preserved, sustained and expanded" this legacy.<sup>10</sup> Every year thousands of ordinary citizens endure the graft and inefficiency that result from overreaching legislation and a poorly administered justice system. This exacerbates existing social disparities and prevents redress for those who are silenced. The resulting chill deters many who might have otherwise spoken out, often marginal voices and critics of the reigning political establishment.

An ineffective lower court judiciary, and inconsistent legal precedents from appellate courts undermine predictable application of the law. This emboldens plaintiffs to pursue suits that would otherwise be dismissed for lack of cause. The resulting wave of *mala fide* actions consumes scarce judicial resources, and forces defendants to bear significant legal costs and/or waste years in court defending their right to free speech.

Despite the Supreme Court of India decision vindicating aspects of free expression on the Internet earlier this year, the overall trend reveals declining interest on the part of the judiciary in defending freedom of expression, especially in local courts that are more susceptible to corruption and undue influence and where the judges tend to hold less liberal values.

Taken together, these problems result in numerous violations of Indian citizens' right to freedom of expression, and to the due process guaranteed in international treaties to which India is bound as a party.

Repeal of and amendments to current legislation would clarify Indian law, decrease police overcharging, reduce caseloads, and result in speedier trials. A clarification of Supreme Court precedents would lessen uncertainty in lower courts and discourage frivolous lawsuits. As it did recently the Supreme Court is also in a position to re-interpret Constitutional limits on freedom of expression and harmonise them with international human rights law.



## KEY FINDINGS

### RESTRICTIVE LEGISLATION

The vague and overbroad phrasing of several sections of the Indian Penal Code (IPC) and the Code of Criminal Procedure (CCP) can be used to restrict freedom of expression, not only by governments, but by almost anyone who wishes to silence another. These include:

**Section 95 of the CCP**, which empowers state governments to seize and prohibit publications that “appear” to violate six discrete sections of the IPC. Although explicit grounds must be given for a forfeiture declaration, the burden of proof for underlying offences does not even rise to a balance of probabilities.

**Section 124A of the IPC**, which criminalises sedition. Throughout India’s history this overbroad provision has been used to silence public figures, including Mahatma Gandhi. More recently it has been used to justify the harassment of several thousand protesters at a nuclear site, a situation that prompted a formal inquiry from three UN Special Rapporteurs.

**Section 153A of the IPC**, which attempts to preserve “harmony” between a variety of enumerated groups by barring speech and several other acts. In January 2015, a BJP Minister was charged under s.153A for referring to a Minister in Uttar Pradesh as a “terrorist” – the complainant (a member of the public) felt that the statement hurt the feelings of the Muslim community. Similar charges were brought later in the month against a politician who criticised one of his opponents for doing nothing for his constituents “apart from procuring a new fleet of vehicles for the police and changing the colour of the vehicles in the convoy.” The opposing party found the statements “objectionable” and argued they “could affect peace and tranquility.”<sup>11</sup>

### OBSCENITY, BLASPHEMY, AND THE CONTROL OF RELIGIOUS AND POLITICAL NARRATIVES

India’s obscenity laws side with the offended party and are easily leveraged by aggrieved groups or individuals. In 2012, when the television regulator imposed a 10-day ban on Comedy Central for broadcasting a risqué skit, the Delhi High Court questioned neither the constitutionality of the Act, nor the penalty imposed. Obscenity laws have also been used to censor an actress whose opinions on pre-marital sex were published in a magazine. In the latter case one complainant only had second-hand knowledge of the alleged offence.

Blasphemy, which is criminalised by s.295A of the IPC, is defined as expression that is “intended to outrage religious feelings of any class by insulting its religion or religious beliefs.” In 2007, charges were successfully laid against the author of a book that dealt with the purported “political world invasion by Muslims.”<sup>12</sup> It took three years before the High Court heard the application to remove the forfeiture — which was subsequently upheld.

The laws have also been used to police religious narratives. In February 2014 University of Chicago professor Wendy Doniger’s book *The Hindus: An Alternative History* was removed from bookstores after criticism from bloggers who believed it attacked Hinduism and sexualised Hindus, and a formal complaint by a member of a far-right conservative Hindu organisation. The book’s publisher noted that s.295A “will make it increasingly difficult for any Indian publisher to uphold international standards of free expression without deliberately placing itself outside the law.”<sup>13</sup> Weeks later a different publisher put on hold the re-printing of another of Doniger’s books, *On Hinduism*, until it was reviewed by independent experts, in response to a charge by the same group.

Section 499, which criminalises defamation, can be used to secure a conviction without proof that actual harm has occurred – the intent or knowledge that harm would likely result is sufficient. Predictably, this provision has been used to silence political speech. In May 2014, the IPC’s public mischief provisions (s. 505) were used to arrest a Bangalore student who sent an allegedly offensive WhatsApp message about Prime Minister Modi.

### REGULATORY CONSTRAINTS

India’s regulatory provisions may be used with more subtlety, but their impact on legitimate criticism of the government is no less significant. The penalties for regulatory offences are so steep, including imprisonment, that for all practical purposes they are just as threatening as criminal prosecutions.

The *Cable Television Network (Regulation) Act, 1995* and the associated *Cable Television Network Rules* permit sanctions for a broadcaster who “offends against good taste or decency,” voices “criticism of friendly countries” or “aspersions against the integrity of the President and judiciary.” Since the rules are not enforced by an independent body, the High Court of Delhi has correctly described this situation as “anathema in a democratic setup inasmuch as it would put broadcast under the direct control of the state.”

The *Unlawful Activities (Prevention) Act, 1967* (UAPA) has been used to prosecute a woman found with “Maoist leaflets,” even though, in a separate case, the High Court of Bombay held that the possession of propaganda from a banned organisation was not sufficient proof of membership. Local human rights groups report that the Act has been used with “fabricated evidence and false charges” to detain and silence peaceful activists.<sup>14</sup>

The *Foreign Contribution (Regulation) Act, 2010* (FCRA) has been used to lodge complaints against small NGOs who do not toe the party line. “I’m quite conservative,” said the Executive Director of one NGO interviewed for this report, “because I don’t want the organisation to be shut down. We can’t be seen as influencing public policy through public campaigns.” The NGO avoids, or downplays, discussion of religious issues and human rights reporting from certain disputed regions in the northeast of India. In April 2015, the Ministry of Home

Affairs used the Act to suspend Greenpeace's registration in India, observing that they were adversely affecting the national interest.

The *Cinematograph Act, 1952* and its associated regulations empower the Central Board of Film Certification (CBFC) to censor parts of films or to ban them outright, not only for "decency or morality" but ostensibly to maintain public order and prevent crime. But even when films are approved by the Board, the threat of violence at screenings and the state's inability, or refusal, to protect filmmakers, often combine to exert a chilling effect. As this report was being prepared, the Board was deliberating over the certification of two controversial films.

The *Contempt of Court Act, 1971* punishes 'criminal contempt' including expression that scandalises or 'tarnishes' the image of the court. A former Supreme Court Justice has called the law a "great silencer,"<sup>15</sup> which has been used to suppress public discussion of questionable judicial conduct. Excesses include contempt cases lodged against policemen "who dare to hold up judges' cars while controlling the flow of traffic," and a judge who threatened to fine a railway official in contempt for not doing as he asked.

The *Information Technology Act, 2000* (ITA) was enacted to promote e-commerce, e-government, and to amend criminal and evidence law to take account of electronic transactions. But many provisions of the act are troublesome. Section 66A — which was struck down in the Supreme Court of India's landmark 24 March 2015 decision — was used to lay charges against a shipbuilder whose Facebook post criticised the prime minister. Police in Maharashtra have reportedly used the provision against individuals who "liked" allegedly objectionable Facebook posts about local politicians. In an interview for this report a retired judge described the breadth of the provision as "legislative carpet bombing."<sup>16</sup>

Section 69 of the ITA, which remains in force, authorises mass surveillance and permits the authorities to "intercept, monitor or decrypt or cause to be intercepted or monitored or decrypted any information generated, transmitted, received or stored in any computer resource." The resulting Central Monitoring System, a wide-ranging surveillance program, raises concerns about digital censorship and surveillance.

## A PUNITIVE PROCESS

A right to freedom of expression means little if the administration of justice — the processes that guarantee fairness and expediency — is inadequate. Nearly all of the more than 30 individuals interviewed for this report said that the bureaucratic inertia and costly delays typical of India's legal system have transformed the process itself into a form of punishment. In late 2009, for instance, more than 30 million cases — two-thirds of them criminal matters — were pending in courts even though the Supreme Court recognises a Constitutional right to a "speedy trial."

As the process itself has become a *de facto* punishment, several groups and individuals have learned how to exploit the breadth and vagueness of the IPC and pressure the police into laying baseless charges. Once in court, the resulting cases often face lengthy delays due to ineffective legal counsel, a poorly trained judiciary, and an overburdened bureaucracy. Regardless of the merits of the case against them, defendants may face years of pointless litigation — a situation that fosters self-censorship and chills freedom of expression.

Without prosecutors to help them vet First Information Reports (FIRs), documents prepared by the police upon receiving a complaint, Indian policemen rarely have sufficient training to ensure that legislation is not being applied incorrectly; they simply read the text of the statute, investigate, and charge. When presented with vexatious FIRs the police often rubberstamp them. This encourages "overcharging" — the unreasonable multiplication of charges against a single defendant — in order to increase the likelihood of a conviction. Thus, by trying to avert a putative law and order problem, the police facilitate censorship and surrender their obligation to protect controversial speakers.

The justice system's poor record on freedom of expression cases is also due to the Supreme Court's inconsistent rulings in Article 19 jurisprudence, particularly its contradictory tests for determining whether a law can be considered to be one of the "reasonable restrictions" mentioned in Article 19(2). As a result, the lower court judiciary cannot be relied upon to produce consistent rulings in freedom of expression cases. Each case remains open to wide judicial discretion since judges can cherry-pick precedents they wish to follow.

In recent years there has also been a tendency to transform civil disputes into criminal cases. The Supreme Court has condemned the practice, but acknowledges "a prevalent impression that civil law remedies are time consuming and do not adequately protect the interests of [claimants]."<sup>17</sup> The Court further notes "an impression that if a person could somehow be entangled in a criminal prosecution, there is a likelihood of imminent settlement."<sup>18</sup>

The Supreme Court of India's 24 March 2015 decision to strike down s.66A of the ITA was a welcome counter-pressure to these tendencies. The Court's decision noted that s.66A "is cast so widely that virtually any opinion on any subject would be covered by it" and that it was "liable therefore to be used in such a way as to have a chilling effect on free speech." This decisive stand against overbroad laws that are effectively "completely open-ended and undefined" bodes well for future Article 19 rulings.

## POLICE CORRUPTION

Section 161 of the IPC criminalises corruption by public servants. But corruption in India is endemic, notoriously so within the police force. In 2010, one poll found that 54 per cent of respondents had bribed a government official; 44 per cent felt government anti-corruption efforts were ineffective, and 74 per cent felt corruption had increased during the last three years.<sup>19</sup>

The Indian police force leads the country's institutions in terms of bribery and its corruption has been especially notable for its impact on the marginalised. A 2008 Transparency International report found that two-thirds of the 5.6 million poor households which had interacted with the police during the previous year, had either "paid a bribe" or "used a contact";<sup>20</sup> 22 per cent of the bribes were paid by people accused of a criminal offence.<sup>21</sup>

## JUDICIAL INCOMPETENCE

The Indian judiciary has fared little better than the police. A study recently published in the *Harvard Human Rights Journal* found significant incompetence among the lower court judiciary in India. In part this was due to the appointment of lawyers with little courtroom experience. Consequently, many lack the appropriate experience and knowledge and feel "insecure, cautious, and unwilling to take a more assertive [position]"<sup>22</sup> when confronted by senior lawyers. Many judges defer to senior lawyers' arguments, or to the government, or strategically adjourn cases to buy themselves more time. Judges often yield to social pressure, particularly when their rulings may result in violence.

More blatant corruption is also rife. One study found that 80 per cent of litigants interviewed in Gujarat reported being "asked to pay a bribe by a lower-level [judicial] staff at some point during an administrative proceeding."<sup>23</sup>

## ACCESS TO JUSTICE

High legal fees and drawn-out court proceedings often mean that poor people lack the resources to successfully defend their rights in India. The *Legal Services Authorities Act, 1987* provides for free legal services in cases that meet certain requirements, but it has failed to provide access to justice for many people. The resulting imbalance favours wealthy litigants over poorer defenders, and undermines the principle of fairness in adversarial trials.

The best-known strategy used to exploit this asymmetric access to legal resources is the Strategic Lawsuit Against Public Participation ("SLAPP suit"), which often has devastating impacts on the freedom of expression of marginalised people. SLAPP suits are frequently initiated for the sole purpose of silencing under-resourced defendants, and socio-economic status is usually a decisive factor in their success. Such coercive legal strategies have been used to intimidate participants at the 2012 and 2013 Jaipur Literature Festival, after they read passages from Salman Rushdie's novel *The Satanic Verses*.

Our research indicates that journalists are particularly vulnerable to coercive litigation. Once entangled in legal proceedings, they often receive little support from fellow journalists. In contrast, artists, writers and filmmakers who have stronger and better-developed support systems are able to band together to resist legal harassment. Defendants in cities tend to have better access to legal and professional resources than their rural counterparts, and journalists working outside of big cities remain particularly vulnerable.

# RECOMMENDATIONS

The findings of this report argue that change is needed to address systemic flaws which enable multiple assaults on freedom of expression in India. It is clear that strong commitments from the national government to institute reforms could go a long way to protecting the fundamental human rights of Indians, including freedom of expression. These changes require legislative interventions: some laws must be repealed while others should be narrowed. Legislative reform may also be necessary in order to repair an inaccessible court system struggling with corruption and incompetence.

## A) TO THE INDIAN GOVERNMENT AND INDIAN LAWMAKERS

- In line with the recommendations of the UN Human Rights Committee, withdraw the reservations and declarations made to Article 19(3) of the International Covenant on Civil and Political Rights (ICCPR);
  - Amend Article 19(2) of the Constitution to remove restrictions on freedom of expression not provided for under international law;
  - Submit overdue reports on India's implementation of the ICCPR to the UN Human Rights Committee without further delay;
  - Ensure full incorporation of ICCPR provisions into domestic law so that fundamental human rights may be invoked directly before the courts;
  - Extend an invitation to the UN Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression to conduct a country mission in India;
  - Create an independent body responsible for governing the content of television broadcasters, per the *Cable Television Network (Regulation) Act, 1995* and *Cable Television Network Rules*;
  - Ensure that regulatory bodies, such as the Central Board of Film Certification, are independent and free from government interference;
  - Establish effective accountability mechanisms and take measures to monitor the district courts and the police;
  - Take all necessary measures to provide the police with autonomy from executive influence.
- Repeal laws that unnecessarily restrict freedom of expression:**
- s.153B of the IPC (assertions prejudicial to national-integration);
  - s. 295A of the IPC (blasphemy);
  - s. 499 of the IPC (criminal defamation);
  - s. 505 of the IPC (statements conducing public mischief);
  - *Foreign Contributions (Regulation) Act*;
  - Those provisions of the *Information Technology Act 2000* that unduly limit speech and which are inconsistent with Article 19 of the ICCPR, in particular s.69A;
  - Those provisions of the *Scheduled Castes and Scheduled Tribes Act, 1989* that unduly limit speech and overlap with ss.153A and 153B of the IPC;
  - *Contempt of Court Act, 1971*.
- Amend vague and overbroad laws that threaten freedom of expression:**
- s.124A of the IPC (sedition) to only limit speech where it is necessary to do so and consistent with the grounds articulated in Article 19(3) of the ICCPR;
  - s.153A of the IPC (promoting enmity) to ensure that it only captures speech which advocates national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence (consistent with Article 20 of the ICCPR);
  - s.292 (obscenity) to only limit speech that is truly obscene, that is, having a dominant purpose related to the undue exploitation of sex, or which combines sex and crime, horror, cruelty, or violence;
  - s. 95 of the *Code of Criminal Procedure* to require a hearing and judicial authorisation, as well as reasonable grounds to believe that publications or materials violate a particular provision of the IPC, prior to seizure;
  - The *Cable Television Network (Regulation) Act* and *Cinematographic Act* to only limit programs in a manner consistent with Article 19(3) of the ICCPR;
  - The *Unlawful Activities (Prevention) Act* to only limit speech in a manner consistent with Article 19(3) of the ICCPR;

- The *Customs Act* to only allow seizure of items alleged to violate the IPC, and include a process for re-determination and appeal by the importer and/or creator.

#### **Enact:**

1. Clear legislation to ensure that increased surveillance of phones and the Internet does not undermine the rights of individuals in India to privacy and free expression;
2. Legislation to combat Strategic Lawsuits Against Public Participation (SLAPP);
3. Legislation that limits individuals to filing a civil case in only one state jurisdiction.

## **B) POLICE AND PROSECUTORS**

- Train police to understand and apply the law in a manner that is consistent with Article 19 of the Indian Constitution and India's obligations under international law;
- Take effective measures to curb the practice of overcharging, including taking seriously and investigating allegations of police intimidation, and requiring prosecutors to vet potential charges before they are laid to ensure there are reasonable and probable grounds;
- Identify and acknowledge police corruption and develop a coordinated and targeted anti-corruption plan with clear benchmarks.

## **C) JUDICIARY**

#### **To all levels of court:**

- Provide judges with specific training in relation to Article 19 of the Indian Constitution, and India's obligations under international human rights law;
- Treat offences that relate to freedom of expression, whether under the IPC or other legislation, as non-cognizable for the purposes of Section 41 and Section 156 of the Criminal Procedure Code.

#### **To the Supreme Court of India:**

- Hear freedom of expression cases, clarify conflicting precedents to ensure that Article 19 of the Constitution is robustly protected, and narrowly interpret the existing laws that unduly limit legitimate expression;
- Reconsider the decision to uphold Section 69A of the ITA and the Intermediaries Guidelines, and order the government, following its recent review of the ITA, to redraft the law, with input from legal experts, academics, and civil society organisations.

## **D) CIVIL SOCIETY AND THE MEDIA**

- Continue to pressure the government to enact reforms that protect freedom of expression through political engagement and strategic litigation;

- Encourage the government to stop delaying reports on its compliance with the ICCPR and to expedite other submissions to UN treaty monitoring bodies and the UN Human Rights Council, particularly through the Universal Periodic Review process, especially when these address freedom of expression concerns;
- Create public education initiatives that encourage tolerance of dissenting views, especially on taboo topics, and educate people on their right to freedom of expression;
- Foster greater solidarity among writers, artists, and journalists, especially those who have been threatened with violence and/or had their work suppressed, and those from marginalised groups or communities;
- Continue to assert and exercise the right to freedom of expression;
- Ensure that defendants in freedom of expression lawsuits who lack the means to afford a lawyer receive adequate legal aid and are fully informed of their rights, particularly in defamation and sedition cases.

## **E) TO THE INTERNATIONAL COMMUNITY INCLUDING THE UNITED NATIONS, WORLD BANK, ASIAN DEVELOPMENT BANK, THE COMMONWEALTH AND BILATERAL GOVERNMENT DONORS**

- Insist that India make progress on its international commitments to protect freedom of expression;
- Encourage the UN Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression to request a country mission to India;
- Request that India address the freedom of expression concerns outlined in this report in the third cycle of the UPR in 2016.

## **F) TO FUTURE AND CURRENT PREFERENTIAL TRADING PARTNERS**

- Raise the issue of freedom of expression during all meetings and negotiations with India;
- Prior to signing an agreement, commission an independent, impartial and comprehensive assessment of the state of fundamental human rights in India, including freedom of expression, and make the findings of the assessment public;
- **Incorporate into any treaty:**
  - a provision that requires both parties to submit an annual, public, independent, impartial, and comprehensive human rights assessment report, with each subsequent report providing an update on how issues noted in previous reports are being addressed;
  - language that refers to existing fundamental human rights obligations and makes these enforceable within the treaty.

# VAGUE AND OVERBROAD LAWS

Every year thousands of citizens endure the graft and inefficiency produced by India's legislative overreach and poorly administered justice system. This exacerbates existing social disparities and prevents redress for those who are silenced. Potential censors can choose from an arsenal of laws if they wish to attack artists, writers, journalists, public figures and other communicators, often pursuing criminal charges, or appealing when police or other authorities refuse to register the reports needed to launch criminal prosecutions.<sup>24</sup> This drags out disputes, burdens the courts, and increases costs to all parties.

An ineffective judiciary, whose conflicting precedents limit the consistency of court decisions, emboldens plaintiffs to pursue suits that would otherwise be dismissed for lack of cause. This wastes scarce judicial resources, and forces defendants to incur significant legal costs and waste years in court defending their right to free speech.

More generally, deficiencies in the administration of justice—whether due to corruption, conflicting precedents, or lengthy delays—tend to magnify existing problems with the system. When countless laws facilitate censorship, a system that should uphold freedom of expression becomes instead a means of gagging others. This report cites numerous examples of laws being used to censor political opponents of the judiciary, police, and government.

The combination of vague laws and ineffective administration produces many permutations of abuse. Often, those who wish to silence others can do so without needing to win in court. Once someone has been charged (often spuriously), the laws permit censorship of the “offensive material” while the wheels of justice grind their way to a verdict. Even when a defendant wins a case on appeal the censored material has often lost its relevance after being silenced for years, irrespective of the substantive merit of the initial complaint.

Repealing and amending India's censorship laws would clarify the law, decrease police overcharging, reduce court caseloads, and result in speedier trials. A clarification of precedents at the Supreme Court would reduce uncertainty in the lower courts, and create a disincentive to pursue frivolous cases. Critically, lawmakers could narrow the exceptions contained in Article 19 of India's Constitution to ensure that they are consistent with international human rights law.

If Indian legislators are reluctant to do so, the Supreme Court could interpret the exceptions set out in the Constitution narrowly, and invalidate, or restrictively interpret, laws that have a negative impact on the right to freedom of expression. This would reduce pressure on a system that remains chronically overburdened and inaccessible.

## A) THE INDIAN CONSTITUTION

### ARTICLE 19 AND BREADTH OF EXCEPTIONS

Article 19(1)(a) of the Indian Constitution guarantees freedom of speech and expression as a fundamental right.<sup>25</sup>

According to Article 19(2), freedom of expression is subject to “reasonable restrictions ... 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.” The overbroad phrasing of these limitations gives the state extensive powers to justify curtailments and unduly restrict freedom of expression.

Article 19(2) lists further exceptions that exceed the scope of the International Covenant on Civil, Cultural and Political Rights (ICCPR), to which India is a state party. The United Nations (UN) Human Rights Committee (HRC), which monitors compliance with the ICCPR, has invited India to clarify its position in light of this discrepancy.<sup>26</sup> In its response to the HRC, India has argued that the ICCPR’s articulation of freedom of expression should be applied so that it conforms with India’s constitutional provisions, even though these are more restrictive:

In India, reasonable restrictions can be imposed on freedom of speech by law in the interests of the sovereignty and integrity of India, the security of the State, friendly relations with foreign States, public order, decency or morality or in relation to contempt of court, defamation or incitement to an offence. Accordingly, at the time of its accession to the Covenant, India explained its position that this provision should be applied in India in conformity with article 19 of the Indian Constitution. Since the consideration of the last report, there has been no change in India’s position in the application of this article in India.<sup>27</sup>

Notably, India has not reported on its compliance with the ICCPR since 1996. Its fourth periodic report, due at the end of 2001, was not submitted even though reports to other treaty-monitoring bodies have been kept up to date.<sup>28</sup>

### INCONSISTENT RULINGS FROM THE SUPREME COURT

For the most part, the Supreme Court of India has a positive record of upholding the constitutional right to freedom of expression,<sup>29</sup> and it is generally seen as independent.<sup>30</sup> The most pressing problem, however, is the widely differing interpretations from one bench to another as to what constitutes a “reasonable restriction” under Article 19(2) of the Constitution.<sup>31</sup>

One of the first cases to address the limits of freedom of expression established considerable judicial discretion in cases where speech had been criminalised for threatening “public order.” In *Ramji Lal Modi v. State of Uttar Pradesh* (1957), a magazine editor was convicted under s.295A

of the Indian Penal Code (IPC), sentenced to 18 months in prison and given a significant fine.<sup>32</sup> *Gauraksha*, the magazine in question, had published an article that was perceived to be offensive by the local Muslim community. The Supreme Court upheld the constitutionality of s.295A, and rejected a narrow interpretation of “public order.” The Court held that speech that tends to provoke disorder fell within the category of impermissible expression.<sup>33</sup> This emphasis on protecting public order and societal tranquility has been echoed by the Supreme Court and other High Courts in subsequent cases.<sup>34</sup>

On other occasions, however, the Supreme Court has substantially departed from *Ramji Lal Modi v. The State of U.P.* In *S. Rangarajan v. P. Jagjivan Ram and Ors* (1989), the film “Ore Oru Gramathile”, which criticised the caste-based reservation policy in Tamil Nadu’s educational institutions, was banned under the *Cinematograph Act*, 1952 on the basis that “the film will hurt the feelings and sentiments of certain sections of the public.”<sup>35</sup> The Supreme Court ultimately ruled in favour of the film’s producer, concluding that criticism of the government and its operations is not a permissible ground for restricting expression.<sup>36</sup> It held that “[t]he State cannot plead its inability to handle the hostile audience problem. It is its obligatory duty to prevent it and protect the freedom of expression.” The Court also stated that freedom of expression and social interests are not of equal weight.<sup>37</sup> Freedom of expression cannot be suppressed unless the anticipated danger is pressing and the expression is “inherently dangerous to public interests.”<sup>38</sup> In this case, censorship would have held freedom of expression to “ransom by an intolerant group of people.”<sup>39</sup>

These conflicting precedents have had a revealing impact on lower courts. In a common law system where judicial precedent binds lower courts, contradictory rulings from the highest court tend to produce confusion since they establish two lines of precedent with conflicting legal tests. In February 2015, for example, the Delhi High Court cited *Ramji Lal Modi v. The State of U.P.* as proof that a law penalising activity that tends to cause public disorder was a reasonable restriction under Article 19(2).<sup>40</sup> As a result, neither individuals nor the lawyers who represent them can predict the outcome of a particular case with any certainty. With such broad judicial discretion at their disposal, judges can cherry-pick the precedents they wish to follow in order to obtain the result they favour. The resulting uncertainty encourages needless litigation.

The Supreme Court’s recent decision striking down s.66A of the *Information Technology Act, 2000* (see “Cyber Offences” below) conducted an extensive review of the jurisprudence on free expression. By invoking proximity, vagueness, overbreadth, and the chilling effect to strike down s.66A, the court implicitly undermined the foundation of the line of cases that restrict free expression. However, the Court did not expressly overturn earlier cases such as *Ramji Lal Modi v. The State of U.P.*, nor comment on the overbreadth of Article 19(2) exceptions.

# IN CONTEXT

## EXCEPTIONS TO ARTICLE 19

In the late 1940s, with Partition still fresh in their minds, India's leaders were "very wary of giving too much room to free speech, civil liberties, due process and religious freedom" when they drafted what would become the 1950 Constitution.<sup>41</sup> Even so, they sought a compromise that would preserve India's multicultural diversity. The resulting document embodied "both the apprehensions and the hopes of the members of the Constituent Assembly ... it being left to the future generations to make sense of its otherwise conservative text."<sup>42</sup>

One debate produced the suggestion that restrictions on fundamental freedom should be "reasonable." Prime Minister Nehru disagreed and the 1948 draft omitted the qualification – which was only added at the insistence of Pundit Thakur Das.<sup>43</sup> In its final version, however, Article 19 of the 1950 Constitution included "reasonable" restrictions, even though these did not apply explicitly to freedom of speech and expression. The 1950 Constitution thus guaranteed the freedom of expression, and its restrictions were confined to defamation, contempt of court, and expression that was indecent, immoral, or undermined the security of the State.

Almost immediately after the Constitution came into force, three state governments moved to restrict free speech. Nehru, who preferred new legislation instead of a Constitutional amendment, sought advice from B.R. Ambedkar, his Law Minister and former Chairman of the Constitution Drafting Committee. Ambedkar advised against removing existing limitations, as a means of preventing the Supreme Court from reading them into Article 19, arguing that speech was already subject to reasonable restrictions for libel, slander, and undermining state security. The Home Ministry recommended that public order and incitement to crime be listed among the exceptions to the right to freedom of speech and it argued for an amendment to permit restrictions "in the interests of the security of the State" and not only when speech aimed "to overthrow" the state.<sup>44</sup>

The 1951 Constitutional amendment therefore "retroactively and prospectively empowered government to impose 'reasonable restrictions' on freedom of expression 'in the interests of the security of the State [replacing the words "tends to overthrow 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'."<sup>45</sup>

The government claimed that the changes were necessary because Article 19 "has been held by some courts to be so comprehensive ... as to permit incitement of murder and other violent crimes."<sup>46</sup> The insertion of "public order" came on the heels of a Supreme Court ruling in the case of *Romesh Thapar*, which invalidated a law that pre-censored speech through press bans in the name of public order.<sup>47</sup> The 1951 constitutional amendment sought to "correct" the Supreme Court's expansive interpretation.<sup>48</sup>

Article 19(2) was further amended in 1963 with the insertion of the words "the sovereignty and integrity of India" as a permissible restriction on freedom of expression.



## B) THE WEB OF LAWS

The root of India's problematic relationship with freedom of expression is the wide array of vague and overbroad laws that enable censorship on any number of grounds. While some of these laws are the product of British colonialism, colonialism cannot shoulder the blame for the subsequent addition of many unduly restrictive laws. The blame for this problem must be placed squarely at the feet of India's politicians and its judiciary.

This section briefly examines some of the most problematic laws. While the report considers both criminal and regulatory laws, it is worth noting that many regulatory offences contemplate stiff penalties, including imprisonment, so that practical distinctions between the two are not always significant.

It is problematic that speech in India can be silenced and the communicator jailed because his or her comments "excite dissatisfaction against the government," "promote disharmony," are "prejudicial to national integration," are "lascivious," are "intended to outrage religious feelings," or are defamatory (sometimes regardless of whether the content is true). In addition, there are numerous regulatory regimes that allow for the censorship of television, the Internet, and films on myriad grounds that effectively amount to the taste and discretion of the executive.

## CRIMINAL LAWS

### "Forfeiture" of publications alleged to violate Penal Code

Section 95 of the *Code of Criminal Procedure* is a good place to start an overview of India's censorship laws.<sup>49</sup> Section 95 empowers state governments to seize and prohibit ("declare forfeited") any publication that "appears" to violate ss.124A, 153A, 153B, 292, 293, or 295A of the *Indian Penal Code* (IPC). Although the government must explicitly state the grounds upon which it issues a forfeiture declaration,<sup>50</sup> the underlying offence alleged need not be proven to, for example, a balance of probabilities in court.<sup>51</sup>

Section 95's power to suppress expression is remarkably wide, and yet the Delhi High Court has held that it does not violate Article 19 of India's Constitution. The Court ruled that, because of India's diversity, it is reasonable to restrict freedom of expression in order to preserve amity between the many different groups.<sup>52</sup> This reasoning is problematic, however, since it does not involve the application of a well-articulated test that can be consistently followed — it effectively leaves s.95 decisions to the whim of local judges.

India's forfeiture regime falls well below best practice in terms of ensuring that there is effective due process before material is seized. Other common law jurisdictions generally require the police to obtain prior judicial authorisation (through a warrant) to seize the offending material.<sup>53</sup> The judge may only issue the warrant where there are reasonable grounds to believe

that the materials violate relevant criminal laws.<sup>54</sup> The person in possession of the offending material, as well as the owner and maker of the material, should also be given the opportunity to contest the seizure.<sup>55</sup> Best practice also dictates that after hearing both sides, the judge may order seizure only if satisfied, on a balance of probabilities, that the material in question violates criminal law.<sup>56</sup> The order itself may be appealed.<sup>57</sup>

### Criminal Defamation: IPC Section 499

Section 499 of the IPC criminalises defamation, which is defined as making or publishing any statement "intending to harm, or knowing or having reason to believe that such imputation will harm, the reputation" of another person (living or deceased), company or association.<sup>58</sup> According to s.500, criminal defamation is punishable by imprisonment of up to two years and/or a fine.<sup>59</sup>

A striking feature of s.499 is that a criminal defamation conviction does not require actual harm to be proven; the intent or knowledge that harm would likely result is enough. Furthermore, no element of malice, or intent to cause harm, needs to be proven.

The IPC includes ten exceptions to defamatory speech, including comments made in good faith about court proceedings and public servants, chastising people over which a speaker has authority (such as a judge censuring the conduct of a court officer), and comments intended to caution third parties about the behaviour of another. The truth of the statements is only a defence to the extent that publication is "for the public good" — a requirement echoed throughout the other exceptions. The qualification means that truth is not a complete defence. Worse still, since establishing that a statement is published for the "public good" is a question of fact, it is left to Courts to make the final decision. This leaves the police with little discretion when deciding whether or not to lay charges.

Criminal defamation is an unreasonable restriction on freedom of expression. In India criminal defamation differs from civil defamation in two important ways:<sup>60</sup> it can result in imprisonment<sup>61</sup> and truth is not a complete defence.<sup>62</sup>

Criminal defamation is particularly problematic because it is often used to silence political speech. In January 2015, charges were laid against a Tamil magazine for alleging that a Minister was involved in corruption.<sup>63</sup> In a December 2014 incident, charges were laid against four BJP leaders engaged in a poster campaign, where the posters depicted local MP Mulayam Singh Yadav and described him as "missing" (from his constituency).<sup>64</sup> The accused were held in custody until they were released by a judge on personal bonds of Rs 50,000 each (approximately US\$800).

When an aggrieved party makes a criminal defamation complaint, the public prosecutor can file the complaint on his or her behalf. This has a chilling effect and "keeps people on the run," says former Attorney General of

India Ashok Desai in an interview for this report.<sup>65</sup> Nikhil Mehra, an advocate practising before the Supreme Court and the Delhi High Court, also observes:

With criminal defamation, people drop the item of speech because the police and state get involved and have the resources to pursue the case, even if the matter is frivolous. The defendant needs to hire lawyers and spend a lot of money but the complainant has the hammer of the state behind them. The complainant spends absolutely nothing and the state will conduct the prosecution on their behalf.<sup>66</sup>

Criminal defamation is used as a weapon not only by individuals, but also by businesses<sup>67</sup> and social groups.<sup>68</sup> Corporations and powerful individuals regularly use the law of defamation to obtain pre-publication injunctions (“gagging writs”) when they wish to suppress inconvenient stories.<sup>69</sup> Criminal defamation cases are prevalent not only because they are inexpensive to launch, but also because the attrition of the legal process makes them all the more intimidating.

This looming threat can have a chilling effect on legitimate criticism of public figures.<sup>70</sup> Judicial refinement of defamation law (both civil and criminal) is rare because cases are often settled out of court.<sup>71</sup> Powerful individuals and companies can exploit the threat or effect of harassing defamation suits to silence bloggers and journalists.<sup>72</sup> This is especially true when writers lack the resources to fight either the government or civil plaintiffs with deep pockets.<sup>73</sup>

# IN FOCUS

## DISSENT ON AIR INDIA

In October 2013, Jitender Bhargava, a former Executive Director of Air India, published an exposé of the mismanagement, cronyism, and “blatant government interference and pillaging” that led to the downfall of India’s national air carrier. *The Descent of Air India* placed much of the blame on former Aviation Minister Praful Patel, a sitting minister at the time of the book’s release.<sup>74</sup>

The fallout was immediate. Bhargava, who regularly appears on TV news channels as an aviation expert, learned that an interview about his book launch had been cut from the evening television broadcast.<sup>75</sup> Magazines and newspapers also gave muted coverage to the launch. Bhargava could not find his book in stores at airports in Delhi and Mumbai. A bookstore owner at an airport informed him that “a lot of pressure had been put on the airport management for not storing and selling the book.”<sup>76</sup> Bhargava and his publisher, Bloomsbury, were named in a criminal defamation complaint lodged by Patel.<sup>77</sup> Bhargava maintained that all claims of falsehood could be defended by documentary evidence, and agreed with his publisher to counter the suit in court.<sup>78</sup>

On the eve of his first court appearance in early January 2014, however, Bhargava was blindsided. Bloomsbury had entered into a deal with Patel in which it agreed to withdraw the book from circulation, pulp remaining copies, and to issue an apology. Bhargava felt that while he could appreciate a change in Bloomsbury’s stance as part of a long term “business strategy”, he was stunned by their attitude because Bloomsbury had arrived at an understanding with Patel without his knowledge or consent. Considering that every charge in the book was backed by documents, Bhargava believes that Bloomsbury had no reason to lose its nerve even if confronted by a powerful minister.<sup>79</sup>

Although Bhargava successfully self-published *The Descent of Air India* as an e-book in March 2014,<sup>80</sup> his legal defence of the defamation suit will likely continue for a long time. Bhargava has already attended court hearings on more than half a dozen occasions because Patel, now no longer a minister, has been seeking repeated adjournments. The next hearing is scheduled for 1 July 2015.

## BLASPHEMY

“These are dark days for the creative class in India.... The lower courts and police are caving in to religious bigots who demand bans on what they don’t want to see and hear.... Publishing houses are capitulating to legal, political and economic pressure.”<sup>81</sup>

**Haroon Siddiqui, emeritus editor of  
*The Toronto Star* editorial page**

Section 295A of the IPC criminalises expression “intended to outrage religious feelings of any class by insulting its religion or religious beliefs.”<sup>82</sup> Although the provision is broadly worded, courts have found that a level of *mens rea* (“guilty mind”) is required in order to convict.<sup>83</sup> However, prosecutors must simply prove an intention to insult, regardless of whether another person is actually insulted. The offence is punishable with imprisonment of up to four years and/or a fine.

Two cases illustrate the use of the provision and, while neither produced a conviction, the time and resources spent fighting the charges were significant and contributed to a chilling effect. In *R. Bhasin v. State of Maharashtra and Marine Drive Police Station* (2010), a book was forfeited under s.95 (discussed above) on the basis of s.295A because it referred to a purported “political world invasion by Muslims.”<sup>84</sup> Three years passed before the High Court ruled on the application to remove the forfeiture, which was denied. During that period, the book remained banned.<sup>85</sup> In *Star India Private Limited v. State of Punjab and Anr*, the court considered a slur used in a television show in reference to Maharishi Valmiki, author of the Ramayana, a seminal Hindu text.<sup>86</sup> The television channel petitioned to have the s. 295A charge quashed at the investigation stage. However, the Punjab and Haryana High Court dismissed the petition and left it to the police or the trial court to determine whether an offence was made out. A year later, the Delhi High Court ruled on the same case with respect to a different charge under the *Cable Television Networks (Regulation) Act, 1995 and Rules*.<sup>87</sup> After a careful analysis of the speech, the Court ruled that the words must be viewed in the context and setting of the episode in which the dialogue occurs, and it found that the speech did not infringe the Rules.<sup>88</sup> The holding appears likely to have application to s.295A cases in the future. Again, however, the court proceedings took nearly two years before they were resolved in favour of the television producer.

# IN FOCUS

## THE CONTROL OF RELIGIOUS NARRATIVES

The decision to remove University of Chicago professor Wendy Doniger’s *The Hindus: An Alternative History* from bookshelves across India in February 2014 made headlines around the world. PEN International and a host of freedom of expression groups spoke out against the decision and called for a reform of ss.153A and 295A of the IPC.<sup>89</sup>

After publication of her book in 2009, bloggers accused Doniger of attacking Hinduism and sexualising Hindus. These objections led to a protest outside the US embassy in Delhi calling for the book to be banned under s.295A of the IPC.<sup>90</sup> In 2010, Dinanath Batra, a member of the far-right organisation Rashtriya Swayamsevak Sangh (RSS) filed a complaint against Doniger and Penguin Group USA, then the parent company of Penguin Books India, claiming that the book breached s.295.<sup>91</sup> Batra then filed a civil suit in 2011. After fighting Doniger’s legal case for four years, the book’s publisher, Penguin Books India, decided to cease publication and withdraw all copies of the book in India as part of an out-of-court settlement with Batra and other complainants.<sup>92</sup> The decision was largely motivated by the fact that the charges were criminal and not civil.<sup>93</sup>

In a public statement Penguin Books noted that, “[T]he Indian Penal Code, and in particular section 295A of that code, will make it increasingly difficult for any Indian publisher to uphold international standards of free expression without deliberately placing itself outside the law.”<sup>94</sup>

Doniger also voiced concerns about India's free expression laws:

I was, of course, angry and disappointed to see this happen, and I am deeply troubled by what it foretells for free speech in India in the present, and steadily worsening, political climate.... I do not blame Penguin Books, India. Other publishers have just quietly withdrawn other books without making the effort that Penguin made to save this book. Penguin, India, took this book on knowing that it would stir anger in the *Hindutva* ranks, and they defended it in the courts for four years, both as a civil and as a criminal suit. They were finally defeated by the true villain of this piece—the Indian law that makes it a criminal rather than civil offense to publish a book that offends any Hindu, a law that jeopardises the physical safety of any publisher, no matter how ludicrous the accusation brought against a book.<sup>95</sup>

Proponents of free speech remain concerned that more publishers will yield to further demands by vocal groups who have the means to effect censorship. In an interview with the authors of this report, founder and director of Teamwork Arts, which produces the Jaipur Literary Festival, Sanjoy Roy presciently warned that the Doniger ban would “open up a Pandora’s box” now that the agitators have “tasted blood.”<sup>96</sup> A few weeks later Batra sent a legal notice to another publisher, Aleph Book Company, reportedly alleging that Doniger’s *On Hinduism* “offended the sensitivities of the Hindu community.”<sup>97</sup> The publisher responded by claiming the book was out of stock and would only be reprinted after independent experts reviewed the objections raised in the notice.<sup>98</sup> Copies of *On Hinduism* have since been reprinted without any alterations.

## “PROMOTING ENMITY”

These laws are a measure of political and social control ... In fact, the state is using the “prevention of disorder” [rhetoric] to enhance control.<sup>99</sup>

**Usha Ramanathan, South Asia Editor of the *Law, Environment and Development Journal*, expert on law and poverty.**

Section 153A of the IPC attempts to preserve “harmony” between a variety of enumerated groups by barring speech and several other acts.<sup>100</sup>

Violations of s.153A are punishable by imprisonment of up to three years and/or a fine. Section 153A(1)(a) is the most pertinent to freedom of expression. It criminalises “words, either spoken or written, or by signs or by visible representations or otherwise, [that] promot[e] or attemp[t] to promote, on grounds of religion, race, place of birth, residence, language, caste or community, or any other ground whatsoever, disharmony or feelings of enmity, hatred or ill-will between different religious, racial, language or regional groups or castes or communities.”

Section 153A has a colourful history. Struck down in 1951 as unconstitutional by the East Punjab High Court, it was rehabilitated after the words “in the interest of public order” were inserted in Article 19(2). The amendment, it was held, was sufficient to save the law from unconstitutionality.<sup>101</sup>

# IN FOCUS

## PK

Released in December 2014, *PK* is an Indian comedy about the adventures of a friendly alien who is new to earth. His innocent questions about people's beliefs force them to reconsider and reappraise those beliefs. Fundamentally, as one reviewer put it, the film is a critique of dogmatism that "ridicules our blind faith in god, and exposes the manipulations of godmen who feed off it for profit."<sup>102</sup> Although critics reviewed the film favourably,<sup>103</sup> its screenings provoked protests and vandalism.<sup>104</sup> Theatres were damaged and the police were needed to prevent one screening from being disrupted.<sup>105</sup>

The film has also become a legal target for Hindu nationalists. The Hindu Front for Justice, based in Lucknow, petitioned the Allahabad High Court to quash the film's certification by the Central Board of Film Certification.<sup>106</sup> The group told *The Hindu* they had filed the petition because "[t]he producer, the director and entire star cast of the movie have made fun of the Hindu religion by misusing the freedom of expression."<sup>107</sup> The Hindu Legal Cell, a new organisation,<sup>108</sup> reportedly filed a criminal complaint against the film's makers under ss.153A and 295A.<sup>109</sup> The First Information Report (FIR), a document prepared by the police upon receiving a complaint, reportedly mentioned the line: "*Jo darta hai vo hi mandir jaata hai*" (or "Those who are afraid, go to temples").<sup>110</sup> Others have also filed FIRs against several individuals involved in the film for "hurting the sentiment of Hindus."<sup>111</sup> The makers of the film were also initially booked under s.292 (discussed below), prior to the film's release.<sup>112</sup>

Thus far the courts have resisted these claims. In August 2014, four months before its scheduled release, the Supreme Court refused to prevent screenings of the film,<sup>113</sup> with Chief Justice RM Lodha reportedly saying, "If you don't like it, don't watch the film. Don't bring religious facets here... These are matters of entertainment. If you restrict it, it will affect others' rights."<sup>114</sup>

Among other arguments, the petitioner had claimed that the film was likely to cause law and order problems. The Delhi High Court rejected this and stated that, in the context of an authorised film screening, such a claim was irrelevant; it is the responsibility of the state to maintain order.<sup>115</sup> The Court added that "a mischievous creation of law and order situation cannot be a ground for interfering with the certification of a film, if otherwise found to be in order."<sup>116</sup> Throughout the ruling, the Court emphasised the importance of freedom of expression, it even noted that: "The present petition is an instance of a growing tendency in the country of intolerance [which] has to be nipped in the bud [lest it] spread like wildfire ..."<sup>117</sup>

Despite these strong affirmations of freedom of expression, FIRs continue to be filed against *PK*, wasting the time and resources of the film's producers, potentially for years.<sup>118</sup>

Section 153A has been used to silence satirical poetry<sup>119</sup> and other forms of speech including film (see *In Focus: PK* above). Commonly it is invoked, in combination with other IPC provisions, by operation of s.95 of the Code of Criminal Procedure (discussed above).

In January 2015, charges under s.153A were laid against Sanjeev Balyan, a BJP Minister who allegedly referred to Azam Khan, a Minister in Uttar Pradesh, as a "terrorist."<sup>120</sup> Notably, the complainant was not Khan but the President of the Samajwadi Party (SP) youth wing who alleged that the comments "hurt the feelings of Muslim community and tried to incite communal passion."<sup>121</sup>

In the same month a similar allegation was made against Telugu Desam leader Nara Lokesh. According to media reports, Lokesh stated in a speech that Chief Minister K Chandrashekar Rao was unfit to be the Chief Minister and that his government has done nothing in the past six months "apart from procuring a new fleet of vehicles for the police and changing the colour of the vehicles in the convoy."<sup>122</sup> According to counsel, the opposing party found the statements "objectionable" and argued they "could affect peace and tranquillity." He requested charges be brought under ss.153A, 504, and 505 of the IPC.<sup>123</sup>

## ASSERTIONS PREJUDICIAL TO NATIONAL-INTEGRATION

Section 153B of the IPC complements s.153A by criminalising "imputations, [and] assertions [that are] prejudicial to national-integration."<sup>124</sup> Violations of s.153B are punishable by up to three years imprisonment and/or a fine.

This provision catches a large variety of expressive acts, including "imputations that any class of persons cannot, by reason or their being members of any religious, racial, language or regional group or caste or community, bear true faith and allegiance to Constitution of India," encouraging or advising that members of a class be deprived of their rights as citizens, or otherwise making an assertion about a class that is likely to cause disharmony or "feelings of enmity" between classes.

Similar to s.153A, this provision is often implemented through s.95 of the *Code of Criminal Procedure* which allows forfeiture of the impugned materials without proof of a crime. Vague language makes s.153B ripe for abuse: the breadth of behaviours potentially caught by the wording of the provision is breathtaking and risks catching legitimate commentary about ethnic and inter-state political problems.

In early 2015, seven young people were arrested under s.153B in Gwalior, in the state of Madhya Pradesh, for displaying a banner that included an image of the Pakistani flag.<sup>125</sup> Details of the incident are scarce, but it appears that a right-wing Hindu organisation filed the complaint.<sup>126</sup> According to quotes carried in the Indian Express, the leader of the organisation would also like to see the youths charged with sedition.<sup>127</sup>

## PUBLIC MISCHIEF

Section 505 of the IPC<sup>128</sup> significantly overlaps with ss.153A (“promoting enmity between groups”) and 153B (“imputations prejudicial to national integration”). This section prohibits expression intended to: cause mutiny within the armed forces, cause public alarm whereby a person may be induced to commit an offence, incite any class of people to commit any offence against any other class of people, or promote enmity between different classes of people. Perhaps the most notable difference between s.505 and ss.153A/153B is the presence of the “intent” requirement in the former.

Higher courts have a reasonably good record of rejecting spurious charges on appeal. However, the fact that public mischief cases are heard by appellate courts suggests that the law is misused by police and withstands constitutional scrutiny before lower courts. For instance, the law was applied in *S. Khushboo v. Kanniammal and Anr.* (discussed below).<sup>129</sup> It is significant that the Supreme Court set aside the decision of the lower court on the basis that the charge sheet did not support even a prima facie case.<sup>130</sup> It demonstrates that the provision can be used by private citizens to lodge spurious complaints against each other. These spurious complaints can undermine individuals’ ability to speak freely, contributing to a chilling effect.

In May of 2014, a student in Bangalore was arrested for public mischief under s.505 and for violating s.66A of the ITA (discussed below) for sending an offensive message on the instant messaging service WhatsApp.<sup>131</sup> According to media reports, the WhatsApp message “showed the final rites of Narendra Modi being performed ... with the caption *Na Jeet Paye Jhooton Ka Sardar — Ab Ki Baar Antim Sanskar* (“A false leader will never win, this time it’s final rites”).<sup>132</sup> The offended party alerted senior BJP leaders in Delhi who advised him to “immediately approach the superintendent of police and file a complaint.”<sup>133</sup>

# IN CONTEXT

## THE RISE OF HINDU NATIONALISM

Although significant throughout the twentieth century, Hindu nationalism only became a formidable political force when the Bharatiya Janata Party (BJP) came to power in the 1998 elections, as part of the National Democratic Alliance (NDA) coalition. Since then, the party has remained the leading voice among the groups loosely associated with the Rashtriya Swayamsevak Sangh (RSS) network, which has coordinated Hindu nationalist political activities for generations. Until a former RSS member assassinated Mahatma Gandhi in 1948, many Hindu Nationalists were members of the Congress party. In the wake of the assassination, however, Congress purged Hindu Nationalist factions from its ranks and the RSS created new groups to maintain its engagement with journalists, unions, students, teachers and other constituencies. It took the RSS several decades to rebuild its political base. Only in the 1980s, did the group, popularly known as the Sangh Parivar (“family”), fully emerge from the shadow of Gandhi’s assassination.

In the 1984 elections, the BJP won just two of 543 parliamentary seats and less than eight per cent of the popular vote. The turnaround that followed owed much to the adoption of a strident *Hindutva* ideology which emphasises “a narrow band of indigenous, foundational texts (Veda, Gita, Ramayana, etc.) ... reinterpreted as containing the seeds of all human culture ... [underlining] the uniqueness and superiority of ‘Hinduness’ [and glorifying] a golden age, before the ‘damage done by the Muslims and the British.’”<sup>134</sup> The party’s support surged in the early 1990s, particularly after a provocative populist campaign to erect a Hindu temple in Ayodhya, Uttar Pradesh. The proposed temple intruded on site of the Babri Masjid mosque, built in 1528 under Babur, the first Mughal emperor. The mosque’s eventual destruction by Hindu nationalist militants in 1992 triggered a wave of Hindu-Muslim violence across the country.

The political tensions produced by the resurgence of Hindu nationalism have highlighted the centrality, and fragility, of freedom of expression in India’s complex secular, multicultural society. Rajeev Dhavan writes:

A new communal politics has [e]merged, [one] devised to intimidate writers, artists, researchers and ordinary people into silence under pain of violence and the destruction of their work and property. ... The Hindu Right beats up and kills people, protests against Valentine’s day, attacks missionaries, prevents films they do not like from being exhibited, imposes social bans on dress and behaviour, prevents beauty pageants from taking place, insists that there must be no display of affection or kissing in public under threat of prosecution, and burns or destroys art, literature, research and heritage. This kind of moral censorship has become a fact of everyday life in India.<sup>135</sup>

## OBSCENITY

Section 292 of the IPC defines as “obscene” anything that “is lascivious or appeals to the prurient interest” or whose effect “tend[s] to deprave and corrupt” those that are likely to read, see or hear it.<sup>136</sup> The section criminalises the creation, sale, distribution, exhibition, import/export etc. of obscene material. The law permits exceptions, including expression that is in the “public good.” Offences are punishable by imprisonment of up to two years and a fine for first-time offenders; repeat offenders are subject to imprisonment of up to five years and a higher fine.

Interestingly, s.292 uses arguably more vague terms than other common law jurisdictions. By defining obscenity as “lascivious or [that which] appeals to the prurient interest” India gives significant discretion to judges to impose their personal morality when considering problematic speech. In Canada, by contrast, obscene publications are more narrowly defined to only include those the “dominant characteristic of which is the undue exploitation of sex, or of sex and any one or more of the following subjects, namely, crime, horror, cruelty and violence ...”<sup>137</sup> Altering India’s definition of obscenity to similarly narrow its scope would be a positive development.

India’s obscenity law is based more on offence than actual harm and remains susceptible to exploitation. In the opinion of constitutional lawyer Bhairav Acharya, obscenity laws have no place in a twenty-first century democratic society.<sup>138</sup> While this statement is at odds with the laws of most constitutional democracies, it reflects the valid concern that overbroad and vague obscenity laws are ripe for abuse. Indeed, examination of the case law reveals that the vague wording of the provision often results in individuals being forced to defend their allegedly obscene expression in court at their own expense.<sup>139</sup> In some cases, the court eventually throws out the cases because the expression is clearly not obscene.<sup>140</sup> However, given the problems with the administration of justice detailed in this report, spurious charges likely contribute to a chilling effect since it may take years before a case is heard by a judge.

## IN FOCUS

### M.F. HUSAIN

*M.F. Husain was one of India’s most celebrated painters, yet he died in London after years of self-imposed exile in Doha, Qatar. His paintings received global recognition<sup>141</sup> and his death prompted former Indian Prime Minister Manmohan Singh to say that the country had suffered “a national loss.”<sup>142</sup> But Husain’s later years were marked by lawsuits, insecurity,<sup>143</sup> and violent attacks on his art.<sup>144</sup>*

On 29 January 2004, Bajrang Dal and Vishwa Hindu Parishad activists attacked the Garden Art Gallery in Surat, destroying several pieces of art by Husain and another artist.<sup>145</sup>

Two years later there were protests in several locations around the country<sup>146</sup> after “*Bharat Mata*”, a painting by Husain allegedly depicting Mother India as a nude woman posed across a map of India, was advertised online. Husain maintained that the painting was untitled when he had originally sold it in 2004, and that other people had given it the new title.<sup>147</sup> Many complaints were made, which were joined by the Supreme Court in 2006 and sent down to the Delhi High Court. These included complaints under ss.292, 294, and 298 of the IPC.<sup>148</sup> Two years later, the Delhi High Court quashed the summons orders and arrest warrants on petition by Husain,<sup>149</sup> but by this time, Husain had fled India. Because of the nature of the petition, the Court did not dismiss the charges themselves.<sup>150</sup> The Court was strong in its pronouncements in favour of Husain: “It is most unfortunate that India’s new ‘puritanism’ is being carried out in the name of cultural purity ... and a host of ignorant people are vandalising art and pushing us towards a pre-Renaissance era.”<sup>151</sup>

Had he remained in India, Husain would not only have become a victim of the vague laws used to silence legitimate expression, but also a casualty of India’s glacial administration of justice. Because charges against him were registered in so many places, Husain would have spent his twilight years answering court summons all over India, rather than deepening India’s artistic tradition. Instead he chose to spend his last days abroad.<sup>152</sup>

Husain’s comments on his situation strike a tragic note: “India is my motherland. I can’t hate my motherland. But India rejected me. Then why should I stay in India?”<sup>153</sup> Salil Tripathi eulogised his departure in similar terms: “Maqbool Fida Husain was Indian. India made him a foreigner.”<sup>154</sup>

In *S. Khushboo v. Kanniammal and Anr.*,<sup>155</sup> a well-known actress made comments in a news magazine regarding the growing prevalence of pre-marital sex among individuals residing in urban parts of India. Criminal charges were filed against her by multiple complainants, including one with nothing more than second-hand knowledge of the interview. The complaints were brought under multiple sections of the IPC, including s.292 and s.505 (public mischief, discussed above). The actress claimed that her statements were protected by the Constitutional guarantee of freedom of expression. The Court held that the complaints lodged against the actress “do not support or even draw a *prima facie* case for any of the statutory offences as alleged.”<sup>156</sup> Although the Court arrived at the correct decision, the misuse of the law in the first instance (and the chilling effects that flow from this) is obvious. From initial complaint to final resolution, the case took five years.

Section 292 has been used recently in a variety of contexts. A magistrate in Jaipur asked police to lay charges under s.292 against the proprietor of World Trade Park (a business and shopping centre) for displaying paintings that depicted nude women on the roof of World Trade Park’s gallery. The petitioner claims the depictions caused him “mental agony.”<sup>157</sup>

## IN FOCUS

### YO YO HONEY SINGH

Despite a successful music career and a substantial media following in India, rapper Yo Yo Honey Singh remains extremely controversial. Some of his lyrics have been described as “misogynistic” and “vulgar” for their depictions of rape and violence.<sup>158</sup>

In December 2014, s.292 was invoked against Yo Yo Honey Singh in Panchpaoli, Nagpur when a complainant alleged that Honey Singh intended to sing obscene songs in an upcoming concert.<sup>159</sup> The police reportedly refused to register an FIR, causing the complainant to appeal the refusal all the way up to the Bombay High Court, which directed that an investigation take place.<sup>160</sup>

Subsequently, the Nagpur police registered charges under ss.292 and 293, along with ss.67 and 67A of the ITA.<sup>161</sup> The latter charges appear to be premised on a claim that the rapper uploaded obscene songs to the Internet.<sup>162</sup> After apparently disappearing for a length of time,<sup>163</sup> Honey Singh appeared before the Panchpaoli police and claimed “that he was in no way involved in uploading the obscene videos.”<sup>164</sup>

Although he was granted bail in December, Honey Singh is not permitted to leave India or “influence any person acquainted with [the] case.”<sup>165</sup> The Bombay High Court has taken an interest in the case, requesting an update before February 18.<sup>166</sup> As this report went to press, the case was ongoing.

## SEDITION: IPC SECTION 124A

“What place does a colonial legacy which [b]elieves that people are bound to feel affection for the state, and should not show any enmity, contempt, hatred or hostility towards the government ... have in a modern democratic state like India?”

**Siddharth Narrain, lawyer and legal researcher at Alternative Law Forum<sup>167</sup>**

Section 124A of the IPC criminalises expression that attempts to incite hatred or excite disaffection towards the government.<sup>168</sup> The maximum penalty is life imprisonment and may also include a fine. “Disaffection” is defined to include “disloyalty and all feelings of enmity.” Speech that expresses disapproval of the government or its administration, but which does not or does not attempt to incite hatred, is not criminalised.

The UN Office of the High Commissioner for Human Rights has criticised overbroad sedition laws, similar to India’s, that do not set out well-defined criteria for sedition and allow authorities to arbitrarily apply such laws to silence dissent.<sup>169</sup> The retention of antiquated legal rules such as sedition laws has also been identified as a key challenge to freedom of expression by the UN Human Rights Council.<sup>170</sup> Other Commonwealth countries have retained, but narrowed, the scope of their sedition laws.<sup>171</sup>

The scope of s.124A was restricted by the Supreme Court in 1962 in *Kedar Nath Singh v. State of Bihar*.<sup>172</sup> The Court found that s.124A infringed the Constitutional guarantee of free expression, but was nevertheless “within the ambit of permissible legislative restrictions.” However, the Court read down the provision by clarifying that the speech must have the “tendency or intention to create disorder, or disturbance of law and order, or incitement to violence.”<sup>173</sup>



# IN CONTEXT

## THE LEGACY OF THE RAJ

When independent India inherited the mechanisms of British censorship, it “preserved, sustained and expanded” the coloniser’s restrictive policies, according to legal scholar Rajeev Dhavan, “assiduously making changes as the common law of the day changed.” Dhavan argues that India did so “partly because it was convenient and partly because successive socialist regimes needed to improve on the imperial example in order to cloak their own infirmities.”<sup>174</sup> No part of the *Indian Penal Code* (IPC), illustrates this repurposing of British censorship better than s.124A, which addresses sedition.

Introduced by the British in 1870,<sup>175</sup> the provision’s phrasing has repeatedly prompted highly restrictive interpretations of what can be said in the public sphere. In 1897, at the first of three famous sedition trials of the *Kesari* newspaper editor Bal Gangadhar Tilak, Justice James Strachey held that reports of the hardship suffered by His Majesty’s subjects during a period of famine and plague could amount to an “incitement to murder” and disloyalty to the Crown.<sup>176</sup> Strachey found that a mere attempt to create ill-will was sufficient grounds for sedition – regardless of the strength of “disaffection” produced, or, indeed, whether any had been produced at all. He expanded the already broad concept of “disaffection” to include “hatred”, “enmity”, “dislike”, “hostility”, “contempt” and other aversions.<sup>177</sup>

The law was amended one year after the Tilak decision, to reflect Strachey’s interpretation. This set the threshold for sedition so low, and gave it such breadth, that Strachey’s opinion has effectively determined the scope of all subsequent readings of s.124.<sup>178</sup> Mahatma Gandhi would later call sedition “[p]rince among the political sections of the *Indian Penal Code* designed to suppress the liberty of the citizen.”<sup>179</sup>

A dozen years after Tilak’s second trial, Gandhi himself faced sedition charges, alongside the proprietor of *Young India* journal. Presciently, he argued: “Affection cannot be manufactured or regulated by the law. If one has no affection for a person, one should be free to give the fullest expression to his disaffection, so long as he does not contemplate, promote or incite to violence.” Gandhi proudly inserted himself into the tradition of Indian patriots convicted for sedition, noting that: “my experience of political cases in India leads me to the conclusion that in nine out of every ten the condemned men were totally innocent. Their crime consisted in the love of their country.”<sup>180</sup>

In 1942, a Federal Court decision raised the threshold for sedition to speech that was not only violent in itself but also attained a level that “must either incite to disorder or must be such as to satisfy reasonable men that that is the intention or tendency.”<sup>181</sup> Legislative reform seemed imminent, but five years later the Privy Council reverted to Strachey’s standards in *King Emperor v. Sadashiv Narayan Bhalerao*. Quoting an earlier case, Justice Thankerton held that s.124’s phrasing “[as] plainly as possible makes the exciting or attempting to excite certain feelings, and not the inducing or attempting to induce to any course of action such as rebellion or forcible resistance, the test of guilt.”<sup>182</sup> Twenty years later, a similar reversion occurred in *Kedar Nath Singh v. State of Bihar*, when the Supreme Court overturned a decision of the High Court of Allahabad that raised concerns that the provision’s restrictions on free speech were “capable of striking at the very root of the Constitution.”

An analysis of India’s sedition law published by the Bangalore & Alternative Law Forum’s Centre for the Study of Social Exclusion and Inclusive Policy (CSSEIP) in 2011 observes that “while the [Supreme Court] has stayed firm in its opinion on sedition from *Kedar Nath* onwards, the lower courts seem to continuously disregard this interpretation of the law.”<sup>183</sup> This adoption of earlier, more severe standards is suggestive of the ways that India’s legal system has been used to restrict free speech.

Remarking on the “striking similarities” between Tilak’s challenges to the moral authority of the state, and arguments raised by “contemporary targets” like Arundhati Roy, the CSSEIP study reports that sedition “is clearly being used to target specific people who choose to express dissent against the policies and activities of the government” and it has been used “to harass and intimidate media personnel, human rights activists, political activists, artists, and public intellectuals despite a Supreme Court ruling narrowing its application...”<sup>184</sup>

Section 124A has been used as a tool to silence political dissent and create a chill on freedom of expression. In 2012, Aseem Trivedi, a prominent anti-corruption campaigner, was arrested under s.124A after he published a series of cartoons that satirised India's national symbols.<sup>185</sup> In one cartoon, Trivedi replaced the three lions in India's national emblem with three wolves, their bared fangs dripping with blood, above the caption "Corruption Triumphs" instead of "Truth Alone Triumphs."<sup>186</sup> Another cartoon depicted the Indian parliament as a giant toilet bowl. Trivedi was released after the Maharashtra government dropped the charge of sedition.

Public interest litigation (PIL) seeking to clarify the parameters in which the police can invoke the charge of sedition was initiated with respect to Trivedi's arrest. The Bombay High Court heard the PIL and held that the police cannot arbitrarily invoke s.124A: "comments, however strongly worded, expressing disapprobation of actions of the Government, without exciting those feelings which generate the inclination to cause public disorder by acts of violence, would not be penal."<sup>187</sup> The Court also accepted a set of guidelines proposed by the Maharashtra Home Department, which will be issued to the police. According to the proposed guidelines, obscenity or vulgarity by itself should not be a factor in deciding whether a case falls within the purview of sedition, and a legal opinion must be obtained from the Law Officer of the District and the State's Public Prosecutor prior to sedition charges being laid.

In 2011, an appeal against a lower court decision that dismissed a s.124A case was brought by an individual who believed that a "tweet" posted by the Chief Minister of Jammu and Kashmir was seditious.<sup>188</sup> The tweet allegedly criticised a resolution passed by the Tamil Nadu Assembly seeking clemency for the individuals who carried out the assassination of Rajiv Gandhi: "... if the [Jammu and Kashmir State] assembly had passed a resolution against the death sentence given to Guru [convicted of attacking the Indian Parliament in 2001] as was done by the Tamil Nadu assembly for the killers of Rajiv Gandhi, the reaction would not have been as muted as it is now."<sup>189</sup> The appeal was dismissed.

Section 124A has also been used against activist Dr. Binayak Sen, a vocal critic of the state government's policies against Maoist rebels in Chhattisgarh.<sup>190</sup> It was alleged that Sen passed letters to imprisoned Maoist ideologue Narayan Sanyal during his visits, the purpose of which was to provide medical assistance to Sanyal, at the Raipur Central Jail.<sup>191</sup> Even though Sen's visits were supervised by police authorities, a Raipur district court convicted Sen on sedition charges and sentenced him to life imprisonment on 24 December 2010.<sup>192</sup> Forty Nobel Laureates signed a petition expressing their dismay in the "unjust life sentence" handed down, and asking for his release.<sup>193</sup> Dr. Sen eventually secured bail at the Supreme Court.<sup>194</sup>

## IN FOCUS

### CRACKDOWN ON "SEDITION" NUCLEAR PROTESTERS

In July 2012, several UN Special Rapporteurs, including the Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression (hereafter referred to as the Special Rapporteur on Freedom of Expression), received information regarding the harassment of individuals protesting against the construction of the Kudankulam nuclear power plant in Tamil Nadu.<sup>195</sup> According to the information received, between 10 September 2009 and 23 December 2011, 6,800 protestors were charged with "waging war against the State" and/or "sedition" under ss.121 and 124A of the IPC.<sup>196</sup> Upon receipt of this information, the Special Rapporteurs drafted a joint urgent appeal to the Permanent Mission of India to the UN.<sup>197</sup>

A second related urgent appeal was issued shortly after on 28 September 2012 concerning new allegations of harassment against anti-nuclear protesters.<sup>198</sup> A peaceful protest was held on 9 September 2012 and it was alleged that the police engaged in threats and ill-treatment toward the protesters in an attempt to disperse the crowd.<sup>199</sup> More than 25 protestors were also subsequently arrested on charges including sedition.<sup>200</sup>

The State replied on 8 November 2012 and 8 August 2013, respectively, and stated that the alleged incidents were baseless.<sup>201</sup> The State noted the sensitivity of the issue, as well as the restraint and lawful actions that the police exercised,<sup>202</sup> but did not respond to alleged violations of specific human rights as requested in the urgent appeal.

Writer Arundhati Roy has also faced allegations of sedition for speaking at a seminar on Kashmir held in Delhi in 2010.<sup>203</sup> At the seminar, Roy reportedly said, "Kashmir has never been an integral part of India. It is a historical fact. Even the Indian government has accepted this."<sup>204</sup>

While the government decided against filing charges against Roy for sedition,<sup>205</sup> the police registered an FIR under the direction of the metropolitan magistrate judge Navita Kumari Bagha.<sup>206</sup> The magistrate judge's order has been criticised for failing to cite the Supreme Court's landmark judgment in *Kedar Nath Singh v. State of Bihar*.<sup>207</sup> The police proceeded with the investigation, but there have been no further developments on the case. Roy's response to the allegations of sedition brought against her could serve as a *cri de coeur* for the many others who

have faced harassment on similarly specious grounds: “Pity the nation that has to silence its writers for speaking their minds. Pity the nation that needs to jail those who ask for justice, while communal killers, mass murderers, corporate scamsters, looters, rapists and those who prey on the poorest of the poor, roam free.”<sup>208</sup>

## REGULATORY LAWS

The relationship between criminal and regulatory offences can be quite complex. Generally, regulatory offences are “directed at circles of actors involved in specific spheres of commercial or professional activity.”<sup>209</sup> Often, the enforcement of regulatory laws is handled through dedicated arm’s-length agencies and involves different procedural safeguards (e.g. different evidentiary requirements, different rights afforded to defendants, etc.).<sup>210</sup> Significantly, administrative offences do not result in imprisonment.<sup>211</sup>

India departs from this definition in two significant ways. First, many of the regimes discussed below, including the *Foreign Contributions (Regulation) Act*<sup>212</sup> and the *Cinematograph Act*,<sup>213</sup> prescribe imprisonment as a penalty. Second, oversight for compliance with the regulations is often left to regular police forces or agencies which face the risk of acting as a proxy for the government. Critics have raised concerns over the independence of regulatory bodies such as the Central Board of Film Certification and the political affiliations of its members.

The following regulatory laws contain provisions designed to silence free expression. Like the penal laws, these laws can cause endless litigation. Many of these laws generate access to justice challenges that may be insurmountable for some defendants, especially those who cannot afford legal representation. Again, this is especially significant since violations can result in imprisonment.

## CYBER-OFFENCES

We need to keep a close eye on the Information Technology Act because it could be used to rob the one truly free space left.

**Siddharth Varadarajan, former editor of *The Hindu***<sup>214</sup>

The *Information Technology Act, 2000*<sup>215</sup> (ITA) was originally enacted to promote e-commerce and e-government, and to amend criminal and evidence laws to take account of electronic transactions.<sup>216</sup> The ITA was overhauled without legislative debate in 2008 partly in response to the widening use of the Internet.<sup>217</sup>

The amendments expand the scope of the Act to include a number of cyber offences.<sup>218</sup> For example, s.69A of the ITA permits the central government to take down a website or censor its content in the interests of the “sovereignty and integrity of India,” “security and defence of the country,” “friendly relations with foreign states,” “public order,” or

to “prevent incitement to the commission of cognizable offence.”<sup>219</sup> Intermediaries who fail to comply with the government’s take-down “requests” are liable to seven years imprisonment, and/or a fine.<sup>220</sup>

The *Information Technology (Intermediaries Guidelines) Rules, 2011* (“Intermediaries Guidelines”),<sup>221</sup> have effectively allowed private actors to censor content on the Internet. Rule 3(4) of the Intermediaries Guidelines requires intermediaries such as Internet Service Providers, Facebook, and Google to proactively monitor and censor offending content. All intermediaries are required to take down offending content within 36 hours of receiving a complaint. The intermediary is not required to inform the user who posted the content about the complaint, and the rules do not outline a process for the creator to respond to the complaint.

India holds the dubious distinction of making the highest number (over 10,000) of successful block requests to Facebook in 2014.<sup>222</sup> Similarly, according to the latest Google Transparency Report, the Indian government makes more requests for information than any other nation except the United States. From January to June 2014, Google received a total of 2,794 requests for user data from various state actors from the executive, judiciary, and police to remove online content on various grounds such as religious offence or obscenity.<sup>223</sup>

Until a recent Supreme Court decision struck it down, s.66A was one of the most troubling provisions in the ITA. Section 66A penalised the electronic communication of information that is “grossly offensive or has a menacing character,” intended to cause “annoyance or inconvenience,” and/or is known to be false, but is sent for the purpose of “causing annoyance, inconvenience, danger, obstruction, insult, injury, criminal intimidation, enmity, [and] hatred or ill will...” The list was alarmingly comprehensive.

Section 66A gave extremely broad powers to the police to censor online expression. That is because s.66A was treated as a “cognizable” offence, which gives the police exclusive jurisdiction to investigate and arrest without seeking a warrant from a magistrate.<sup>224</sup> The student mentioned above who sent an allegedly offensive message on WhatsApp was also charged under s.66A of the ITA.<sup>225</sup> A similar charge was laid against a shipbuilder who posted on Facebook that Prime Minister Modi, if elected “would unleash a holocaust.”<sup>226</sup> In April 2012, Jadavpur University Professor Ambikesh Mahapatra was arrested in West Bengal for circulating an email with pictures that poked fun at the state’s chief minister.<sup>227</sup> A substantial number of similar cases appear in media reports.<sup>228</sup>

As a result of incidents like these public interest litigation was launched which argued that s.66A is so vague and overbroad that it is highly susceptible to abuse and therefore violates Article 19 of the Indian Constitution.<sup>229</sup> The litigation argued that phrases such as “causing annoyance”, “grossly offensive”, and “menacing character” are so vague that judgments based on objective standards are, for all practical purposes, impossible. In an interview for this report, Bombay High Court Judge Gautam Patel described the breadth of the provision as “legislative carpet bombing.”<sup>230</sup>

# IN FOCUS

## YOUTHS ARRESTED OVER FACEBOOK POST

In November 2012, Shaheen Dadha and Renu Srinivassan were arrested in Maharashtra for a Facebook post criticising the Mumbai shutdown after the death of Bal Thackeray, former chief of the Shiv Sena political party. The girls were arrested following a complaint from a local Shiv Sena leader.<sup>231</sup>

The incident drew international attention and a nation-wide protest forced the government to review the s.66A charges, which were eventually dropped. The two arresting police officers were suspended.

The central government then issued an advisory to all state governments requiring prior approval from senior police officers for all arrests under s.66A.<sup>232</sup> In May 2013, the Supreme Court directed all states to carry out the government's advisory, making it mandatory for police to seek clearance from high-ranking officials.<sup>233</sup> While the advisory requires arrests to be approved by senior level officials, some critics continue to be concerned with the threat of misuse by police, regardless of their seniority.<sup>234</sup>

Section 66A has subsequently been repealed. See below.

On 24 March 2015, the Supreme Court struck down s.66A on the basis that it was too vague and overbroad to be considered a reasonable restriction under the Constitution's Article 19(2). In the Court's words: "Section 66A is cast so widely that virtually any opinion on any subject would be covered by it."<sup>235</sup> Notably, the Court observed that the overbreadth of the provision would "have a chilling effect on speech."<sup>236</sup> The ruling sends a strong signal to lower courts about considering the consequences of vague and overbroad laws when hearing freedom of expression cases.

While the Supreme Court's ruling was helpful insofar as it struck down s.66A, it should be noted that other laws, including many of the IPC provisions cited by this report, capture the same incidents. Thus, while a charge under s.66A is no longer possible, the same expression may result in charges under, for example, s.153A.

Unfortunately, in the same ruling, s.69A was upheld. Section 69A allows the government to direct intermediaries to "block for access by the public ... any information generated, transmitted received, stored or hosted in any computer resource" on the grounds specified in Article 19(2) of the Constitution. In the Court's view, the provision contained adequate "safeguards" to ensure that the blocking power is not misused as a means of censorship.<sup>237</sup> This ignores the fact that the review committee charged with determining whether content should be blocked is not a judicial body and is not independent so as to preclude government interference. Finally, the rules covering the operation of s.69A do not provide an appeals process.<sup>238</sup>

Mass surveillance is also authorised by s.69 of the ITA. Section 69 permits the authorities to "intercept, monitor or decrypt or cause to be intercepted or monitored or decrypted any information generated, transmitted, received or stored in any computer resource." The implementation of the Central Monitoring System (CMS), a wide-ranging surveillance program, heightens concerns about digital censorship and surveillance. The CMS operates by forcing Telecom Service Providers to install automated forwarding hardware into their data storage facilities.<sup>239</sup> The effect is that individuals' data is automatically forwarded through to the CMS.<sup>240</sup> The CMS was created without Parliamentary authorisation.<sup>241</sup> Sunil Abraham, director of India's Centre for Internet and Society, quoted in *Time*, called the CMS an "abuse of privacy rights and security-agency overreach."<sup>242</sup>

The ITA has been described by Indian experts as having "created an unclear regulatory regime that is non-transparent, prone to misuse, and that does not provide remedy for aggrieved individuals."<sup>243</sup> The CMS is particularly worrying in the context of a trend towards increasing online censorship. Freedom of expression and individuals' privacy are inextricably linked.<sup>244</sup> If individuals know that their expression is being monitored, they may be less willing to speak out against the government.

The UN recognises the value of a free Internet as a tool for the exercise of freedom of expression.<sup>245</sup> Then-Special Rapporteur on Freedom of Expression, Frank La Rue, emphasised the importance of access to online content and notes that, as a general rule, "there should be as little restriction as possible to the flow of information on the Internet, except under a few, very exceptional and limited circumstances prescribed by international law for the protection of other human rights."<sup>246</sup> Further, a website cannot be restricted on the basis that it has published or disseminated material that is critical of the government.<sup>247</sup>

# VOICES

## APAR GUPTA: REPEALING SECTION 66A

On 24 March 2015, in *Shreya Singhal v. Union of India*, the Supreme Court of India held s.66A of the *Information Technology Act, 2000* (ITA) to be unconstitutional. Section 66A criminalised offensive online speech and, due to its vague and ambiguous phrasing, was routinely abused to arrest academics, students, artists and even political dissidents. This caused widespread concern and provoked public demands for the law to be scrapped.

The *Shreya Singhal* judgement was, in part, due to the efforts of several petitioners who made common cause. Civil liberties organisations, a parliamentarian, private companies and industry associations joined the original petitioner to argue that various ITA provisions created unreasonable restrictions on online speech. A large part of the Court's opinion was informed by written submissions made by the civil rights group, People's Union for Civil Liberties (PUCI). These focussed on case law concerning the proximity of a legal restriction to the "reasonable restrictions" set out in Article 19(2) of the Indian constitution, and they formed one of the main legal grounds on which s.66A was deemed unconstitutional.

In many ways the case is historic. After several years, if not decades, the Supreme Court has held a provision of a parliamentary statute to be unconstitutional when it conflicts with the right to freedom of speech and expression. The judgement will likely serve as an influential precedent in future debates on digital liberties in India. For this reason it is important to understand the legal arguments and the reliefs that were sought under them.

The petitioners asked for three distinct provisions to be struck down and, in case this could not be done, for safeguards to be placed on them. In addition to impugning s.66A they challenged provisions of the *Information Technology (Procedure and Safeguards for Blocking of Access of Information by Public) Rules, 2009* and the *Information Technology (Intermediaries Guidelines) Rules, 2011*, arguing that these unreasonably restricted the fundamental right to freedom of speech and expression set out under Article 19(1)(A) of the Constitution. They further argued that the restrictions could not be relaxed merely because of a difference in media.

The crux of the argument was that restrictions that exceed constitutional safeguards cannot be made into law merely because the content is published through the Internet instead of being broadcast on television. The court accepted this argument and indicated in its judgement that, "we do not find anything in the features outlined by the learned Additional Solicitor General to relax the Court's scrutiny of the curbing of the content of free speech over the Internet." Hence, even though the legislature can make laws specifically for the Internet, such restrictions cannot be legally tolerated on a relaxed reading of constitutional guarantees.

The case also gave the Court an opportunity to state clearly that take-downs of online content — under s.79(3)(b) of the ITA — require a judicial or an executive order. Earlier take-downs were triggered by legal notices and private complaints, without any legal determination by a court or a state authority. Prior to this judgement the ITA Rules facilitated take-downs whenever individual complaints were issued against any online platform or blog hosting service. This effectively promoted a form of private censorship. If such websites had served only as passive conduits for information posted by users and failed to remove the disputed content, they could have been held liable for abetment in court. The *Shreya Singhal* judgement reformed this anomaly and, recognising the threat of a chill, held that censorship requires a valid, legal order and not just a private complaint.

The petitioners did not succeed entirely, however. Despite being challenged, the Blocking Rules, which mandate secrecy in the adjudications process, remain unchanged. The judgement does not seem to consider them problematic, reasoning that contentious blocking orders can be legally challenged. It further states that the safeguards used for book censorship cannot simply be reused to determine whether websites should be blocked.

Despite these reservations the *Shreya Singhal* judgement underscores India's constitutional commitment to protecting civil liberties. These liberties have recently been enhanced by the Internet — a technology that gives voice to dissent. As Internet use increases in India, there will undoubtedly be further attempts to control and restrict the medium. Hence the importance of the *Shreya Singhal* decision as a future safeguard for the digital freedom of hundreds of millions of Indian citizens.

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## MOVIE CENSORSHIP: CINEMATOGRAPH ACT, 1952

2013 marked the 100th anniversary of Indian cinema. Films play a distinct and important role in Indian contemporary culture. Indeed, the cinema is the central and most popular form of entertainment for the country's 1.23 billion people.<sup>248</sup> Through films, the Indian public are exposed to a diversity of viewpoints.

Commonly known as the "Censor Board", the Central Board of Film Certification (CBFC),<sup>249</sup> has the power to censor parts of films<sup>250</sup> or to ban them outright, not only for "decency or morality" but also ostensibly to maintain public order and prevent crime.<sup>251</sup> Section 5B(1) of the *Cinematograph Act, 1952* ('1952 Act') gives the CBFC broad powers to refuse certification.<sup>252</sup> In reality, many films are banned by state governments under s.13(1) of the 1952 Act, which gives central or state governments the power to suspend the exhibition of a film in a particular state, even after the CBFC has certified the film, as long as the film's public exhibition is "likely to cause a breach of peace."<sup>253</sup>

Concerns about the independence of the CBFC, a subsidiary of the Ministry of Information and Broadcasting, are similar to those raised in the area of television broadcasting, discussed below. The CBFC consists of a chairperson and number of board members, all of whom are appointed by the government. The composition of the Board and its concentration of power in the hands of a small number of people have been criticised.<sup>254</sup> The Board is not independent of the government, but is instead controlled by the Ministry of Information and Broadcasting.<sup>255</sup> In January 2015, former Chairperson Leela Samson and nine CBFC members resigned, citing lack of autonomy and interference from the government as reasons.<sup>256</sup> The resignation letter sent by the CBFC members also notes the "cavalier and dismissive manner" in which the Board is treated by the government.

Courts view film as a powerful form of expression that sometimes must be limited to preserve peace and other social values.<sup>257</sup> Nevertheless, the *Cinematograph Act* allows the Board and central government to censor films with relative impunity. The Act's vague wording coupled with the severe penalties to which someone showing a banned movie may be liable (including imprisonment for a term of at least three months, per s.7 of the Act), is a contributing factor to an overall chilling effect on the types of ideas that are expressed through film.

As this report was being prepared, the decision to deny certification to two films was being reviewed by the Delhi High Court. *Kaum de Heere* allegedly glorifies the murder of Indira Gandhi, while *Textures of Loss* is a documentary depicting the impact of violence on people in Kashmir.<sup>258</sup> Another film, *The Messenger of God*, featuring a godman playing himself in the film was denied certification under the Act by the CBFC, but the order was reversed by the Film Certificate Appellate Tribunal.<sup>259</sup> The reversal triggered the resignation of a number of CBFC members and the film has been protested by a number of groups.<sup>260</sup>

Importantly, even where films are approved by the CBFC, threats of violence surrounding controversial screenings and the state's inability (or refusal) to protect filmmakers have a chilling effect. Documentary filmmaker Anand Patwardhan observes: "Theoretically a censor board clearing ought to give you immunity. When groups come up and threaten with violence, the law is clear that if a film is certified, the police have the responsibility to protect the screening."<sup>261</sup> Where state authorities abdicate their role in offering protection for film screenings, producers may self-censor for fear of violence.

## VOICES

### SIDDHARTH VARDARAJAN: THE POLITICISATION OF THE FILM CENSOR BOARD

Despite India producing more movies every year than anywhere else in the world, the certification of films for public screening inside the country has always been an arbitrary and somewhat politically fraught process. The Central Board for Film Certification (CBFC) derives its mandate from the 1952 Cinematograph Act, which empowers the central government to establish a censor board to vet films for public exhibition. The fact that appointments to the CBFC are made by the government, rather than by the industry or a body that is at arm's length from the government has meant the use of the board as a means of disbursing political patronage and as a vehicle for furthering the ideological, cultural or political agenda of the ruling party.

As if that were not bad enough, the structure of the CBFC — with regional committees that are often beholden to provincial-level politicians, woefully inadequate funding and the lack of professional input — has turned film certification into a game of roulette in which movies with similar content can end up with entirely different outcomes.

The politicisation of the CBFC has reached a new high-water mark under Narendra Modi, whose government has filled its ranks with individuals affiliated with the ruling party in one way or the other. The new chairman, Pahalaj Nihalani is the man responsible for a hagiographical election song 'Har har Modi' and at least one of the new members, Ashok Bhat, is on the record saying the critically acclaimed film, Haider, an adaptation of Hamlet set against the backdrop of the troubles in Kashmir, should not have been certified because it shows the Indian Army in a bad light.

The social and political conservatism of the CBFC under Nihalani became obvious from day one. He circulated a list of words that would not be allowed in movies under his watch, including, curiously “Bombay”, the old name of India’s largest city, because Hindu nationalists object to any name being used other than “Mumbai.” In March 2015, a film, *Unfreedom*, with a strong lesbian theme, was denied a certificate and effectively banned on the grounds, *inter alia*, that it might “ignite unnatural passions.” Another film with a theme India’s political right-wing will find awkward – Shonali Bose’s award-winning *Margarita, with a Straw*, was cleared for screening after the director agreed to make one cut in a version she had already toned down in anticipation of trouble with the censors.

A case filed in the Delhi High Court in February 2015 by documentary filmmaker Pankaj Butalia has sought a complete revamp of the film certification process. Butalia is challenging the denial of a certificate to his *The Textures of Loss*, a documentary on Kashmir, following his refusal to make cuts as required by the CBFC. According to Saurav Datta, among the cuts ordered is one from the film’s opening scene “in which Butalia says that in 2010, the armed forces used ‘disproportionate force’ in quelling a ‘stone-throwing intifada’ by agitated Kashmiris, most of them youth and teenagers. The latter pelted stones to vent their anger and frustration; the soldiers replied with a volley of bullets, which claimed 102 lives. [The CBFC] wanted ‘disproportionate’ to be beeped out, because otherwise it would ‘demoralise the Army,’ rendering them incapable of properly fighting the militants.”<sup>262</sup>

Butalia is challenging not just the denial of a certificate for his film but the entire set of guidelines which the CBFC uses. With Indian filmmakers pushing the boundaries of experimentation with more realistic themes and new modes of storytelling, the last thing the movie industry needs is a conservative censor board. While no one expects the court to go in for a drastic overhaul of the film certification process, more than enough has emerged about the arbitrariness and even corruption it has bred for the government to pretend it can get away with a ‘business as usual’ approach.

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## CABLE TELEVISION REGULATIONS

The *Cable Television Network (Regulation) Act, 1995*<sup>263</sup> and the associated *Cable Television Network Rules* (“CTN Rules”)<sup>264</sup> govern broadcasters and the content of television programs. Together, the Act and the Rules prohibit any broadcast that “offends against good taste or decency,”<sup>265</sup> “contains criticism of friendly countries,”<sup>266</sup> “contains anything against maintenance of law and order,”<sup>267</sup> or “contains aspersions against the integrity of the President and judiciary”<sup>268</sup> among other offences. The list of prohibited content is extensive and the Act has been wielded against individuals for broadcasting material that a member of the public found offensive.<sup>269</sup> Suspected violation of the Act and the CTN Rules permits the police to seize equipment without a preliminary inquiry.<sup>270</sup>

Another troubling aspect of Indian law is that television regulation is enforced by the executive rather than by an independent regulatory body.<sup>271</sup> The Delhi High Court has called this arrangement “anathema in a democratic set up inasmuch as it would put broadcast under the direct control of the state.”<sup>272</sup> This echoes an earlier Supreme Court judgment that found “the broadcast media should be placed under the control of public, i.e., in the hands of statutory corporation or corporations, as the case may be. This is the implicit command of Article 19(1)(a).”<sup>273</sup>

The necessity of independent regulators is well established internationally. In his report to the then UN Commission on Human Rights, then-Special Rapporteur on Freedom of Expression Abid Hussain notes that public broadcasting should be protected from political and commercial interference through the creation of an independent governing body.<sup>274</sup> The Inter-American Commission on Human Rights echoes a similar view in its *Declaration of Principles on Freedom of Expression*: “The exercise of power and the use of public funds by the state... with the intent to put pressure on and punish or reward and provide privileges to social communicators and communications media because of the opinions they express threaten freedom of expression, and must be explicitly prohibited by law.”<sup>275</sup>

A recent decision of the Madras High Court also rejects the ability of the Court to pre-censor materials broadcast on private television networks. The complainants had sought an order directing the Electronic Media Monitoring Centre (a division of the Ministry of Information and Broadcasting) to regulate the content of nearly every major broadcaster in the country and prohibit programs “glorifying violence,” showing sexual violence, or showing “half-naked girls” dancing.<sup>276</sup> However, while the Court held that determinations of what could be regulated was better left to the executive, it missed the opportunity to emphasise the need for an independent regulatory body.

# IN FOCUS

## INDIA'S DAUGHTER

*India's Daughter*, the BBC documentary directed by British filmmaker Leslee Udwin, details the 2012 gang rape and murder of 23 year-old student Jyoti Singh.<sup>277</sup> The documentary featured an interview with Mukesh Singh, one of the men convicted of the gang rape, and was set to air in India and in the United Kingdom on 8 March 2015 to mark International Women's Day.

Attempts to silence the documentary were swift. Even before a screening was scheduled FIRs had been issued under ss.505, 504, 505(1)(b), and 509 of the IPC, and s.66A of the ITA.<sup>278</sup> The government sought, and was granted, an injunction on showing the documentary in India,<sup>279</sup> citing possible law and order problems.<sup>280</sup> Meanwhile, the BBC screened the documentary in the UK four days ahead of the original release date.

A government advisory was sent to private television channels on 3 March 2015, cautioning broadcasters not to telecast the documentary.<sup>281</sup> The advisory specifically stated that the telecast of certain excerpts of the documentary would attract liability under the CTN Rules. Lawyer Apar Gupta explains that even though “[t]he advisory is extra-legal – in the sense of a letter of caution ... [t]here is a three- and five-strike rule ... [t]hat's why everyone apologises or complies for future broadcasts, hoping no formal violation is found.”<sup>282</sup>

In defiance of the ban, a screening of the film was held in the village in which four of the now-convicted rapists lived. Police filed an FIR against an unnamed individual in response.<sup>283</sup> Indian television network NDTV halted its programming to protest the ban, during the timeslot that had been assigned to the documentary.<sup>284</sup>

The documentary has garnered attention worldwide, due in part to the ban. After the ban was put in place, the documentary began to proliferate on YouTube. The BJP Minister of Parliamentary Affairs, Venkaiah Naidu, told Parliament: “We can ban the documentary in India but there is a conspiracy to defame India and the documentary can be telecast outside. We will also be examining what should be done.”<sup>285</sup> The government requested that Google Inc., YouTube's owner, block the documentary in India, and some links were taken down.<sup>286</sup> However, *The Hindu* reports that this exercise has turned into “a cat-and-mouse game”, given the ease in which videos are widely shared in the digital age.<sup>287</sup>

PEN Canada and PEN International, among other civil society organisations, have called on the Indian government to lift the ban and to release anyone held for screening *India's Daughter*.

As this report went to press, India's ban on telecasting the documentary remained in place.

## CONTEMPT OF COURT

To jettison freedom of expression in the name of immunising fair judicial hearing is a poor compliment to justices, as if they are so soft and feeble to be swayed in their judgments by passing media winds.

**Justice V.R. Krishna Iyer, former Supreme Court of India judge<sup>288</sup>**

The *Contempt of Court Act, 1971* punishes “criminal contempt” including expression that scandalises or “tarnishes” the image of the court.<sup>289</sup> Contempt of court proceedings occur by way of summary procedure, which means that accused persons do not receive the same due process protections as they would if they were charged criminally.<sup>290</sup> Contempt charges are also adjudicated by judges from the same court in which the matter has arisen.<sup>291</sup> The combination of judges examining alleged offences against their colleagues, and tasked with interpreting vague terms like “scandalise,” “tarnish,” and “public interest” is a recipe for misuse. Indeed, the Supreme Court of India has described the court's contempt powers as “a vague and wandering jurisdiction with uncertain frontiers, a sensitive and suspect power to punish vested in the prosecutor.”<sup>292</sup>

According to Abhinav Chandrachud, a legal academic and son of the late Supreme Court Justice Y. V. Chandrachud, contempt cases have a “disturbing” prevalence in Indian court dockets.<sup>293</sup> The law is worded so vaguely that, in its current form, it provides no safeguards against those who misuse it to silence legitimate critics of the judiciary. In proceedings, judges rarely consider balancing Indians' constitutional guarantee of freedom of expression against the provisions of the *Contempt of Court Act*.<sup>294</sup>

Former Supreme Court Justice Ruma Pal calls the law a “great silencer,” acknowledging that any public discussion of questionable judicial conduct has been suppressed through it.<sup>295</sup> Excesses include contempt cases lodged against police officers “who dare to hold up judges' cars while controlling the flow of traffic,”<sup>296</sup> and a judge who held court on a train platform, charging a terrified railway official with contempt for not doing as he asked.<sup>297</sup>

These hypersensitive attitudes have created a chill on candid press accounts of court proceedings.<sup>298</sup> Some newspapers still observe a policy of not attributing the names of individual judges to what is said in court, opting instead for anonymous references.<sup>299</sup> It is noteworthy that in 2012 retired Supreme Court Justice Katju called for amendments to the Act in the name of democracy.<sup>300</sup>



In January 2015, the Meghalaya High Court registered a contempt of court case against two newspapers and a local District Council chief for making “derogatory, defamatory and contemptuous” comments about a recent judgment. According to the *Assam Tribune*, the chief allegedly stated that “he suspected a ‘hidden agenda against the indigenous community’ behind the judgment.”<sup>301</sup> The judge making the complaint stated:

If anyone is not satisfied with any judgment, he has the right to make an appeal but he has no business to challenge the Judiciary or to give any kind of derogatory or defamatory statement against any Judge in particular or against the institution in general.<sup>302</sup>

It is arguable that India does not need a contempt of court law on the books in order to punish those who inappropriately undermine the administration of justice. Indeed, in other common law jurisdictions, courts have relied on their inherent jurisdiction to prosecute and punish contempt of court, but tend to do so only where the conduct undermines the administration of justice and not to silence those who make critical statements about a particular judge or case.<sup>303</sup>

## PROHIBITIONS ON THE IMPORT OF GOODS

Import restrictions silence expression in a different way from ordinary criminal prohibitions. Instead of penalising expression after it has taken place, import restrictions prevent expression from occurring in the first place. This sort of restriction is known as “prior restraint.”<sup>304</sup>

Section 11 of the *Customs Act, 1962* allows the Central Government to prohibit absolutely the import of goods of any description for the purpose of maintenance of the security, public order, standards of decency and morality of India, or “other purpose conducive to the interests of the general public.”<sup>305</sup> The 1988 ban on Salman Rushdie’s novel, *The Satanic Verses*, was implemented through s.11 of the *Customs Act*.<sup>306</sup>

Section 11 of the *Act* contains language that is so vague that customs officers or other officials can act with impunity to ensure that items which they deem “contrary to the interests of the general public” are effectively banned. It also enables customs officials to determine whether a good violates other Indian laws, including the IPC. Many of these laws are themselves vaguely worded, magnifying the problem. In an appeal against an import decision made on the basis that an article was “obscene” per IPC s.292, the Calcutta High Court stated that the IPC’s definition of “obscenity” is vague, but nevertheless attempted to interpret it.<sup>307</sup> Vagueness layered on vagueness is not helpful to customs officials and it effectively guarantees the misapplication of the Customs Act against legitimate expressive materials, including literature.<sup>308</sup>

While other common law jurisdictions permit the imposition of some prior restraints on publications such as obscene material (see discussion above regarding the definition of “obscenity”), “the dangers inherent in prior restraints are such that they call for the most careful scrutiny on the part of the Court.”<sup>309</sup> It is therefore

disappointing that the Indian courts have allowed the government’s sweeping powers in this regard to remain unchallenged.

## FOREIGN CONTRIBUTIONS

The *Foreign Contribution (Regulation) Act, 2010* (FCRA) is a relatively new piece of legislation.<sup>310</sup> The FCRA determines whether certain enumerated groups of people, including politicians, broadcasters, columnists and even cartoonists, are eligible to accept foreign contributions. The broad sweep and the overly vague wording of the law permit the government to strangle the resources of organisations that receive foreign funding and promote differing viewpoints (for example, human rights NGOs). The law also allows the government to suspend the registration certificate of NGOs, removing their ability to fundraise. This in turn creates a chilling effect on the NGOs’ work and stifles meaningful expression, a clear contravention of international law (see Freedom of Association in International Law below).

It is useful to divide the law’s operation into two parts: the first dealing with the provisions which explicitly address foreign contributions and “political” organisations, and the second addressing the registration, cancellation, and suspension provisions in s.13 and s.14. Both parts of the legislation were discussed in a pair of cases involving the organisation Indian Social Action Forum (INSAF).<sup>311</sup>

The first INSAF case<sup>312</sup> dealt with how organisations were deemed to be “political.” INSAF argued that the language used in s.5 of the FCRA was unacceptably vague and uncertain because it relied on the words “ideology” and “programme.”<sup>313</sup> The Delhi High Court held that although the words were “in large expanse” they could not be regarded as “vague or uncertain.” The Court further held that there was no freedom of expression issue at stake, because foreign contributions were not speech.

The second INSAF case<sup>314</sup> was a significant demonstration of the law’s potential for misuse. INSAF was issued a s.13 order which suspended its registration certification on the basis that INSAF’s activities were “likely to prejudicially affect the public interest.” The impact of the order was that INSAF was prevented from receiving foreign funding for several months. By the time the order was quashed by a court, the certificate had been suspended for 180 days, seriously impairing the organisation’s finances.

The American Bar Association Center for Human Rights commented on the case and pointed to a lack of definitions for “public interest” and “national interest,” which gives wide discretion for the government to unjustly silence NGOs.<sup>315</sup>

FCRA complaints are often lodged against NGOs that do not toe the party line and cannot sustain any kind of pressure.<sup>316</sup> Human Rights Watch reports that, “nonprofit and advocacy groups say officials harass them with constant queries and threaten investigations in apparently deliberate efforts to curtail dissent.”<sup>317</sup>

# IN FOCUS

## BLOCKING FOREIGN FUNDING TO ENVIRONMENT WATCHDOG GREENPEACE INDIA

Environment watchdog Greenpeace International is known for engaging in naming and shaming to expose environmental problems around the world. Greenpeace India, an arm of the global environmental NGO, has protested against the Kudankulam nuclear power project in Tamil Nadu<sup>318</sup> and the destruction of the Mahan forest area in Madhya Pradesh.<sup>319</sup> A Ministry of Home Affairs Intelligence Bureau report dated 3 June 2014 calls Greenpeace “a threat to national economic security.”<sup>320</sup>

The government sought to block foreign funding to Greenpeace India, under s.46 of the *Foreign Contribution (Regulation) Act, 2010 (FCRA)*. A circular dated 15 January 2015 issued by the Reserve Bank of India listed Greenpeace International as a foreign donor agency for which prior permission from the Ministry of Home Affairs is required before funds can be credited to the accounts of the recipient individual or NGO.<sup>321</sup> On 20 January 2015, the Delhi High Court directed the government to remove the freeze on the bank account of Greenpeace India so that it could access funds contributed by Greenpeace International.<sup>322</sup> The Court noted that “disagreement with the policies of Government of India, could not, per se be construed as actions which are detrimental to national interest.”<sup>323</sup> Despite this, in April 2015, the Ministry of Home Affairs used the FCRA to suspend Greenpeace’s license to receive overseas funds and ordered that its Indian accounts be frozen.<sup>324</sup>

Indeed, it is clear that the FCRA has led to self-censorship. “I’m quite conservative because I don’t want the organisation to be shut down,” said the Executive Director of an Indian NGO who agreed to be interviewed, anonymously, for this report. As a consequence the NGO in question avoids, or waters down, discussions of religion or reporting on the human rights situation in certain disputed regions in the North East. “We can’t be seen as influencing public policy through public campaigns. We would love to, but we can only do research and deliver it to others, we can’t advocate.”<sup>325</sup>

## UNLAWFUL ASSOCIATION

The *Unlawful Activities (Prevention) Act, 1967 (UAPA)* criminalises membership in unlawful associations, which are defined as associations which have for their object any unlawful activity or the encouragement of persons to undertake an unlawful activity.<sup>326</sup> Generally, unlawful activities are defined to include any action that supports a secession of territory from India, or which disrupts the sovereignty and territorial integrity of India, or is “intended to cause disaffection against India.”<sup>327</sup>

Thus, the UAPA covers far more than just violent physical acts or acts of terrorism, and criminalises certain forms of expression. While the term “disaffection” is defined in s.124A of the IPC as including “disloyalty and all feelings of enmity”, it is not defined in the UAPA. The term is nonetheless vague and overbroad and may cover a variety of forms of legitimate political comment, or dissent against the government.

The UAPA was amended in 2008 to extend both the minimum and maximum period of detention of suspects, from 15 to 30 days and from 90 to 180 days, respectively. Amnesty International India has also criticised the draconian legislation for inadequate pre-trial safeguards against torture, and other cruel and inhuman treatment.<sup>328</sup>

The law was used to prosecute a woman after she was found with “Maoist leaflets,”<sup>329</sup> although in a different case, the Bombay High Court found that mere possession of Maoist literature and propaganda (which had not been banned under s.95 of the *Code of Criminal Procedure*) was not a basis for inferring that an accused was a member of a banned organisation.<sup>330</sup> The very broad language deployed by the Act is, like many of the other laws discussed here, vulnerable to misuse by overzealous private citizens, police, and judicial officials and may catch legitimate political speech. It is otherwise difficult to account for the prosecution of the woman found with the Maoist leaflets, although the full details of the lower court decision were not reported.

Several human rights groups in the country have reported that the UAPA has been used in conjunction with “fabricated evidence and false charges to detain” and therefore silence peaceful activists.<sup>331</sup> Members of the Kabir Kala Manch, a group which uses music and theatre to raise awareness of human rights issues including Dalit rights and caste-based violence and discrimination, were targeted under the UAPA in 2011 for their alleged involvement with the Maoist movement.<sup>332</sup> Two individuals were arrested and four others went into hiding.<sup>333</sup> “I have never taken up arms,” says Deepak Dhengle, one of the two activists arrested. “But the State arrested me under a law that punishes terrorists.”<sup>334</sup>

## PREVENTION OF “ATROCITIES” AGAINST SCHEDULED CASTES AND TRIBES

The *Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989*,<sup>335</sup> also known colloquially as the “Atrocities Act” or “Prevention of Atrocities Act,” bans expression that “intentionally insults or intimidates with intent to humiliate” a member of a scheduled caste or tribe.<sup>336</sup> Violation of the Act results in a minimum of six months imprisonment and up to a maximum of three years, as well as a fine. Notably, the provisions apply to expression that does not necessarily rise to the level of inciting hatred, but simply requires the intention to humiliate.

Moreover, there is an overlap between the Atrocities Act and ss.153A and 153B of the IPC. A major issue surrounding freedom of expression and hate speech in India is the fact that there are multiple other pieces of legislation that potentially capture the same expressive content, facilitating overcharging (discussed below).

The majority of cases under the Atrocities Act are entirely appropriate and involve prosecution of violent actions against members of protected groups. However, the Act is occasionally used against individuals for expression that arguably does not rise to the level of hate speech. Again, the vague and overbroad language of the Act, which targets humiliating rather than hateful speech, makes it ripe for abuse.

In late 2014, Secretary of the Lok Janshakti Party, Vishnu Paswan, filed a case against Janata Dal (United) president Sharad Yadav.<sup>337</sup> According to media reports, Paswan “alleged that Yadav’s comments about the educational and political qualification of chief minister Jitan Ram Manjhi hurt the sentiments of Dalits and people of musahar castes.”<sup>338</sup> One of the statements at issue was: “How can he become the CM as he has not seen books and school[?].”

In 2009, the Hindi film *Delhi-6* was accused of containing language deemed to be insulting to the entire Balmiki Samaj, a Scheduled Caste.<sup>339</sup> It took until 2013 for the case to be resolved and for the Court to situate the comments within the broader purpose of the film which was actually to curb offensive practices.<sup>340</sup>

In 2013, academic Ashis Nandy, was charged under the Act for comments he made at the Jaipur Literature Festival.<sup>341</sup> He was alleged to have stated that people from the scheduled tribes and scheduled castes were the “most corrupt.”<sup>342</sup> Nandy clarified his comments and noted that he had meant to draw attention to the fact that “most of the people getting caught in corruption charges [belong] to marginalised sections, as they don’t have the means to save themselves unlike people from upper castes.”<sup>343</sup> The charges filed against Nandy required him to report to the police for questioning.<sup>344</sup> Since he had the means to retain a lawyer to challenge the allegations, Nandy made an urgent appeal to the Supreme Court arguing that, “there was no *mala fide* intent or purpose” on his part to make a comment in order to insult or humiliate a member of a scheduled caste or scheduled tribe.<sup>345</sup> The Supreme Court stayed the arrest.<sup>346</sup>

## IN CONTEXT THE CASTE SYSTEM

The caste system is a stratified and hierarchical feature of Hindu society.<sup>347</sup> Dalits, who are often referred to in the West as “untouchables”, are the lowest caste in traditional Hindu society. So-called Tribals or the Adivasis (original inhabitants) are India’s indigenous peoples who often live in remote forested areas. These Scheduled Castes (SC) and Scheduled Tribes (ST) are socially marginalised and sometimes face threats of physical violence.<sup>348</sup> Article 15 of the Indian Constitution prohibits discrimination on any grounds, and Articles 15 and 16 have been the basis for quota-based affirmative action measures to promote substantive equality. However, while the Constitution protects equality between castes, in practice discrimination continues. A 2014 report by Human Rights Watch found that school authorities persistently discriminate against children from marginalised communities, including Dalit, Muslim, and tribal students.<sup>349</sup> While the Prevention of Atrocities Act aims to address the realities of caste violence and discrimination, the vague and overbroad language in s.3(1)(x), coupled with the manner in which the Act has been applied to cases such as Ashis Nandy raise concerns.

# ADMINISTRATION OF JUSTICE: THE PROCESS IS THE PUNISHMENT

Constitutional guarantees of freedom of expression are meaningless without an effective justice system. The engine of that justice system—the processes that ensure fairness and expediency—are referred to in this report as “the administration of justice.” An inefficient and corrupt administration of justice compromises an individual’s ability to access justice, reduces the effectiveness of court processes, and creates an environment ripe for assaults on freedom of expression. This results in a chilling effect on those who would otherwise exercise their right to free speech.

India’s administration of justice is in dire straits. Nearly every one of the more than 30 people interviewed for this report said that in India, the legal process itself has become a form of punishment. Setting aside questions of guilt or innocence, the system’s routine delays and other problems noticeably deter free expression and encourage self-censorship.<sup>350</sup> Private actors who exploit vague and overbroad legislation to pressure the police into laying charges exacerbate the system’s failures, and these problems are compounded when the cases reach court only to be further delayed, or incompetently processed, by ineffective legal counsel and a poorly trained judiciary. By all accounts, India’s current system of administering of justice is fraught with corruption, inefficiency, and unreasonable delays.

This section begins by examining the first point of contact for many people, the process of charging (or, in civil cases, “instituting suit”). It then considers police corruption and access to legal representation, before considering problems that arise when a case reaches the courts.

Our analysis reveals a system in turmoil. Unreasonable delays in judicial proceedings incentivise bribery. Pervasive bribery prevents marginalised people from accessing justice. Wealth disparities are reinforced by strategic lawsuits aimed at silencing critics of the dominant narrative (discussed below). The list goes on. All of this affects freedom of expression and results in squandered opportunities for the free exchange of ideas, advocacy, art, and commerce.

## A) INITIATING LEGAL PROCEEDINGS

The most frightening thing is that any mad coot can go and lodge a complaint against you. It’s a serious amount of harassment.

**Arundhati Roy, writer**

## CRIMINAL CHARGES

In India, criminal proceedings are initiated by the preparation of a First Information Report (FIR). The FIR is generated by police and contains details of an alleged criminal offence as reported by a complainant either orally or in writing.<sup>351</sup> FIRs are followed by a police investigation that may result in formal charges.

Filing FIRs can be an abusive tactic. Instead of refusing to file questionable FIRs, police officers often rubberstamp spurious complaints.<sup>352</sup> Rather than risk a speculative law and order problem, they bow to pressure from aggrieved religious groups or the government.<sup>353</sup> Many groups will threaten to start a riot if the police refuse to register the FIR. In these instances, says legal scholar Usha Ramanathan, the police effectively surrender their responsibility to protect controversial speakers.<sup>354</sup> In the mind of many police officials, once the FIR is registered, the matter is out of their hands and becomes a judge’s concern.

Moreover, anyone wishing to invoke the IPC’s blasphemy or communal harmony provisions may do so wherever the offending publication is sold. As a result, complainants can pull an author from one remote corner of the country to another to answer a lawsuit or face a criminal charge.<sup>355</sup> This creates obvious difficulties for the economically marginalised (a large portion of the population in India), who lack the means to travel across a large country.

Without prosecutors to help them vet FIRs, the police rarely have enough training to ensure that freedom of expression or due process rights are not breached by the misapplication of vague and overbroad laws.<sup>356</sup> Satish Sahney, a former Police Commissioner of Mumbai, said that it is not the job of the police to interpret law; they just go by the bare text of the statute, investigate if the case is cognizable, and charge.<sup>357</sup> This is especially problematic given that a review of the case law indicates that, while convoluted and contradictory at times, the appellate courts have been relatively more restrictive in their application of overbroad and vague provisions than the police. Indeed, Sahney also notes, “the investigating officers while investigating a case are not concerned with jurisprudence. Their job is only to gather admissible evidence pertaining to the case at hand. In fact “jurisprudence” is not even taught to police station level officers when they are under training.”<sup>358</sup>

In a 2002 submission to the Indian government, the Asian Human Rights Commission cited this lack of guidance from prosecutors as a problem: “...investigators must keep prosecutors informed of cases from the very start, and be guided by their legal advice.”<sup>359</sup> It is hoped that by doing so, spurious prosecutions can be stopped before they start, reducing the extraordinary backlog of cases paralyzing Indian courts.

The Indian government seems unwilling to crack down on the practice of spurious charging. Those who object to an act of free expression, often successfully, put the government in a bind. They can threaten to burn books, bookstores, or theatres – thus raising the prospect of an even larger law and order problem.<sup>360</sup> Once an FIR is registered, however, the government can claim that the matter is out of its hands. This excuse has often been used to keep the government out of the fray, not least when M.F. Husain faced arrest under the ITA.<sup>361</sup>

Threats of disorder can also cause the government to use its highly discretionary power under the forfeiture clause of the *Code of Criminal Procedure* to effectively ban the offending publication without proof of an offence or even a public hearing. In *State of Maharashtra and Ors v. Sangharaj Damodar Rupawate and Ors.* an allegedly inflammatory book caused riots in Pune.<sup>362</sup> Two days after the riots, a FIR was registered under ss.153, 153A and 34 of the IPC, and a s.95 forfeiture notice followed a few days later.

Magistrates may choose to not accept a spurious FIR. But, given that higher courts can be unpredictable (discussed below), magistrates often err on the side of caution and give the FIR a hearing, lest they face criticism by a reviewing court for failing to hear a valid claim.<sup>363</sup> If a magistrate rules against the accused in a freedom of expression case, it can take two to three years before a higher court will hear an appeal.<sup>364</sup> The High Courts usually correct illogical lower court rulings, but by that point, the hecklers have won by subjecting the target to a lengthy legal ordeal, sapping their energy, time, and resources. Once again, the process is the punishment and it produces censorship.<sup>365</sup>

Finally, overcharging is an enormous problem in the Indian criminal justice system, which is facilitated in part by the overly broad and vague language used in many provisions, and duplicative provisions that effectively punish the same underlying conduct. “Overcharging” is defined as “multiplying ‘unreasonably’ the number of accusations against a single defendant,” in order to assert leverage in a plea bargaining situation.<sup>366</sup> The aim is to secure a guilty plea on a single or smaller set of charges in exchange for the dismissal of the outstanding charges.

Given the vague, overbroad and overlapping web of laws available to those who seek to censor speech, it is not surprising that overcharging is at play in several cases involving freedom of expression. In *Subhashree Das @ Milli v. State of Orissa and Ors.*, the appellant was charged with nine offences after police located Maoist literature in her car.<sup>367</sup> Specifically, she was charged under ss.120B, 121, 121A, 124A read with s.34 of the IPC, s.17 of the *Criminal Law (Amendment) Act*, s.63 of the *Indian Copyright Act, 1957*, and ss.10, 13, 18 and 20 of *Unlawful Activities (Prevention) Act, 1967*.<sup>368</sup> This is only one example. In *Devidas Ramchandra Tuljapurkar v. The State of Maharashtra*, the publication of one poem resulted in charges under ss. 153A, 153B and 292 of the IPC.<sup>369</sup>

The American Bar Association discourages overcharging, especially where the offences being charged lack probable cause.<sup>370</sup> The rationale is straightforward: “the frequent filing of charges on bare minima of evidence would lead to a greater number of erroneous convictions”<sup>371</sup> and arguably also contributes to the chilling effect on freedom of expression.

Finally, there is a growing tendency to convert purely civil disputes into criminal cases.<sup>372</sup> According to the Supreme Court, which has condemned the practice, this is done both as a response to problems within the civil justice system and as an effective inducement to settle the dispute:

[There is] a prevalent impression that civil law remedies are time consuming and do not adequately protect the interests of lenders/creditors... There is also an impression that if a person could somehow be entangled in a criminal prosecution, there is a likelihood of imminent settlement.<sup>373</sup>

Involving police in vexatious criminal complaints adds a further dimension to efforts to silence expression. It requires a separate trial, and presents a second opportunity for corruption to creep into the process (see below “Police Corruption” and “Judicial Corruption”).

## CIVIL SUITS

Civil actions are guided by the *Code of Civil Procedure, 1908*.<sup>374</sup> Section 19 provides that suits for certain torts, including defamation, may be instituted either in the jurisdiction in which the defendant resides or carries on business, or where the tort was committed. Significantly, at common law, the tort of defamation is committed wherever the defamatory statement is heard. As such, a defamatory article written by a person in Delhi, but published in Calcutta, may be sued upon in either Calcutta or Delhi.<sup>375</sup>

The persistence of this antiquated rule means that authors can be forced to defend themselves in many different parts of India, at great expense of time and money.<sup>376</sup> Worse, instituting a suit provides more opportunities for officials to engage in extortion and bribe-taking, which further compromises the administration of justice.<sup>377</sup> This cycle of corruption affects poor people disproportionately since they are often unable to pay bribes.

Like criminal charges, civil suits can be abused in order to silence one's adversaries and critics.<sup>378</sup> Strategic Lawsuits Against Public Participation (SLAPP), discussed in greater detail below, are sometimes grounded in civil defamation and capitalise on the glacial pace of the Indian justice system by dragging parties to court regularly over extended periods of time, wasting money, and completely disrupting parties' lives.<sup>379</sup>

## REGULATORY REVIEWS

Regulatory reviews are largely governed by the relevant statute. The *Cable Television Networks (Regulation) Act*, for instance, governs many of the cable television industry's actions, and prescribes punishments where appropriate. Unfortunately, regulatory prohibitions in that Act give police wide (and discretionary) enforcement powers, premised on a "reason to believe that" certain provisions have been impugned (rather than, for example, reasonable and probable grounds). A FIR is sufficient to spark police interest, at which point the only hurdle for the police to overcome before seizing transmission equipment is that the authorised officer satisfy himself that there is reason to believe an infraction has occurred.<sup>380</sup> This is a very broad discretion, especially given that police rarely have prosecutorial guidance (as noted above).<sup>381</sup> A similar set of provisions and powers exists within the *Foreign Contribution (Regulation) Act*.<sup>382</sup>

It appears therefore, that a vexatious complaint, combined with reasonable belief by police, can be enough to silence activists, broadcasters, journalists, filmmakers, and many others. Driving home the danger of the situation, the statutes often, as in the *Cable Television Networks (Regulation) Act*,<sup>383</sup> the *Foreign Contribution (Regulation) Act*,<sup>384</sup> and the *Cinematograph Act*,<sup>385</sup> prescribe punishments which include imprisonment.

## B) POLICE CORRUPTION

Section 161 of the *Indian Penal Code* criminalises corruption by public servants, including the police. Despite this, corruption is endemic. India was ranked 94 out of 177 in Transparency International's 2013 Corruption Perception Index, tied with Columbia, Djibouti, and Algeria.<sup>386</sup> In 2010, 54 per cent of people reported paying a bribe to a government official, 44 per cent felt their government's efforts to fight corruption were ineffective, and 74 per cent felt that the level of corruption had increased since 2007.<sup>387</sup>

A number of factors have contributed to this situation, not the least of which is the original structure of the police force. Established during the Raj in order to assert British control over Indian subjects the police have nearly unlimited power.<sup>388</sup> More recently, the expansion of regulatory control that came with India's commitment to state-managed development has provided opportunities for corruption.<sup>389</sup> As globalisation has gradually modernised India's economy without reducing significant wealth disparities, further opportunities for corruption abound.<sup>390</sup>

India's police force is noteworthy for its level of corruption. A 2008 Transparency International study focusing on the effects of corruption on marginalised families found that two-thirds of the 5.6 million indigent households which had interacted with police during the previous year had either "paid a bribe" or "used a contact."<sup>391</sup> The numbers did not change significantly three years later in a survey that was not restricted to impoverished households: 64 per cent of respondents who had dealt with the police reported paying a bribe.<sup>392</sup> Police may require bribes in order to register FIRs (especially if the complaint accuses a specific person), investigate an offence, arrest the individual, or provide other services.<sup>393</sup> On the other hand, the police are adept at extortion, using suspicion and their broad power of arrest to extort businesses and people.<sup>394</sup>

These statistics indicate that corruption is pervasive, regardless of one's income level, but its impact on India's poor is significant because they are least able to pay bribes. Thus, corruption disproportionately affects the most marginalised groups, and limits their access to justice.

Twenty-two per cent of the impoverished individuals who paid bribes had been accused of a criminal offence.<sup>395</sup> This suggests that corruption has had a significant impact on access to justice: four per cent of impoverished households reported that they were unable to use police services because they could not afford the bribe.<sup>396</sup> In fact, a large majority of indigent Indians (73 per cent) believe the police are corrupt.<sup>397</sup>

## C) COURT PROCEEDINGS

Once the parties get to court, new problems arise. These can be roughly grouped into four categories: unreasonable delay, judicial (in)competence, conflicting precedents, and corruption. Each has important consequences for freedom of expression in India.

### UNREASONABLE DELAY

In late 2009, over 30 million cases were pending in India's courts<sup>398</sup> despite the fact that the Supreme Court has interpreted Article 21 of the Constitution (right to the protection of life and personal liberty) to include the right to a "speedy trial."<sup>399</sup> Unfortunately, the constitutional ideal is remote from the lived reality and the system's lengthy delays are a general source of frustration.<sup>400</sup>

It is a matter of common experience that in many cases where the persons are accused of minor offense ... the proceedings are kept pending for years together. If they are poor and helpless, they languish in jails for long periods either because there is no one to bail them out or because there is no one, to think of them. The very pendency of criminal proceedings for long periods by itself operates as an engine of oppression.

**"Common Cause" A Registered Society through its Director v. Union of India and Ors.**<sup>401</sup>

And languish they do. The number of cases left pending is excessively high and two-thirds of the backlog consists of criminal cases.<sup>402</sup> A 2003 Committee Report issued by the Indian Ministry of Home Affairs (Malimath Committee) found excessive caseloads, inordinate procedural delays, and low conviction rates throughout the criminal justice system.<sup>403</sup> In an interview for this report, Justice Gautam Patel told us: "I have suits from 1978 on my docket."<sup>404</sup> Startlingly, there are cases that are not resolved within the lifetime of the accused.<sup>405</sup> The Delhi High Court reported major backlogs for the disposal of criminal cases: 3,706 cases between five and ten years old pending; 904 cases between ten and 15 years old; 32 cases between 15 and 20 years old; four cases more than 20 years old.<sup>406</sup> By itself, this process can wear people down.<sup>407</sup>

Even after the case makes it to court, proceedings can drag out for years, increasing costs to all parties and disrupting their lives. For instance, in Maharashtra, most cases take between three to five years to resolve, although they routinely drag on for over ten years.<sup>408</sup>

These delays compound the difficulties facing poor litigants, especially those trapped in the criminal justice system where charges loom over their heads for years. In terms of bureaucratic fatigue, civil litigants fare no better. Documentary filmmaker Anand Patwardhan, who has fought and won many battles against government censors, told us that his cases usually last between four and five years. He reports, "One case took ten years. It's not that you have to work on it every day but it's a huge waste of time. Ninety per cent of your time goes just waiting in court."<sup>409</sup>

### COMPETENCE OF THE JUDICIARY

Once the parties arrive in front of a judge, further challenges present themselves. In a study recently published in the *Harvard Human Rights Journal*, Jayanth K. Krishnan, a professor at the Maurer School of Law (Indiana University), reveals significant, systemic problems with the competence of India's lower court judiciary. Krishnan describes two common paths to becoming a judge: via appointments to the bench after practicing law for a few years<sup>410</sup> or by "taking a series of civil service exams" after law school graduation.<sup>411</sup> Unfortunately, as the second route has become more normal it has produced many judges who lack relevant experience and knowledge. Consequently, seasoned lawyers can make inexperienced judges feel "insecure, cautious, and unwilling to take a more assertive lead during the case."<sup>412</sup> As a result,

judges generally either defer to the veteran lawyer's arguments, defer to the government if it is one of the parties, or strategically issue adjournments to buy themselves more time, especially if both sides have a veteran lawyer making persuasive arguments or both sides have young lawyers whose questions they are unable to answer.<sup>413</sup>

Krishnan also identifies the poor quality of legal education in many areas of the country as a problem. Rote learning of statutes is the norm,<sup>414</sup> books are out-dated, and English competency is not properly emphasised (English is used in all official documents in the Supreme Court and High Courts).<sup>415</sup> This is compounded by the degree to which judges are overworked. Not only are many poorly trained, they also lack the time to delve deeply into issues even when a case warrants such analysis.<sup>416</sup> These problems may partly explain the phenomenon of conflicting precedents discussed below.

The process of judicial appointment to the High Courts (state appellate courts) and the Supreme Court must be closely monitored. The *National Judicial Appointments Commission Bill*, along with the *Constitutional (121st Amendment) Bill*, were introduced in August 2014 and seek to change the procedure for selecting appellate judges. If passed, the current collegium system (judges

selecting judges) will be replaced with the National Judicial Appointments Commission (NJAC).<sup>417</sup> The NJAC consists of a panel of six individuals: the Chief Justice of India (CJI), two senior Supreme Court judges, the Law Minister, and two “eminent persons” nominated by a committee comprising the Prime Minister, the CJI, and the Leader of Opposition.

The Supreme Court is currently hearing several petitions that challenge these bills. The petitions argue that the creation of the NJAC undermines judicial independence and effectively gives veto power to the executive (since any two members of the NJAC can defeat the recommendation for appointment, and two members are effectively appointed by the executive).<sup>418</sup> For the appointment of High Court judges, the NJAC is also required to consult with a state’s Chief Minister before making recommendations. The Centre for Public Interest Litigation is challenging the constitutionality of the NJAC in court, stating,

Before making a selection, the candidates have to be evaluated for their competence, integrity, judicial temperament and their sensitivity for the concerns of common persons. The same cannot be done by an *ex-officio* body. An *ex-officio* body of sitting judges and ministers cannot devote the kind of time required for this task. Therefore, the said Amendment does not create a body that can fulfill the onerous task of appointing Supreme Court and High Court judges by finding out the best available talent. The Amendment does not ensure judicial integrity and thus violates the Basic Structure of the Constitution.<sup>419</sup>

While the existing collegium system of appointing judges has been criticised for lack of transparency,<sup>420</sup> the new bills raise more concerns rather than addressing the old ones.<sup>421</sup>

### JUDICIAL CORRUPTION

Judicial corruption not only impairs faith in the rule of law, but also in access to justice, since many people cannot afford the bribes needed to advance their cases or to have the case registered in the first place.<sup>422</sup>

Principle 2 of the UN’s “Basic Principles on the Independence of the Judiciary,”<sup>423</sup> provides the following guidance:

The judiciary shall decide matters before them impartially, on the basis of facts and in accordance with the law, without any restrictions, improper influences, inducements, pressures, threats or interferences, direct or indirect, from any quarter or for any reason.

Unfortunately, judges in India often yield to social pressure: “There’s nobody easier to frighten than a judge,” Justice Gautam Patel told us, “They don’t want blood on their hands for releasing somebody who causes violence.”<sup>424</sup>

More blatant corruption is also rife. Illustrating the magnitude of the problem, one study found that

approximately 80 per cent of litigants interviewed in Gujarat “said that they had been asked to pay a bribe by a lower-level judicial staff at some point during an administrative proceeding.”<sup>425</sup> Former Chief Justice of the Supreme Court Chandrani Banerjee acknowledged that bribes for bail are endemic.<sup>426</sup> Dozens of media reports confirm the breadth and seriousness of the problem.<sup>427</sup>

## IN FOCUS

### EXPOSING JUDICIAL CORRUPTION

Corruption appears to exist beyond the lower courts. Recent allegations made by former Supreme Court Justice Markandey Katju suggest that there are (or have been) several High Court judges using their positions to accept bribes.<sup>428</sup>

Katju describes an incident where the then-Chief Justice of India, S.H. Kapadia, requested that he investigate a high court judge with a bad reputation for corruption. Katju contacted some lawyers he knew and gave Kapadia three mobile numbers of the agents through whom this judge was allegedly taking money. Katju suggested that these numbers be wiretapped. About two months later, Kapadia told Katju that the recorded conversations revealed the judge’s involvement in corrupt practices.

While the corrupt judge was barred from being Chief Justice of any High Court or appointment to the Supreme Court, Justice Kapadia did not ask for the judge’s resignation nor did he refer the matter to Parliament for impeachment. Katju reveals, “Most CJIs are reluctant to expose corruption in the judiciary thinking this will defame the judiciary, and so they prefer to bury corruption under the carpet, not realising that the bulge under the carpet will show.”<sup>429</sup>

### GROWING ANTIPATHY TOWARDS FREE SPEECH

As the face of India’s judiciary changes, judges have begun to show less interest in freedom of expression, and a corresponding willingness to restrict expression despite precedents that demand the opposite. According to journalist Siddharth Varadarajan, the judiciary’s record on rulings that protect freedom of expression is quite mixed.<sup>430</sup> While the Supreme Court and some High Courts tend to defend free speech, lower courts often take the opposite view. The concern over the lower judiciary is even more noticeable in the magistrate



courts, which deal with most criminal cases. The lack of adequate legal training provided to judges at the magistrate level, combined with vague and overbroad laws, allow judges' personal viewpoints greater influence on judgments. Indeed, one of the lawyers interviewed for this report noted that magistrates often misapply the law by ignoring the intent requirements of communal harmony provisions, leaving their decisions to be appealed in higher courts.<sup>431</sup>

Moreover, notwithstanding the Supreme Court's recent decision on provisions of the ITA, Stanford Law School doctoral student Abhinav Chandrachud suggests that the Supreme Court's interest in and prioritisation of freedom of expression cases has declined over the past two decades, even as the total number of cases addressing freedom of expression has grown.<sup>432</sup> Chief Justices preside over fewer freedom of expression cases and often appoint smaller benches to hear such cases.<sup>433</sup>

## CONFLICTING PRECEDENTS

Common law jurisdictions, like India, the UK and Canada, rely on the concept of judicial precedent: the binding guidance of previous decisions. This means that, as a general rule, cases with similar facts are decided in similar ways with reference to a prior decision. The evolution of these decisions is referred to as jurisprudence<sup>434</sup> and is foundational to the predictability of results in common law jurisdictions.

As noted above, the Supreme Court of India's Article 19 jurisprudence has been inconsistent. While the facts of each case determine whether the Court will justify an infringement of the right to freedom of speech, the Court has articulated contradictory tests with respect to determination of whether a particular law is considered a reasonable restriction under Article 19(2).

In many cases, citizens, lawyers, and lower courts cannot discern which Supreme Court decision represents settled law and therefore binding precedent.<sup>435</sup> This precedential chaos leaves judgments in lower courts open to the whims of presiding magistrates, effectively giving them the discretion to decide on their own terms where a reasonable limit on expression lies, and making it more difficult to decide cases expeditiously.

## ACCESS TO JUSTICE

The effective administration of justice requires that individuals can access the resources needed to defend their rights successfully. Since many poor Indian citizens cannot afford legal fees they are routinely denied such access and are therefore unable to effectively assert their right to freedom of expression in court.

In developing countries the ability to assert and defend one's rights is fundamental to progress.<sup>436</sup> This has been recognised by the UN and World Bank, each of which have put significant resources into developing

access to justice schemes in India.<sup>437</sup> The state has also recognised the importance of access to justice by enshrining the right to free legal aid in its Constitution. Article 39A states:

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.

The *Legal Services Authorities Act, 1987* provides for free legal services in cases that meet certain requirements. The legislation is expansive: s.12 affords free legal aid to broad categories of groups including women, children, and industrial workmen (all without qualification of income level), and people receiving less than 9,000 rupees per year. The Act applies to all courts, which are defined in s.2(a) as "a civil, criminal or revenue court and includes any tribunal or any other authority constituted under any law for the time being in force, to exercise judicial or quasi-judicial functions."

The Act creates three levels of administration of legal aid, each with different responsibilities: the National Legal Aid Fund,<sup>438</sup> State Legal Aid Fund,<sup>439</sup> and District Legal Aid Fund.<sup>440</sup> Because each State and District has authority for legal aid programming in its jurisdiction, the actual implementation of the Act may be inconsistent.<sup>441</sup> Both the *Code of Civil Procedure*<sup>442</sup> and the *Code of Criminal Procedure*<sup>443</sup> have provisions for easing the burden on poor parties.

These measures however, are insufficient to ensure access to justice for many people. Law professor, Jayanath Krishnan, notes that indigent litigants blame costs as "a major barrier to accessing the courts."<sup>444</sup> These costs include "court fees, photocopying fees, file-retrieval fees, scheduling or calendar fees for court appearances, and 'refresher' fees contingent on the length of the case, as well as unpredictable extralegal fees."<sup>445</sup> All of this is exacerbated by judges' willingness to prolong litigation with continuances.<sup>446</sup> These problems are compounded by corruption among some lawyers who undermine legal education campaigns in order to ensure that people continue to pay their fees.<sup>447</sup>

In sum, there is a power imbalance that favours wealthy litigants against poorer defenders, which undermines the principle of fairness in adversarial trials. As Dr. Ashwani Kumar, then minister of law and justice, said, "The Supreme Court of India elevated the right to fair trial as a basic structure of the Constitution thus making it inalienable, unamendable and primordial."<sup>448</sup> A deprivation of this right has, in past cases, resulted in decisions being set aside.<sup>449</sup>

The most visible strategy used to exploit this power imbalance is the Strategic Lawsuit Against Public Participation (or "SLAPP suit"), which often has devastating impacts on the freedom of expression of marginalised people. SLAPP suits are often initiated

for the sole purpose of intimidating under-resourced defendants into silence. Indeed, socio-economic status is often the decisive factor in a SLAPP suit's success because its aim is to inflict costly legal fees on the weaker party.<sup>450</sup> This prevents weaker parties from accessing the courts to assert their rights. Those fortunate enough to be well-connected can rely on their social network to help them steer clear of legal trouble,<sup>451</sup> or deal with a suit expeditiously when it arises. Affluent, well-connected individuals can usually respond to freedom of expression complaints effectively, since the associated financial costs are, for them, relatively small, and they can often leverage political, judicial, or government contacts to smooth out or speed up the process.

While SLAPP suits can be used in both criminal and civil cases, senior advocate Rajeev Dhavan coined the term KICKS, "(K)riminal Intimidatory Coercive Knock-out Strategy", to more accurately describe what happens in a criminal case.<sup>452</sup> At the 2012 and 2013 Jaipur Literature Festival, for example, passages from Salman Rushdie's novel *The Satanic Verses* were read aloud, and, as discussed above, sociologist Ashis Nandy discussed corruption among lower castes. These actions provoked multiple criminal complaints against the speakers and organisers.<sup>453</sup> Festival organiser Sanjoy Roy managed to receive an exemption from regularly appearing at the court, but others were not as lucky.<sup>454</sup> He explains that "it's wear and tear, time and money. The other people have nothing to lose; they file a case and walk away."<sup>455</sup>

Perhaps the best-known target of this strategy was the late M.F. Husain (see above), who chose to live abroad rather than spend his remaining years travelling around India fending off lawsuits.<sup>456</sup>

At the other end of the spectrum, the system tends to be particularly severe on defendants with modest levels of education and few resources.<sup>457</sup> Journalist, Geeta Seshu, notes that "there's no mistake that with criminal charges, there is a chilling effect."<sup>458</sup> Seshu recalls the case of Murzban F. Shroff, author of *Breathless* in Bombay, a collection of short stories. In 2009, a complaint was filed against Shroff, under ss.292, 292A, and 293 of the IPC, for writing obscene stories. The complainant alleged that "the book was highly loaded with obscene stories with a view to expose the reader's mind to impure, lecherous substance."<sup>459</sup> Another complaint was filed against Shroff in the same year for spreading disharmony among communities. The second complainant took offence at Shroff's use of a derogatory term for Maharashtrians in the book.<sup>460</sup> Seshu explains that "for three years Shroff had to do nothing else but defend his case. It affects your work, your career prospects. He did not get a lot of support or resources to fight the case."<sup>461</sup>

Free speech cases may become attractive pro bono causes once they reach the High Court or Supreme Court level.<sup>462</sup> However, there is a critical shortage of lawyers to represent defendants in trials at the magistrate courts.<sup>463</sup> As discussed above, many

bloggers simply capitulate and retract their comments instead of fighting criminal defamation charges laid by powerful individuals or companies. Unfortunately, those accused of criminal offences often fare even worse. Handicapped by indigence or illiteracy, many remain unaware of their right to free legal representation or even the ability to apply for bail.<sup>464</sup>

Our research indicates that journalists are particularly vulnerable to SLAPP and KICKS suits. Once entangled in these proceedings, they often have to go it alone, without much support from fellow journalists.<sup>465</sup> By contrast, artists, writers and filmmakers have better-developed support systems and more often band together and push back against legal harassment and attempts to censor their work.<sup>466</sup> Defendants in larger, urban settings, with robust social networks, also tend to have far better access to legal and professional resources than their rural counterparts, and journalists working outside of big cities are often particularly vulnerable. In remote communities, those facing legal harassment often lack the means to answer charges effectively and few lawyers offer pro bono representation.<sup>467</sup> In these situations journalists often receive ad hoc and ill-informed legal advice.

# VOICES

## NILANJANA ROY: THE HAZARDS OF JOURNALISM

It is not easy to be a journalist in India in a decade that has shown a dismaying fall in both media freedoms and general freedoms of expression. My respect for the ones who do manage to produce good, original, questioning work has risen in the last few years.

Journalists in India face multiple hazards. In conversations in rural and small-town India, the two things journalists mention most often is the risk of violence from “big bosses” in business, and the often open harassment from local politicians or local officials. Both urban and rural journalists struggle with legal challenges that obstruct and challenge reporters from across the spectrum.

It is becoming harder for journalists to predict what might give offence and call down either legal retribution or threats from mobs, which are often fronted by political parties or religious fundamentalists. In the first few months of 2015, for example, a subeditor with the regional Oriya-language daily *Samaj* in Cuttack was charged under a law that makes “hurting religious sentiments” an offence, for publishing a picture of the Prophet Mohammed in the paper’s 14 January edition. The paper’s offices were attacked. In the same month, aggressive Hindu nationalist protestors burnt photographs of the *Indian Express*’s national editor Praveen Swami. This came after the *Express* published Swami’s story critiquing the government’s handling of an incident where a fishing boat was blown up in contested circumstances.

A few weeks later, Mumbai-based editor Shireen Dalvi was forced into hiding and continues to receive threats of violence. She was arrested and released on bail, but was unable to return to her home or her office after she republished *Charlie Hebdo* covers in the Urdu newspaper *Avadhnama*. Multiple cases were filed against her under the increasingly notorious s. 295(a), which makes it a crime to outrage religious sentiments with malicious intent.

The casual ease with which bans are now used in India to shut down books, conferences, art and film has spread to the media. On 8 March 2015, the national television news channel NDTV ran visuals of a flickering lamp for one hour in a silent protest against the government’s restraining order prohibiting the screening of Leslee Udwin’s documentary *India’s Daughter*. But for many of us, what was even more alarming was that some of the most vicious and strident attacks on NDTV came from the rival channel Times Now.

The Times Now anchors called NDTV “anti-national” for supporting the documentary. “Anti-national” is increasingly becoming a dangerous slur, a way of targeting and shutting down journalists, human rights activists or NGOs who clash with the state or the ruling party. Some editors I spoke with expect more aggression from pro-government media groups against neutral or sceptical media houses over the next year.

Inside media houses, senior editors speak of how they feel “strangled” by laws (ranging from sedition to offence laws) that ringfence journalism. Cases can take from a minimum of two years to sometimes ten years to move through the backlogged judicial system. This is a serious deterrent for independent magazines that don’t have access to either funds or legal resources. While the courts often return favourable verdicts, the many demands made on defendants by the process tends to make media corporations risk-averse and unwilling to hire reporters or editors who might get them into trouble.

A year ago, veteran media watcher Sevanti Ninan raised warnings about the growing corporate and political control of the Indian media, questioning the sackings and the restructuring of various media houses as a new right-wing government came in. “India’s feisty press turns reticent when called upon to report on its own,” she wrote.

Television channels in particular seem far more partisan these days; the high-decibel reliance on successive cycles of outrage, each burning issue of the day forgotten as soon as the next story breaks, masks the equally high levels of self-censorship within channels. A less serious but still troubling development has been the deliberate attempt to discredit or harass journalists and media groups whose critical and often objective reporting is perceived to be “anti-Hindu” or “anti-national”, on social media forums such as Twitter.

The chilling effect on media groups is considerable, and one extremely troubling development for journalists (and other authors) publishing non-fiction books is that they face unofficial pre-censorship from publishing houses. The dangers of the legal department being handed editorial control over content are enormous, but in many media houses and publishing houses, this is now the norm.

But I am often reminded that there are worse risks besides the risk of censorship or of blinkered reporting. The most vulnerable of India’s journalists remain those reporting in parts of the country away from the relatively protective spotlight of media attention, or from conflict zones. Though the number of deaths of journalists came down sharply in 2014, from eight to two, the nature of the two deaths reported was telling. Tarun Acharya in Odisha and MVN Shankar in Andhra Pradesh were both killed after they had turned in reports critical of local business interests. The 11 journalists killed in 2011 were reporting from places like Bastar, Bulandshahr, Muzaffarnagar and Etawah – important but non-metropolitan centres. As with Acharya and Shankar, their investigative reporting was crucial, disruptive, and in the end had deadly consequences.

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# BREACHES OF INTERNATIONAL LAW

India's web of vague and overbroad laws imposes serious limits on its citizens' right to free expression. Coupled with significant problems in the administration of justice, this results in a violation of the rights to freedom of expression and due process, which are guaranteed in international treaties to which India is bound.

## A) THE RIGHT TO FREEDOM OF EXPRESSION

Freedom of expression is an essential precondition for effective political participation and democracy.<sup>468</sup> The right to free expression is recognised in many international legal instruments, including the *International Covenant on Civil and Political Rights* (ICCPR)<sup>469</sup> which creates binding obligations on states parties, including India, to respect, protect, and fulfil the human rights protected therein.

The right to free expression is articulated in Article 19 of the ICCPR and is further elaborated upon by the UN Human Rights Committee in General Comment 34:

1. Everyone shall have the right to hold opinions without interference.
2. Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers.
3. The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:
  - (a) For respect of the rights or reputations of others;
  - (b) For the protection of national security or of public order, or of public health or morals.<sup>470</sup>

India has entered a declaration conditioning its acceptance of Article 19 (3) on the basis that it would be implemented only in so far as it would be in line with India's Constitution.<sup>471</sup> The UN Human Rights Committee (HRC), the authoritative interpretative body for the ICCPR has recommended that the declaration be withdrawn.<sup>472</sup>

In its 2012 Universal Periodic Review (UPR) by the UN Human Rights Council, the delegation of India stated:

Freedom of speech and expression was a fundamental right, guaranteed by the Constitution, with accepted restrictions. India's vibrant media bore testimony to this.<sup>473</sup>

Two countries made recommendations relating to freedom of expression. Sweden, in particular, regretted India's measures to limit freedom of expression<sup>474</sup> and recommended that India "ensures that measures limiting freedom of expression on the Internet is based on clearly defined criteria in accordance with international human rights standard."<sup>475</sup> India has not accepted the recommendation.<sup>476</sup>

## PUNITIVE SANCTIONS

Freedom of expression includes the right to criticise without fear of interference or punishment.<sup>477</sup> The arbitrary use of criminal law to sanction legitimate expression, according to then-Special Rapporteur on Freedom of Expression Frank La Rue, constitutes one of the gravest forms of restriction to the right, as it leads to other human rights violations, such as arbitrary detention and torture and other forms of cruel, inhuman or degrading treatment or punishment.<sup>478</sup>

Given the paramount importance of free expression in a democratic society, the severity of criminal sanctions must be proportionate. According to the HRC, it is incompatible with states parties' obligations under the ICCPR to criminalise the holding of an opinion, and imprisonment is never an appropriate penalty.<sup>479</sup>

The harassment, intimidation or stigmatisation of a person, including arrest, detention, trial or imprisonment for reasons of the opinions they may hold, constitutes a violation of international law.<sup>480</sup>

In India, the possibility of imprisonment for published or broadcast words has a chilling effect and effectively curbs free expression.<sup>481</sup> Amnesty International, in their 2014 submission to the Law Commission of India, noted that criminal defamation laws are abused in India, particularly to intimidate and silence journalists, with criminal trials often taking years to resolve and many journalists held in pre-trial detention.<sup>482</sup> The use of criminal defamation laws to subdue dissent has also been criticised by the UNHRC.<sup>483</sup> Then-Special Rapporteur on Freedom of Expression, Frank La Rue also called for the decriminalisation of defamation, arguing that criminalising defamation limits the liberty in which freedom of expression can be exercised.<sup>484</sup>

Even civil sanctions may exert a chilling effect on freedom of expression. In the context of defamation, civil sanctions “should be designed to restore the reputation harmed, not to compensate the plaintiff or to punish the defendant.”<sup>485</sup>

## VAGUE AND OVERBROAD LAWS

Restrictions on freedom of expression must not be overbroad or vague.<sup>486</sup> Any ambiguity in the law effectively gives discretion to the police to misapply the law (whether due to corruption, intimidation, laziness, or fear). Violations of the right to freedom of expression also arise more broadly when existing laws are selectively interpreted or enforced by the State to crackdown on specific forms of media content. As illustrated above, laws that are overbroad and incorporate insufficient accountability mechanisms and protections against abuse are vulnerable to selective interpretation and enforcement.

Then-Special Rapporteur on Freedom of Expression Frank La Rue explored how vague and overbroad laws are often used by the state in the name of “national security” to legitimise invasive practices that target individuals who speak out.<sup>487</sup> When laws are drafted in vague terms, individuals are unable to foresee how they will be applied, which can influence their willingness to speak out freely.<sup>488</sup>

General Comment 34 cautions that sedition laws must not be overbroad on their face and should be applied only with respect to the strict legal test set out in Article 19(3) of the ICCPR (discussed below).<sup>489</sup> Specifically, the HRC notes that, “it is not compatible with paragraph 3, for instance, to invoke such laws to suppress or withhold from the public information of legitimate public interest that does not harm national security or to prosecute journalists, researchers, environmental activists, human rights defenders, or others, for having disseminated such information.”<sup>490</sup> Human Rights Watch and Amnesty International have called on India to repeal s.124A of the IPC, the country’s archaic sedition law.<sup>491</sup>

With the increasing use and popularity of the Internet, social media, and other communications technologies, vague and overbroad laws such as s.69A of the ITA, the now defunct s.66A of India’s ITA, and a host of IPC provisions, constitute excessive and undue limitations on freedom of expression. Such laws should either be eliminated or be applied only after a careful and objective assessment of the threat posed by the offending expression.

India’s laws prohibiting religious and cultural offence should also be carefully reviewed. A joint submission by various Special Rapporteurs in an expert workshop on Asia-Pacific noted with concern the vague formulations of domestic legal provisions that prohibit incitement. These include combating “incitement to religious unrest”, “promoting division between religious believers and non-believers”, “defamation of religion”, “inciting to violation”, “instigating hatred and disrespect against the ruling regime”, “inciting subversion of state power” and “offences that damage public tranquillity.”<sup>492</sup> Such vague and overbroad terms do not meet the criterion of legal clarity required under international law.

The then-Special Rapporteur on the situation of human rights defenders, Margaret Sekaggya, has also criticised the use of the overbroad *Unlawful Activities (Prevention) Act* to arbitrarily detain human rights defenders.<sup>493</sup> She noted with concern that the Act “allows the Government to place certain restrictions on civil liberties, including freedoms of expression, assembly, and association, in the interest of protecting the sovereignty and territorial integrity of India.”<sup>494</sup>

## B) REASONABLE LIMITS ON EXPRESSION

While fundamental, the right to freedom of expression is not absolute under international law. The issue then is how, and under what circumstances, can freedom of expression be restricted in accordance with international law. As specified by the UN Human Rights Council, the following types of expression should never be subject to restrictions: discussion of government policies and political debate; reporting on human rights, government activities and corruption; engaging in election campaigns, peaceful demonstrations or political activities, including for peace or democracy; and expression of opinion and dissent, religion or belief, including by persons belonging to minorities or vulnerable groups.<sup>495</sup>

Per Article 19(3) of the ICCPR, restrictions on freedom of expression are permissible if they are provided by law and necessary: to protect the respect of the rights or reputations of others; or for protection of national security, public order, public health, or morals.<sup>496</sup> Under Article 20, the ICCPR requires state parties to prohibit hate speech that constitutes an incitement to discrimination, hostility, or violence. The Indian Constitution, however, delineates other grounds for curtailing freedom of expression beyond that which is provided in the ICCPR, and it is arguable that these additional grounds are impermissible limits to freedom of expression under international law.<sup>497</sup>

Article 19(3) outlines a cumulative three-part test that must be met before free expression can be legitimately restricted. Restrictions must (a) be provided by law; (b) pursue a legitimate aim; and (c) conform to the strict tests of necessity and proportionality. According to the HRC, a restriction that is provided by law must be clear and accessible to everyone.<sup>498</sup> Restrictions must also be the least intrusive measure available and must not be overbroad. General Comment 34 further elaborates that “[t]he principle of proportionality has to be respected not only in the law that frames the restrictions but also by the administrative and judicial authorities in applying the law.”<sup>499</sup>

The test set out in Article 19(3) is discussed in General Comment 34.<sup>500</sup> Article 19(3) “may never be invoked as a justification for the muzzling of any advocacy of multi-party democracy, democratic tenets and human rights. Any attack on a person, including arbitrary arrest, torture, threats to life and killing, because of the exercise of the person’s freedom of opinion and expression, can never be compatible with Article 19.”<sup>501</sup> The HRC makes clear that restrictions on free expression must be legitimate in the particular circumstances in which they apply.

### NATIONAL SECURITY

Freedom of expression can be restricted on the grounds of national security under Article 19(3)(b).<sup>502</sup> However, the HRC has stressed the importance of precision in defining how national security is affected by the speech in order to justify a restriction on freedom of expression. The state party is required to specify the precise nature of the threat.<sup>503</sup>

The *Global Principles on National Security and the Right to Information* (Tshwane Principles)<sup>504</sup> emphasise that restrictions on free expression on the basis of national security must be prescribed by law, necessary in a democratic society, and protect a legitimate national security interest.<sup>505</sup> A national security interest is not legitimate if its real purpose or primary impact is to protect an interest unrelated to national security.<sup>506</sup>

One of the most pressing issues when judges make determinations regarding national security is their lack of expertise in what actually constitutes a threat to national security.<sup>507</sup> The issue is often complicated by the secrecy in which questions of national security are couched, and the fact that knowledgeable individuals are not at liberty to disclose vital details, which may be necessary when judges are evaluating the necessity and proportionality aspects of the three-part test.<sup>508</sup>

India’s ITA is an example of a legal framework that gives wide discretion to the state to take action in the name of ‘national security.’ In particular, s.69 uses general language that allows for communication to be interfered with in the name of “the sovereignty or integrity of India, defence of India, security of the State, friendly relations with foreign States or public order or for preventing incitement to the commission of any cognizable offence relating to above or for investigation of any offence.”<sup>509</sup>

In a 2013 thematic report, then-Special Rapporteur on Freedom of Expression, Frank LaRue, noted with concern the ability of the Indian government to intercept communications on the vague and unspecified ground of national security.<sup>510</sup>

### PUBLIC ORDER

Per Article 19(3)(b), the maintenance of public order is also a permissible restriction on the freedom of expression.<sup>511</sup> Public order is a broader concept than national security and may be defined as the sum of rules which ensure the peaceful and effective functioning of society.<sup>512</sup>

To prevent misuse of this ground, international law requires a close nexus between the impugned expression and the risk of harm. For example, the *Declaration of Principles on Freedom of Expression in Africa* states: “Freedom of expression should not be restricted on public order or national security grounds unless there is a real risk of harm to a legitimate interest and there is a close causal link between the risk of harm and the expression.”<sup>513</sup>

In the absence of a close nexus between the expression and the risk of harm, unduly suppressing free expression is a violation of international law.

In India, public order is often invoked to protect dominant narratives, rather than to truly protect the rights of a State’s population. While inter-communal differences can give rise to challenges to public order, the role of law in censoring offensive speech should be secondary to the role of education and policies supported by the state aimed at promoting tolerance and dialogue.<sup>514</sup>

In this regard, it is likely that the vague and overbroad language contained in various IPC provisions that limit speech, including ss.124A (sedition), 153A/153B (promoting enmity/assertions prejudicial to national integration), 295A (insulting religion), 505 (public mischief), are contrary to international law because, on their face, they do not require the state or petitioner to establish a close nexus between the alleged speech and harm to public order. The censorship laws outlined above in relation to cable television broadcasting, foreign contributions, prevention of atrocities/unlawful activities, and film certification also rely on a public order rationale that would fail international law scrutiny on similar grounds.

# VOICES

## SALIL TRIPATHI: FEAR OF THE MOB

The struggle to protect freedom of expression is difficult in India not only because the law is unhelpful; not only because most politicians don't see any value in defending writers or artists; and not only because judges and police place the preservation of law and order above an individual's right to express freely, but also because many Indians seem to think that is how it should be. They like freedom of expression when they are doing the talking, but their minds change when those they disagree with get to exercise their rights.

The law is bad enough: while Article 19 of the Indian Constitution guarantees freedom of expression as a fundamental right, it immediately places caveats and "reasonable restrictions" on the right. Those restrictions cover many areas—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. This is a ridiculous list, poorly-defined and infantilising a population.

Two other laws make it worse – s.295(A) of the Indian Penal Code makes it a criminal act to "outrage religious feelings" with malicious intent. And s.153(A) outlaws "promoting enmity between different groups on grounds of religion, race, place of birth, residence, language, etc., and doing acts prejudicial to maintenance of harmony". Can you write about anything provocative at all in such circumstances? During the Emergency of 1975-77, when Prime Minister Indira Gandhi had imposed press censorship and some journalists were jailed, the late Behram Contractor, who wrote under the pseudonym Busybee, wryly noted that the only safe topics left to write about were cricket and mangoes. Another pernicious section – s.66A of the Information Technology Act of 2000 widened the reach of offences further, and bizarre prosecutions followed, against people who clicked "like" on controversial posts on Facebook, the social media website. The Indian Supreme Court declared the section unconstitutional in a March 2015 judgment challenging specific provisions of the act.

But the threat does not emerge only from the laws. India, in fact, bans relatively few books (although censorship is more rampant and arbitrary with films), and the trend is downward. The more dangerous trend is of religious and other busybodies from most faiths and castes protesting against books or articles, threatening or sometimes committing violent acts against writers or publishers, filing lawsuits in distant local courts, and demanding that the state take action against the writer.

The recent case of Perumal Murugan, a Tamil writer who wrote a novel called *Madhorubagan* (which Penguin published in English as *One Part Woman*) set in the village of Namakkal, shows how. In the novel, Perumal Murugan writes of a childless couple's attempts to conceive, and refers to a custom within a community which permits sexual permissiveness on a specific day. Village elders and community leaders were incensed, and they protested against the novelist. The state intervened – not to protect the author, but to assuage the community's feelings – and arranged a meeting with the community, at which it got Perumal Murugan to sign an undertaking not to offend the community and to withdraw the novel from circulation. Perumal Murugan decided to withdraw not only that novel, but all his previous works; he wrote a post on Facebook, saying that the author Perumal Murugan had died.

Perumal Murugan had little choice because the state and its officials were unwilling to do anything to protect his right to express; they were there to protect self-selected representatives of a community who claimed they had been offended, and the only remedy for that was the withdrawal of the book and an apology from the author. The home of Kumar Ketkar, a noted Marathi journalist, was attacked when he wrote a column in which he criticised the tax-payer funded expenditure to build a statue to commemorate the seventeenth-century warrior-king, Shivaji, in the Arabian Sea. The mob has become the arbiter of taste, and the state does nothing; it acquiesces with the mob.

Many Indians don't seem to mind that. India abounds with people who are part of what Salman Rushdie describes as the "but brigade," or people who say "free speech is good, but..." and find ways to place limits on the freedom. He was writing in the immediate aftermath of the attack on the office of the satirical French magazine, *Charlie Hebdo*, where terrorists killed twelve cartoonists and staff in Paris.

## MORALITY

Perumal Murugan's decision to withdraw his books follows Penguin's decision to withdraw Wendy Doniger's book on Hinduism because of a prolonged case against the book filed by a Hindu nationalist organisation that showed no sign of ending anytime soon. While there were no public threats of violence against Penguin, the political environment is sufficiently charged for demonstrations to get out of hand, and at such times, police officers and politicians admonish the writer or the publisher for inviting the wrath of the mob by provoking them. Mumbai University's vice-chancellor complied with the outrageous demand by an aggrieved student to remove Rohinton Mistry's acclaimed novel, *Such A Long Journey* from the university syllabus. He was no ordinary student; his grandfather happened to be Bal Thackeray, whose political party, the Shiv Sena, has become the de facto heckler in Mumbai, with veto rights about what can be seen, shown, or said in the city. In Delhi, a rowdy group of Akhil Bharatiya Vidyarthi Parishad (the student wing of the ruling Bharatiya Janata Party) succeeded in censoring *Three Hundred Ramayanas: Five Examples and Three Thoughts in Translation*, an essay by the late poet, A.K. Ramanujan, which pointed out the rich diversity in the Ramayana tradition.

It would be futile to expect Prime Minister Narendra Modi to act: when he was chief minister of Gujarat state between 2001 and 2014, his government banned two biographies – Joseph Lelyveld's *Great Soul: Mahatma Gandhi and his Struggle with India* and Jaswant Singh's *Jinnah: India, Partition, Independence*. And India has the dubious honour of being the first country in the world to act against Rushdie's novel *The Satanic Verses*, whose importation was banned soon after its publication in 1988. The fear of the mob is so palpable that even after a court order lifting restrictions on James W. Laine's book on Shivaji, bookshops are unwilling to stock it. They remember that Laine's associate, Shrikant Bahulkar, was physically assaulted, and the renowned Bhandarkar Oriental Research Institute, where Laine did some of his primary research, was vandalised and rare manuscripts destroyed.

The bullies are winning because the state has turned timid.

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Per the ICCPR Article 19(3)(b), the protection of morals can also be a legitimate reason for derogating from the right to freedom of expression.<sup>515</sup> Freedom of expression and freedom of religion are also intimately connected. However, freedom of expression guarantees the right to proclaim alternative ideas of religious truth, which may contradict the orthodox view. In General Comment 22, the HRC states: "the concept of morals derives from many social, philosophical and religious traditions; consequently, limitations ... for the purpose of protecting morals must be based on principles not deriving exclusively from a single tradition."<sup>516</sup>

Elaborating on General Comment 22, General Comment 34 notes that, despite the flexible nature of the term "morality", any limitation on expression for the purpose of morality must be framed within the principles of non-discrimination and the universality of human rights.<sup>517</sup> The HRC further notes that "public morals" in the human rights context should be compatible with religious and ideological pluralism.<sup>518</sup> Toby Mendel, the Executive Director of the Centre for Law and Democracy, has also grappled with the complexity of the concept of morality. He writes, "Public morals are not only hard to define, and change over time ... it remains very difficult to identify what is being protected."<sup>519</sup> Similarly, the 1984 Siracusa Principles note: "Since public morality varies over time and from one culture to another, a state which invokes public morality as a ground for restricting human rights, while enjoying a certain margin of discretion, shall demonstrate that the limitation in question is essential to the maintenance of respect for fundamental values of the community."<sup>520</sup>

In their *Joint Declaration on Universality and the Right to Freedom of Expression*, then-Special Rapporteurs on Freedom of Expression of the UN, the Organisation of American States (OAS) and the African Commission on Human and Peoples' Rights (ACHPR), and the Organisation for Security and Co-operation in Europe (OSCE) Representative on Freedom of the Media stated that certain legal restrictions cannot be justified in reference to local tradition, cultures, or values.<sup>521</sup> These include laws (a) protecting religions against criticism or prohibit[ing] the expression of dissenting religious beliefs, (b) prohibiting debate about issues concerning minorities or other groups and, (c) laws that give special protection against criticism for officials, institutions, historical figures, or national or religious symbols.<sup>522</sup>

India's blasphemy laws and other laws which aim to protect the religious sensitivities of believers are incompatible with the ICCPR. While international law does provide protection against incitement to hatred, in accordance with Article 20(2) of the ICCPR (see discussion below), it does not permit prohibitions to be used to prevent or punish criticism of religious leaders or commentary on religious doctrine.<sup>523</sup> To the extent that censorship laws in India are disproportionately used by dominant religions or religious/nationalist extremists to silence counter-narratives (for example, ss.292 and 295A of the IPC), or to censor speech that may be offensive to their particular version of morality, there is a violation of Article 19 under international law.



## INCITEMENT TO DISCRIMINATION, HOSTILITY OR VIOLENCE

Under Article 20(2) of the ICCPR, freedom of expression may be legitimately restricted if the advocacy of national, racial or religious hatred “constitutes incitement to discrimination, hostility or violence.”<sup>524</sup> Expression of opinions, even when they are deemed offensive by some believers, and advocacy of religious hatred that constitutes incitement to discrimination, hostility or violence, have been distinguished.<sup>525</sup> The type of expression that is prohibited under Article 20 must be an advocacy of hatred and must constitute incitement.

As noted in General Comment 34, a limitation that is justified on the basis of Article 20 must also comply with the three-part test set out in Article 19(3).<sup>526</sup> Moreover, as noted in a thematic report by then-Special Rapporteur on Freedom of Expression, Frank La Rue, “The right to freedom of expression implies that it should be possible to scrutinise, openly debate and criticise, even harshly and unreasonably, ideas, opinions, belief systems and institutions, including religious ones, as long as this does not advocate hatred that incites hostility, discrimination or violence against an individual or a group of individuals.”<sup>527</sup>

On the issue of communal violence on the basis of religion in India, the then-Special Rapporteur on the freedom of religion or belief, Asma Jahangir, and the then-Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance, Doudou Diène, emphasised that freedom of religion and freedom of expression are interdependent and interrelated.<sup>528</sup> Both Special Rapporteurs submitted a report to the HRC in 2006 and noted that the right to freedom of religion or belief does not include the right for one’s religion or belief to be free from criticism or all adverse comment.<sup>529</sup> Moreover, Asma Jahangir has noted that legislation prohibiting or limiting speech on religious issues should not be excessive or vague, but rather “all-inclusive, carefully crafted and implemented in a balanced manner.”<sup>530</sup>

Again, many of India’s censorship laws do not strike a reasonable balance between freedom of expression and freedom of religion. For example, ss.153A/B (promoting enmity/assertions prejudicial to national integration) and s.295A (insulting religion) of the IPC allow censorship of speech that does not rise to the level of incitement of hatred, and easily captures expression that simply challenges dominant religious narratives.

## C) THE RIGHT TO FREEDOM OF ASSOCIATION

A necessary precondition for free expression by non-government organisations is the right to freedom of association. This right is internationally protected by Article 22 of the ICCPR. A law can constrain freedom of association for a very limited number of reasons, including where the constraint is necessary in a democratic society for national security, public safety, public health and morals.<sup>531</sup>

Impermissible constraints include prohibiting civil society organisations from accessing funding, requiring organisations to obtain Government approval to receive funding, and restricting foreign-funded civil society organisations from engaging in human rights advocacy, among others.<sup>532</sup> These constraints violate Article 22<sup>533</sup> and other international instruments, including *International Covenant on Economic, Social and Cultural Rights*<sup>534</sup> to which India is a party, and Article 13 of the *Declaration on human rights defenders*<sup>535</sup>, which reads:

“everyone has the right, individually and in association with others, to solicit, receive and utilise resources for the express purpose of promoting and protecting human rights and fundamental freedoms through peaceful means, in accordance with article 3 of the present Declaration” [emphasis added].

The Special Rapporteur on the rights to freedom of peaceful assembly and of association, Maina Kiai identified and condemned a growing international trend towards constraining foreign funding to civil society organisations in a 2013 report to the UN General Assembly.<sup>536</sup> He identified the violations described above and went on to describe a few of the defences that countries typically use to justify such restrictions. Although India’s *Foreign Contribution (Regulation) Act* does not identify a purpose other than “national interest” (in the title of the Act),<sup>537</sup> Kiai discusses “state sovereignty against foreign interference” as an impermissible justification that has been invoked by some countries to restrict access by organisations to foreign funding.<sup>538</sup> India’s FCRA infringes internationally guaranteed freedom of association rights and has been applied by state actors to silence dissent, contrary to international law.

## D) ADMINISTRATION OF JUSTICE IN INTERNATIONAL LAW

Aside from violations of freedom of expression and association, India’s challenges with administration of justice infringe due process rights, including the right to a fair and expedient trial. While the violation of these rights is unacceptable in its own right, failure to remedy these rights violations has a particularly negative impact on freedom of expression by contributing to the chilling effect.

## IN CONTEXT

### IMPUNITY FOR VIOLENCE AGAINST JOURNALISTS

State impunity for violence against journalists remains a problem for India, and is connected to the broader problems facing freedom of expression. Impunity enables violence against journalists by assuring wrongdoers that they will face no consequences, and also creates a climate of fear and a chilling effect. People are afraid to speak when violence against others has gone unpunished.<sup>539</sup>

The Committee to Protect Journalists reports that 34 journalists in India have been murdered in direct reprisal for their work, killed as result of a dangerous assignment, or killed in a crossfire during fighting since January 1992.<sup>540</sup> According to UNESCO's 2014 Director-General Report on the Safety of Journalists and the Danger of Impunity, of the 17 journalists killed in India from 2006-2013, information about the judicial process concerning their killings has been provided by India in only two cases.<sup>541</sup>

In India's 2012 Universal Periodic Review, Austria recommended that the State "take proactive measures to address the issue of impunity [for violence against journalists], such as swift and independent investigations."<sup>542</sup> India did not accept the recommendation.

Articles 9 and 14 of the ICCPR outline a number of due process rights. In relation to criminal charges, article 9(3) states:

Anyone arrested or detained on a criminal charge shall be brought promptly before a judge or other officer authorised by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release....

Article 14(1) of the ICCPR states:

All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law.

Article 14(3) is also helpful in terms of understanding minimum due process rights in criminal cases:

In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality:

- a) To be informed promptly and in detail in a language which he understands of the nature and cause of the charge against him;
- b) To have adequate time and facilities for the preparation of his defense and to communicate with counsel of his own choosing;
- c) To be tried without undue delay;
- d) To be tried in his presence, and to defend himself in person or through legal assistance of his own choosing; to be informed, if he does not have legal assistance, of this right; and to have legal assistance assigned to him, in any case where the interests of justice so require, and without payment by him in any such case if he does not have sufficient means to pay for it...

India's obligations under the ICCPR are complicated by the fact that many of the provisions identified in this report as harmful to freedom of expression are part of administrative regimes rather than the IPC. Nevertheless, many administrative offences can be viewed as "criminal charges" within the framework identified by the HRC and are therefore subject to the guarantees in Article 14(3) of the ICCPR. General Comment 32 states that "[c]riminal charges relate in principle to acts declared to be punishable under domestic criminal law. The notion may also extend to acts that are criminal in nature with sanctions that, regardless of their qualification in domestic law, must be regarded as penal because of their purpose, character or severity."<sup>543</sup>

This formulation has been applied by the HRC in cases where the sanctions imposed are criminal in nature despite being categorised as administrative under the state party's law. In *Osiyuk v Belarus (1311/04)*, the HRC held that the categorisation of a charge as criminal in international law was independent of the domestic categorisations.<sup>544</sup> It further held that, in terms of their "purpose and character," sanctions "imposed on the author [of the complaint] had the aims of repressing, through penalties, offences alleged against him and of serving as a deterrent for the others, the objectives analogous to the general goal of the criminal law."<sup>545</sup> Further, the HRC found that the laws infringed by the author "are directed, not towards a given group possessing a special status – in the manner, for example, of disciplinary law, – but towards everyone in his or her capacity as individuals..."<sup>546</sup>

The possibility of imprisonment (a severe sanction intended as a deterrent), the focus of the laws (often the general population rather than a group possessing a special status), and the purpose/character of the laws (often attempting to address issues of public morality and order), place many of the regulatory laws in India firmly within the "criminal" category. As a result, Article 14(3) of the ICCPR applies, and India is in violation of its international obligations when it fails to provide for the rights enumerated therein.

Additional detailed articulations of the international community's expected minimum standards for the administration of justice can be found in UN General Assembly resolutions. For instance, 20 years ago, in 1985, the General Assembly endorsed the *Basic Principles on the Independence of the Judiciary* in resolutions 40/32 and 40/146. The *Principles* require that the judiciary be impartial,<sup>547</sup> conduct proceedings fairly,<sup>548</sup> ensure that rights are respected,<sup>549</sup> and have appropriate training.<sup>550</sup> States have a duty to provide adequate resources to allow the judiciary to meet these requirements.<sup>551</sup>

In relation to police, Article 7 of the UN Code of Conduct for Law Enforcement Officials<sup>552</sup> states that law enforcement officials shall not commit acts of corruption, and should also rigorously oppose and combat them.

Finally, the "Basic Principles on the Role of Lawyers,"<sup>553</sup> the preamble of which states that the Principles "should be respected and taken into account by Governments within the framework of their national legislation," directs governments to ensure that legal aid for marginalised people is available.<sup>554</sup> These Principles also emphasise the need for governments and lawyers to promote public awareness of people's rights, obligations, and freedoms.<sup>555</sup>

India's failure to provide reasonably expeditious trials, issues with access to justice for India's most marginalised communities, and problems with corruption and incompetence within the police and judiciary all impugn international law. In recognition of the fundamental nature of these rights to a free and democratic society, signatories to the ICCPR, including India, must make these rights effective immediately and without delay, regardless of alleged resource limitations. Indeed, much of this task could be accomplished by limiting the scope of vague and overbroad laws to ensure they conform to Article 19 of the ICCPR, and repealing those that are duplicative. Investments towards addressing issues with the administration of justice will not only vindicate the rights of artists, writers, journalists, public figures and other communicators who come into conflict with the law, but will be less expensive over time since fewer people will find themselves before the courts.

# RECOMMENDATIONS

The findings of this report argue that change is needed to address systemic flaws which enable multiple assaults on freedom of expression in India. It is clear that strong commitments from the national government to institute reforms could go a long way to protecting the fundamental human rights of Indians, including freedom of expression. These changes require legislative interventions: some laws must be repealed while others should be narrowed. Legislative reform may also be necessary in order to repair an inaccessible court system struggling with corruption and incompetence.

## G) TO THE INDIAN GOVERNMENT AND INDIAN LAWMAKERS

- In line with the recommendations of the UN Human Rights Committee, withdraw the reservations and declarations made to Article 19(3) of the International Covenant on Civil and Political Rights (ICCPR);
- Amend Article 19(2) of the Constitution to remove restrictions on freedom of expression not provided for under international law;
- Submit overdue reports on India's implementation of the ICCPR to the UN Human Rights Committee without further delay;
- Ensure full incorporation of ICCPR provisions into domestic law so that fundamental human rights may be invoked directly before the courts;
- Extend an invitation to the UN Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression to conduct a country mission in India;
- Create an independent body responsible for governing the content of television broadcasters, per the *Cable Television Network (Regulation) Act, 1995* and *Cable Television Network Rules*;
- Ensure that regulatory bodies, such as the Central Board of Film Certification, are independent and free from government interference;
- Establish effective accountability mechanisms and take measures to monitor the district courts and the police;
- Take all necessary measures to provide the police with autonomy from executive influence.

## REPEAL LAWS THAT UNNECESSARILY RESTRICT FREEDOM OF EXPRESSION:

- s.153B of the IPC (assertions prejudicial to national-integration);
- s. 295A of the IPC (blasphemy);
- s. 499 of the IPC (criminal defamation);
- s. 505 of the IPC (statements conducing public mischief);
- *Foreign Contributions (Regulation) Act*;
- Those provisions of the *Information Technology Act 2000* that unduly limit speech and which are inconsistent with Article 19 of the ICCPR, in particular s.69A;
- Those provisions of the *Scheduled Castes and Scheduled Tribes Act, 1989* that unduly limit speech and overlap with ss.153A and 153B of the IPC;
- *Contempt of Court Act, 1971*.

## AMEND VAGUE AND OVERBROAD LAWS THAT THREATEN FREEDOM OF EXPRESSION:

- s.124A of the IPC (sedition) to only limit speech where it is necessary to do so and consistent with the grounds articulated in Article 19(3) of the ICCPR;
- s.153A of the IPC (promoting enmity) to ensure that it only captures speech which advocates national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence (consistent with Article 20 of the ICCPR);
- s.292 (obscenity) to only limit speech that is truly obscene, that is, having a dominant purpose related to the undue exploitation of sex, or which combines sex and crime, horror, cruelty, or violence;
- s. 95 of the *Code of Criminal Procedure* to require a hearing and judicial authorisation, as well as reasonable grounds to believe that publications or materials violate a particular provision of the IPC, prior to seizure;
- The *Cable Television Network (Regulation) Act* and *Cinematographic Act* to only limit programs where it is consistent with Article 19(3) of the ICCPR;
- The *Unlawful Activities (Prevention) Act* to only limit speech where it is consistent with Article 19(3) of the ICCPR;
- The *Customs Act* to only allow seizure of items alleged to violate the IPC, and include a process for re-determination and appeal by the importer and/or creator.

## ENACT:

4. Clear legislation to ensure that increased surveillance of phones and the Internet does not undermine the rights of individuals in India to privacy and free expression;
5. Legislation to combat Strategic Lawsuits Against Public Participation (SLAPP);
6. Legislation that limits individuals to filing a civil case in only one state jurisdiction.

## H) POLICE AND PROSECUTORS

- Train police to understand and apply the law in a manner that is consistent with Article 19 of the Indian Constitution and India's obligations under international law;
- Take effective measures to curb the practice of overcharging, including taking seriously and investigating allegations of police intimidation, and requiring prosecutors to vet potential charges before they are laid to ensure there are reasonable and probable grounds;
- Identify and acknowledge police corruption and develop a coordinated and targeted anti-corruption plan with clear benchmarks.

## I) JUDICIARY

### To all levels of court:

- Provide judges with specific training in relation to Article 19 of the Indian Constitution, and India's obligations under international human rights law;
- Treat offences that relate to freedom of expression, whether under the IPC or other legislation, as non-cognizable for the purposes of Section 41 and Section 156 of the Criminal Procedure Code.

### To the Supreme Court of India:

- Hear freedom of expression cases, clarify conflicting precedents to ensure that Article 19 of the Constitution is robustly protected, and narrowly interpret the existing laws that unduly limit legitimate expression;
- Reconsider the decision to uphold Section 69A of the ITA and the Intermediaries Guidelines, and order the government, following its recent review of the ITA, to redraft the law, with input from legal experts, academics, and civil society organisations.

## J) CIVIL SOCIETY AND THE MEDIA

- Continue to pressure the government to enact reforms that protect freedom of expression through political engagement and strategic litigation;
- Encourage the government to stop delaying reports on its compliance with the ICCPR and to expedite other submissions to UN treaty monitoring bodies and the UN Human Rights Council, particularly through the Universal Periodic Review process, especially when these address freedom of expression concerns;
- Create public education initiatives that encourage tolerance of dissenting views, especially on taboo topics, and educate people on their right to freedom of expression;
- Foster greater solidarity among writers, artists, and journalists, especially those who have been threatened with violence and/or had their work suppressed, and those from marginalised groups or communities;
- Continue to assert and exercise the right to freedom of expression;
- Ensure that defendants in freedom of expression lawsuits who lack the means to afford a lawyer receive adequate legal aid and are fully informed of their rights, particularly in defamation and sedition cases.

## I) TO FUTURE AND CURRENT PREFERENTIAL TRADING PARTNERS

- Raise the issue of freedom of expression during all meetings and negotiations with India;
- Prior to signing an agreement, commission an independent, impartial and comprehensive assessment of the state of fundamental human rights in India, including freedom of expression, and make the findings of the assessment public;
- Incorporate into any treaty:
  - a provision that requires both parties to submit an annual, public, independent, impartial, and comprehensive human rights assessment report, with each subsequent report providing an update on how issues noted in previous reports are being addressed;
  - language that refers to existing fundamental human rights obligations and makes these enforceable within the treaty.

## K) TO THE INTERNATIONAL COMMUNITY INCLUDING THE UNITED NATIONS, WORLD BANK, ASIAN DEVELOPMENT BANK, THE COMMONWEALTH AND BILATERAL GOVERNMENT DONORS

- Insist that India make progress on its international commitments to protect freedom of expression;
- Encourage the UN Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression to request a country mission to India;
- Request that India address the freedom of expression concerns outlined in this report in the third cycle of the UPR in 2017.

# APPENDIX A: SUMMARY OF LAWS

## CRIMINAL OFFENCES RELATING TO EXPRESSION<sup>556</sup>

Year first enacted	Section of Indian Penal Code	Offence	Imprisonment?	Fine?	Compliant with ICCPR? 1. Provided by law? 2. Legitimate aim (Reputation/Rights of Others, National Security, Public Order, Public Morals)? 3. Necessary and proportionate?
1860	292	Obscenity	✓ Up to 5 years	✓ Up to 5000 RPS	<b>NO</b> Not provided by law – vague language (e.g. obscenity is defined as “lascivious or appeals to the prurient interest”) Yes – public morals Unnecessary
1860	499	Defamation	✓ Up to 2 years	✓	<b>NO</b> Not provided by law – vague language (e.g. “public good”) Yes – reputation/ rights of others Unnecessary (not least restrictive means) and not penalties not proportionate
1860	505	Public Mischief	✓ Up to 5 years	✓	<b>NO</b> Not provided by law – vague (e.g. “cause public alarm”; “promote enmity”) Yes – public order Unnecessary (not least restrictive means)
1870	124A	Sedition	✓ Life imprisonment or 3 years	✓	<b>NO</b> Not provided by law – vague language (e.g. “likely to cause disaffection” is defined to include “disloyalty and all feelings of enmity”) Yes – national security Unnecessary (not least restrictive means) and not proportionate

**CRIMINAL OFFENCES RELATING TO EXPRESSION<sup>556</sup> (CONTINUED)**

Year first enacted	Section of Indian Penal Code	Offence	Imprisonment?	Fine?	Compliant with ICCPR? 1. Provided by law? 2. Legitimate aim (Reputation/Rights of Others, National Security, Public Order, Public Morals)? 3. Necessary and proportionate?
1898	153A	Promoting enmity between classes	√ Up to 5 years	√	<b>NO</b> Not provided by law – vague language (e.g. “disharmony or feelings of enmity”) Yes – public order Not proportionate
1927	153B	Imputations, assertions prejudicial to the national integration	√ Up to 4 years	√	<b>NO</b> Not provided by law –vague language (e.g. “intended to outrage religious feelings of any class”) No – blasphemy laws are incompatible with the ICCPR Unnecessary
1927	295A	Maliciously insulting a religion	√ Up to 4 years	√	<b>NO</b> Not provided by law –vague language (e.g. “intended to outrage religious feelings of any class”) No – blasphemy laws are incompatible with the ICCPR Unnecessary



## REGULATORY OFFENCES RELATING TO EXPRESSION

Year first enacted	Act	Offence	Censorship?	Imprisonment?	Fine?	Compliant with ICCPR? 1. Provided by law? 2. Legitimate aim (Reputation/Rights of Others, National Security, Public Order, Public Morals)? 3. Necessary and proportionate?
1952	Cinematograph Act -guidelines	Films or scenes against the interests or sovereignty or integrity of India, foreign relations; public order; decency, morality, incitement of an offence, etc.	√	√	√	<b>NO</b> Not provided by law – vague language (e.g. “incitement or commission of any offence”) Impermissible limit: Friendly relations with foreign states; incite commission of any offence Overbroad; some penalties not proportionate
1962	Customs Act	Import of material prohibited for the security of the state, public order, morality, general public good	√			<b>NO</b> Not provided by law – vague language (e.g. “contrary to the interests of the general public”) Impermissible limit: National prestige; “any other purpose conducive to interests of the general public” Overbroad; Unnecessary
1967	Unlawful Activities (Prevention) Act	Offering support, inviting support, or furthering the activities of an organisation labelled terrorist		√ Up to 7 years	√	<b>NO</b> Not provided by law: vague language (e.g. “disaffection” may cover legitimate political comment or dissent; “unlawful activity” defined to include dissenting expressions pertaining to opinion on Indian territorial claims) Yes – national security Unnecessary (not the least restrictive means); penalties not proportionate
1971	Contempt of Court Act	Expression that “tends to scandalise” or “tarnish” the image of the Court		√ Up to 6 months	√ Up to 2000 RPS	<b>NO</b> Not provided by law: vague language (e.g. “scandalises or tends to scandalise, or lowers the authority of any court”) Impermissible Limit: Scandalises or tends to scandalise, or lowers the authority of any court. Overbroad; unnecessary

**REGULATORY OFFENCES RELATING TO EXPRESSION (CONTINUED)**

Year first enacted	Act	Offence	Censorship?	Imprisonment?	Fine?	Compliant with ICCPR? 1. Provided by law? 2. Legitimate aim (Reputation/Rights of Others, National Security, Public Order, Public Morals)? 3. Necessary and proportionate?
1989	Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act	Intentionally insulting or intimidating with an intent to humiliate a lower protected caste in public view		√ Up to 5 years; no less than 6 months	√	<b>NO</b> Not provided by law: vague and overbroad language (e.g. “within public view”; “intentionally insults or intimidates with intent to humiliate”)  Legitimate aim – hate speech  Unnecessary
1995	Cable Television Networks (Regulation) Act	Content likely to create disharmony among groups, disturb public tranquillity -in the public interest	√	√		<b>NO</b> Not provided by law: vague and overbroad language (e.g. “disharmony or feelings of enmity”; “likely to disturb public tranquillity”)  Impermissible Limit: Sovereignty or integrity of India; friendly relations with foreign states  Overbroad; penalties not proportionate
2008	Information Technology Act	-sending offensive messages through communication service, etc.  - publishing or transmitting obscene material in electronic form  - intermediary who fails to comply with the direction of the Central Government		√ Up to 7 years	√ Up to 1M RPS	<b>NO</b> Not provided by law: vague and overbroad language (e.g. “causing annoyance, inconvenience, danger, obstruction, insult, injury, criminal intimidation, enmity, hatred, or ill will”; “grossly offensive”; “menacing character”)  Impermissible limit: Prevent annoyance or inconvenience; sovereignty or integrity of India; friendly relations with foreign states  Unnecessary and penalties not proportionate

## REGULATORY OFFENCES RELATING TO EXPRESSION (CONTINUED)

Year first enacted	Act	Offence	Censorship?	Imprisonment?	Fine?	Compliant with ICCPR? 1. Provided by law? 2. Legitimate aim (Reputation/Rights of Others, National Security, Public Order, Public Morals)? 3. Necessary and proportionate?
2010	Foreign Contributions (Regulation) Act	Becoming an “organisation of a political nature”	√	√	√	<p><b>NO</b></p> <p>Not provided by law: vague and overbroad language (e.g. “national interest” undefined; prevents foreign funding for “organisation of a political nature”)</p> <p>Yes – national security</p> <p>Unnecessary (not the least restrictive means); Penalties not proportionate</p>

# APPENDIX B: FULL TEXT OF CRIMINAL LAWS

## *Code of Criminal Procedure, 1973, s. 95*

95. Where (a) any newspaper, or book, or (b) any document, wherever printed, appears to the State Government to contain any matter the publication of which is punishable under section 124A or section 153A or section 153B or section 292 or section 293 or section 295A of the Indian Penal Code (45 of 1860), the State Government may, by notification, stating the grounds of its opinion, declare every copy of the issue of the newspaper containing such matter, and every copy of such book or other document to be forfeited to Government, and thereupon any police officer may seize the same wherever found in India and any Magistrate may by warrant authorise any police officer not below the rank of sub-inspector to enter upon and search for the same in any premises where any copy of such issue or any such book or other document may be or may be reasonably suspected to be.

## *Indian Penal Code, s. 124A: "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 the Government established by law in India, shall be punished with imprisonment for life, to which fine may be added, or with imprisonment which may extend to three years, to which fine may be added, or with fine.

### **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.

## *Indian Penal Code, s. 153A: "Promoting enmity between different groups on grounds of religion, race, place of birth, residence, language, etc., and doing acts prejudicial to maintenance of harmony"*

### (1) Whoever—

(a) By words, either spoken or written, or by signs or by visible representations or otherwise, promotes or attempts to promote, on grounds of religion, race, place or birth, residence, language, caste or community or any other ground whatsoever, disharmony or feelings of enmity, hatred or ill-will between different religious, racial, language or regional groups or castes or communities, or

(b) Commits any act which is prejudicial to the maintenance of harmony between different religious, racial, language or regional groups or castes or communities, and which disturbs or is likely to disturb the public tranquility, or

(c) Organises any exercise, movement, drill or other similar activity intending that the participants in such activity shall use or be trained to use criminal force or violence of knowing it to be likely that the participants in such activity will use or be trained to use criminal force or violence, or participates in such activity intending to use or be trained to use criminal force or violence or knowing it to be likely that the participants in such activity will use or be trained to use criminal force or violence, against any religious, racial, language or regional group or caste or community and such activity for any reason whatsoever causes or is likely to cause fear or alarm or a feeling of insecurity amongst members of such religious, racial, language or regional group or caste or community, shall be punished with imprisonment which may extend to three years, or with fine, or with both.

(2) Whoever commits an offence specified in subsection (1) 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.

**Indian Penal Code, s. 153B: "Imputations, assertions prejudicial to national-integration"**

(1) Whoever, by words either spoken or written or by signs or by visible representations or otherwise, -

(a) Makes or publishes any imputation that any class of persons cannot, by reason or their being members of any religious, racial, language or regional group or caste or community, bear true faith and allegiance to Constitution of India as by law established or uphold the sovereignty and integrity of India, or

(b) Asserts, counsels, advises, propagates or publishes that any class or persons shall, by reason of their being members of any religious, racial, language or regional group or caste or community, be denied or deprived of their rights as citizens of India or

(c) makes or publishes any assertion, counsel, plea or appeal concerning the obligation of any class of persons, by reason of their being members of any religious, racial, language or regional group or caste or community, and such assertion, counsel, plea or appeal causes or is likely to cause disharmony or feelings of enmity or hatred or ill-will between such members and other persons, shall be punished with imprisonment which may extend to three years, or with fine, or with both.

(2) Whoever commits an offence specified in sub-section (1), 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.

**Indian Penal Code, s. 292: "Sale, etc., of obscene books etc."**

(1) For the purposes of sub-section (2), a book, pamphlet, paper, writing, drawing, painting, representation, figure or any other object, shall be deemed to be obscene if it is lascivious or appeals to the prurient interest or if its effect, or (where it comprises two or more distinct items) the effect of any one of its items, is, if taken as a whole, such as to tend to deprave and corrupt person, who are likely, having regard to all relevant circumstances, to read, see or hear the matter contained or embodied in it.

(2) Whoever—

(a) sells, lets to hire, distributes, publicly exhibits or in any manner puts into circulation, or for purposes of sale, hire, distribution, public exhibition or circulation, makes, produces or has in his possession any obscene book, pamphlet, paper, drawing, painting, representation or figure or any other obscene object whatsoever, or

(b) imports, exports or conveys any obscene object for any of the purposes aforesaid, or knowing or having reason to believe that such object will be sold, let to hire, distributed or publicly exhibited or in any manner put into circulation, or

(c) takes part in or receives profits from any business in the course of which he knows or has reason to believe that any such obscene objects are for any of the purposes aforesaid, made, produced, purchased, kept, imported, exported, conveyed, publicly exhibited or in any manner put into circulation, or

(d) advertises or makes known by any means whatsoever that any person is engaged or is ready to engage in any act which is an offence under this section, or that any such obscene object can be procured from or through any person, or

(e) offers or attempts to do any act which is an offence under this section,

shall be punished [on first conviction with imprisonment of either description for a term which may extend to two years, and with fine which may extend to two thousand rupees, and, in the event of a second or subsequent conviction, with imprisonment of either description for a term which may extend to five years, and also with fine which may extend to five thousand rupees].

Exception — This section does not extend to

(a) any book, pamphlet, paper, writing, drawing, painting, representation or figure (i) the publication of which is proved to be justified as being for the public good on the ground that such book, pamphlet, paper, writing, drawing, painting, representation or figure is in the interest of science, literature, art or learning or other objects of general concern, or

(ii) which is kept or used bona fide for religious purposes;

(b) any representation sculptured, engraved, painted or otherwise represented on or in (i) any ancient monument within the meaning of the Ancient Monuments and Archaeological Sites and Remains Act, 1958 (24 of 1958), or (ii) any temple, or on any car used for the conveyance of idols, or kept or used for any religious purpose.

**Indian Penal Code, s. 295A: “Maliciously insulting the religion or religious belief of any class”**

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

**Indian Penal Code, s. 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 expected, to defame that person.

Whoever defames another shall be punished with simple imprisonment for a term which may extend to two years, or with fine, or with both (IPC, s. 500)

**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.

...

**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 a 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.

...

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

...

**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.

...

**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 further.

...

**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.

...

**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.

...

**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 interests of the person making it, or of any other person, or for the public good.

...

**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.

**Indian Penal Code, s. 505: "Statement conducing to public mischief"**

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

(b) with intent to cause, or which is likely to cause, fear or alarm to the public, or to any section of the public whereby any person may be induced to commit an offence against the State or against the public tranquility; or

(c) with intent to incite, or which is likely to incite, any class or community of persons to commit any offence against any other class or community, shall be punished with imprisonment which may extend to 6[three years], or with fine, or with both.

(2) 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) Whoever commits an offence specified in sub-section (2) in any place of worship or in an 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.

# APPENDIX C: FULL TEXT OF REGULATORY LAWS

## ***Cable Television Network (Regulation) Act***

5. No person shall transmit or re-transmit through a cable service any programme unless such programme is in conformity with the prescribed programme code.

...

19. Where any authorised officer thinks it necessary or expedient so to do in the public interest, he may, by order, prohibit any cable operator from transmitting or re-transmitting any programme or channel if, it is not in conformity with the prescribed programme code referred to in section 5 and advertisement code referred to in section 6 or if it is likely to promote, on grounds of religion, race, language, caste or community or any other ground whatsoever, disharmony or feelings of enmity, hatred or ill-will between different religious, racial, linguistic or regional groups or castes or communities or which is likely to disturb the public tranquillity.

20. (1) Where the Central Government thinks it necessary or expedient so to do in public interest, it may prohibit the operation of any cable television network in such areas as it may, by notification in the Official Gazette, specify in this behalf. (2) Where the Central Government thinks it necessary or expedient so to do in the interest of the (i) sovereignty or integrity of India; or (ii) security of India; or (iii) friendly relations of India with any foreign State; or (iv) public order, decency or morality, it may, by order, regulate or prohibit the transmission or re-transmission of any channel or programme.

## ***Unlawful Activities (Prevention) Act***

13. (1) Whoever (a) takes part in or commits, or (b) advocates, abets, advises or incites the commission of, any unlawful activity, shall be punishable with imprisonment for a term which may extend to seven years, and shall also be liable to fine. (2) Whoever, in any way, assists any unlawful activity of any association declared unlawful under section 3, after the notification by which it has been so declared has become effective under sub-section (3) of that section, shall be punishable with imprisonment for a term which may extend to five years, or with fine, or with both.

## ***Foreign Contribution (Regulation) Act***

3.(1) No foreign contribution shall be accepted by any—

- (a) candidate for election;
- (b) correspondent, columnist, cartoonist, editor, owner, printer or publisher of a registered newspaper;
- (c) Judge, Government servant or employee of any corporation or any other body controlled or owned by the Government;
- (d) member of any Legislature;
- (e) political party or office-bearer thereof;
- (f) organisation of a political nature as may be specified under sub-section (1) of section 5 by the Central Government;
- (g) association or company engaged in the production or broadcast of audio news or audio visual news or current affairs programmes through any electronic mode, or any other electronic form as defined in clause (r) of sub-section (1) of section 2 of the Information Technology Act, 2000 (21 of 2000) or any other mode of mass communication;
- (h) correspondent or columnist, cartoonist, editor, owner of the association or company referred to in clause

...

11. (1) Save as otherwise provided in this Act, no person having a definite cultural, economic, educational, religious or social programme shall accept foreign contribution unless such person obtains a certificate of registration from the Central Government. (2) Every person referred to in sub-section (1) may, if it is not registered with the Central Government under that sub-section, accept any foreign contribution only after obtaining the prior permission of the Central Government and such prior permission shall be valid for the specific purpose for which it is obtained and from the specific source.



**Cinematograph Act, 1952**

4. (1) Any person desiring to exhibit any film shall in the prescribed manner make an application to the Board for a certificate in respect thereof, and the Board may, after examining or having the film examined in the prescribed manner,—

(i) sanction the film for unrestricted public exhibition: Provided that, having regard to any material in the film, if the Board is of the opinion that it is necessary to caution that the question as to whether any child below the age of twelve years may be allowed to see such a film should be considered by the parents or guardian of such child, the Board may sanction the film for unrestricted public exhibition with an endorsement to that effect; or

(ii) sanction the film for public exhibition restricted to adults; or (iia) sanction the film for public exhibition restricted to members of any profession or any class of persons, having regard to the nature, content and theme of the film; or

(iii) direct the applicant to carry out such excisions or modifications in the film as it thinks necessary before sanctioning the film for public exhibition under any of the foregoing clauses; or

(iv) refuse to sanction the film for public exhibition.

...

5B. (1) A film shall not be certified for public exhibition if, in the opinion of the authority competent to grant the certificate, the film or any part of it is against 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 involves defamation or contempt of court or is likely to incite the commission of any offence. (2) Subject to the provisions contained in sub-section (1), the Central Government may issue such directions as it may think fit setting out the principles which shall guide the authority competent to grant certificates under this Act in sanctioning films for public exhibition.

**Contempt of Court Act, 1971**

2. (c) “criminal contempt” means the publication (whether by words, spoken or written, or by signs, or by visible representation, or otherwise) of any matter or the doing of any other act whatsoever which (i) scandalises or tends to scandalise, or lowers or tends to lower the authority of, any court; ...

**Customs Act, 1962**

11. (1) If the Central Government is satisfied that it is necessary so to do for any of the purposes specified in sub-section (2), it may, by notification in the Official Gazette, prohibit either absolutely or subject to such conditions (to be fulfilled before or after clearance) as may be specified in the notification, the import or export of goods of any specified description.

(2) The purposes referred to in sub-section (1) are the following:

(a) the maintenance of the security of India;

(b) the maintenance of public order and standards of decency or morality;

...

(t) the prevention of dissemination of documents containing any matter which is likely to prejudicially affect friendly relations with any foreign State or is derogatory to national prestige;

(v) any other purpose conducive to the interests of the general public.

**Information Technology Act, 2000**

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

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 makes 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 two three years and with fine.

...

67. Punishment for publishing or transmitting obscene material in electronic form

Whoever publishes or transmits or causes to be published in the electronic form, any material which is lascivious or appeals to the prurient interest or if its effect is such as to tend to deprave and corrupt persons who are likely, having regard to all relevant circumstances, to read, see or hear the matter contained or embodied in it, shall be punished on first conviction with imprisonment of either

description for a term which may extend to two three years and with fine which may extend to five lakh rupees and in the event of a second or subsequent conviction with imprisonment of either description for a term which may extend to five years and also with fine which may extend to ten lakh rupees.

...

69 A. Power to issue directions for blocking for public access of any information through any computer resource

(1) Where the Central Government or any of its officer specially authorised by it in this behalf is satisfied that it is necessary or expedient so to do in the interest of sovereignty and integrity of India, defence of India, security of the State, friendly relations with foreign states or public order or for preventing incitement to the commission of any cognisable offence relating to above, it may subject to the provisions of sub-sections (2) for reasons to be recorded in writing, by order direct any agency of the Government or intermediary to block access by the public or cause to be blocked for access by public any information generated, transmitted, received, stored or hosted in any computer resource.

(2) The procedure and safeguards subject to which such blocking for access by the public may be carried out shall be such as may be prescribed.

(3) The intermediary who fails to comply with the direction issued under sub-section (1) shall be punished with an imprisonment for a term which may extend to seven years and also be liable to fine.

### **Information Technology (Intermediary Guidelines) Rules, 2011**

3. The intermediary shall observe following due diligence while discharging his duties, namely : (1) The intermediary shall publish the rules and regulations, privacy policy and user agreement for access-or usage of the intermediary's computer resource by any person. (2) Such rules and regulations, terms and conditions or user agreement shall inform the users of computer resource not to host, display, upload, modify, publish, transmit, update or share any information that (a) belongs to another person and to which the user does not have any right to; (b) is grossly harmful, harassing, blasphemous defamatory, obscene, pornographic, paedophilic, libellous, invasive of another's privacy, hateful, or racially, ethnically objectionable, disparaging, relating or encouraging money laundering or gambling, or otherwise unlawful in any manner whatever; ... (i) threatens the unity, integrity, defence, security or sovereignty of India, friendly relations with foreign states, or public order or causes incitement to the commission of any cognisable offence or prevents investigation of any offence or is insulting any other nation

... (4) The intermediary, on whose computer system the information is stored or hosted or published, upon obtaining knowledge by itself or been brought to actual knowledge by an affected person in writing or through email signed with electronic signature about any such information as mentioned in sub-rule (2) above, shall act within thirty six hours and where applicable, work with user or owner of such information to disable such information that is in contravention of sub-rule (2). Further the intermediary shall preserve such information and associated records for at least ninety days for investigation purposes.

### **Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989**

3. (1) Whoever, not being a member of a Scheduled Caste or a Scheduled Tribe ... (x) intentionally insults or intimidates with intent to humiliate a member of a Scheduled Caste or a Scheduled Tribe in any place within public view; ... (xv) ... shall be punishable with imprisonment for a term which shall not be less than six months but which may extend to five years and with fine.

# ENDNOTES

## IMPOSING SILENCE THE USE OF INDIA'S LAWS TO SUPPRESS FREE SPEECH

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- 9 Sunil Khilnani, *The Idea of India*, 5th Ed. (London: Penguin, 2012) at iii.
- 10 Rajeev Dhavan, *Publish and Be Damned: Censorship and Intolerance in India* (New Delhi: Tulika Books, 2008) at 11 [Publish and be Damned].
- 11 "Telangana lawyers file case against Nara Lokesh for defaming KCR" (January 19, 2015), *Deccan Chronicle*, online: <http://www.deccanchronicle.com/150119/nation-current-affairs/article/telangana-lawyers-file-case-against-nara-lokesh-defaming-kcr> (accessed March 4, 2015) ["Telangana Lawyers"].
- 12 *R.V. Bhasin v. State of Maharashtra and Marine Drive Police Station*, (2010), (112) BOMLR 154 (Bombay High Court) [R.V. Bhasin].
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- 28 "Reporting Status for India", Office for the High Commissioner for Human Rights, online: [http://tbinternet.ohchr.org/\\_layouts/TreatyBodyExternal/Countries.aspx?CountryCode=IND&Lang=EN](http://tbinternet.ohchr.org/_layouts/TreatyBodyExternal/Countries.aspx?CountryCode=IND&Lang=EN) (accessed March 24, 2015).
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- 32 *Ramji Lal Modi v. The State of U.P.* (1957), MANU/SC/0101/1957 at para 2 (Supreme Court of India).
- 33 *Ibid.* at para 9.
- 34 See e.g. *Anil Bhatia and Ors. v. Govt. of NCT of Delhi and Ors.* (2015), MANU/DE/0427/2015 at para 29 (Delhi High Court); *Mohamed Gani, Secretary Gani Beebi Darga Mosque v. The Superintendent of Police and Ors.* (2005), AIR 2005 Mad 359 at para 30 (Madras High Court); *Sri Baragur Ramachandrappa and Ors. v. State of Karnataka and Ors.* (2007), 5 SCC 11 at paras 8-9 (Supreme Court of India); *The State of Uttar Pradesh v. Lalai Singh Yadav* (1976), MANU/SC/0205/1976 at para 7 (Supreme Court of India).
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- 38 *Ibid.* [emphasis added]

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- 41 Publish and be Damned, supra note 10 at 15.
- 42 Ibid. at 15.
- 43 Ibid. at 16.
- 44 Granville Austin, *Working a Democratic Constitution: The Indian Experience* (Oxford University Press, 1999) at 44.
- 45 Ibid. at 49.
- 46 The Constitution (First Amendment) Act, 1951. New Delhi, preamble; See Chiranjit Lal v. Union of India, AIR 1951 SC 41 (Supreme Court of India); See also State of Bihar v. Shaialabala Devi, AIR 1952 SC 329 (Supreme Court of India); See generally Nivedita Menon, "Citizenship and the Passive Revolution Interpreting the First Amendment", Chapter 8 in the book, *Politics and Ethics of the Indian Constitution*, ed Rajeev Bhargava (New Delhi: Oxford University Press, 2008) at 192-193, 199, 203-206.
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- 50 State of Maharashtra and Ors v. Sangharaj Damodar Rupawate and Ors. (2010) 7 SCC 398 at para 25 (Supreme Court of India) [Maharashtra v. Sangharaj Damodar Rupawate].
- 51 R.V. Bhasin, supra note 12 at para 33 (Bombay High Court); see also Nand Kishore Singh and etc. v. State of Bihar and Anr., 1985 (33) BLJR 366 at para 17 (Patna High Court Special Bench).
- 52 R.V. Bhasin, supra note 12 at para 56.
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- 54 Ibid. at para 148.
- 55 In Canada, the person in possession of the offending material, as well as the owner and maker of the material may appear before the judge within seven days to contest the seizure.
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- 57 Ibid. at para 270.
- 58 Indian Penal Code, s. 499, online: <http://indiankanoon.org/doc/1041742/> (accessed April 22, 2015)
- 59 Importantly, the Supreme Court has expressed doubt about the constitutional validity of s.499, and is currently examining the issue. The case before the Supreme Court allege misuse of s.499 by the Tamil Nadu state government to silence politically sensitive speech. It is unclear when a decision in the matter can be expected. See Dhananjay Mahapatra, "SC to examine misuse of criminal defamation to muzzle free speech" (October 31, 2014), *The Times of India*, online: <http://timesofindia.indiatimes.com/india/SC-to-examine-misuse-of-criminal-defamation-to-muzzle-free-speech/articleshow/44988787.cms> (accessed April 23, 2015).
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- 67 Indian Penal Code, s. 499, explanation 2, online: <http://indiankanoon.org/doc/1041742/> (accessed April 22, 2015).
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